The Florida Land Trust: An Overview

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Abstract

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The Florida Land Trust: An Overview

In 1963 the Florida legislature, in an effort to stimulate the productivity, growth, and development of Florida real estate, sanctioned use of the land trust and enacted chapter 63-468, Laws of Florida, now section 689.071. The essential purpose of a land trust is to facilitate

1. 1963 Fla. Laws 998; FLA. STAT. § 689.071 (1981) states:

   Section 1. Every conveyance, deed, mortgage, lease, assignment or other instrument heretofore or hereafter made, hereinafter referred to as the "recorded instrument," transferring any interests in real property in this State including but not limited to leasehold and mortgage interests to any person, corporation, bank, or trust company, qualified to act as fiduciary in this State, in which said recorded instrument said person, corporation, bank, or trust company is designated "Trustee," or, "As Trustee," without therein naming the beneficiaries of such trust, whether or not reference is made in said recorded instrument to any separate collateral unrecorded declarations or agreements, shall be effective to vest and is hereby declared to have vested in such trustee full rights of ownership over said real property or interest therein, with full power and authority as granted and provided in said recorded instrument to deal in and with said property or interest therein or any part thereof provided, said recorded instrument shall confer on the trustee the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property described in said recorded instrument.

   Section 2. Any grantee, mortgagee, lessee, transferee, assignee, or person obtaining satisfactions, releases, or otherwise in any way dealing with the trustees with respect to said real properties held in trust under said recorded instrument, as hereinafore provided for, shall not be obligated to inquire into the identification of status of any named or unnamed beneficiaries, or their heirs or assigns to whom a trustee may be accountable under the terms of said recorded instrument, or under any unrecorded separate declarations or agreements collateral to said recorded instrument whether or not such declarations or agreements are referred to therein, nor to inquire into or ascertain the authority of such trustee to act within and exercise the powers granted under said recorded instrument, nor to inquire into the adequacy or disposition of any consideration, if any is paid or delivered to such trustee in connection with any interest so acquired from such trustee, nor to inquire into any of the provisions of any said unrecorded declarations of agreements.
and provide a flexible and practical method for the acquisition, financing, and disposition of real estate.

Illinois appears to have been the first state to have recognized and developed the land trust. By statute they have defined a land trust as:

[A]ny arrangement under which the title, both legal and equitable, to real property, is held by a trustee and the interest of the beneficiary is personal property and under which the beneficiary, or any person designated in writing by the beneficiary, has the exclusive power to direct or control the trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive right to the earnings, avails and proceeds of said property is in the beneficiary of the trust.

Simply stated, a land trust is an arrangement under which both legal and equitable title is held by a trustee. At the same time, all of

Section 3. All persons dealing with the trustee under said recorded instrument as hereinabove provided shall take any interest transferred by the trustee thereunder within the power and authority as granted and provided therein, free and clear of the claims of all the named or unnamed beneficiaries of such trust, and of any unrecorded declarations or agreements collateral thereto whether referred to in said recorded instrument or not, and of anyone claiming by, through or under said beneficiaries, including and without limiting the foregoing to any claim arising out of any dower or curtesy interest of the spouse of any beneficiary thereof; provided, nothing herein contained shall prevent a beneficiary of any said unrecorded collateral declarations or agreements from enforcing the terms thereof against the trustee.

Section 4. In all cases where said recorded instrument, as hereinabove provided, contains a provision defining and declaring the interests of beneficiaries thereunder to be personal property only, such provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of this State.

Section 5. This act is remedial in nature and shall be given a liberal interpretation to effectuate the intent and purposes hereinabove expressed, and shall take effect immediately upon becoming a law.

Section 6. This act shall not apply to any deed, mortgage or other instrument to which section 689.07 Florida Statutes, applies.

the rights, interests, powers and conveniences of fee ownership are re-
tained and exercised by the beneficiary. The beneficiary retains a per-
sonal property interest. Thus, even with both legal and equitable title
vested in the trustee, most of the usual and necessary attributes of real
estate fee ownership are retained by the beneficiary under the trust
agreement. The only attribute generally ascribed to the trustee is "that
relating to title, upon which third parties may rely in transactions
where title to the real estate is of primary importance." 5

The land trust is a modified form of the conventional trust agree-
ment. However, the Florida Land Trust Statute section 689.0716
should not be confused with section 689.07, Florida Statutes, which al-
lows recording of deeds of real estate conveyances in the name of a
trustee. Section 689.07 provides that grantors will be deemed to grant a
fee simple estate to a grantee, if the words "trustee"/"as trustee" are
added to the name of the grantee, provided no named beneficiaries or
apparent trust purposes are set forth in the instrument of conveyance. 7
The section attempts to simplify conveyances of real property made to
a trustee as grantee, as if no trustee reference was used. 8 Sections
689.07 and 689.071 are mutually exclusive provisions. Subsection 6 of
section 689.071 expressly provides that the Land Trust Act does not
apply to any transactions to which section 689.07 applies. 9

As stated, the land trust is a modified form of the conventional
trust agreement. It does differ, however, from the typical trust arrange-
ment. In a land trust, the res is limited to "an arrangement where the
trustee holds title to the property and all active managerial and admin-
istrative powers are reserved to the beneficiaries. The trustee's only
duty is to deal with the trust when and as directed by the beneficiaries,
and to convey the property . . . when the trust terminates." 10

4. Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926), Ferraro v. Parker, 229
So. 2d 621 (Fla. 2d Dist. Ct. App. 1969); Goldman v. Mandell, 403 So. 2d 511 (Fla.
5. People v. Chicago Title & Trust Co., 75 Ill. 2d 479, 488, 389 N.E.2d 540, 543
(1979).
8. Id.
A trust of this nature must, in Florida, meet the same substantive legal requirements that a conventional trust arrangement must satisfy.11 "The fact that a trust has a corpus consisting of land does not change the necessary elements requisite to a valid trust."12

Under the Florida Land Trust Act, the trustee is vested with the power to deal with all facets of property ownership.13 It is to be noted the Act only applies if the recorded instrument, transferring any title and interest to the trustee, specifically grants "the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property described in the recorded instrument."14

In the states which have recognized and authorized the use of land trusts15 the device's popularity has been based upon its practical application for those dealing in real estate. This note provides an overview of the basic advantages and attributes that may be realized through the use of a Florida land trust.

