



Trust Me! I'm a Lawyer

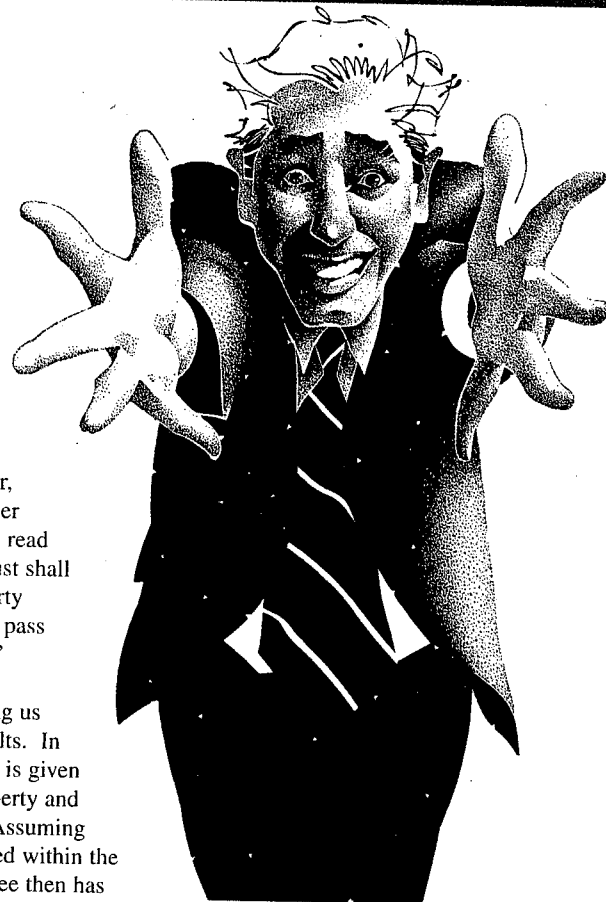
■ Michael S. Davis, Florida State Counsel

Our Underwriting Department is often asked questions regarding trusts, their interpretation and impact on title to real property. This brief article will focus on one aspect of the trust.

This discussion will be limited to an active trust, and not a passive trust. An active trust is one in which the trustee has been given certain duties and responsibilities. Typically, title will be held in a manner such as **Fide U. Ciari, Trustee under the XYZ Trust dated February 30, 1922**. Usually, the trust will be a grantor type *inter vivos* trust. In order to convey the land in question, the trustee normally will produce the trust for the title agent to review and determine if it is an active trust and if the trustee has adequate power to sell the land in question. Often, the grantor or settlor of the trust is also named as the trustee. What happens if the grantor/settlor/trustee is dead?

When a title agent learns that the grantor/settlor of the trust has died, the agent will again review the trust agreement. Because the grantor/settlor is often the trustee, the trust agreement will be reviewed for direction as to successor trustees. The title agent will typically look for the same matters set forth above, such as the power of the trustee to convey and similar matters. It is important, however, to look beyond those matters that we "normally" review. We must look to see what disposition is made of the trust assets upon the death of the grantor/settlor/trustee.

Occasionally, a settlor or grantor will include language in his or her trust to the effect that "Upon my death, the trustee shall sell the land then held by him, and shall distribute the proceeds to my daughter, Goldie Digger." On other occasions, the trust may read "Upon my death, the trust shall terminate and the property held by the trustee shall pass to my son, Scala Wagg." From a title perspective, these two situations bring us to entirely different results. In the first case, the trustee is given direction to sell the property and disburse the proceeds. Assuming power of sale is contained within the trust document, the trustee then has the power to convey the property to a third party purchaser, even though the grantor of the trust may have died. In the second scenario, however, the trustee is not given any direction to dispose of the land following death of the grantor. The trustee's duties and obligations cease upon death of the grantor/trustee, and the trust terminates. Upon such termination, the Statute of Uses will operate to vest title in the beneficiaries. No conveyance from a successor trustee is necessary. The trustee no longer has the power or authority to convey trust assets to a third party.



In the case of the terminated trust, it is important that the entire trust be placed of record so that one examining title may see for themselves that the trust is terminated, and that title has vested in the beneficiary.

This article does not address matters involving homestead, estate taxes or claims of creditors. If questions involving those issues should arise, please contact your Old Republic underwriting office.

NOTICE:

WANT TO ASK A QUESTION OF UNDERWRITING? Our next issue of *IN THE TITLE CORNER* will feature a new article called *Ask Your Underwriter*. Please fax or mail your real estate related questions, concerns or comments to the ORNTIC Underwriting Department at fax # (813) 228-0301. If your question, comment or concern is directed to a particular underwriter, please indicate that. We will try to answer as many questions as possible in each issue.

