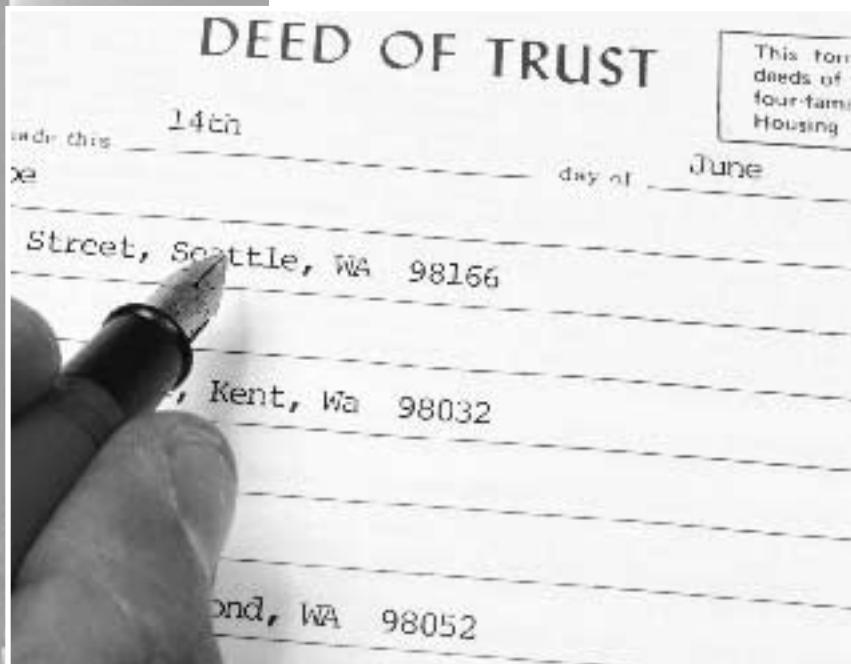


TRUSTS AND TRUSTEE CONVEYANCES



BY PAUL L. DEBOLE

A RIGHT OF WAY AGENT'S GUIDE

It happens, more often than expected: you are out in the field, talking with a landowner who is willing to sign the easement document. The owner is not only willing to sign, but ready to sign now. The local assessor's office says that the individual is the owner of record. You have no problem, right? You take out a standard easement document, fill in the blanks, have the owner sign the document and acknowledge the signatures. Then you're off and away. There are no problems ... that is, until you go to the local registry of deeds or county recorder's office, pull a copy of the current owner deed and find that the property is held in trust. You have a sinking feeling in your stomach, not unlike the feeling that real estate attorneys have when forced to deal with a trustee as a grantor. You have some questions that must be resolved. *How are trust conveyances worded? Does the trustee have the power to make the grant? What documents are necessary to execute a change in the trustees?* There are, however, some simple rules that will make this type of situation a little less onerous.

FUNDAMENTAL DEFINITIONS

A *trust* is defined as a fiduciary relationship in which one person (the trustee), holds property for the benefit of another (the beneficiary). It is not an entity, but rather a legal separation of rights from duties and obligations. The *trustee* has the duties and obligations of ownership: duties to repair and preserve the trust estate, disburse trust income, pay the mortgage and real estate taxes and so forth. The *beneficiary* has all of the benefits of ownership, the right to use and occupy the property, the right to derive income from the property and the like.

The trust relationship is based on a fiduciary duty, which the trustees owe to the beneficiaries. A *fiduciary duty* is defined as a duty of unselfish loyalty, good faith and fair dealing in or with the trust property.

The *settlor* or the *trustor* is the person who creates the trust and determines the

terms under which the trustees will hold the property for the benefit of the beneficiaries.

BEWARE OF MERGER OF INTERESTS

It is the splitting of duties and benefits that gives rise to the trust relationship. One example of a typical trust relationship is one in which "A" and "B" hold property for the benefit of "C." "C," as a beneficiary, may have the use of the property, or the right to income produced by that property. "A" and "B," as trustees, have a duty to repair and maintain the property, see to its upkeep, collect and account for any rents or income received. In that type of arrangement, "A" and "B" each have a fiduciary duty to "C."