Comment on the Statute of Uses

It is apparent that the validity of the land trust depends upon the effect and construction given the Statute of Uses. Under Florida law this statute will execute an inactive, or passive, trust of real property, placing both legal and equitable title in the beneficiary.16 A passive trust is one in which the trustee has no active duties to perform.17 Commentators have questioned whether classification of a trust as passive, or a determination that Florida's Statute of Uses applies to personalty, could invalidate the design of the land trust and extinguish the trustee's

14. Id.
15. Other states which have expressly recognized and/or adopted similar land trust statutes are: Hawaii, HAWAII REV. STAT. ch. 558 (Supp. 1979); Indiana, IND. CODE ANN. § 30-4-2-13 (Burns 1971); North Dakota, N.D. CENT. CODE § 59-03-02 (1967); and Virginia, VA. CODE ANN. § 55-17.1 (Supp. 1964).
17. Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940).
title. To avoid this result, duties and powers of the trustee must be sufficiently active to prevent the operation of the Statute of Uses. Both Professor Scott and the Restatement of Trusts, Second, express the view that "where a trust is created by the terms of which the trustee is directed to convey the land to the beneficiary and no other active duties are imposed upon him . . . the weight of authority is . . . that the direction to convey is sufficient to make it an active trust." 

In considering the Florida Land Trust Statute, Florida's courts have not yet clearly articulated whether the Statute of Uses will apply both to trusts of land and trusts of personal property. Commentators, such as Professor Boyer, suggest that the Florida Land Trust Act "circumvents the statute" by permitting the trust instrument to declare that a beneficiary's interests are personal property. It has been asserted that since historically the Statute of Uses was never applied to personalty, and since Florida has no statute subjecting personalty to the statute, trusts in personalty should not be affected by the statute.

The Illinois courts have held the Statute of Uses inapplicable to land trusts due to the active duties imposed upon the trustee and the fact that beneficiaries' interest is personalty. The leading Florida case on this issue is Ferraro v. Parker. In Ferraro, the Second District Court of Appeal indicated that Florida would apparently follow Illinois in finding and construing such trusts to be active rather than passive.

18. McKillop, supra note 16.
21. Id.
22. R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS 178 (1980).
27. McKillop, supra note 16.
Advantages and Attributes of Land Trusts

The single most important aspect of the use of a land trust is that it converts the beneficiaries' interest from one in real estate to one of personal property in the possession, control, rents, issues and proceeds, etc. of the real estate, which are attributes of personal property. It now seems Florida recognizes, as long as the instrument of conveyance to the trustee so declares, that the beneficiaries' interests are personality. This division of the incidents of ownership of real estate is the quint-essential factor contributing to the ability of a land trust to offer advantages not available in other devices or arrangements suitable for the holding of title to real estate.

Nondisclosure or Privacy of Ownership

Under the Florida Land Trust Act, the conveyance of property to the trustee is effective to place in that named trustee full rights of ownership. The recorded trust deed need only disclose the name of the trustee and not beneficiaries' names, nor the names of those having actual authority or power of direction over the property's management and control. The trustee may disclose beneficiaries' identities when authorized to do so by the beneficiaries or by legal process.

There are many reasons why owners desire anonymity from the public record. Developers' secretly assembling large parcels of acreage for development are a good example. The protection that privacy affords in some circumstances eases developers' negotiating processes during acquisition thus minimizing unreasonable or unrealistic demands sellers might otherwise make. In addition, "[the] land owner may simply not wish to disclose his ownership for the wholly proper reason that he wants his real estate ownership to be private . . ." just as his holdings in other investment portfolios are private.

32. W.B. Garrett, supra note 2, at 6.
Judgments and Creditors Rights

A judgment against the beneficiary of a land trust does not create a lien against the property held in a land trust. It is essential to the utility and effective administration of the land trust that this be the result. Otherwise, a judgment against one of a number of beneficiaries could restrict and impede the operation of a trust property and frustrate its objectives.

In Florida, a court judgment awarding money damages to an unsecured creditor must be enforced by an execution. Such judgments however become a lien only on real property and such other property upon which there may be a levy of execution. By statute this property is limited to "lands and tenements, goods and chattels, equities of redemption in real and personal property. . . ." Since a beneficiary in a land trust has no legal or equitable interest in the trust property, but only an interest declared as personalty, his interest would not be subject to either a judgment lien or an execution lien. The beneficial

34. H.W. Kenoe, supra note 10, § 3.2.
39. Id. § 55.10 (1981).
40. Id. § 56.061 (1981). As to tangible personal property, Florida Statutes section 56.061 may not be considered all inclusive: Florida courts have created and enforced liens on personal property of judgement debtors when a writ of execution is delivered for docketing to the sheriff of the county in which the personal property is located. As a
interest in a land trust, is more in the nature of an intangible interest or chose in action; these trusts, are therefore "not proper subjects of levy and sale under execution unless made so by statute. . . ." 42

The fact that a beneficial interest in a Florida land trust is not subject to levy and sale under writ of execution does not suggest that a beneficiary's interest is completely protected from creditors and third parties. Since the interest of a beneficiary in a land trust cannot be reached by execution at law, it may be possible to bring a creditor's bill in chancery. 43 A creditor's bill is an action brought by a creditor who sues in equity for the purpose of reaching property that cannot be reached by execution at law. 44 Whether the interest of a beneficiary in a land trust may be reached by a creditor's suit has not yet been answered in Florida. The Illinois courts though have clearly made available to a judgment creditor the remedy of a creditor's bill. 45

Another equitable remedy potentially available to a judgment creditor is a proceedings supplementary 46 which is also based on a valid unsatisfied execution. A judgment granting equitable relief to a creditor, through either a creditor's suit or proceedings supplementary, may order the sale of the beneficiaries' property interest with proceeds distributed to satisfy execution of the judgment or utilize any other equi-

result, the lien is created and perfected upon delivery of the writ of execution to the sheriff. The lien attaches to all personal property of the judgment debtor in the county in which the unit is docketed. . . .


