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### The North Dakota Land Trust

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# NOTE

## THE NORTH DAKOTA LAND TRUST\*

### INTRODUCTION

The land trust as adopted in North Dakota is a concept which deviates from the traditional trust form in that the legal and equitable title of the realty are conveyed to a trustee, while the interest retained by the beneficiary is personalty which virtually allows the beneficiary to retain all incidents of ownership. The creation of this concept is accomplished through the use of an instrument, generally referred to as the deed in trust, in which the realty is conveyed to the trustee. The powers of the trustee, however, are restricted through the use of a trust agreement whereby the beneficiary retains full powers of control and management.

It is not entirely clear when land trusts actually came into existence. W. Garret and H. Kenoe refer to the *Hart v. Seymour* case<sup>1</sup> as being the landmark case since this was the first case concerning a trust involving real estate.<sup>2</sup> The property referred to in this case was not held under land trust, although it formulated the legal justification for land trust. Others refer to the *Kerr v. Kotz* case<sup>3</sup> as being the historical beginning since this was the first case in which an examination was made of the law upon which these trusts or devices operate.<sup>4</sup> Thus the judicial justification can probably be credited to the *Hart* case although the first case in which a conflict arose is the *Kerr v. Kotz* case.

Two authors contend that the Illinois Land Trust is an outgrowth of the Massachusetts Business Trust.<sup>5</sup> Their reasoning appears to be justified by the fact that the Massachusetts Business Trust was in existence many years prior to the land trust,<sup>6</sup> and

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\* The writers wish to acknowledge their appreciation to Mr. William B. Garrett and the Chicago Bar Association for the assistance which their articles contributed during the preparation of this note. W. GARRETT, *LAND TRUSTS* [reprint from *ILL. L. FORUM* (1955)]; COMMITTEE ON CONTINUING LEGAL EDUCATION, CHICAGO BAR ASSOCIATION, *LAND TRUSTS* (1968).

1. 147 Ill. 598, 35 N.E. 246 (1893). This case deals with the question of whether the duties of a trustee in a situation similar to land trusts are sufficient to avoid being executed by the Statute of Uses.

2. W. GARRETT & H. KENOE, *Histroy And Development in LAND TRUSTS* (Committee on Continuing Legal Education, Chicago B. Ass'n) [Hereinafter cited as *Chicago B. Ass'n*] 1 (1968).

3. 218 Ill. App. 654 (1st Dist. 1920) (abst. dec.).

4. W. GARRETT, *LAND TRUSTS* [reprint from *ILL. L. FORUM* 655-680 (1955)] third revision, 1966 at 5 (Hereinafter cited as W. GARRETT, *LAND TRUSTS*); Comment, *Land Trusts: Some Problems in Virginia*, 7 WM. & MARY L. REV. 368 (1966).

5. W. GARRETT, *LAND TRUSTS* at 4; *Land Trusts — Adaptability to Kansas Real Estate Practices*, 14 U. KAN. L. REV. 97 (1965).

6. W. GARRETT, *LAND TRUSTS* at 4.

by the many similarities which exist between the two trusts.<sup>7</sup>

Basically, under the land trust idea, the trustee receives some of the rights and powers with respect to the land and the beneficiary retains the remainder. Thus the trust *res* consists of the legal and equitable title with the beneficiary retaining the power of full control of the property including the right to collect rents, possession, proceeds of its sales, lease, etc. Generally then, the land trust idea is quite simple. However, the small number of states which have adopted this theory seems to indicate that we lose some of the simplicity and admirability of it in practice.

Possibly the lack of acceptance has been due to the deviation from the traditional trust form. Illinois has adopted and developed the land trust through its judicial system. A couple of states have attempted the use of land trusts but the courts have consistently held that the duties of a trustee are passive and therefore, the Statute of Uses vests the entire title in the beneficiaries.<sup>8</sup> Despite the hesitancy of the courts in adopting this form of trust, there are states which have adopted the land trust through legislation<sup>9</sup> including North Dakota's adoption in 1967.<sup>10</sup> Prior to the adoption of the land trust, each disposition of real property, whether by transfer or will, had to be made directly to the person in whom the right to the possession and profits were vested.<sup>11</sup> If a transfer was made to a trustee for the use of another, the result was simply that no interest or estate vested in the trustee and a release of the property had to be executed upon demand by the beneficiaries. In this respect, the adoption of the Illinois Land Trust has brought about a complete new outlook.

7. Under the Massachusetts Business Trust, the investors agree to the creation of a group of governing trustees in whom the title of the property is vested along with the control and management of the property. The beneficial interests of the trust are evidenced by transferable trust certificates. Under the land trust, the trustee obtains the record title through a deed in trust with all the powers to deal freely with the land, except that the trustee does not manage or control the property. The major difference is that under the Massachusetts Business Trust, the trustee maintains complete control and management of the trust property. Note, *Land Trust Act*, 18 U. MIA MIAMI L. REV. 699 (1964); for a detailed and complete analysis of the Massachusetts Business Trust, see Annot., 156 A.L.R. 22 (1945).

8. *Janura v. Fenck*, 261 Wis. 179, 52 N.W.2d 144 (1952); *Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54 (1940).

9. FLA. STAT. ANN. § 689.071 (Supp. 1968); VA. CODE ANN. § 55-17.1 (Supp. 1968).

10. N.D. CENT. CODE § 59-03-02 (Supp. 1967): "No trust relating to real property shall fail nor shall any use relating to real property be defeated because no beneficiaries are specified by name in the recorded deed of conveyance to the trustee or because no duties are imposed upon the trustee, notwithstanding the provisions of section 59-03-04 and 59-03-05. Power conferred by any such instrument on a trustee to sell, lease, encumber, or otherwise dispose of property therein described shall be effective and no person dealing with such trustee shall be required to make further inquiry as to the rights of such trustee to act, nor shall he be required to inquire as to the disposition of any proceeds. Nothing in this section shall be construed to affect any right which a creditor may otherwise have against a trustee or beneficiary, or to affect the rule against perpetuities."

11. N.D. CENT. CODE § 59-03-04, repealed by 1967 N.D. Sess. Laws, ch. 471.

Since the adoption of the North Dakota statute regarding land trusts,<sup>12</sup> the trustee can hold title to certain property while allowing the beneficiaries complete use, benefit and management of the property. The greatest benefit derived from adopting this creation would be the avoidance of the cumbersome and often entangling problems of title transfer. The use of this device allows the trustee to execute instruments dealing with the title and in this way alleviates the problem of attaining the individual signature of multiple owners or the proper signatures of both spouses, etc.<sup>13</sup>

The North Dakota Code Section which adopted land trusts specifically repealed Section 59-03-05 of the North Dakota Century Code which provided that if there was any disposition in which a person was entitled to the actual possession and the receipt of rents and profits of that real property, then that person was deemed to have legal title therein of the same quality and duration as his beneficial interest. The new provision specifically states that a trust relating to real property shall not fail because no duties are imposed upon the trustee.<sup>14</sup> This Section also states that:

Power conferred by any such instruments upon a trustee . . . shall be effective and no person dealing with such trustee shall be required to make further inquiry . . . as to the disposition of any proceeds.<sup>15</sup>

The code, therefore, creates a trust in which the trustee is given the legal and equitable title while the beneficiary has retained the power to control and possess the property, etc., referred to previously.

