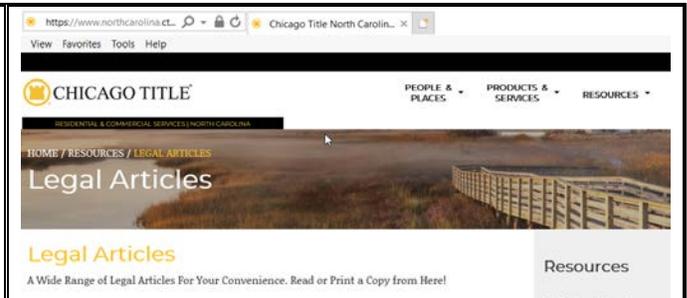




CHICAGO BULL

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Transfer of Real Estate to Trusts – Who Can You Trust?



Transfer of Real Property Trust Assets

The issuance of title insurance is dependent upon an acceptable or “clean” examination of title to a real property. The examination is primarily of the chain of conveyances, encumbrances and liens found recorded with the Register of Deeds in the North Carolina County in which the property sits. An examination will also be conducted of the files in the Clerk’s office of the Superior Court for matters that may affect title, such as estates, judgments and ongoing lawsuits.

In order to transfer title from one or more persons or entities to another, and protect the priority of the transfer as against all other subsequent encumbrances, liens or transfers, the document must be recorded in the land records with the Register of Deeds. **NCGS 47-18.**

The process is the same whether an individual, corporation or governmental division is conveying or transferring their interests. The same holds true when a settlor or maker of a trust desires to transfer real property to a trustee to be held and administered by the trustee under the terms of the trust. In order to insure title upon conveyance to a trust, an instrument actually conveying the property to the trust is necessary. Whether the trust is express, declaratory, oral, etc., without recording a conveyance document – deed or court order, the conveyance is not effective as to anyone other than the settlor and trustee.

How to Title Real Property To Be Held in Trust:

Taking it as a given that real property **should** be conveyed by the settlor as a trust asset if the trust agreement so directs, the question arises as to **how** title should be vested. “Conveying title to the trust” is a common, but misleading phrase. You will even see that the term appears in this Bull, as it is a useful and convenient shorthand phrase! Title, however, is actually vested in the Trustee who is obligated as a fiduciary to manage the trust assets for the beneficiaries in the manner prescribed in the trust document by the settlor.

Over the years, it has become fairly common to see conveyances showing the trust as the grantor or grantee rather than the trustee. It has become so common, in fact, that the state legislature has stepped in to assist. Under

NCGS 39-6.7, conveyances by deed, will or other instruments of trust assets are deemed to be made to the trustee of the trust if, in fact, the conveyances were made to the trust itself. Likewise, any security instrument given to a lender or other creditor by a trust rather than the trustee shall not fail for that reason.

Best practices, of course, would be for the trustee to take title, convey title or convey a security interest to alleviate any ambiguities. The preferred vesting from a title insurance perspective would be something similar to: “John Doe, as Trustee of the John Doe Trust, dated January 1, 2019”. As discussed below, there are numerous instances where a settlor has more than one trust – either intentionally or through a misunderstanding – that have very different purposes, beneficiaries and/or terms.

Misnamed Trusts – Ambiguity, Multiple Trusts, Decanting:

Ambiguities in the vesting of title into trustees can arise when the trust is difficult to properly identify or when the settlor had made more than one trust. For example, a settlor may make a revocable family trust and also a separate trust for specific property or a special needs family member. This can have consequences even when relying upon a Certification of Trust if the trustee is certifying as to the incorrect trust.

There have been numerous instances where deeds reference a trust with a similar name, or the same name with a different date as set forth in the trust or certificate of trust presented. Typographical error? Maybe yes, maybe no.

It is not hard to imagine a person or couple visiting an attorney for estate planning and not understanding the importance of the documents. The attorney may have had them sign a deed and recorded it. When their life circumstances change, they may visit another attorney because they moved or the original attorney retired, and obtain a whole new set of estate planning documents including another trust. This new attorney neglects to record a new deed, or perhaps his or her services do not include the titling of assets. And, the new trust revokes and renders void any prior trusts.

In a similar vein, the newer North Carolina Uniform Trust Decanting Act (**NCGS 36C-8A**), contained within the North Carolina Uniform Trust Code, may also create a scenario where the titled trust has been replaced. Trust assets may be decanted or “poured over” into a new trust to accommodate the real life circumstances of the beneficiaries, so long as doing so doesn’t frustrate the purpose of the original trust. Often, these new trusts are given the same or a similar name as the original trust and they may or may not have different trustees.

While the trustee under the prior trust in either scenario may well have the power to “wind up” the trust, so to speak, what happens if it is not caught and the property gets transferred incorrectly to a new buyer? If a typographical error is assumed? The certifying/closing attorney and the title company would have a higher likelihood of incurring the time, effort and cost of defending, correcting and/or paying a claim.

How to Handle Issues Regarding Proper Vesting of Real Property Trust Assets:

All said and done, if there are any questions regarding the proper vesting of trust assets, or whether an asset is titled into the proper trust, the attorney should go right to the source – the trustor/settlor, the trustee or the attorney who prepared the documents. Upon attaining as much information as possible, the attorney should contact their underwriter to work through any unresolved issues. If handled up front, gaps in the prior chain of title can be avoided; unentitled or incorrect trustees or beneficiaries will not improperly receive income or proceeds; and title insurance claims or malpractice claims can be avoided.

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