42. 24 FLA. JUR. 2d Creditors' Rights § 14 (1981); Peninsula State Bank v. United States, 211 So. 2d 3 (Fla. 1968).

43. FLA. STAT. § 68.05 (1981).

44. B.L.E. Realty Corp. v. Mary Williams Co., 100 Fla. 254, 134 So. 47 (1931); 13 FLA. JUR. 2d Creditors' Rights § 281 (1979), H. Trawick, supra note 34, § 27-10.


46. FLA. STAT. § 56.29 (1981); H. Trawick, supra note 34, § 27-9; FLA. R. SUMM. P. 7.220.
table remedies available to enforce its judgment.\textsuperscript{47}

Just exactly what equitable remedy or relief will be afforded a judgment creditor against a Florida land trust beneficiary remains unclear. The Illinois statute on supplementary proceedings\textsuperscript{48} provides:

\begin{quote}
(2) When assets . . . of the judgment debtor . . . are discovered, the court may, by appropriate order, judgment or decree:
(e) Compel any person cited to execute an assignment of any chose in action or a conveyance of title to real or personal property, in the same manner and to the same extent as a court of chancery could do in any proceeding by a judgment creditor to enforce payment of a judgment or in aid of execution.\textsuperscript{49}
\end{quote}

This section clearly authorizes institution of proceedings which may result in a court order directing sale of the beneficiary's interest in the land trust with application of proceeds to the satisfaction of the judgment in the same manner as the relief afforded under a creditor's bill.

The Florida courts have not yet spoken to the issue of whether proceedings supplementary, with its concomitant remedies, are applicable to a creditor's judgment against a land trust beneficiary. Certainly, the courts may follow Illinois in holding such remedy available. Following Illinois provisions in this area, the Florida legislature could enact or amend existing law to provide for the execution by proceedings supplementary of a chose in action, title to personal property, or specifically the beneficial interest in a Florida land trust.

** Elective Share and Spousal Rights **

In Florida there is no longer dower or curtesy estates afforded the surviving spouse in the decedent's real or personal property.\textsuperscript{50} The new Florida Probate Code affords the surviving spouse of a decedent domi-

\textsuperscript{47} H. TRAWICK, \textit{supra} note 34, § 27-10 (1980).
\textsuperscript{48} ILL. REV. STAT. ch. 110, § 73 (1980).
\textsuperscript{49} Id. § 73(2)(e).
\textsuperscript{50} 1973 Fla. Laws ch. 73-107 abolished the right of dower in property transferred prior to death; Florida Statutes section 732.111 abolished dower and curtesy in Florida.
ciled in Florida, an elective share\textsuperscript{51} equal to thirty percent\textsuperscript{52} of the
value of "all property of the decedent."\textsuperscript{53} This includes both the real
and personal property subject to administration; real estate located
outside Florida is not included.\textsuperscript{54} The percentage of elective allowance
is computed by the court after deducting from the estate assets valid
claims paid or payable from the estate and "all mortgages, liens, or
security interests thereon."\textsuperscript{55} Since the property subject to the elective
share provisions\textsuperscript{56} includes personal property\textsuperscript{57} two important issues
concerning land trusts emerge. The first question is whether a spouse
must concur in transactions involving land trust property in order to
release any inchoate dower or elective share rights to which the trust
property may be subject. The second question is whether a surviving
spouse may be defrauded or deprived an elective share when property,
otherwise includable in the probate estate, is placed in a land trust.

The Florida Land Trust Act,\textsuperscript{58} provides that:

All persons dealing with the trustee . . . shall take any interest
transferred by the trustee . . . free and clear of the claims of all
the named beneficiaries . . . or . . . of anyone claiming by,
through or under said beneficiaries . . . including . . . any claim
arising out of any dower or curtesy interest of the spouse of any
beneficiary. . . . \textsuperscript{59}

As a result of this provision, "beneficial interests in land trusts may be

\begin{footnotes}
54. Id.
55. Id. § 732.207 (1981).
56. Id. § 732.206 (1981).
57. Farington v. Richardson, 153 Fla. 907, 16 So. 2d 158 (1944); FLA. STAT. §

58. FLA. STAT. § 689.071(3) (1981).
59. Florida abolished dower and curtesy rights with the adoption of the new
Florida Probate Code, effective January 1, 1976 which implemented the elective share
provisions in its place. Since the Florida Land Trust Act was adopted in 1963, prior to
the adoption of the new probate code, references in the text of the statute should
equally apply to claims arising out of a surviving spouse's elective share rights. If in
fact this is the intent of the legislature, it is suggested that the text of the Land Trust
Act be amended accordingly.
\end{footnotes}
freely transferred and dealt with without the concurrence of the spouse of the beneficiary.\textsuperscript{60} This aspect will clearly aid the efficient and "un-impeded transactional arrangements of real estate interests particularly by those who are dealing actively in such properties."\textsuperscript{61}

With Florida's elimination of dower and curtesy came elimination too of those inchoate characteristics regarding elective share provisions.\textsuperscript{62} Since a surviving spouse of a post-January 1, 1976 decedent, no longer has any inchoate interest in the deceased spouse's real and personal estate, only the beneficiary is required for transactions involving his interests. Thus, the surviving spouse need not concur in the release of the beneficiary's personal property interests in the Florida land trust.

Another advantage is that the settler of a land trust who retains the beneficial interest in the property may provide for the interest's devolution on his death. This may be done in a variety of ways, e.g., to designated parties as joint tenants with right of survivorship, as life estates with remainders over, etc. Thus, the beneficial interest passes directly to the named party or remainderman by operation of the trust agreement and is not subject to probate.

Where the trust agreement does not so provide, or the beneficial interest has not been properly designated under appropriate testamentary disposition, the beneficial interest is subject to administration as part of the probate estate. In that case the beneficial interest, passing according to the decedent's testamentary plan, is subject to inclusion in computation of the elective share.\textsuperscript{63} But, where the beneficial interest passes by operation of the trust agreement, the interest will not be included in computation of elective share property.\textsuperscript{64} This raises the question of whether in such instances spousal rights can be completely disregarded or whether the land trust can be used to defraud a surviving spouse of her elective share rights.