The adoption of the Illinois Land Trusts into North Dakota law is a deviation from the traditional trust theory and may in some instances be contradictory to prior law. However, the writers of this note trust that the creative and ingenious minds of our profession can find uses beyond those mentioned in the note, which would make this trust irreplaceable. Adaptability of it into our present trust system runs the gamut of valuable methods of property conveyances. It is interesting to note that the Doctrine of Uses which was developed by the medieval property owner met a great deal of objection and finally was obviated by the Statute of Uses in 1536 during the reign of Henry VIII. However, because of the usefulness of the trust idea, the courts of this early date found that the Statute of Uses did not relate to active trusts. Nathan Isaacs in his article, "Trusteeship in Modern Business," states that "[W]hatever one may think of the technical machinery for saving

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12. N.D. CENT. CODE § 59-03-02 (Supp. 1967).

13. See W. GARRETT, *Creating And Administering The Trust in LAND TRUSTS* (Chicago B. Ass'n) 4 (1968) for a discussion of the issues and advantages of land trusts.

14. N.D. CENT. CODE § 59-03-02 (Supp. 1967).

15. *Id.*

the idea, the underlying reason that inspired the legal profession to save it was its usefulness."<sup>16</sup> Mr. Isaacs in the same article also states that the:

Modern business has seized upon the trust idea and has found it useful for so many novel purposes that trust companies have become veritable financial department stores ready to serve the most diverse needs, and trusteeship has become a readily available tool for every day purposes of organization, financing, risk-shifting, credit operations, settling of disputes and liquidation of business affairs.<sup>17</sup>

The list of uses for which the trust idea can be adopted is endless and the life of land trusts rests in the hands of those creative minds who wish to develop this concept to its ultra capabilities.

### USES OF LAND TRUSTS

The land trust, as presented by the recently passed statute, offers North Dakota attorneys the opportunity to suggest an additional alternative to those clients exhibiting particular problems during the discussion stages of estate planning. Land trusts are not a panacea for all the individual estate planning problems which might arise, but it can be used effectively if circumstances merit its adoption. The following ideas attempt to suggest certain appropriate circumstances when implementation of the land trust might be useful and advantageous. It must, however, be remembered that the North Dakota courts have not had the opportunity to render their interpretation of the statute and until this is done the exact breadth of it will not be known. The lack of interpretation should not hinder the basic uses of land trusts.

Probably the most important use for the land trust is in the situation where the ownership of land is shared by a number of persons.<sup>18</sup> Under this set of circumstances the problem of conveying the real estate is not as complex, because only the signature of the trustee and not of each individual owner is required to transfer the land. This ease of transfer is particularly important if the beneficiaries of the property do not reside near the land.

Some other problems, involving multiple ownership, which the land trust avoids, concerns the areas of bankruptcy,<sup>19</sup> incompe-

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16. Isaacs, *Trusteeship in Modern Business*, 42 HARV. L. REV. 1048, 1050 (1929).

17. *Id.* at 1048.

18. *Supra* note 13.

19. Turner, *Some Legal Aspects of Beneficial Interest Under Illinois Land Trusts*, 39 ILL. L. REV. 216, 219 (1945); Comment, *Land Trusts: Some Problems in Virginia*, 7 WM. & MARY L. REV. 368, 369 (1966); *supra* note 13.

tency,<sup>20</sup> judgements<sup>21</sup> and martial litigation.<sup>22</sup> The death of an individual owner would of course also complicate any transfer of title. If any one of the beneficiaries under a land trust were to experience any of these adversities a clouded title would not be created, thereby not complicating the title transfer.<sup>23</sup> Under the land trust arrangement the real estate is immune from the problems and difficulties which may arise from the affairs of the beneficiaries.<sup>24</sup>

Real estate held under a land trust agreement can also be used as security for mortgages.<sup>25</sup> When the land trust is used as security in financing there should be specific language which eliminates the beneficiary's personal liability and this can best be accomplished by making the real estate the only security for the transactions.<sup>26</sup>

There is a particular advantage for utilizing the land trust when there is a desire to subdivide a parcel of land. Generally, when a subdivision is desired, the mortgage will provide for a partial release which the buyer can obtain from the mortgagee upon completion of the agreed terms.<sup>27</sup> The buyer must also obtain a deed from the trustee.<sup>28</sup> This system provides for a continual check on the remaining parcels of land still within the trust and it eliminates the possibility of duplicate conveyances.<sup>29</sup>

Another use for the land trust is that the identity of the real estate ownership can be concealed. Many landlords in the slums of Chicago utilized such secrecy and it was not until 1963 that the Illinois General Assembly enacted a statute which required a land trust trustee to disclose the identity of the beneficiaries of the trust within ten days after receiving a written notice of a violation of a building ordinance.<sup>30</sup> This statute removed the privacy of ownership concept from the Illinois Land Trust which the slum lords had benefited from.

The privacy of ownership concept offers several benefits if properly applied and these benefits should not be disregarded. An individual owner may not want the exact extent of his personal

20. *Supra* note 19.

21. *Supra* note 19.

22. *Supra* note 19.

23. W. GARRETT, *LAND TRUSTS* at 7.

24. W. GARRETT, *LAND TRUSTS*.

25. *Id.* at 8; TRUSTS DEPARTMENT, *THE CENTRAL NATIONAL BANK OF RICHMOND, LAND TRUSTS: A NEW CONCEPT OF HANDLING REAL ESTATE IN VIRGINIA* 4 (1962).

26. W. GARRETT, *Creating And Administering The Trust* in *LAND TRUSTS* (Chicago B. Ass'n) 6 (1968).

27. *Id.* at 5; *LAND TRUSTS: A NEW CONCEPT OF HANDLING REAL ESTATE IN VIRGINIA*, *supra* note 25, at 4.

28. *Supra* note 26, at 5.

29. *Supra* note 26, at 5.

