

CHAPTER VIII

CONVEYANCES BY AND TO TRUSTEES



STANDARD 8.1

DEED CREATING PASSIVE TRUST

STANDARD: A CONVEYANCE TO A TRUSTEE, WHO HAS NO POWER OF ACTUAL DISPOSITION OR MANAGEMENT OR UPON WHOM NO TRUST DUTIES ARE IMPOSED, CREATES A PASSIVE TRUST AND VESTS TITLE IN THE BENEFICIARY, IF LIVING, AND NOT IN THE NAMED TRUSTEE.

Problem: John Doe deeded Blackacre to “Richard Roe in trust for Mary Doe.” The deed contained no other reference to a trust. Investigation establishes that there is no will, declaration of trust or other instrument in which Roe is named as trustee for Mary Doe. Later, Mary Doe deeded Blackacre to Simon Grant. Roe did not join, either individually or as trustee. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 555.3 and MCL 555.5. *Ready v Kearsley*, 14 Mich 215 (1866); *Everts v Everts*, 80 Mich 222, 45 NW 88 (1890); *Rothschild v Dickinson*, 169 Mich 200, 134 NW 1035 (1912); *Woolfitt v Histed*, 208 Mich 308, 175 NW 286 (1919).

Note: The prudent title examiner should consider requiring a deed from the named trustee in addition to a deed from the beneficiary, because of the difficulty in establishing with certainty that no valid trust exists.

STANDARD 8.2

EFFECT OF DESIGNATION “TRUSTEE”

STANDARD: THE WORD “TRUSTEE” FOLLOWING THE NAME OF A PARTY TO AN INSTRUMENT WHICH CONTAINS NO OTHER REFERENCE TO A TRUST OR TRUST POWERS, DOES NOT OF ITSELF CONSTITUTE NOTICE OF A TRUST.

Problem A: John Doe deeded Blackacre to “Richard Roe, Trustee.” The deed contained no other reference to a trust. Does the word “Trustee” constitute notice of a trust?

Answer: No.

Problem B: Same facts as in Problem A, except that Doe deeded Blackacre to “Ruth Roe, Trustee.” The deed contained no other reference to a trust. Later, “Ruth Roe, Trustee” deeded Blackacre to Simon Grant, who was a purchaser for value with no actual notice of the existence of a trust. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Grant could treat the conveyance as vesting title in Ruth Roe individually and free of any trust. Although there may have been a valid trust, Grant took free of the trust because he had no notice of it.

Authorities: MCL 555.20 and 555.11. *McQuillan v Ayer*, 189 Mich 566, 155 NW 599 (1915).

Comment: MCL 555.20 provides that “[w]hen an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute as against the subsequent... purchasers from such trustees, without notice, and for a valuable consideration.” The Committee expresses no opinion as to the meaning of the words “contained” or “declared” in this provision, or as to what additional words, beyond the mere designation of “trustee,” would be sufficient to charge a purchaser with the duty of making inquiry as to whether there is a trust and, if so, what its terms provide.

Note: A deed from “Richard Roe, Trustee” which does not state the grantor’s marital status would not be entitled to be recorded if the deed has no other reference to a trust. MCL 565.221. See, Standard 3.4. In the case of a deed from “Richard Roe, Trustee,” without other reference to a trust, if Roe is married but his wife does not join in the deed, the prudent title examiner should consider requiring a deed from Roe’s wife so as to bar her inchoate dower.

Caveat: This Standard does not address transactions in which a purchaser has actual or constructive notice of a trust derived from a source other than an instrument which only refers to the grantor as “trustee.”

STANDARD 8.3

DEED BY TRUSTEE UNDER EXPRESS TRUST

STANDARD: A DEED BY A TRUSTEE UNDER A TRUST WHOSE NECESSARY TERMS ARE EXPRESSED IN THE INSTRUMENT CREATING THE TRUSTEE'S ESTATE DOES NOT VEST MARKETABLE TITLE OF RECORD IN THE GRANTEE UNLESS THE INSTRUMENT CONTAINING THE TRUST TERMS OR A CERTIFICATE OF TRUST EXISTENCE AND AUTHORITY COMPLYING WITH THE REQUIREMENTS OF ACT 133 OF THE MICHIGAN PUBLIC ACTS OF 1991:

(A) IS OF PUBLIC RECORD;

(B) ESTABLISHES A VALID TRUST; AND

(C) CONTAINS A VALID AUTHORITY FOR THE CONVEYANCE.