In \textit{Stoxen v. Stoxen},\textsuperscript{65} the Illinois Appellate Court held that dower rights do not extend to the beneficiary's personal property interest in a
land trust. Nevertheless, in *Dubin v. Wise,*66 a beneficiary’s conveyance of his interest in a land trust to his son for the purpose of depleting his estate in violation of a prenuptial agreement, was set aside.

Florida’s courts have not yet specifically answered this question. As discussed, there is no longer an inchoate right of dower, but rather an elective share in property “that is subject to administration.”67 It would seem, therefore, that if a bona fide land trust is created a spouse may be able to dispose of his property in almost any manner he chooses. An Illinois case is illustrative. In *Matter of Estate of Nemecek*68 both the surviving wife and administrator of the decedent’s estate brought an action to recover property (her marital home) which had been conveyed by the decedent into an Illinois land trust. The trust instrument provided that upon the decedent’s death the trustee was to sell the property and distribute the proceeds to the decedent’s nephew and sister-in-law. The surviving wife contended the conveyance constituted an invalid testamentary disposition, was illusory, and amounted to a fraud on her marital rights. The Illinois Appellate Court affirmed the lower court grant of the defendant trustee’s motion to dismiss. The appellate panel stated that, under Illinois law:

[A] property owner has an absolute right to dispose of his property during his lifetime in any manner he sees fit. He may convey his property to another even though the transfer may be for the sole purpose of minimizing or defeating the statutory marital interest of his spouse . . . . This type of conveyance is not subject to defeasance by the surviving spouse unless it is a sham and is colorable or illusory and tantamount to a fraud.69

In stating this position the *Nemecek* court relied on *Johnson v. La Grange State Bank.*70 In *Johnson,* the decedent had placed the majority of her assets in an inter vivos revocable trust. She made herself trustee and named a bank as successor trustee. Upon her death distribution of the trust res was to be made to her mother, sister, niece, and

69. Id. at 656.
various charities. Mr. Johnson, the surviving spouse whose net worth was in excess of $2,000,000, brought an action to set aside the trust contending he, as surviving spouse, was deprived of his marital rights in the trust property. At issue was whether the assets of such an inter vivos trust could be "insulated" from the testator's probate estate" insofar as the surviving spouse was concerned. The Illinois Supreme Court concluded that:

"[A]n inter vivos transfer of property is valid as against the marital rights of the surviving spouse unless the transaction is tantamount to a fraud as manifested by the absence of donative intent to make a conveyance of a present interest in the property conveyed. Without such intent the transfer would simply be a sham or illusory transfer. . . ."

In *Bee Branch Cattle Company v. Koon*, the settlor established inter vivos trusts for the financial well-being of his niece and nephews. The trust res consisted of shares of stock in a corporation in which the settlor had been the primary shareholder. After establishing the trusts, the settlor became incompetent. His spouse, appointed guardian and curator of his estate, brought an action to cancel the trusts arguing the trusts constituted a fraud upon her inchoate dower rights in the property. The Florida Supreme Court, referring to their decision in *Williams v. Collier*, sustained the trusts and noted that the spouse would be amply provided for by her dower share in other property of the settlor at his death. The court contrasted their decision to the opposite result reached in *Smith v. Hines* where it appeared "that the husband had designed by subterfuge to deprive his wife of her dower rights when she was not properly provided for from his property."

In *In re the Estate of Herron*, a surviving spouse elected to as-

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71. *Id.* at 190.
72. *Id.* at 194.
73. 44 So. 2d 684 (Fla. 1950).
75. Smith v. Hines, 10 Fla. 258 (1863).
76. 44 So. 2d at 690.
77. 236 So. 2d 563 (Fla. 4th Dist. Ct. App. 1970).
sert dower rights in the proceeds of certain life insurance policies. The policies constituted the res of an inter vivos trust created by the decedent during his life. The surviving spouse contended that the trust was illusory or testamentary and therefore invalid. The Fourth District Court of Appeal held the trust proceeds were not subject to the spouse’s right of dower. In Herron, the court noted that the testator’s intention to create a trust was clearly expressed and under such circumstances “the manifest intention of the settlor should control as against a contention that the trust is illusory.”

As articulated in Herron, concern in illusory transfer cases focuses on the sufficiency, or bona fides, of the settlor’s intention to create a trust. Absent illusory or fraudulent transfers, or where conveyance of property was intended merely as a sham scheme to retain settlor’s ownership, a spouse may dispose of his personal property as he sees fit. In the absence of fraud, then an inter vivos or land trust may be used to legitimately defeat a surviving spouse of dower or elective share rights in the property conveyed.

78. Id. at 567.
79. An illusory trust is a trust arrangement which takes the form of a trust, but because of the powers retained, has no real substance and in reality is not a completed trust. In re Estate of Herron, 237 So. 2d at 566.
80. The Illinois cases on this point indicate that the intent to defraud the surviving spouse does not involve the traditional meaning of fraud. Their interpretation of the phrase is to be construed in connection with the words illusory and colorable. Where the settlor has no real intent to convey any present interest in the property, but, in fact, intends to retain complete ownership and control, there is no present donative intent and therefore amounts to a fraud on the spouse’s marital rights. In re Estate of Nemeczek, 85 Ill. App. 3d at 883, 407 N.E.2d at 656; Johnson v. La Grange State Bank, 73 Ill. 2d at 359, 383 N.E.2d at 193.

Another factor considered in determining whether an intent to defraud is present may be ascertained from “transfers of a disproportionate and unreasonable amount of assets in relationship to the balance of the promisor’s property.” Dubin v. Wise, 41 Ill. App. 3d 132, 354 N.E.2d 403, 409 (1976). In Dubin, a conveyance by the settlor of a land trust which eliminated a fractional interest which was to have gone to the surviving spouse upon his death, was set aside on the basis of fraud and an intent to subvert an antenuptial agreement. Id.
Multiple Title Holders

Where title to real estate is vested in a number of parties, complexities in conveyancing may arise. Generally, upon any conveyance or transfer of interest in real property, the signatures of all involved parties must be obtained. In Florida, absentee or non-resident ownership is very common. The burdens and problems inherent in this ownership situation can be avoided by the use of a land trust. In land trusts the power to convey real estate is vested in the trustee who alone executes instruments dealing with title. In addition, shares owned by beneficiaries may be transferred through assignment of these beneficial trust interests.