30. ILL. REV. STAT. c.80 § 81 (1966).

real estate holdings to be publicly known.<sup>31</sup> Furthermore, the owner may want to remove himself from any negotiations which might include his tenants or adjoining landowners.<sup>32</sup>

Finally, it might be economically advantageous if the prospective landowner's identity were withheld if separate parcels of land are required for a particular business venture.<sup>33</sup>

The privacy of ownership concept obviously does not work to the advantage of all persons involved with land trusts and, as experience indicates, it can be badly abused. The possibility that the concept of secrecy might be abused should not in itself restrict the benefits of the privacy of ownership concept. The North Dakota Legislature could, if necessary, legislate out of existence any abusive aspect of the land trust thereby making any abusive benefit only temporary. Such an approach seems to have been successful in Illinois. If the legislature feels that the identity of the beneficiaries should be made public it can set out the particular procedure which should be followed to obtain this result.<sup>34</sup>

The land trust also reduces the amount of probate tax which would normally be assessed against an estate.<sup>35</sup> The land trust concept is even more beneficial to the non-resident beneficiary in that the beneficiary has an interest in personal property and not real property; therefore, the need for ancillary probate should be removed.<sup>36</sup> Even though the inheritance tax problems would still exist the land trust permits ease and simplicity in dealing with title of the property for the nonresident.<sup>37</sup>

In many cases the land trust can be used to remove a dower interest in real estate. Generally, this approach is used when the husband trades and deals in real estate or when the wife is "incompetent and therefore unable to execute a deed or release."<sup>38</sup> It should, however, be pointed out that the land trust cannot be used to defraud a spouse of proper dower rights.<sup>39</sup>

Another advantage of the land trust is the income tax deduction which is permitted for the depreciation of improvements to the real estate. However, these deductions can only be taken if the relationship among the beneficiaries does not qualify them to be treated as a corporate association and taxed as a corporation.<sup>40</sup>

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31. *Supra* note 26, at 4; *supra* note 24, at 7-8.

32. *Supra* note 26, at 4; *supra* note 24, at 7-8.

33. *Supra* note 26, at 4; *supra* note 24, at 7-8.

34. *Supra* note 24, at 7-8.

35. *Supra* note 26, at 8.

36. W. GARRETT, *LAND TRUSTS*, at 8; *LAND TRUST: A NEW CONCEPT FOR HANDLING REAL ESTATE IN VIRGINIA*, *supra* note 25, at 4.

37. *Supra* note 36.

38. *Infra* note 39.

39. W. GARRETT, *Creating And Administering The Trust*, in *LAND TRUSTS* (Chicago B. Ass'n) 6 (1968); W. GARRETT, *LAND TRUSTS* at 8.

40. W. GARRETT, *LAND TRUSTS* at 9.

The previous examples indicate that the uses and advantages of land trusts are varied and because of this fact it can be of considerable value when one is involved in estate planning. The examples should also indicate that the land trust has its limitation; therefore, no attempt should be made to go beyond its capabilities. For instance, the land trust would not be a satisfactory substitute for a well drafted will or a complete *inter vivos* trust.<sup>41</sup> However, if the land trust concept is integrated into the entire estate planning process the benefits can be substantial.

### CREATION OF LAND TRUSTS

No real difficulty exists in the procedure used to create a land trust. Basically the trust is made up of the legal and equitable title to the real estate. Full control of the property, however, remains with the beneficiaries.<sup>42</sup> The beneficiaries' control includes "[t]he right to direct its conveyance by the trustee, to collect the proceeds and avails of its sale or mortgaging, to possession, to lease, to collect rents and to do all of the other things done by owners of real estate."<sup>43</sup>

All of the control exercised by the beneficiaries is derived from the execution of the following documents. The deed in trust, "[a] conveyance to the trustee is the means by which the title is placed in the land trust."<sup>44</sup> By this document the trustee is given full and complete power to deal with the title. The document further provides that the interest of the beneficiary or of any person claiming under the beneficiaries is limited to the earnings, avails, and proceeds coming from the sale or other disposition of the real property.<sup>45</sup> The instrument provides that no beneficiary has any title, legal or equitable, in the real estate, and specifically declares the beneficiaries' interest to be personal property.<sup>46</sup>

After the deed in trust has been drawn and recorded there must be a trust agreement entered into by the trustee and the beneficiaries.<sup>47</sup> In general, the trust agreement includes much of the same information as the deed in trust. In nearly all cases this agreement will specifically include statements which provide "[t]hat on the death of the beneficiary his interest [will pass] (to his executor as personal property [and] that the death of the

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41. H. KENO, *Limitation On Uses*, in LAND TRUSTS (Chicago B. Ass'n) 50 (1968).

42. W. GARRETT, *Creating And Administering The Trust*, in LAND TRUSTS, *supra* note 39, at 6.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. W. GARRETT, *Creating And Administering The Trust*, in LAND TRUSTS, *supra* note 39, at 7.



beneficiary will not terminate the trust."<sup>48</sup> Other provisions which are quite common in the agreement are those that give protection to the trustee, "[s]uch as the statement that the trustee has no duty to file tax returns plus a right in the trustee to recover any advances it shall make in connection with the trust."<sup>49</sup>

One element, in the trust agreement, which differs from the deed in trust is that "[r]ecordation of the trust agreement is specifically forbidden. . . ."<sup>50</sup> The trust agreement usually provides that if the real estate stays in trust for twenty years it must be sold at a public auction and the proceeds be distributed among the beneficiaries.<sup>51</sup> The agreement also provides that the trustee, in dealing with the title, will be directed by the person or persons named by the beneficiaries.<sup>52</sup> Finally, the provision requiring the trustee not to disclose the name of the beneficiaries to the public is included in the trust agreement.<sup>53</sup>

The deed in trust and the trust agreement are the primary instruments used in creating a land trust and in many cases these will be sufficient. However, if a number of beneficiaries are created and if their relationship to one another or to the property vary to a considerable degree then a collateral agreement should be made.<sup>54</sup> The collateral agreement can define the rights and privileges of the individual beneficiaries in the particular set of circumstances. This agreement, generally, is used to specify how the property will be operated, by whom, who has survival rights, and what the sales price will be.<sup>55</sup> The collateral agreement often takes the form of a partnership agreement and as in the partnership agreement, if prepared properly, it will avoid hard feelings and expensive litigation.<sup>56</sup>

## LEGAL ASPECTS OF LAND TRUSTS

### *Question of Personality*

The enactment of the land trust legislation provides unique legal consequences which are susceptible to practical application in real property law. Probably the foremost of these is that the beneficiary's interest is personalty rather than realty.<sup>57</sup>

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. W. GARRETT, *Creating And Administering The Trust*, in LAND TRUSTS, *supra* note 39, at 7-8.

55. *Id.*

56. *Id.*

57. *Send v. Franke*, 20 Ill. 2d 70, 169 N.E.2d 335 (1960); *Crawford Realty & Development Corp. v. Woodlawn Trust & Sav. Bank*, 382 Ill. 345, 47 N.E.2d 81 (1943).