Problem A: John Doe deeded Blackacre to “Richard Roe as Trustee to collect rents and pay to James Smith for his life.” There is no recorded trust instrument or certificate of trust existence and authority. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem B: John Doe, a widower and owner of Blackacre, died testate. Doe's will, which was admitted to probate, created a valid trust for the benefit of Doe's children and appointed Richard Roe trustee, with power of sale. Doe's estate was probated, debts, taxes and expenses paid, and an order entered distributing Blackacre to the trustee. Roe, as testamentary trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Richard Roe owned Blackacre as trustee under a trust agreement conferring upon the trustee the express power to sell and convey any real property constituting part of the trust corpus. A certificate of trust existence and authority as to the trust, complying with the require-

ments of Act 133 of the Michigan Public Acts of 1991, was recorded. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant obtain marketable title to Blackacre?

Answer: Yes.

Problem D: John Doe deeded Blackacre to Richard Roe as trustee under a valid recorded trust. The trust agreement conferred power of sale only with the consent of a majority of the beneficiaries. Roe, as trustee, deeded Blackacre to Simon Grant, but a majority of the beneficiaries did not sign the deed or otherwise consent to the conveyance. Did Grant acquire marketable title of record to Blackacre?

Answer: No.

Problem E: John Doe, a widower, the owner of Blackacre, deeded Blackacre on December 1, 1988, to Richard Roe as trustee under a recorded declaration of trust containing a power of sale. The trust provided that the corpus was to be retained for 50 years and then distributed to Doe's then-living lineal descendants, the income to be distributed annually to Doe's children and grandchildren. Later, Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. The trust was void *ab initio* as violating either the statute prohibiting suspension of the power of alienation (see, Standard 9.6) or the common law rule against perpetuities (see, Standard 9.4), whichever is applicable. Because the trust was void at its creation, the power of sale failed. In the absence of a valid trust and power of sale, title acquired through the trustee was not marketable.

Authorities: Generally: MCL 555.11 through 555.23 and 565.431 through 555.436.

Problem D: *Palmer v Williams*, 24 Mich 328 (1872).

Problem E: MCL 554.14 through 554.20 (repealed and superseded by 1949 P.A. 38, being MCL 554.51 through 554.53). *Petit v Flint & Pere Marquette R Co*, 114 Mich 362, 72 NW 238 (1897); *Grand Rapids Trust Co v Herbst*, 200 Mich 321, 190 NW 250 (1922); *Gard-*

ner v City National Bank and Trust Co, 267 Mich 270, 255 NW 587 (1934); *LaMere v Jackson*, 288 Mich 99, 284 NW 659 (1939).

- Comment A:** If the trustee's deed in Problem E had been executed and recorded after December 27, 1988, the effective date of the Uniform Statutory Rule Against Perpetuities, being Act 418 of the Michigan Public Acts of 1988 (MCL 554.71 *et seq.*), it may be valid under the alternative 90-year rule provided by the Act.
- Comment B:** This Standard does not consider the requirements of MCL 700.162 (now repealed), pertaining to the recording of wills, nor does it address issues arising as a result of the trust instrument being recorded in a county other than that in which the real property is located.
- Caveat 1:** This Standard addresses only the requirements for establishing a marketable record title in connection with deeds by trustees if the trust terms and existence are sufficiently expressed to constitute notice of the existence of the trust. See Standard 8.2, regarding deeds from trustees or grantors when the trust is not fully expressed.
- Caveat 2:** The Revised Probate Code (RPC) § 833, MCL 700.833 (repealed and superseded by MCL 700.7404), may protect a third party in dealing with a trustee, by permitting the third party to assume the existence and proper exercise of trust powers, even if the trust is fully expressed on the record, if the third party does not have actual notice that the trustee has exceeded his or her powers or has improperly exercised them. There may be an apparent conflict between RPC § 833, MCL 700.833 (now MCL 700.7404), and MCL 555.21 and 565.435.

STANDARD 8.4

DEED BY LESS THAN ALL TRUSTEES UNDER EXPRESS TRUST

STANDARD: ALL SURVIVING TRUSTEES MUST EXECUTE A DEED PURSUANT TO A POWER OF SALE CONTAINED IN AN EXPRESS TRUST UNLESS THE TRUST INSTRUMENT PROVIDES OTHERWISE.