Transferability of Interest

The land trust beneficiary has a personal property interest 82 which can be transferred easily by any form of assignment adequate to transfer an interest in intangible personal property. In Florida an assignment of beneficial interest need not comply with Florida Statute § 680.06; thus the two party witness requirement is obviated and only the signature of the assignor is required to assign a beneficiary’s interest. 83 Fractional interests may be handled with a minimum of documentation. “The assignment becomes effective when lodged with the trustee and its acceptance is indicated on a copy of the assignment.” 84 A sale or transfer of the ownership may also be made without title examination under some circumstances. This is because the subject matter of the transfer is the beneficial personal property interest transferred independently of the legal and equitable title which remain in the trustee. 85

This assignment of beneficial interest is distinguishable from a conveyance or transfer of trust property itself. Florida’s Act empowers the trustee to deal completely with the property, as provided by the trust agreement itself. Third parties may rely on the trustee's exercise of those powers without notice or knowledge of the trust beneficiaries

82. This interest could be restricted by agreement of the parties as evidenced in the trust agreement.
or of limitations placed on the trustee.

Partition

A land trust also provides a convenient vehicle for multiple ownership of property. One of the most useful functions of the trust—preventing problems and difficulties between multiple beneficiaries of property—would be negated if partition proceedings could be brought by any dissident beneficiary. While the Florida courts have not yet addressed the issue of whether land trust beneficiaries may bring an action for partition, both Wisconsin and Illinois have clearly held that partition will not lie against property held in a land trust while the trust is still in effect. 86

In Florida, partition is not permitted in “a tenancy in partnership so long as the partnership is not destroyed,” 87 and a partner’s interest is considered by statute to be personal property. 88 However, Florida Statutes section 64.091 does provide 89 that partition will lie against personal property as far as the nature of the property permits. Though the effect of this statute on partition of land trust interests is yet to be decided, it is foreseeable that given the legislative intent and nature of the Land Trust Act, Florida will follow the Illinois and Wisconsin courts. Currently the trust agreement or deed in trust should prohibit beneficiaries from bringing an action to partition the trust property.

Transfer of Beneficial Interest Upon Death

Land trusts can be particularly effective in estate planning. At the time the trust is established, or by amendment at any time thereafter, the beneficiary may provide for the devolution of his interest on his death.

Many property owners hold title to real estate as joint tenants in order to pass full ownership to the survivor. The joint tenant necessarily acquires an immediate interest in this type relationship which may not

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87. R. Boyer, supra note 22, § 20.04.
reflect the desire of the original owners. The intended result may more accurately be accomplished with a land trust. The trust agreement may provide the trust settlor will retain sole possession, control, or management, etc. over the property for some stated period or until the settlor's death. The agreement can provide that upon the beneficiary's death the beneficial interest shall vest in another effecting joint tenancies, life estates, contingent interests or remainders in named successor beneficiaries. Provisions for transfers of beneficial interests upon the settlor's or primary beneficiary's death should be carefully drafted. Such remainder interests are present interests which do not circumvent the Statute of Wills.90 The interests designated for beneficiary remainderman must involve only beneficial interests. Since in a land trust legal and equitable title is vested solely in the trustee, a testamentary remainder anticipating transference of the trust property's legal or equitable title will be void.91

In an Illinois case, Favata v. Favata92 the settlor made two amendments to his land trust. The first amendment provided the existing trust interest vested in his daughter at his death. However a subsequent amendment provided that title to real estate held in the land trust was to pass to his son in the event of the settlor's death. Certain other property was to be held in trust for his daughter. The Illinois Appellate Court held that under the terms of the first amendment the daughter received a present remainder interest the moment the trust was created. As a result, this amendment was valid and did not constitute a void testamentary disposition. However, the second amendment was held invalid because the “settlor apparently attempted to transfer legal and equitable title”93 to his children.

**Estate Planning, Ancillary Administration**

Because land trusts have the basic characteristics of conventional trust agreements, they may be utilized as effective estate planning devices. As discussed above, upon the beneficiary’s death, the beneficial

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91. Id.
93. Favata, 74 Ill. App. 3d at 982, 394 N.E.2d at 447.
interest can be automatically conveyed to successor beneficiaries or transmitted by the deceased beneficiary's will. By placing title to real estate in a land trust, the grantor retains a measure of control over the beneficiaries and the manner in which they hold and maintain the property. By appropriate language in the trust agreement, the power of direction may be conferred upon someone other than the beneficiary, while the income and other benefits of property ownership will still flow to the beneficiary.

A land trust may also avoid problems of ancillary administration. "[I]t is uniformly recognized that such beneficial interest is transmitted by probate administration in the domicile of the beneficiary." Therefore, a New York or California resident owning Florida real estate can place title to the property in a Florida land trust. Upon the settlor's death the beneficial interest will automatically transfer to his successor, as named in the trust agreement or by the settlor's will, etc., and ancillary probate administration in Florida will not be required. The land trust may also provide for a local agent or representative through which the property management may be channeled.

Tort Liability for Negligence in Connection with Real Estate Held in Trust

In general, beneficiaries are deemed liable for injury to persons or property incurred on real estate held in trust. Certainly, the land trust arrangement could not function if tort liability were imposed on the trustee.

Liability in negligence arises primarily out of a duty and a breach of duty. Such duty arises out of possession, control or management of the property. Since the land trust trustee generally has no right in respect of possession, maintenance, control or repair of the property, he obviously lacks a duty to third parties regarding these attributes. Therefore, under the typical land trust arrangement, the trustee should not be held personally liable for injuries occurring on the trust

96. W.B. Garrett, supra note 2, at 11.
property. 98

Trustee Liability to Third Parties

The essential function of a land trust trustee is to act as a vehicle for holding title to real estate. As discussed earlier, both legal and equitable title is vested in the trustee for this purpose. 99 "In reality the transfer to the trustee is a formality involving a shifting of legal documents." 100 Under the typical land trust arrangement, the "trustee has no duties in respect to the management or control of the property or to pay taxes, insurance, or to be responsible for litigation." 101 The duties, rights and responsibilities attendant upon real property owners continue to reside in the beneficiaries. While typically these duties are retained, they may be delegated to third parties or to the land trust trustee.