In a similar type of arrangement, "A" and "B" (as trustees) may hold property in trust for the benefit of themselves, "A" and "B" as beneficiaries. That is, "A" and "B" in their capacity as trustees, have a fiduciary duty to "A" as a beneficiary and to "B" as a beneficiary.

The problem is, absent a pre-existing designation of a successor trustee, upon the death of either "A" or "B," the surviving trustee then has a duty to the surviving beneficiary. In the case of the death of "B," "A" as trustee has a fiduciary duty to "A" as a beneficiary. There is then a merger of interests in the survivor as both the sole trustee and the sole beneficiary. It is impossible to owe one's self a duty of unselfish loyalty, good faith and fair dealing. Therefore, the interests of "A" as sole surviving trustee and "A" as sole surviving beneficiary have merged. "A" now has title to the subject property in fee simple (since we are talking about real property, but the same is true for personal property).

REVIEW THE TRUST DOCUMENTS

The first step is to review the trust documents with the project attorney. During the course of the review, you should keep the following questions in mind:

Does the jurisdiction require that a copy of the trust documents be recorded at the local registry of deeds?

Many jurisdictions, like Massachusetts, require that the trust documents be recorded at the local registry of deeds or county recorder's office. Other jurisdictions, like New Hampshire, do not require that the trust be recorded. Know the conveyancing practice in your area.

Does the jurisdiction require a conveyance into a named trustee?

As noted above, a trust is based on a fiduciary relationship. The trust itself is not an entity, but merely a relationship between two parties having different capacities. In many states, a conveyance by or into a trust must be by or into a

trust dated June 1, 1996, and recorded in the Smith County Registry of Deeds, Book 1234, Page 567, grants to John and Mary Smith, husband and wife, both of ..."

However, several jurisdictions do allow a conveyance into a trust and do not require that the trustee be designated by name. Those states are in the minority.

Are those named in the trust document the same as those listed in the conveyancing document?

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named trustee rather than the trust itself. For example, a grant from "John and Mary Smith to the XYZ Realty Trust" would be invalid, and title would remain vested in the grantors. It is analogous to John and Mary Smith granting a parcel of property to Fred. The name is incomplete and since the grantees can not be ascertained with any degree of certainty, the conveyance is void and title remains with John and Mary Smith.

In these states, the proper conveyance would be from "John and Mary Smith to William P. Jones as Trustee of the XYZ Realty Trust, under a declaration of trust dated June 1, 1996, and recorded in the Smith County Registry of Deeds, Book 1234, Page 567." A grant from a trustee should be worded in exactly the same way: "William P. Jones as Trustee of the XYZ Realty Trust, under a declaration of

the trust document itself should clearly detail the procedure for appointing a new or successor trustee. In the case of removal of a trustee, evidence of his removal such as a resignation or death certificate should be recorded. Then an appointment of a new trustee, in accordance with the terms of the trust agreement, as well as an acceptance of the duties of the trustee by the newly appointed successor trustee should also be recorded.

Do the trustees have the power to execute the conveyance?

Does the trustee have the power to actually convey the property? Is that a power expressly granted to the trustee under the terms of the trust agreement or is there some statutory basis for the power? Does the trustee require the direction of the beneficiaries, as in the

case of a nominee trust? In the case of a testamentary trust, is an order or license of the probate court required?

May good faith purchasers rely on information contained in the public records concerning the names of the trustees?

Many trust documents state that good purchaser or other grantee may rely on the recorded instruments for the identity of the trustees, and that no further inquiry into the identity of the trustees is required.

What is the termination date of the trust?

To accomplish the intent and purpose of the trust, and to avoid violating peculiar common law trust principles, most trusts terminate on a specific date, or a certain time after the occurrence of a specified event. "Said trust shall terminate twenty (20) years after the date of death of the survivor of the original trustees named herein." In addition, since certain agreements (i.e., licenses, leases, etc.) may extend beyond the termination date of the trust. The trust

agreement should allow for that possibility, by stating that the trustee does have full power and authority to enter into agreements and create obligations that may extend beyond the termination date of trust.

