

A Legal View: A Transaction Involving Property That is an Asset of a Living Trust is Subject to Unique Considerations

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**Q: I am considering purchasing a residence from a seller who I suspect is a trustee of a living trust, but that has not been clarified. Should I be concerned that I may be purchasing the property from a living trust, and what should I be aware of during the transaction?**

**A:** An inter vivos or living trust is not itself a legal entity like a corporation, it is simply a collection of assets and liabilities. Legal title to real property that is an asset of the trust is held by the trustee(s), and both the sale contract and instrument of conveyance should be executed by the trustee, or co-trustees. The purchase and sale of property that is an asset of a trust is subject to unique considerations that should be recognized by both the seller and buyer to avoid legal disputes.

The California Association of Realtors provides a Trust Advisory (Listing) form (TAL, 4/08) that should be used by a broker representing the seller of a property that is a trust asset. It provides a description of the obligations that are normally imposed on sellers of real property containing one-to-four dwelling units that are exempted, and those that should still be complied with.

The trustee of a living trust has the power to enter into a contract with a third person when such power is expressly given by the trust instrument or by the court, or when making the contract is reasonably necessary to the execution of the purposes of the trust and so impliedly authorized. The trustee has the duty to administer a trust according to the terms of the trust instrument. A trustee's powers to deal with real property in a trust instrument normally include the power to receive and hold title to real property (as trustee of the trust), to dispose of the property, to encumber or mortgage the trust property, and to lease the property.

If a buyer becomes aware that the property is an asset of a trust, it is a good practice for the prospective buyer to request a copy of the trust instrument or a certification of trust and examine them for verification of the trustee's authority to sell. The buyer should also consider requesting a warranty of authority in the purchase and sale agreement based upon the copy of the trust instrument or certification provided, or even a written opinion of an attorney if the issue requires an interpretation of uncertain language in the trust instrument.

According to Bud Mauro, REALTOR, 1998 President-SRAR, and a California licensed real estate broker since 1974: "It is also a good practice when a trust is involved for the broker to check the chain of title to insure that the property was deeded to the trust during the lifetime of the settlor/trustee. I was involved in two properties that did not get deeded to the trust while the original owner was alive, and it cost each of the successor trustee's over \$12,000 to get the title cleared by a court action, with a

delay in the closing of the escrow." This illustrates one of the most common failings by persons who create a living trust. Often, they fail to follow-up after the trust is

Under applicable trust principles, the trustee of the trust is vested with legal title to the trust property, and a person acting in good faith and for value, and without actual knowledge that the trustee is exceeding or improperly exercising his powers, may assume without inquiry that the trustee is acting within the proper exercise of the trustee's powers, and such person is fully protected in dealings with the trustee. Section 18100 of the California Probate Code protects third parties who deal with or assist the trustee by excusing them from investigating and permitting them to assume the existence of a trust power and its proper exercise, except where the third parties have actual knowledge of a breach of the trust. However, a prudent broker should still request a copy of the trust to confirm the trustee's authority and capacity to enter into the transaction.

One of the most problematic issues arises when there are multiple trustees (particularly successor co-trustees), and the best practice is to have all of the co-trustees execute the sale contract and transaction documents, including the grant deed. This practice avoids the non-signing trustee from later contending that he did not know or agree to the transaction and precludes a later lawsuit to overturn the transaction.

So long as the trustee has the power to convey property owned by the trust, a sale contract, as well as a deed, is enforceable against the trust even if executed by the trustee in his or her individual, rather than representative, capacity. However, it is a better practice during the sale of trust property to have the trustee specify in the contract and the deed that he is signing in his representative capacity on behalf of the trust.

Trustees buying real property on behalf of a trust may be required by the title insurer to record a memorandum of trust before the title company will issue a policy of insurance. An alternative would be to purchase the property as an individual and then later transfer it to the trust.

Therefore, in a real estate transaction involving a trust, the first step is to obtain a copy of the trust and/or certification of trust and evaluate the authority of the trustee to sell the real property, and the capacity of the various trustees to enter into the transaction. Be cautious when dealing with successor trustees and co-trustees to insure that they have the capacity to enter into the transaction. If in doubt regarding the trust or the nature of the documents presented, consider making further inquiry and seeking legal advice. If the issues discussed above are kept in mind, a transaction involving a trust can be as successful as one between individual owners.

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*vary and professional advice is recommended before making any decisions concerning legal matters. E-mail your comments or questions to [Forrylaw@aol.com](mailto:Forrylaw@aol.com).*

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