As a practical matter, the only duties specifically imposed upon the trustee are to convey and deal with matters concerning title to the trust property. Under the typical land trust agreement, the trustee may engage in these matters only upon the written direction of the beneficiaries or the person named in the trust agreement as having the power of direction. 102 Land trust trustees are empowered by statute and usually by agreement to execute various types of agreements and documents. As a result of this authority to contract with third parties, questions arise concerning land trust trustee liability. Under traditional rules of trustee liability "\[i\]f a trustee makes a contract in the administration of the trust, he is personally liable unless the contract provides otherwise." 103 If the land trust trustee wishes to avoid personal liability

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99. See supra cases cited in note 4.
100. People v. Chicago Title & Trust Co., 75 Ill. 2d 479, 492, 389 N.E.2d 540, 545 (1979).

This position of the trustee warranted by the nature of the land trust
he should include an exculpatory provision in the contract instrument. Failure to do so may render him personally liable on the agreement to the same extent as if he held the property free of the trust.\(^{104}\)

Florida’s common law rules governing trustee liability to third persons were changed in 1975 by legislative enactment. Florida Statutes section 737.306 provides:

(1) Unless otherwise provided in the contract, a trustee is not personally liable on contracts, except contracts for attorneys’ fees, properly entered into his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(2) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(3) Claims based on contracts, except contracts for attorneys’ fees, entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trustee in his fiduciary capacity, whether or not the trustee is personally liable.

(4) Issues of liability between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification, or in any other appropriate proceeding.\(^{105}\)

The protection afforded by this statute has been held inapplicable to land trust trustees. In *Taylor v. Richmond’s New Approach*

... should be recognized by those dealing with the beneficial interest and in preparing instruments which are to be presented to the trustee for signature. Any contract of sale, mortgage, or other security document, lease or contract, which provides for the payment of money or the performance of any representation or warranty should be so drafted that these obligations are not those of the trustee. When presented with such an instrument the trustee will refuse to execute it or will modify it so that the obligations are those of the beneficiaries alone.


Ass'n, a land development corporation conveyed title to property, upon which they had developed a condominium, to the president and secretary of the corporation as trustees pursuant to the Florida Land Trust Act. After the developer's control of the association passed to unit owners, the condominium association attempted to hold the trustees liable for assessment against unsold apartments as well as for some contractual obligations. Having lost the assets of the trust through a mortgage foreclosure, the trustees were held personally liable for the obligations. On appeal, the second district held that absent any contractual provision indicating the trustees sought to limit their liability in dealing with third parties traditional rules of trustee liability would apply. The provisions of Florida’s statute section 737.306 were found inapplicable to land trust trustees. “In the absence of a more specific pronouncement, we do not believe the legislature intended to extend this protection to Florida land developers operating under an Illinois land trust.” The protections afforded by this section, the court said, were intended to apply only to trustees acting under classical inter vivos or testamentary trust arrangements. “Moreover, [the land trust] statute prescribes that the trustee is vested with full rights of ownership over the real property.”

If the trustee of an Illinois land trust can deal with the trust property as if it were his own, we believe it logical that he be subject to personal liability for obligations which he has incurred to third persons in his administration of the trust.

Looking at the facts in Taylor the court’s result appears correct. But perhaps the legislature should consider whether Florida’s statute section 737.036 should apply to land trusts as well as inter vivos or testamentary trusts. It is submitted that the protections afforded by this statute should extend to land trust trustees.

As pointed out in Taylor, the Florida Land Trust Statute vests the trustee with full rights of ownership over the real estate. But as a

107. Id. at 1096.
108. Id.
109. Id.
110. Id.
practical matter, while the land trust trustee is statutorily vested with
"power" to deal with property title, under the typical trust agreement
he lacks this right absent the beneficiary's direction. In contrast the
trustee of a typical inter vivos or testamentary trust, is vested not only
with the power to deal with the trust property but also with other dis-
cretionary powers prescribed by the trust agreement. Since the land
trust trustee's power (e.g., to sell, lease, encumber, manage and deal
with all matters affecting title to the real estate) are effected only upon
specific direction of the beneficiary (unless the trust agreement vests the
trustee with discretionary authority and power to act in such matters)
the land trust trustee's ability to act in a representative capacity is
clearly more limited than the trustee of a conventional inter vivos or
testamentary trust. The trustee in a land trust is merely a conduit
through which passes the intent and the direction of the true own-
ers—the holders of the beneficial interests or those having the power of
direction.

"The land trust is, in fact a fiction which has become entrenched
in the law of this state and accepted as a useful instrument in the han-
dling of real estate transactions. Outside of relationships based on legal
title, the trustee's title has little significance."111 Under these circum-
stances should not the protections afforded by Florida's statute section
737.036 more equitably apply to land trust trustees than to trustees of
an inter vivos or testamentary trust? If the legislature or judiciary rec-
ognize this limitation on liability, third parties dealing with land trust
trustees would certainly be more prudent. All third parties would rec-
ognize that, with respect to any obligations undertaken by the parties,
recourse would be limited to the trust res. If further assurances or
guarantees were deemed necessary to protect third parties, the benefi-
ciaries or the party with the power of direction could sign the agree-
ment as guarantor.

In situations, such as Taylor, where the trustee and beneficiary or
trustee and settlor are substantially similar in identity, a better ap-
proach for imposing liability would be to follow equitable principles
analogous to piercing of the corporate veil. If a land trust has been
used to intentionally defraud third parties and the trustee is personally

111. People v. Chicago Title & Trust Co., 75 Ill. 2d 479, 492, 389 N.E.2d 540,
545 (1979).
at fault for obligations arising from his *actual control or management* of the property, then the trustee should be held personally liable for his actions.