Problem A: John Doe, the owner of Blackacre, died testate. Doe's will devised Blackacre to Edgar Poe and Richard Roe as trustees under an express trust containing a power of sale. The order assigning residue entered in Doe's estate assigned Blackacre to Poe and Roe as trustees. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem B: Same facts as in Problem A, except that Poe died before the execution of the deed and no successor co-trustee was appointed. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 555.21 and 700.7406(4). *Nichols v Pospiech*, 289 Mich 324, 286 NW 633 (1939); *Traxler v Rothbart*, 473 Mich 488, 703 NW 2d 796 (2005).

STANDARD 8.5

DEED BY SUCCESSOR TRUSTEE UNDER EXPRESS TRUST

STANDARD: IF AN EXPRESS TRUST CONTAINS A POWER OF SALE WHICH IS NOT LIMITED TO THE NAMED TRUSTEE, A SUCCESSOR TRUSTEE MAY CONVEY REAL PROPERTY PURSUANT TO THE TRUST TERMS. IF A TRUST DOES NOT CONTAIN A POWER OF SALE OR CONTAINS A POWER OF SALE LIMITED TO THE NAMED TRUSTEE, THE PROBATE COURT MAY ENTER AN ORDER REMOVING ANY TRUST PROVISION LIMITING THE SUCCESSOR TRUSTEE'S POWER OF SALE, THEREBY PERMITTING THE SUCCESSOR TRUSTEE TO CONVEY REAL PROPERTY PURSUANT TO THE COURT'S ORDER.

Problem A: Richard Roe, the sole (or surviving) trustee under an express, recorded declaration of trust containing a power of sale, died. The trust instrument did not provide for a successor trustee. Blackacre was part of the corpus of the trust. Later, Alice Roe, widow and sole heir at law of Richard Roe, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. Real property held in trust does not descend to the heirs at law of a deceased trustee.

Problem B: Same facts as in Problem A, except that after Roe's death the probate court appointed Edgar Poe as successor trustee. Poe, as trustee, conveyed Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Richard Roe resigned as trustee and the probate court appointed Edgar Poe as successor trustee. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem D: John Doe executed a declaration of trust under which Richard Roe and Edgar Poe were appointed trustees. The trust instrument contained a power of sale which was limited as follows: “Having confidence in the trustees herein named, I declare that the powers granted shall be personal to them and shall not vest in their successors.” The trust instrument was recorded, and Doe deeded Blackacre to the named trustees. Roe and Poe died; the probate court appointed John Jones and Samuel Smith as successor trustees. Jones and Smith, as successor trustees, executed a deed describing Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre.

Answer: No. Although the probate court appointed successor trustees, the court’s order did not remove the trust provision limiting the power of sale to the named trustees.

Authorities: MCL 700.1302, 700.7201 and 700.7402.

Comment A: This Standard and the Problems are limited to non-testamentary trusts. The probate court has jurisdiction to appoint a successor trustee under a testamentary trust upon the death, resignation or removal of a sole or surviving trustee. MCL 700.7201 and 700.1302.

Comment B: The Estates and Protected Individuals Code (EPIC) gives the probate court certain powers in the administration of trusts, both testamentary and non-testamentary. Not all trusts, however, meet the definition of a trust for purposes of EPIC. The following trusts are not “trusts” within the meaning of EPIC and therefore the probate court has no jurisdiction over them: resulting trusts; business trusts providing for certificates to be issued to beneficiaries; investment trusts; common trust funds; voting trusts; security arrangements; liquidation trusts; trusts created for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is a nominee or escrow agent for another. See, MCL 700.1107. The jurisdiction to appoint a successor trustee for the above-named types of trusts is vested in the circuit court. MCL 555.24 and 555.27.

