The Title Holding Trust

• **What is a title holding trust?–** It is a simple, legal method of separating the ownership of real property from the possession of real property…such that the public, record title to property is held by an appointed trustee – while at the same time the possession, use and benefits of property ownership are retained by the trust beneficiaries. Since this type of trust was first created in Illinois in 1891 by Chicago Title Land Trust Company (www.ctlandtrust.com) it was commonly referred to as an "Illinois Land Trust". However, over the ensuing century it's been adopted and regularly used in most other states, including California. So outside of Illinois it's now generally referred to as a *title holding trust* (THT).

A very popular variant of a title holding trust is a *living trust*, wherein the focus is to create a comprehensive, estate planning device that goes far beyond the simple succession of a beneficial interest inherent to all trusts.

For our purposes, the simplicity of the THT is all we need. It just serves as a revocable or irrevocable, title holding device wherein the trustee, upon the written direction from the beneficiaries, executes documents that affect the legal title to the trust's property. **Therefore the trustee is not given, nor is it expected to exercise, any possessory rights or powers over the trust's assets at all.** Thus, the trustee isn't responsible for any management duties or operational tasks. All possessory powers and privileges remain in the domain of the beneficiaries of the trust.

• **Creating a title holding trust –** The creation of a trust is done in private, without the involvement of the state and without recording or registering any trust documentation anywhere. It's about 8 pages long and might take about ten minutes of time to fill in the various blanks and sign. Once created the original is held by the beneficiary for safe keeping, away from the prying eyes of the public. A notarized, Certification of Trust will be made from time to time to attest to the authority of the party acting as the trustee – to either a title company, escrow company, insurance company, mortgage company, etc.

• **Transferring title to a title holding trust –** Title is transferred and recorded, via a deed from the settlors/grantors, in the name of a specified trustee (for example, **"Might E. Trustworthy, Trustee of the Megabucks Trust, dated 01-22-93"**) who holds title in trust on behalf of the trust's owners (known as "beneficiaries") per the dictates of a non-recorded trust agreement. The role and duties of the trustee can be carried out by a living person(s), by another trust, or by any other corporate entity. Any subsequent change-out or substitution of trustee is usually accomplished via a recorded deed from the current trustee to a successor trustee.

So, what might you ask, is the point of such arrangement? Well, basically it allows someone to legally control and possess real property without the technicalities, publicity or problems associated with actual legal ownership. Some of the main benefits and issues are:

• **Privacy of ownership –** The trust agreement amounts to a legally enforceable contract between the beneficiaries of a trust and its trustee. Like most contracts, it's a private document that doesn't have to be recorded or registered in any public archive anywhere to be binding and enforceable. Thus the identity of the owners of the trust (the "beneficiaries") can be kept private and not attract any unwanted, outside attention. The only way the identity of trust beneficiaries can be involuntarily disclosed is by compelling the trustee to do so by a court order.

Some of the more common reasons people seek privacy of ownership, are to:

1. Avoid a "Due on Sale" situation upon the resale of property;
2. Avoid the appearance of wealth (no property titles in their name in the public record);
3. Qualify more easily for welfare or scholarships (if they don't hold property in their name);
4. Possess property regardless of personal liens or negative credit items against their name;
5. Avoid an ownership conflict problem with their IRA;

6. Avoid “merger” problems when taking back a deed-in-lieu of foreclosure;
7. Avoid probate costs and estate settlement delays;
8. Avoid stalkers;
9. Avoid potential clouds on title (see following).

• **Avoidance of clouds on title –** This is a very real concern when a group of non-related investors pool their money together to buy investment realty. If they hold title to real property directly in their names, such as tenants-in-common, they are needlessly exposing that title to a high probability of involvement in their personal legal woes (due to their untimely deaths, divorces, judgment liens, IRS tax liens, etc). On the other hand, as beneficiaries of a trust, they don’t actually own the property, the trust does. Their ownership share of a trust is a personal property interest, not a real property interest. Therefore, whatever legal problems that might occur in their personal lives, they can’t affect or attach to the title of the trust’s property. Yes, investors can accomplish the same avoidance of clouds on title by using a limited partnership or corporation format. But then they’d be giving up their confidentiality of involvement (since the formation documents of those entities are publicly registered and periodically updated with the state). Even the Limited Liability Company (LLC) business format, as adopted September 30, 1994 in California, is not as useful as the title holding trust. It lacks confidentiality of ownership and is subject to the same minimum $800 yearly tax to the Franchise Tax Board as Corporations are.

• **Avoidance of partition lawsuits –** Normally a co-owner of real property, regardless of the percentage of their property ownership, can force the sale of a partnership property through an action in partition. However, since the beneficiaries of a trust are NOT directly on title to the real property, and thus technically, not the owners of the real property, the courts have held that a non-controlling beneficiary doesn’t have standing to compel the sale of the trust’s property.

• **Non-recorded transfer of ownership –** Since the beneficial ownership of a trust is not known to outsiders, the transfer or sale of such an interest would remain confidential also. Thus a title holding trust can provide the means to automatically pass on the ownership and control of the trust and its assets upon one’s death or some other specified event. Thus you could avoid all the costs and hassles of probate. You could also neatly avoid setting off the ”due on sale” clauses in any existing mortgage(s) by simply transferring ownership of the trust (via a non-recorded assignment of the beneficial interest thereto) to the new owners. Since the trust would still remain the legal owner of the property it holds, there’d be no consequential change at all to the public record. However, there would be a re-assessment of its property value…triggered by the filing requirement of a “change in ownership control” to the State Board of Equalization. [Section 64(d) R&T Code]

• **Financing –** Most conventional lenders offer a wide variety of different loans to their borrowing public. The underwriting requirements for each program vary dramatically, depending upon whether or not the lender intends to keep a particular loan in their portfolio or resell it in the secondary mortgage market that’s dominated by Fannie Mae. To flip their loans successfully lenders have to follow FNMA’s strict underwriting standards. And those standards don’t allow lending to fictitious legal entities, such as trusts.

Thus the best loan sources for trusts are those lenders (i.e. banks, S&Ls, local profit-sharing or pension trust plans, credit unions, private parties, etc.) who intend keeping some or all of their loan originations. Though such a “portfolio” loan would be made directly to the trust, it would still be based on the beneficiary’s current income and credit since the typical trust comes up short in both of those areas. So the trust’s beneficiary must be prepared to both qualify and personally sign the non-recorded promissory note for such a loan – just as if he or she was the actual borrower. But since the title to the property is vested in a trust, the Trustee will have to sign the recorded trust deed that secures the payoff of the promissory note.. ■