If section 737.036 did apply, and the trustee treated the property as if it were his own, or failed to reveal he was acting in a representative capacity, or acted without regard to the beneficiaries' directions then, absent any attempt to exonerate himself from liability, personal liability would attach against the trustee. In regard to issues of this nature, the courts and legislature should look to the realities of control rather than the refinements of title. Liability should lie against those parties who control the trust property, as well as those who enjoy the benefits of ownership. Logic and equity, tempered by the realities of the trustee-beneficiary relationship dictate that provisions of section 737.306 apply to land trust trustees.

**Tax Aspects**

*Federal Taxation*

Under the Florida Land Trust Act at least two documents are required: (1) a deed in trust conveying the property to the trustee and (2) a trust agreement, setting forth the agreement between the trustee and the beneficiaries. If there are multiple beneficiaries, it is recommended that a third document be drawn, setting forth the relationships of the beneficiaries among themselves.\(^{112}\)

The beneficiary of a land trust may be an individual, sole proprietor, partnership or corporation and will be taxed accordingly. However, in the event the relationship between the beneficiaries is not carefully structured, it is possible beneficiaries will be treated as a corporation for income tax purposes. The result is double taxation on the trust income.\(^{113}\)

*Homestead*

Under the Florida Constitution, the homestead exemption is

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\(^{113}\) Id.
granted to "every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner. . . ."114 Since the land trust beneficiary has neither legal nor equitable title, he is not afforded homestead protection.115

As made apparent by Florida's Constitution, when a land trust attempts to hold title to residential property beneficiaries are deprived of the substantial protection against creditor's claims as well as the benefit of potential ad valorem tax exemptions. This result should be carefully considered when the land trust is used solely to hold title to property utilized as the beneficiary's principal residence.

Contracts for The Sale of Trust Property

Though Florida has not yet ruled on whether a beneficiary may validly execute a contract for the sale of the trust real estate, the Illinois courts have concluded a sole beneficiary may execute such a contract, provided he discloses the property is held in a land trust, and that he is the beneficiary thereof.116 This may be true even if the beneficiary does not disclose that the property is held in a land trust.117

Financing

As a practical matter commercial, personal or conventional mortgage loans may be secured by property held in a land trust. In the typical mortgage context the trustee's legal and equitable title is used as security for the loan. In such cases the trustee will be designated mortgagor and must therefore execute all documents necessary to consummate the transaction. However the trustee's authority and power to encumber both legal and equitable title to the trust property must be expressed in the trust deed. As the Florida Land Trust Act, subsection 1 provides:

[E]very conveyance . . . [is] effective to vest in the trustee full rights of ownership . . . with full power and authority . . . as

granted in the instrument . . . provided the instrument confers on
the trustee the power to . . . encumber . . . the property.118

The trust deed should, therefore, contain an express provision em-
powering the trustee to mortgage, pledge, or otherwise encumber the
property held in trust for the trust’s benefit. Mortgagees dealing with
the trustee and trust property119 are protected under the Act; they are
not obligated to look beyond the four corners of the recorded trust deed
to determine the interests or rights of the beneficiaries, nor are they
liable for any unrecorded collateral declarations or agreements.120

The trustee’s mortgage obligation is secured by a lien on the trust
property. The mortgage terms, e.g., amount of debt, interest rate,
amortization period, etc., should be stated in the promissory note. In
order to limit the security to the trust res the promissory note should
limit the rights and remedies of the lender to foreclosure of the mort-
gaged property securing the debt. Unless other guarantees or collateral-
ization have been agreed to, the lender should acknowledge in the note
and mortgage document that no personal liability will be asserted
against the trustee or any beneficiary in the event of deficiency arising
from a foreclosure action. Beneficiaries may guarantee their personal
liability at the lender’s insistence, and this may be included in the
promissory note or as a separate instrument.

A promissory note executed by a land trustee, which is payable
only out of the land trust property with no personal liability, qualifies
as a negotiable instrument under the Uniform Commercial Code.121
But when mortgage terms are incorporated in the note the note be-
comes non-negotiable. If the promissory note merely refers to the fact
that it is secured by mortgage on the trust res, this alone does not elimi-
nate the negotiability of the note.122 The question of whether the
promissory note should embody any of the essential terms of the mort-
gage instrument, other than the repayment terms and parties, will be

119. Id.
based upon the lender's preference as to the negotiability of the instrument and whether an assignment of the note and mortgage to a third party is contemplated.

The beneficial personal property interest in a land trust\textsuperscript{123} may be assigned by the beneficiary as collateral for a loan, just as any other form of personalty (e.g. stock certificates, bonds, certificates of deposit, etc.) may be assigned. Lenders unfamiliar with the land trust concept and assignment of beneficial interest transactions, may be hesitant about accepting such assignments as loan collateral. Nonetheless, this technique does have certain advantages for both lender and borrower. First, it avoids the necessity of that complex documentation usually associated with use of real property as security for debt, such as mortgage documentation, recording, releases and application procedures. Second, a collateral assignment of beneficial interest as security for a debt may avoid the assignor's right of redemption\textsuperscript{124} eliminating lender concerns over rights on foreclosure of the debt.\textsuperscript{125} Third, a pledge of personal property becomes security for the loan, and therefore assignments of beneficial interest in a land trust fall within the purview of Article 9 of the Uniform Commercial Code.\textsuperscript{126} Foreclosure of a security interest in personalty under Article 9 is less costly and less time consuming than foreclosure of a typical real estate mortgage.

This form of financing transaction is well suited to unamortized commercial or personal loans made on a demand or short term basis. Transactions of this nature must be carefully documented. It has been suggested that such transactions should involve trusts that were created prior to the negotiation of the loan,\textsuperscript{127} otherwise such a loan may be characterized as a mortgage requiring\textsuperscript{128} legal foreclosure and full recognition of any rights and defenses a defaulting mortgagee may have.