Case Law Update

■ James C. Russick, Florida State Counsel

Recently, the Florida Supreme Court addressed the issue of the applicability of the Marketable Record Title Act (MARTA) to a common law way of necessity. In the case of *H&F Land, Inc. v. Panama City-Bay County Airport & Industrial District*, 24 Fla. L. Weekly S264, the Court, acknowledging the issue to be one of great public importance, accepted the certified issue of whether "the Marketable Record Title Act, Chapter 712, Florida Statutes, operate(s) to extinguish, an otherwise valid claim of a common law way of necessity when such claim was not asserted within thirty years."

The facts of the case were undisputed. Coastal Lands, Inc. was the former common landowner of all the real property involved in this case. On October 4, 1940, Coastal conveyed 390 acres of land to Bay County, which later conveyed the property on July 23, 1947 to the Panama City Airport Board. Coastal retained a small piece of land that was both water and landlocked. The parties agreed that an implied common law way of necessity from the retained parcel was created as a result

of the 1940 conveyance; however, no notice of a claim to such a way of necessity was ever filed in the public records or asserted by use.

The Court approached the main issue by first determining whether a common law way of necessity was an interest in land subject to MARTA. It concluded that a common law way of necessity "...is based upon the principle and assumption that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property, but retains whatever is necessary for the beneficial use of the land he still holds." Recognizing the fact that an easement is more than a mere personal privilege, the Court found an easement to be an interest in land within the meaning of MARTA.

Having established that the easement was an interest in land subject to the provisions of MARTA, the Court then examined whether there were any applicable exceptions to the operation of MARTA under *Sec. 712.03, F.S.* and concluded that there were none.

The Court weighed the conflicting public policy issues involved in this case and

unanimously concluded that the way of necessity was expunged under MARTA. The Court stated, "Our decision today is predicated upon the strong public policy concerns underlying the enactment of M(A)RTA. The Legislature clearly stated the purpose of M(A)RTA and the exclusivity of its exceptions by adopting *section 712.10*. It provides: 'This law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in *s. 712.02* subject only to such limitations as appear in *s. 712.03*.' While we also recognize the public policy concerns behind *section 704.01*, we conclude that it is important for the overall stability of property law under M(A)RTA that claimants assert their interest in property in a reasonable and timely manner. . . M(A)RTA has essentially shifted the burden to those claiming an interest in land to publicly assert these claims so that all interests in land will be a matter of public record."

Old Republic All Stars

■ Linda M. Hernandez, Florida State Underwriter

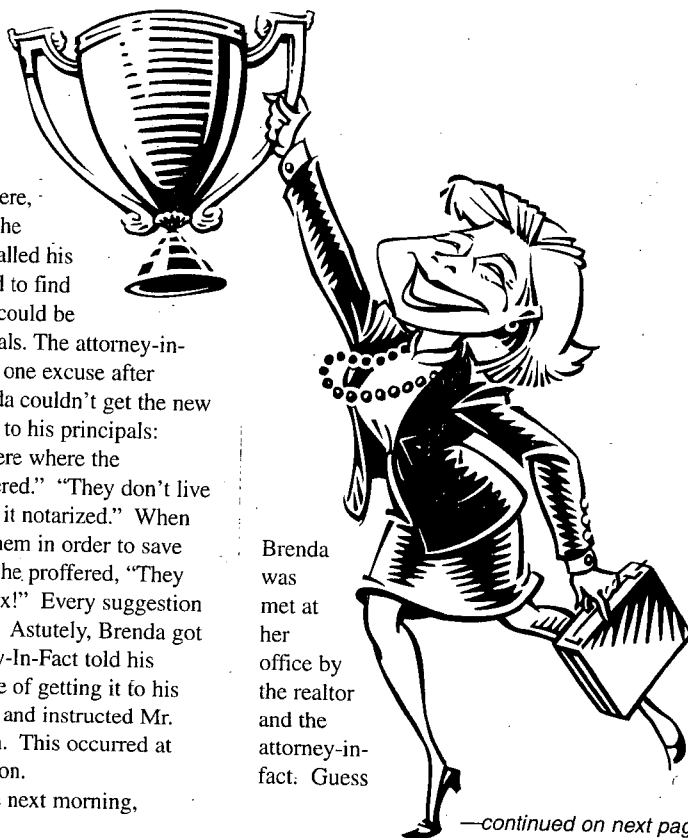
In a sky full of shimmering **Old Republic** stars, one star twinkles particularly bright this issue. A few weeks ago, **Brenda Landis**, manager and part owner of **All Realty Title Company** in Lutz, was instrumental in preventing a potential forgery on the Company. Her fifteen years of experience in the title industry and good common sense were valuable resources for her.