STANDARD 8.6

DEED EXECUTED BY TRUSTEE WITHOUT EXPRESS OR IMPLIED POWER OF SALE UNDER EXPRESS TRUST BEFORE APRIL 1, 2000

STANDARD: BEFORE APRIL 1, 2000 A TRUSTEE UNDER AN EXPRESS TRUST WHICH NEITHER CONTAINS NOR IMPLIES A POWER OF SALE BUT DOES NOT RESTRICT SALE, HAD POWER TO CONVEY REAL PROPERTY IF:

- (A) ALL PERSONS HAVING A BENEFICIAL INTEREST JOINED WITH THE TRUSTEE IN THE CONVEYANCE OR CONVEYED BY SEPARATE INSTRUMENT; OR
- (B) THE SALE WAS CONFIRMED BY AN ORDER OF THE PROBATE COURT.

Problem A: John Doe died testate on December 1, 1999. His will devised Blackacre and other real property to Richard Roe as trustee under an express trust. The will did not contain or imply a power of sale, but it did not require that Blackacre be retained in the trust or otherwise restrict the sale of Blackacre. On January 31, 2000 Roe, as trustee, and all persons having a beneficial interest joined in a deed of Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Roe, as trustee, reported the facts of the sale to the probate court and requested confirmation of the sale. Notice of hearing was given to all parties in interest. An order confirming the sale was entered, pursuant to which Roe deeded Blackacre to Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Roe, as trustee, petitioned the probate court for construction of the will and for authority to con-

vey Blackacre. All interested parties were joined in the proceeding. The court entered an order authorizing the sale in order to preserve the assets of the estate, after determining that there was no express power of sale under the will. Roe, as trustee, filed a report of the sale to Grant, and the probate court entered an order confirming the sale. Roe, as trustee, deeded Blackacre to Grant pursuant to the order. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: Problems A through C: MCL 700.634 (repealed effective April 1, 2000); and 700.643 through 700.647 (repealed effective April 1, 2000). *Jones v Harsha*, 225 Mich 416, 196 NW 624 (1923); *MacKenzie v Union Guardian Trust Co*, 262 Mich 563, 247 NW2d 914 (1933).

Comment: Beginning April 1, 2000, the effective date of the Estates and Protected Individuals Code, the provisions governing the authority of trustees are set forth in MCL 700.7401 through 700.7410. Under 700.7401, a trustee has the power to sell real property unless the trustee's power of sale is restricted by the trust instrument.

Note: See Standard 8.5 regarding conveyances by a successor trustee under an express trust containing a power of sale and, as to trusts on or after April 1, 2000, the authority of the probate court to remove trust provisions limiting the power of sale of a successor trustee.

STANDARD 8.7

ACQUISITION OF TRUST REAL PROPERTY BY NON-TESTAMENTARY TRUSTEE UNDER EXPRESS TRUST

STANDARD: IF THE TRUSTEE OF AN EXPRESS NON-TESTAMENTARY TRUST DIRECTLY OR INDIRECTLY CONVEYS TRUST REAL PROPERTY TO HIMSELF OR HERSELF IN AN INDIVIDUAL CAPACITY, THE TITLE ACQUIRED IS NOT MARKETABLE UNLESS THE TRUST INSTRUMENT AUTHORIZES THE CONVEYANCE.

Problem A: Title to Blackacre was vested in Richard Roe as trustee under an express trust which contained a power of sale but no provision authorizing Roe to acquire an interest in Blackacre. Roe, as trustee, deeded Blackacre to Susan Grant. Later, Grant deeded Blackacre to Richard Roe and Alice Roe, husband and wife. Did the Roes acquire marketable title to Blackacre?

Answer: No.

Problem B: Title to Blackacre was vested in Richard Roe as trustee under an express trust for the benefit of Lucy Doe. Upon the death of Doe, the trust was to terminate and the corpus vest in Roe and Marjorie Poe. After Doe's death, Roe, as trustee, deeded Blackacre to himself and Poe. Did Roe and Poe acquire marketable title to Blackacre?

Answer: Yes.

Authorities: *Campau v Van Dyke*, 15 Mich 371 (1867); *Sheldon v Estate of Rice*, 30 Mich 296 (1874); *In re Culhane's Estate*, 269 Mich 68, 256 NW 807 (1934); *Sprenger v Sprenger*, 298 Mich 551, 299 NW 711 (1941); *Newton v Old Merchants National Bank & Trust Co*, 299 Mich 499, 300 NW 859 (1941).

Comment: The Committee recognizes that laches or estoppel may bar claims of trust beneficiaries challenging the validity of conveyances such as are described in Problem A.

Note: See Standards 7.10 and 7.11 regarding self-dealing transactions by testamentary trustees.