It appears that the courts have used two bases: the expressed intention of the settlor in the trust deed and agreement;<sup>58</sup> and, the doctrine of equitable conversion;<sup>59</sup> in concluding that the beneficiary's interest is personalty. The former basis is a tacit recognition of the later.<sup>60</sup> In the *Chicago Title and Trust Company v. Merchantile Trust and Savings Bank* case the Supreme Court of Illinois found that under the specific terms of the trust there was an equitable conversion of the real estate into personal property.<sup>61</sup> Professor Scott states that:

There is equitable conversion where the trustee is directed to sell the land, even though it is not his duty to sell it immediately. It is sufficient that there is imposed upon him by the trust instrument an absolute duty to sell at some time.<sup>62</sup>

The doctrine of equitable conversion is recognized in North Dakota in the area of wills where direction to sell has been expressed, or by clear implication, such real estate is equitably converted into personalty.<sup>63</sup> The North Dakota Supreme Court in *In Re Reynolds Will*, while speaking on the question of equitable conversion, quoted from Tiffany Real Property, 3d edition, Section 297, the following: "In order that the doctrine of equitable conversion may apply, it is necessary that there be an absolute obligation to convert, either immediately or at a future time. . . ."<sup>64</sup> The doctrine of equitable conversion is based on the principal that equity regards things agreed to be done, as having actually been performed.<sup>65</sup> It would appear, then, that since the trust agreement directs the trustee to sell the land without discretion in twenty years,<sup>66</sup> the requirements of the doctrine of equitable conversion have been met and the beneficiary's interest has in fact been converted into personalty.<sup>67</sup>

58. *Horney v. Hayes*, 11 ILL. 2d 178, 142 N.E.2d 94, 97 (1957). The court refers to the trust agreement which states that the beneficiaries' interest is personalty and held "That beneficial interests under such trusts are personal property and not real estate."; Comment, *Land Trusts—Adaptability to Kansas Real Estate Practice*, 14 U. KAN. L. REV. 97, 103 (1965).

59. *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952); *Duncanson v. Lill*, 323 Ill. 528, 153 N.E. 618 (1926); 2 BOGERT, TRUSTS AND TRUSTEES § 185 (2d ed. 1965).

60. Comment, *Land Trust—Adaptability to Kansas Real Estate Practice*, *supra* note 58, at 103.

61. 300 Ill. App. 329, 20 N.E.2d 992 (1939); see *Aronson v. Olson*, 348 Ill. 26, 180 N.E. 565 (1932); *Duncanson v. Lill*, *supra* note 59.

62. II A. SCOTT, SCOTT ON TRUSTS § 131 at 977 (2d ed. 1956).

63. N.D. CENT. CODE § 56-05-22 (1960): "When a will directs the conversion of real property into money such property and all of its proceeds must be deemed personal property from the time of the testator's death."

64. 85 N.W.2d 553, 559 (N.D. 1957).

65. *Penfield v. Tower*, 1 N.D. 216, 46 N.W. 418 (1890).

66. Generally, under a land trust agreement, twenty years is the accepted time limit, although if circumstances warrant, it may be decreased; however, a term of more than twenty years may violate the rule against perpetuities.

67. *In Re Reynolds Will*, *supra* note 64; *Seno v. Franke*, *supra* note 57.

Despite the fact that the doctrine of equitable conversion has operated in regard to the interest of the beneficiary, the rights are a little different than the rights of a holder in fee. The interest of the beneficiary, generally, consists of: the right to manage and control the property; the right to possession; the right to income; the right to assign; and, the right to the sale price.<sup>68</sup> Many of the desirable characteristics of the land trust, as covered under the section on uses, arise from the personalty feature. It would, therefore, be desirable that the doctrine be adopted in regard to land trusts and from the discussion of the cases cited, the adaptability of the equitable conversion doctrine is foreseeable.

*The Statute of Uses*

The medieval property owner developed the Doctrine of Uses in which one person would hold the legal title for the use of another. Due, primarily, to the difficulty the state experienced in collecting the feudal duties, the Statute of Uses was passed in 1536, which curtailed the use of this doctrine for a short period of time. However, by 1544 the English Courts held the Statute of Uses inapplicable to active uses and as a result the concept of trusts has evolved. Now, some four centuries later, one of the foremost questions raised, in regard to land trusts is, whether the duties of the trustee are sufficient to prevent the operation of the Statute of Uses. The Illinois Supreme Court has taken a liberal view with regard to the operation of the Statute of Uses. The leading case in Illinois on the Statute of Uses is *Crow v. Crow*.<sup>69</sup> In this case the husband conveyed the property to a nominee so that it could be transferred to himself and his wife as joint tenants. The son, after the grantor's death, claimed that the Statute of Uses applied to the conveyance and thereby nullified the conveyance to the nominee. The court held that the duty of a nominee to convey was sufficient to take it out of the Statute of Uses.

There are certain states which do not take such a liberal attitude as that expressed by the Illinois Courts. For example, in 1952 the Supreme Court of Wisconsin found that the sole duty of the trustee to sell and divide the proceeds at the end of twenty years was insufficient to classify the land trust as an active trust. The court, therefore, held the land trust plan inoperable.<sup>70</sup> The weight of authority, according to Professor Scott, is that the trustee's duty to convey upon direction is sufficient to establish an active trust.<sup>71</sup> The duties which the trustee must perform under the

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68. The beneficiary shall not be entitled to hold the title since under the land trust agreement it is vested in the trustee.

69. 348 Ill. 241, 180 N.E. 877 (1932).

70. *Janura v. Fenck*, 261 Wis. 179, 52 N.W.2d 144 (1952) concerned a trust in which realty was held for the ultimate use, control and management of the beneficiaries.

71. I. A. SCOTT, *SCOTT ON TRUSTS* § 69.1 at 601 (2d ed. 1956).

customary land trust are: to sell on proper direction; to sell at public sale any property remaining after the specified time (usually twenty years); and, to distribute the proceeds of the sale to the beneficiaries according to their respective shares. The above duties should be enough to take the land trust out of the operation of the Statute of Uses.<sup>72</sup> However, if for some reason these duties are not sufficient, another argument would be the fact that the beneficiaries interest is personalty and the Statute of Uses does not apply.<sup>73</sup>

The probability of this question arising in North Dakota is rather tenuous since the statute relating to land trusts specifically states that the trust shall not fail “. . . because no duties are imposed upon the trustee. . . .”<sup>74</sup>

### Question of Agency

Both a trustee and an agent are in a fiduciary relationship to those individuals they represent, but there are many legal differences which distinguish one from the other.<sup>75</sup> The legal differences will not deny the trustee the opportunity to act as agent for the beneficiary nor will it stop the beneficiary from acting as agent for the trustee. These relationships, however, do not arise simply from the fact that there is a trust. An agency relationship can exist if the trust agreement specifically provides for such a relationship.<sup>76</sup> After reading the deed in trust and the trust agreement in the appendix it can be seen that neither document grants the trustee or beneficiary the right to act as an agent for the other. Since the land trust documents specifically state the duties and obligations of the trustee and beneficiaries there has been a reluctance on the part of some courts to go beyond the literal interpretation of the language found in the instruments.<sup>77</sup> For example the cases of *Schneider v. Pioneer Trust and Savings Bank*<sup>78</sup> and *Marshall Savings and Loan Association v. Chicago National Bank*,<sup>79</sup> indicate that the beneficiaries cannot act as the agent for the trustee in the sale of property. The reasoning behind this conclusion seems to be that the beneficiary has no interest in the real estate and therefore, he cannot dispose of property in which he has no interest.<sup>80</sup>

72. *Id.*

73. *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1939); *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952).