THE TRUSTEE CERTIFICATE

In many instances, a thorough search of the public records will reveal the answer to many of the issues contained above.

However, in all cases, it is prudent to obtain a trustee certificate. The trustee certificate, obtained under the penalties and pains of perjury states that:

1. The trustee has full power and authority to execute the conveyance
2. The trust has not been revoked, terminated, altered or amended
3. When a direction of the beneficiaries is required, that the trustee is acting as directed by the beneficiaries or the holders of a majority of the beneficial interest of the trust

DIRECTION OF BENEFICIARIES

In the case of a *nominee trust*, one in which the trustees are only empowered to act to the extent so directed by the beneficiaries, a Direction of Beneficiary form is required. This document is a sworn statement by each beneficiary (or by the holders of a majority of the beneficial interest in the trust, check the trust agreement to see which is required) which states:

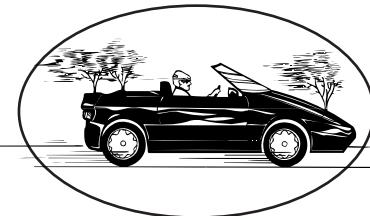
1. That the person executing the Direction of Beneficiary form is a beneficiary of the trust, and holds a certain percentage of the beneficial interest in the trust
2. That the trustees have been directed by the beneficiary to grant the easement, or that the beneficiary assents to the conveyance by the trustee; and
3. That the beneficiary has achieved the age of majority

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LOOK OUT FOR THE
TESTAMENTARY TRUST!

There are many types of trusts: nominee versus classic, revocable versus irrevocable, and so on. However, from a right of way agent's standpoint, the distinction between an *inter vivos* trust and a testamentary is an important one. An *inter vivos trust* is one that is created during the lifetime of the settlor or the trustor. A *testamentary trust* is one that is created in the will of the settlor or trustor.

A problem arises in that, in some states, testamentary trusts are under the continuing jurisdiction of the state probate court for the period of their existence. It is not uncommon to see that continuing jurisdiction last for 40 or 50 years. In those states in which the probate courts retain jurisdiction over a testamentary trust, a leave of the court or license may be required even when there is an express power contained in the will or trust document.

CONCLUSION

When a trustee conveys real property or grants an easement, the right of way agent will be faced with special considerations. You must carefully review the trust documents with the project attorney or outside counsel, the local statutes governing the transfer of property by a trustee, and the public records concerning the trust. You must be satisfied that the trust documents have been properly recorded and that the trustee is authorized to act, that the trust is valid and existing, and that all jurisdictional requirements have been satisfied. As an additional precaution, obtain a trustee certificate from the trustee and direction of beneficiary forms (if necessary) to confirm the legality of the trust and the power of the trustee to act. ■

Paul DeBole is a Senior Right of Way Coordinator with the RCN Corporation, a publicly traded telephone, cable television and ISP company, and is a lecturer at several Boston area colleges.



THE RIGHT OF WAY
INTERNATIONAL EDUCATION FOUNDATION
2000 Gator Classic

The Right of Way International Education Foundation is hosting a golf tournament on June 21st in Orlando, Florida in conjunction with the 2000 International Education Seminar. The proceeds from the tournament will go to the RWIEF and CEF for use in developing educational materials for the right of way profession.

We are seeking companies, agencies, individuals, etc. that would like to help make this tournament a big success by signing up for one of the four levels of sponsorship or donating prize items. Sponsors names will be displayed at the tournament as well as the Seminar site so we may recognize and show our appreciation to those who contributed.

We are expecting 144 golfers. Sponsorship is a great way to get name recognition in the right of way field and benefit a very worthwhile organization at the same time.

Thank you in advance for your generous support. If you have any questions, please call Terry Mock at 404-771-7334. **Please indicate your response by June 1, 2000. Make checks payable to RWIEF, and detach and return the form below to:**

Terry Mock
Service Resources
1571 Brookcliff Place
Marietta, GA 30062

2000 Gator Classic
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