Brenda was scheduled to handle a closing in August. Shortly before the scheduled closing date, she was presented with a Power of Attorney to be used for the sellers. Brenda carefully checked the instrument and found that it didn't contain the requisite powers and authority. It only gave the attorney-in-fact power to "execute any and all documents in our behalf to effectuate the closing of the following described property ..."

She furnished the attorney-in-fact's realtor with a form that did contain the necessary language and offered to overnight it

to the principals who were, she'd been told, out of the country. Mr. Realtor called his client with the news and to find out how this document could be expedited to the principals. The attorney-in-fact vehemently offered one excuse after another as to why Brenda couldn't get the new Power of Attorney form to his principals: "They don't live anywhere where the instrument can be delivered." "They don't live near a city and can't get it notarized." When she offered to fax it to them in order to save overnight delivery time, he proffered, "They don't have access to a fax!" Every suggestion was met with resistance. Astutely, Brenda got suspicious. Mr. Attorney-In-Fact told his realtor that he'd take care of getting it to his brother and sister-in-law and instructed Mr. Realtor to bring it to him. This occurred at about 5:30 in the afternoon.

Bright and early the next morning,



Brenda was met at her office by the realtor and the attorney-in-fact. Guess

—continued on next page

Quarterly Profile: Orlando Agency & Title Plant

PROFILE

HOW BIG IS BIGGER?

In the last newsletter, we were thrilled to report that we had underwritten a transaction in Tampa in excess of \$18,000,000.00. So, you can imagine how pleased and proud we are to announce that **Attorney Daniel J. Lefevre** has issued an Owner's Policy in the amount of **\$29,700,000.00** insuring a medical facility in Orlando. Mr. Lefevre, whose office is in Winter Park, has been a loyal agent of Old Republic and its predecessors since May 12, 1965!

As gracious as he is, I'm certain Mr. Lefevre would agree that Susan Holland, our Title Plant Manager who supervised the title work, was a tremendous help, as was the entire Orlando Title Plant staff who also assisted with the project. Great job everyone and THANK YOU, MR. LEFEVRE!

TITLE PLANT GROWTH:

As you know, the Orlando Plant performs commercial and residential searches for properties in Orange, Seminole, Lake, Osceola and Volusia counties. Most other counties can be serviced as well through our statewide network.

Susan Holland, a veteran of Old Republic for eleven years, has seen our title plant staff and capacity for orders grow to **five times** its original size to service our agents and customers. To further improve production, we are in the process of upgrading our technology so that our Plant will be a state-of-the-art facility.

NEW AGENTS SIGNED:

We continue to sign new corporate and attorney agents in this market. Debbie Davids, our Agency Account Manager who is an attorney herself, has found that our growing list of value-added services for agents appeals to many who look to their underwriter for dependable and responsive support. We welcome all of our new Agents!

Please note our upcoming seminars in Melbourne and Orlando on the attached list of classes for the remainder of the year.

We gratefully acknowledge all of our agents in Orlando and surrounding areas, both long-time and new friends, for your loyal support. We are committed to continuing to offer our assistance to help you compete successfully in the next millennium. We know you can do it!

Robin Stein Cardella, Assistant Vice President

Old Republic All Stars continued from previous page—

what Mr. Attorney-In-Fact had in his little hands? You guessed it - a new Power of Attorney, completely signed and notarized! Even the miracles of modern technology couldn't have pulled that one off! Of course, when Brenda began questioning the circumstances of the event—how the instrument had gotten signed in such a short span of time—Mr. Attorney-In-Fact retorted that, ironically, his brother had flown in the night before (from a very far away place) and

had signed it. Of course, Brenda, being the experienced professional that she is, refused to rely on the authenticity of the instrument, and Mr. Attorney-In-Fact went on his way.

Thank you, Brenda, for your sensitivity and alertness in preventing a potential loss!

Brenda, her husband and three children moved to Florida from Pennsylvania in 1984. During that time, she has seen and experienced the tremendous changes that have taken place in our industry. In spite of,

and maybe even because of, those changes, a few years ago she took a giant step and opened **ALL REALTY TITLE COMPANY**. If you ask Brenda, she says that her staff is her extended family, and that she considers Michele Boyd, Gaby Germino, Timi Strickland and Cheryl Woods as integral a part of her life as she does her husband, three children, and grandson.