74. N.D. CENT. CODE § 59-03-02 (Supp. 1967).

75. I. A. SCOTT, *SCOTT ON TRUSTS* § 8 (3d ed. 1967).

76. W. GARRETT, *LAND TRUSTS* at 12-13.

77. *Gallagher & Speck v. Chicago Title & Trust Co.*, 238 Ill. App. 39 (1st Dist. 1925) as cited in W. GARRETT, *LAND TRUSTS*, at 13.

78. 26 Ill. App. 2d 463, 168 N.E.2d 808, 809 (1960).

79. 56 Ill. App. 2d 872, 206 N.E.2d 117, 120 (1965).

80. *Schneider v. Pioneer Trust and Savings Bank*, *supra* note 78.

The courts have also reasoned that if the beneficiaries were allowed to bypass the trustee, when dealing with the property, they would then be acting as though the land trust did not exist, while still retaining the advantages of the trust.<sup>81</sup> Consistency requires the observance of the form of the trustees' ownership.<sup>82</sup> These cases do not, however, contend that the beneficiary could not act as an agent for the trustee if given specific authority.<sup>83</sup>

Courts, which have had to deal with land trust problems, have also ruled that trustees are not agents of the beneficiaries.<sup>84</sup> The cases, however, did not specifically involve the trustee's ability to transfer title. The cases have instead dealt with the questions concerning whether or not the trustee can be required to accept service of process<sup>85</sup> and whether or not the trustee can accept mortgage obligations as agent for the beneficiary.<sup>86</sup>

North Dakota follows the Virginia approach,<sup>87</sup> to the agency question, in that the trustee can in some respects represent the beneficiary in the sale of the land. The trustee can pass a good title if the property is sold to a purchaser who did not have knowledge of the trustee's lack of authority to sell the property without the approval of the beneficiary. This result is based on Section 59-03-02(4) of the North Dakota Century Code which provides that:

[N]o person dealing with such trustee shall be required to make further inquiry as to the right of such trustee to act, nor shall he be required to inquire as to the disposition of the proceeds.<sup>88</sup>

If the sale occurred and the beneficiary were opposed to it, the only remedy that he would have would be in the form of a damage suit against the trustee. One of the best methods to alleviate this possible problem would be to deal with a responsible corporate trustee.<sup>89</sup>

### *Negligence Liability*

A question which is of importance to both the trustee and the

81. *Id.*

82. *Id.*

83. W. GARRETT, *LAND TRUSTS* at 13.

84. *Barkhausen v. Continental Illinois Nat'l Bank & Trust Co.*, 3 Ill.2d 254, 120 N.E.2d 649 (1954), *cert. denied sub nom.*, *Edwards v. Barkhausen*, 348 U.S. 897 (1954); *Robinson v. Chicago Nat'l Bank*, 32 Ill. App. 55, 176 N.E.2d 659 (1st Dist. 1961); see W. GARRETT, *LAND TRUSTS* at 14.

85. *Robinson v. Chicago Nat'l Bank*, *supra* note 84. Service of process on the trustee by an injured third party is not sufficient to be service on the beneficiary. The trustee is not the beneficiary's agent.

86. *Barkhausen v. Continental Illinois Nat'l Bank & Trust Co.*, *supra* note 84.

87. Comment, *Land Trusts: Some Problems in Virginia*, 7 WM. & MARY L. REV. 368, 371 n.11 (1966).

88. N.D. CENT. CODE § 59-03-02 (4) (Supp. 1967).

89. *Supra* note 87, at 377-378.

beneficiaries concerns tort liability. The primary reason for concern is the obvious fact that there are many opportunities for accidents to occur on real property. This problem is compounded further when items such as fences and buildings are added to the premises.

Presently, only general rules exist as to who is liable when a tort occurs upon the property held under the land trust. Professor Scott points out that the trustee is personally liable to a third person if, in the course of the administration of the trust, he commits a tort against that third person.<sup>90</sup> He further points out that it is immaterial: whether the tort was not committed by the trustee personally; whether the tort occurred because of specific action or no action; whether the act was intentionally or negligently caused.<sup>91</sup>

The general rule does have an exception in that if the tort results, "from the operations of the premises and not from the mere fact of ownership," the trustee's liability will not exist if he was not responsible for the operations of the premises.<sup>92</sup> The question of whether or not the trustee had the necessary control of the property apparently is the determining factor in deciding where the liability should rest.<sup>93</sup>

One of the first cases concerning the aspects of control and its relationship to land trusts was *Brazowski v. Chicago Title and Trust Company*.<sup>94</sup> In this case a faulty iron fence fell on a little boy and broke his leg. The property was held by a trustee under a land trust agreement and the Illinois Appellate Court found that the division of powers between the trustee and the beneficiaries was sufficient to remove the trustee's liability for negligence.<sup>95</sup> The court, in this case, said:

[T]he trustee . . . had neither the right to, nor the actual possession or control of the premises, upon which the inquiry occurred. It is a fundamental rule that the liability to pay damages for negligence arises out of the existence of a duty and a breach thereof. . . . The duty in the case at bar would, of necessity, arise out of the fact of possession and control, and can be attributed only to the person who has the possession and control.<sup>96</sup>

The *Fields v. Indiana Avenue Apartments* case stresses the importance of control in determining what liability the trustee has

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90. III A. SCOTT, SCOTT ON TRUSTS § 264 (3d. ed. 1967).

91. *Id.*

92. *Supra* note 90, at 2244.

93. *Supra* note 90, at 2244.

94. 280 Ill. App. 293 (1st Dist. 1935); see W. GARRETT, LAND TRUSTS at 12; see 13 CHI-KENT L. REV. 383 (1935).

95. *Brazowski v. Chicago Title and Trust Co.*, 280 Ill. App. 293 (1st Dist. 1935).

96. *Id.*

in regard to injuries arising from the land trust premises.<sup>97</sup> The trustee in this case merely held title to the property and in no way participated in the management or operations of the building in which the alleged accident occurred.<sup>98</sup> The court concluded that since the trustee had no duties to perform and because the beneficiary was the party which controlled the operations and maintenance of the trust property, the beneficiary must then accept the liability for torts caused by his employees while in the course of their employment.<sup>99</sup>

These cases indicate that the degree of control held by the trustee over the operations and management will be instrumental in determining the trustee's tort liability. For this reason it is not difficult to understand why both the deed in trust and the trust agreement specify the duties and obligations of the trustee and the beneficiaries.<sup>100</sup>

The deed in trust gives "[t]he trustee . . . full and complete power to deal with the title in every conceivable way."<sup>101</sup> The document further states that the beneficiaries interest is in the "[e]arnings, avails, and proceeds."<sup>102</sup> The trust agreement also restricts the trustee's ability to deal with anything concerning the property, except the title, and like the deed in trust, it grants the beneficiaries the control of the operations of the property.<sup>103</sup> Based on the language of the two instruments it is apparent that the trustee has no control over the possession, maintenance or operations of the property held in the land trust. Since the trustee has no control he therefore should not be liable for injuries occurring on the trust property.