Litigation resulting from this procedure has been based upon claims that such assignment transactions were devices used to avoid both mortgage foreclosure proceedings and borrower's rights of re-

\textsuperscript{123} FLA. STAT. § 689.071(4) (1981).
\textsuperscript{124} 229 So. 2d at 624.
\textsuperscript{125} See ILL. REV. STAT. ch. 77, § 18b. (1980).
\textsuperscript{126} FLA. STAT. § 679.101 (1981).
\textsuperscript{127} H.W. KENOIE, \textit{supra} note 10, at § 5.34.
\textsuperscript{128} FLA. STAT. § 697.01 (1981).
demption on loans secured by real estate. In *Quinn v. Pullman Trust and Savings Bank*, the Illinois appellate court summarized and set forth guidelines as to when an assignment of beneficial interest transaction would constitute a mortgage:

A land trust may not be used as a device to circumvent the right of redemption where the transaction of creation of the land trust and borrowing of funds with the simultaneous pledging and assignment of the beneficial interest are one transaction. However where, as here, the trust contains no provision for the sale of the real estate subject-matter on default in a debt, where it is set up for purposes other than a security for debt, where the pledge of the beneficial interest is subsequent to the creation of the trust, and where the pledged security transaction is of the trust beneficial interest only, the transaction is valid and will not be construed to be a real estate mortgage.

In later Illinois cases, *Kortenhof v. Messick* and *Shefner v. University National Bank*, the courts upheld the validity of the assignment of beneficial interest transaction and refused to require the trust beneficiary-creditor to follow statutory mortgage foreclosure proceedings. In both cases the loan transactions adhered to *Quinn*'s articulated guidelines.

In *Ferraro v. Parker*, a land trust agreement was entered into for the purchase and development of certain real estate. Ferraro, who was both trustee and beneficiary, executed a demand note to the other two trust beneficiaries for $18,572.10 and at the same time signed a loan agreement putting up his 31 percent interest in the trust as collateral security for the loan. Failing to satisfy the debt on time, his interest, evidenced by a trust participation certificate, was deemed forfeited and was sold to a third party. Ferraro thereafter sought a declaratory

129. DeVoigne v. Chicago Title & Trust Co., 304 Ill. 177, 189, 136 N.E. 498 (1922); See also Horney v. Hayes, 11 Ill. 2d 178, 142 N.E.2d 94 (1957).
133. 229 So. 2d at 624.
judgment declaring the loan agreement be deemed a mortgage on his equitable interest in the trust. Ferraro also argued the defendants should have foreclosed on the mortgage before depriving him of his equity of redemption. In their motion to dismiss the defendants contended that Ferraro, who failed to pay the note for more than one year after it was due, had failed to redeem any equity he might have had. In addition, defendants argued the loan agreement and assignment of Ferraro’s trust participation certificate was not intended as a mortgage.

The trial court dismissed the complaint. On appeal, Florida’s Second District Court of Appeal affirmed stating “the interest [of Ferraro] was not an interest in real estate nor would a pledge of that interest be rendered a mortgage. . . .” Responding to Ferraro’s claim that his pledged trust participation certificate was merely security for his loan (constituting a mortgage) and that this required legal foreclosure, the court found the loan agreement conveyed legal title to the certificate and did not constitute a lien. The agreement was an absolute assignment of Ferraro’s interest and neither the loan agreement nor assignment indicated an intention to secure payment of the obligation.

The essential result of these cases, where Quinn’s guidelines are met, is that an assignment of a land trust’s beneficial interest for the purpose of securing a loan does not convert the transaction into a real estate mortgage requiring legal foreclosure proceedings and recognition of debtor’s redemptive rights.

A beneficial interest in a land trust is a “general intangible” under section 9-106 of the Uniform Commercial Code. Pursuant to the code, the security interest in a general intangible must be perfected by filing a financial statement. The Illinois legislature, through an amendment to their code provision, specifically exempted “a security interest created by an assignment of a beneficial interest in a trust or a decedent’s estate” from filing requirements. In Illinois, therefore, a security interest in a land trust can now be perfected without filing a financial statement. In contrast, Florida’s code states a financing

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134. Id. at 624.
138. First Federal Savings & Loan Ass’n of Chicago v. Pogue, 72 Ill. App. 3d
statement will not be required to perfect "a security interest created by
an assignment of a beneficial interest in a decedent's estate." The
text of this section clearly differs from the U.C.C. and Illinois code
which exempts the beneficial interests created both "in a trust or a
decedent's estate." A literal reading of Florida Statutes section 679.302 requires Florida practitioners to file a financing statement to perfect the security interest. Ironically the sponsors' notes to subsection (1)(c) indicate the intent of this provision is to:

Overcome a growing body of case law requiring perfection by
filing of a security interest created by an assignment of a benefi-
cial interest in a trust or a decedent's estate. Most of these cases
involved trusts or estates which had as their corpus real property.
In a substantial percentage of these cases, the courts concluded
that the security party's interest was in personality, i.e., any rights
in the real property were inchoate. These cases represent a dra-
matic departure from traditional principles of real property. In
Florida, the most recent judicial authority in this regard conforms
with the revisions.

The inconsistency between statutory text and legislative intent has
not yet been reconciled by judicial construction or legislative amend-
ment. Therefore, as a matter of sound practice the careful practitioner
must continue to process and file financing statements in the course of
transactions involving collateral assignments of beneficial interests.

Conclusion

Both the legislature and courts of this state have come to recog-
nize that the so called "Illinois" land trust could become useful in the
growth and development of Florida real estate. Although used in Illi-
nois throughout this century, Florida lawyers, banks and trust institu-
tions have appeared cautious in their promotion and use of land trusts.

141. FLA. STAT. § 679.9-302(1)(c) (1981) (emphasis added); But see In re Cow-
Perhaps this reluctance derives from what was traditionally perceived as the greatest obstacle to utilization of land trusts in Florida—the impact of the Statute of Uses on such trusts. But in recent years this obstacle has been overcome by legislation and judicial decision. Perhaps attorneys' and institutions' lack of familiarity with the practical and beneficial aspects of such trusts has contributed to this result.

Florida case law concerning land trusts is still in its infancy. Nevertheless, there remains sufficient legal foundation of which members of the bar may take note. There are numerous unanswered questions concerning application of the land trust to various situations. By starting with a firm foundation and understanding of the basic advantages and attributes of the Florida land trust we can resolve unanswered issues and explore new areas of application.

Mitchell A. Sherman