May the Power Be With You

■ *Linda M. Hernandez, Florida State Underwriter*

It's as easy as **1-2-3!** Just fill in the blanks, put your initials or check marks in the applicable boxes and sign your name! PRESTO! You have an instant Power of Attorney. In this world of "instant" coffee, "instant" tea and "instant" grits, what else would you expect? Now, **anyone** can prepare her own Power of Attorney without the aid of an attorney and, best of all, without incurring hefty legal fees! Well...that's what the ads would lead you to believe.

I'm sure many of you have already been presented with some of the "check the box" forms and, if you've sent them to us for review, you've probably already experienced rejection—of the forms, I mean.

I can only recall one instance where one of these types of instruments passed muster—and that was because the underwriter called the Connecticut attorney who prepared the document and he was willing to execute an affidavit enumerating the specific powers conferred to attorneys-in-fact under the state statute cited in the form. Believe me—this was one of the better "check mark" forms with which we've recently been presented.

What kinds of things does the underwriter look for in a power of attorney?

1. Does it contain the appropriate powers for which they are attempting to use it, i.e., does it include **"sell, mortgage, lease and convey"** verbiage? (Remember, power to "sell" does not include power to "convey" and power to "sell and convey" is not authority to give a mortgage or execute a lease!)
2. Has it been or will it be **recorded**?
3. Is it **signed**? Is it signed in the presence of **two subscribing witnesses**? (Even if the power of attorney is being used to execute a mortgage, if the property is homestead or if the instrument

offered is a durable power of attorney, Florida Statutes require that "powers of attorney to convey or mortgage homestead property be executed with

the same formalities required for the conveyance of real property.")

4. Is it properly **acknowledged** by a notary public?
5. Is it a **military power of attorney**? (If so, different rules apply. Despite the general rule requiring two witnesses for purposes of conveying real estate, a military power of attorney, which is not executed in the presence of witnesses, may be acceptable to convey title if it is prepared in accordance with *10 U.S.C., Sec. 1044(b)*.)
6. How **old** is it? (Generally, unless the power of attorney is already of record, we don't like to accept those older than one year.)
7. Why are we being asked to use a power of attorney? Is the principal in a nursing home?
8. Do we have any information regarding the **death or incapacity of the principal**? (Generally, powers of attorney are revoked by the death or disability of the principal. Nevertheless, a durable power of attorney executed in compliance with Florida Statute *709.08(1)*, can be relied on until the principal either revokes the power of attorney or dies, or until a petition to determine competency of the principal is filed.)

Power of Attorney

REAL ESTATE TRANSACTIONS

BANKING MATTERS

9. **Is the attorney-in-fact the purchaser** in the transaction in which the power of attorney is to be used? (The rule is well-settled that an agent who is authorized to sell his principal's property cannot purchase such property for himself without consent of the principal.) We require a deed from the principal.
10. **Is the principal a trustee under a declaration of trust**, and is the Trustee appointing an attorney-in-fact to sell and convey the specifically described property to a named third party pursuant to a contract executed by the trustee herself? (The general rule is that a trustee, in whom there is vested discretionary powers involving personal confidence, cannot delegate her powers and shift her responsibility to other persons. The rule, however, does not prohibit the delegation of mere ministerial duties incidental to the execution of the trust, nor does it apply where express authority to employ agents and attorneys is given by the instrument creating the trust.)

This list is certainly not presumed exclusive; therefore, should you have any questions regarding the power of attorney presented to you, as always, your Underwriting Department will be glad to answer your questions or review the document with you.

COMMENTS:

We invite your feedback and welcome your suggestions regarding **"In The Title Corner"** and the publication of future articles. Address correspondence to:

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BABY BOOM

Debbie Lail, Tampa Plant Operations, became a mom again. Debbie and Mike brought a bouncing baby girl into the world on July 7, 1999 at 10:00 a.m. Danielle weighed 7-lbs. 6 oz., and was 20 inches long. Mom, Dad and big sister Nichole are thrilled with the new addition. ***Congratulations to the Lails!***

Yadira Kitterman, Escrow Officer for Central Florida Title's Curry Ford Office in Orlando, has become a mom for the second time around. Yadira and her husband, Lam, are the proud parents of Joshua William Kitterman born July 16, 1999. Joshua weighed in at 8-lbs. 2 oz. Yadira is supposed to be taking a 3-month maternity leave but may be back sooner since she seems to be calling all the time looking for adult conversation. Hurry back, Yadira, and, ***congratulations to you and Lam!***



Old Republic National Title Insurance Co.

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