### *Financing*

The beneficial interest that the beneficiary holds is of considerable value to him if he wishes to enter into some type of financing transactions. If the beneficial interest is treated as personalty it consequently could, like other forms of personalty, be pledged as security for loans. This, at least, has been the conclusion reached by the Illinois Supreme Court in the case of *Horney v. Hayes*.<sup>104</sup>

If the beneficiaries interest is to be pledged as security for a loan the requirements of Article 9 of the Uniform Commercial Code should be closely followed. According to the North Dakota Century

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97. 47 Ill. App.2d 55, 196 N.E.2d 485, 487 (1964).

98. *Id.*

99. *Id.*

100. W. GARRETT, *Creating And Administering The Trust in LAND TRUSTS* (Chicago B. Ass'n) 6-7 (1968).

101. *Id.* at 6.

102. *Id.* at 7.

103. *Id.* at 7.

104. 11 Ill.2d 178, 142 N.E.2d 94 (1957).

Code, "General Intangibles" includes "any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents, and instruments."<sup>105</sup> Since the land trust agreement is said to be personal property it will fall within the code definition.<sup>106</sup> If a creditor follows the language of the code he could have the additional protection of a perfected interest by filing a financing statement.<sup>107</sup>

North Dakota courts have not had the opportunity to determine whether or not the beneficiary's interest in the land trust is personalty under the code definition. However, a recent Illinois case, *Levine v. Pascal*,<sup>108</sup> has held that a beneficial interest in a land trust was personalty and that no interest in the real property existed. Therefore, the court concluded that any secured transaction involving such personal property would be governed by the Uniform Commercial Code.

North Dakota does have language in its land trust statute which indicates that, "[n]othing in the section shall be construed to affect any right which a creditor may otherwise have against a trustee or beneficiary. . . ."<sup>109</sup> Using this language the North Dakota courts could arrive at the same conclusion as the Illinois court and it would seem safe to conclude that this is the decision that will be reached.

### *Taxation*

There is one particular tax hazard which warrants discussion. The area of taxation does not seem to present many problems. The greatest pitfall lies in the field of income tax. Generally, no consequential problems arise in the tax statements of the average land trust if the income is properly reported by the individual beneficiaries. However, when there is more than one beneficiary, the question of whether or not they are an association or a corporation is raised.<sup>110</sup> The problem here does not concern the trust deed or trust agreement, but is concerned primarily with the relationship of the beneficiaries. The Treasury Department issued in 1960 the Kintner Regulations,<sup>111</sup> which set out the following guidelines which the Internal Revenue Service will use in determining whether a business group should be taxed as a corporation:

#### 1. associates

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105. UNIFORM COMMERCIAL CODE § 9-106; N.D. CENT. CODE § 41-09-06 (1968).

106. W. GARRETT, *LAND TRUSTS* at 20.

107. N.D. CENT. CODE §§ 41-09-40, 41-09-41 (1968).

108. 94 Ill. App.2d. 43, 236 N.E.2d. 425 (1968).

109. N.D. CENT. CODE § 59-03-02 (4) (Supp. 1967).

110. J. BOUGHNER, *Tax And Estate Planning Aspects In LAND TRUSTS* (Chicago B. Ass'n) 19 (1968).

111. Treas. Reg. §§ 801.7701.1; 801.7701.4 (1960).



2. an objective to carry on the business and divide the gains
3. free transferability of interest
4. centralization of management
5. continuity of life
6. liability for corporate debt limited to corporate property<sup>112</sup>

The question whether the association will be taxed as a corporation is primarily dependent upon whether or not there is centralized management.<sup>113</sup> Mr. Jackson L. Boughner in an article entitled "*Tax and Estate Planning Aspects in Land Trusts*" suggests that to be absolutely certain in regard to the problem of centralized management:

[T]he trust agreement should provide that all of the beneficiaries must execute any letters of direction. There should be no power of attorney to any of the beneficiaries; there should be no management contract giving unlimited powers to certain beneficiaries and all decisions relative to the management and operation of the property should be joined in by all of the beneficiaries.<sup>114</sup>

Mr. Boughner further suggests that because of the ever present possibility of corporate taxation, another form of agreement among the beneficiaries should be negotiated which would further indicate a partnership.<sup>115</sup>

In the area of real estate taxes, there is a question which may arise regarding tax liability since the beneficiary has an interest under the land trust agreement which gives him the full benefit and use of the property.

Assuming the real estate taxes are assessed against the titleholder, the trustee would be liable as owner of the realty. However, under the standard form land trust agreement in the appendix, the tax bills are forwarded to the beneficiary by the trustee and the beneficiary agrees to pay any and all taxes.

Personal property taxation presents a different kind of problem in that there exists a possibility that the beneficiaries' interest will be taxed as personal property, since the interest of the beneficiary is personalty. However in Illinois this is not the case at present. Mr. Boughner indicated in his article the reason may be that the tax assessor believed that this would be double taxation, since it is included in the real estate taxes.<sup>116</sup>

### *Question of Corporate Farming Under the Land Trust*

The question of corporate farming is one area in which the

112. *Id.*; *supra* note 110.

113. *Supra* note 110, at 22.

114. *Supra* note 110, at 22.

115. *Supra* note 110, at 22.

116. *Supra* note 110, at 19.

land trust could offer the farmer some, but not all, of the benefits available under the corporate farming concept.

Under Section 10-06-01 of the North Dakota Century Code, farming by domestic and foreign corporations is prohibited. It is the opinion of the authors that with the land trust a group of farmers could perhaps accomplish the same purpose disallowed under Section 10-06-01 of the North Dakota Century Code. The writers do not wish to imply that domestic or foreign corporations could accomplish the purposes referred to, but that a group of non-corporate individuals could possibly use a land trust to obtain some of the advantages they had contemplated by incorporating their farming interests.

If the proposed farm incorporation legislation<sup>117</sup> is approved those individuals who wish to obtain the advantages of corporate farming would seem to have a choice. They could arguably accomplish their objective under either the land trust arrangement or the proposed legislation allowing corporations to carry on farming and ranching operations.

The present proposed statutory language imposes the following limitations upon corporations attempting to farm in North Dakota:

1. The shareholders shall not exceed ten in number.
2. The corporation shall not have as a shareholder a person, other than an estate, who is not a natural person.
3. The corporation shall not have more than one class of shares.
4. The corporation's income from rent, royalties, dividends, interest, and annuities does not exceed twenty percent of the corporation's gross receipts.

It would appear from the above limitations that the large corporation would be precluded from engaging in farming operations since, for example, the number of shareholders is limited to ten individuals.

The land trust arrangement does not seem to offer a lawful alternative to such corporations. This is so since the proposed corporate farming statute not only prohibits the owning of farm lands, but also the engaging in farming operations. Therefore, even though the large corporation could transfer the land to a trustee and divest itself of the title, the land trust could not conceal the fact that the corporation was engaging in farming operations.

Hence, it would seem that neither the land trust nor the proposed corporate farming statute would serve as a means by which the large corporation could circumvent North Dakota's corporate

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117. N.D. CENT. CODE § 10-06-07 (Supp. 1967).

farming policies. On the contrary, the two statutes would serve to give North Dakota farmers alternatives from which to choose in order to accomplish their legitimate objectives.

### CONCLUSION

The adoption of the land trust in North Dakota should avoid some of the problems which plague the area of real estate ownership. The extent of the land trust's usefulness in North Dakota will depend upon what type of reception the courts will give the new legislation. If, for instance, the concept of personalty is not accepted, the usefulness of the land trust will be negligible. On the other hand, if the North Dakota courts are as receptive as the Illinois courts, the trust will be a particularly valuable tool in estate planning.

The primary value of the land trust is that it reduces the complexities of the traditional methods used in present day real estate transactions. Simply by eliminating the necessity of multiple signatures it reduces the chance of error and creates a more practical method of transferring title. The ease of transfer is arrived at by allowing the trustee to hold the legal and equitable title for the beneficiaries.

As previously indicated, the North Dakota land trust may encounter problems similar to those in states which already have accepted the land trust concept. The particular problems which tend to be litigated most often are the areas of personalty, agency, taxation and financing. Even though problems exist, the courts, when faced with a land trust question, tend to arrive at similar conclusions and thereby solidify the land trust characteristics which in general appear to be more desirable than the strict traditional approaches used in real estate transactions. Utilization of the land trust concept can only be left to the legal fraternity and its acceptance or rejection in the courts will determine the success or failure of the land trust.

LARRY A. BAKKEN  
NORLYN E. SCHULZ

## APPENDIX

## STANDARD FORMS FOR THE LAND TRUST\*

## STANDARD FORM DEED IN TRUST

THIS INDENTURE WITNESSETH, That the Grantor ..... of the County of ..... and State of ..... for and in consideration of ..... Dollars, and other good and valuable considerations in hand paid, Convey ..... and Warrant ..... unto TRUST COMPANY, a corporation of Illinois, as Trustee under the provisions of a trust agreement dated the ..... day of ..... 19....., known as Trust Number ..... the following described real estate in the County of ..... and State of Illinois, to-wit:

TO HAVE AND TO HOLD the said premises with the appurtenances upon the trust and for the uses and purposes herein and in said trust agreement set forth.

Full power and authority is hereby granted to said Trustee to improve, manage, protect and subdivide said premises or any part thereof, to dedicate parks, streets, highways or alleys and to vacate any subdivision or part thereof, and to resubdivide said property as often as desired, to contract to sell, to grant options to purchase, to sell on any terms, to convey either with or without consideration, to convey said premises or any part thereof to a successor or successors in trust and to grant to such successor or successors in trust all of the title, estate, powers and authorities vested in said trustee, to donate, to dedicate, to mortgage, pledge or otherwise encumber said property, or any part thereof, to lease said property, or any part thereof, from time to time, in possession or reversion, by leases to commence in praesenti or futuro, and upon any terms and for any period or periods of time, not exceeding in any case of any single demise the term of 99 years, and to renew or extend leases upon any terms and for any period or periods of time and to amend, change or modify leases and the terms and provisions thereof at any time or times hereafter, to contract to make leases and to grant options to lease and options to renew leases and options to purchase the whole or any part of the reversion and to contract respecting the manner of fixing the amount of present or future rentals, to partition or to exchange said property, or any part thereof, for other real or personal property, to grant easements or charges of any kind, to release, convey or assign any right, title or interest in or about or easement appurtenant to said premises or any part thereof, and to deal with said property and every part thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified, at any time or times hereafter.

In no case shall any party dealing with said trustee in relation to said premises, or to whom said premises or any part thereof shall be conveyed, contracted to be sold, leased or mortgaged by said trustee, be obliged to see to the application of any purchase money, rent, or money borrowed or advanced on said premises, or be obliged to see that the terms of this trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of said trustee, or be obliged or privileged to inquire into any of the terms of said trust agreement; and every deed, trust deed, mortgage, lease or other instrument executed by said trustee in relation to said real estate shall be conclusive evidence in favor of every person relying upon or claiming

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under any such conveyance, lease or other instrument, (a) that at the time of the delivery thereof the trust created by this Indenture and by said trust agreement was in full force and effect, (b) that such conveyance or other instrument was executed in accordance with the trusts, conditions and limitations contained in this Indenture and in said trust agreement or in some amendment thereof and binding upon all beneficiaries thereunder, (c) that said trustee was duly authorized and empowered to execute and deliver every such deed, trust deed, lease, mortgage or other instrument and (d) if the conveyance is made to a successor or successors in trust, that such successor or successors in trust have been properly appointed and are fully vested with all the title, estate, rights, powers, authorities, duties and obligations of its, his or their predecessor in trust.

The interest of each and every beneficiary hereunder and of all persons claiming under them or any of them shall be only in the earnings, avails and proceeds arising from the sale or other disposition of said real estate, and such interest is hereby declared to be personal property, and no beneficiary hereunder shall have any title or interest, legal or equitable, in or to said real estate as such, but only an interest in the earnings, avails and proceeds thereof as aforesaid.

If the title to any of the above lands is now or hereafter registered, the Registrar of Titles is hereby directed not to register or note in the certificate of title or duplicate thereof, or memorial, the words "in trust", or "upon condition", or "with limitations", or words of similar import, in accordance with the statute in such case made and provided.

And the said grantor... hereby expressly waive... and release... any and all right or benefit under and by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale or execution or otherwise.

In Witness Whereof, the grantor... aforesaid ha ...hereunto set ..... hand... and seal... this..... day of ..... 19.....

..... (SEAL)  
 ..... (SEAL)

**STANDARD FORM LAND TRUST AGREEMENT**

THIS TRUST AGREEMENT, dated this ..... day of ..... 19....., and known as Trust Number ....., is to certify that the TRUST COMPANY, a coporation of Illinois as trustee hereunder, is about to take title to the following described real estate in ..... County, Illinois, to-wit:

otherwise known as No. .... Street and that when it has taken the title thereto, or to any other real estate deeded to it as trustee hereunder, it will hold it for the uses and purposes and upon the trusts herein set forth. The following named persons shall be entitled to the earnings, avails and proceeds of said real estate according to the respective interests herein set forth, to-wit:

IT IS UNDERSTOOD AND AGREED between the parties hereto, and by any person or persons who may become entitled to any interest under this trust, that the interest of any beneficiary hereunder shall consist solely of a power of direction to deal with the title to said property and to manage and control said property as hereinafter provided, and the right to receive the proceeds from rental and from mortgages, sales or other disposition of said premises, and that such right in the avails of said property shall be deemed to be personal property, and may be assigned and transferred as such; that in case of the death of any beneficiary hereunder during the existence of this trust, his or

her right and interest hereunder shall, except as herein otherwise specifically provided, pass to his or her executor or administrator, and not to his or her heirs at law; and that no beneficiary now has, and that no beneficiary hereunder at any time shall have any right, title or interest in or to any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails and proceeds as aforesaid. The death of any beneficiary hereunder shall not terminate the trust nor in any manner affect the powers of the trustee hereunder. No assignment of any beneficial interest hereunder shall be binding on the trustee until the original or a duplicate of the assignment is lodged with the trustee, and accepted by the trustee and every assignment of any beneficial interest hereunder, the original or duplicate of which shall not have been lodged with and accepted by the trustee, shall be void as to all subsequent assignees or purchasers without notice.

Nothing contained in this agreement shall be construed as imposing any obligation on the trustee to file any income, profit or other tax reports or schedules, it being expressly understood that the beneficiaries from time to time will individually make all such reports, and pay any and all taxes, required with respect to the earnings, avails and proceeds of said real estate or growing out of their interest under this trust agreement.

In case said trustee shall make any advances of money on account of this trust or shall be made a party to any litigation on account of holding title to said real estate or in connection with this trust, or in case said trustee shall be compelled to pay any sum of money on account of this trust, whether on account of breach of contract, injury to person or property, fines or penalties under any law or otherwise, the beneficiaries hereunder do hereby jointly and severally agree that they will on demand pay to the said trustee, with interest thereon at the rate of 7% per annum, all such disbursements or advances or payments made by said trustee, together with its expenses, including reasonable attorney's fees, and that the said trustee shall not be called upon to convey or otherwise deal with said property at any time held hereunder until all of said disbursements, payments, advances and expenses made or incurred by said trustee shall have been fully paid, together with interest thereon as aforesaid. However, nothing herein contained shall be construed as requiring the trustee to advance or pay out any money on account of this trust or to prosecute or defend any legal proceeding involving this trust or any property or interest thereunder unless it shall be furnished with funds sufficient therefor or be satisfactorily indemnified in respect thereto. In the event the trustee is served with process or notice of legal proceedings or of any other matter concerning the trust or the trust property, the sole duty of the trustee in connection therewith shall be to forward the process or notice by first class mail to the person designated herein as the person to whom inquiries or notices shall be sent or, in the absence of such designation, to the beneficiaries. The last address appearing in the records of the trustee shall be used for such mailing.

It shall not be the duty of the purchaser of said premises or of any part thereof to see to the application of the purchase money paid therefor; nor shall any one who may deal with said trustee be required or privileged to inquire into the necessity or expediency of any act of said trustee, or of provisions of this instrument.

This trust agreement shall not be placed on record in the Recorder's Office of the county in which the land is situated, or elsewhere, however the recording of the same shall not be considered as notice of the rights of any person hereunder, derogatory to the title or powers of said trustee.

The trustee may at any time resign by sending by registered mail a notice of its intention so to do to each of then beneficiaries hereunder at his or her address last known to the trustee. Such resignation shall become effective ten days after the mailing of such notices by the trustee. In the event of such resig-

nation, a successor or successors may be appointed by the person or persons then entitled to direct the trustee in the disposition of the trust property, and the trustee shall thereupon convey the trust property to such successor or successors in trust. In the event that no successor in trust is named as above provided within ten days after the mailing of such notices by the trustee, then the trustee may convey the trust property to the beneficiaries in accordance with their respective interests hereunder and the deed of conveyance may be recorded or registered, as the case may be, by the trustee, or the trustee may, at its option, file a bill for appropriate relief in any court of competent jurisdiction. The trustee notwithstanding such resignation shall continue to have a first lien on the trust property for its costs, expenses and attorneys' fees and for its reasonable compensation.

Every successor trustee or trustees appointed hereunder shall become fully vested with all the estate, properties, rights, powers, trusts, duties and obligations of its, his or their predecessor.

It is understood and agreed by the parties hereto and by any person who may hereafter become a party hereto, that said Trust Company will deal with said real estate only when authorized to do so in writing, and that (notwithstanding any change in the beneficiary or beneficiaries hereunder) it will, on the written direction of ..... or will on the written direction of such other person or persons as shall be from time to time named in writing by the beneficiary or beneficiaries, or on the written direction of such person or persons as may be beneficiary or beneficiaries at the time, make deeds for, or otherwise deal with the title to said real estate, provided, however, that the trustee shall not be required to enter into any personal obligation or liability in dealing with said land or to make itself liable for any damages, costs, expenses, fines or penalties, or to deal with the title so long as any money is due to it hereunder. Otherwise, the trustee shall not be required to inquire into the propriety of any such direction.

The beneficiary or beneficiaries hereunder, in his, her or their own right shall have the management of said property and control of the selling, renting and handling thereof, and said trustee shall have no duty in respect to such management or control, or the collection, handling or application of such rents, earnings, avails or proceeds, or in respect to the payment of taxes or assessments or in respect to insurance, litigation or otherwise, except on written direction as hereinabove provided, and after the payment to it of all money necessary to carry out said instructions. No beneficiary hereunder shall have any authority to contract for or in the name of the trustee or to bind the trustee personally. If any property remains in this trust twenty years from this date it shall be sold at public sale by the trustee on reasonable notice, and the proceeds of the sale shall be divided among those who are entitled thereto under this trust agreement.

The Trust Company shall receive for its services in accepting this trust and in taking title hereunder the sum of \$.....; also the sum of \$..... per year for holding title after the ..... day of ....., 19....., so long as any property remains in this trust; also its regular schedule fees for making deeds, and it shall receive reasonable compensation for any special services which may be rendered by it hereunder, or for taking and holding any other property which may hereafter be deeded to it hereunder, which fees, charges or other compensation, the beneficiaries hereunder jointly and severally agree to pay.

IN TESTIMONY WHEREOF, the Trust Company has caused these presents to be signed by its Vice President and attested by its Assistant Secretary,

and has caused its corporate seal to be hereto attached as and for the act and deed of said corporation, the day and date above written.

TRUST COMPANY,

ATTEST: ..... By .....  
Assistant Secretary. Vice President.

And on said day the said beneficiaries have signed this Declaration of Trust and Trust Agreement in order to signify their assent to the terms hereof.

..... (SEAL) Address .....

May the name of any beneficiary be disclosed to the public? .....

Refer written inquiries and legal notices by first class mail to .....

May oral inquiries be referred directly? ..... To whom? .....

To whom shall bills be mailed? .....

EXCULPATION CLAUSE

It is expressly understood and agreed by and between the parties hereto, anything herein to the contrary notwithstanding, that each and all of the representations, covenants, undertakings and agreements herein made on the part of the Trustee while in form purporting to be the representations, covenants, undertakings and agreements of said Trustee are nevertheless each and every one of them, made and intended not as personal representations, covenants, undertakings and agreements by the Trustee or for the purpose or with the intention of binding said Trustee personally but are made and intended for the purpose of binding only that portion of the trust property specifically described herein, and this instrument is executed and delivered by said Trustee not in its own right, but solely in the exercise of the powers conferred upon it as such Trustee; and that no personal liability or personal responsibility is assumed by nor shall at any time be asserted or enforceable against the Trust Company or any of the beneficiaries under said Trust Agreement, on account of this instrument or on account of any representation, covenant, undertaking or agreement of the said Trustee in this instrument contained, either expressed or implied, all such personal liability, if any, being expressly waived and released.