Title Insurance … From a BUSINESS Perspective

Arkansas Bar Association

June 11, 2020

Jim Pender

President - First National Title Company

Little Rock, Arkansas

David Harrison

Executive VP – First National Title Company

Fayetteville, Arkansas

Will Avant

AVP & Area Counsel – Chicago Title Insurance Company

Birmingham, Alabama

AGENDA

Fiduciaries

*(and the **misuse** of POAs)*

Legal Analysis *vs.* Risk Assessment

Fiduciaries

(and title insurance)

Fiduciaries

1. Trustees

2. POAs

Trusts

Settlor → Trustee

(e.g Deed)

Income, Interest, Life Estate, etc.

Beneficiary

TRUST AGREEMENT CONTROLS ALL

Trustee's Powers

Trustees have **GENERAL** powers

(powers conferred by Trust, manage, invest & distribute trust property)

- AR → AR Code §28-73-815

Trustees have **SPECIFIC** powers

(collect trust property, acquire, sell, borrow money, mtg, make deposits, hold securities, vote/proxy, enter lease, pay taxes, insurance, etc.)

- AR → AR Code §28-73-816

Trustee's Powers

- **Trust Agreement** **TRUMPS** the statute

Like §815 says -

a. "A trustee may exercise:
   1) Powers conferred by the terms of the **Trust**; and
   2) Except as limited by the terms of the **Trust**
      A. All powers over trust property
      B. Powers to invest, manage and distribute trust property
      C. Power conferred by this chapter (statute)

AR Code §28-73-815

Can a Trustee delegate its powers?

MAYBE

MAYBE

AR → AR Code §28-73-807

*"A **Trustee** **MAY** delegate duties and powers that a prudent trustee could properly delegate under the circumstances"*

Can a Trustee delegate its powers?

- Statutes say **YES**
- But you have to review the **Trust Agreement**
  - Limit/Restrict the Trustee's ability to delegate?
  - Require delegation by **POA**?

TRUST AGREEMENT CONTROLS ALL

If allowed, you MUST review the Delegation and/or POA along with the Trust Agreement

Powers of Attorney

POAs

- The POA lives and dies with the **Principal**
  - *"Aunt Josie just died but I have her POA so I can sell the condo. Just make the check out to me."*

- Once the Principal is deceased, the POA **terminates**.

- For there to be a "power" it must be granted in the POA, **specifically**.

The Law of POA’s

- Each state has its own laws regarding fiduciary duties and regulating POA’s

- Arkansas has adopted the “**Uniform**” Power of Attorney Act.

AR Code § 28-68-101 et. seq.

The Uniform Power of Attorney Act

- A number of significant changes from traditional **POA** statutes
- Prescribed **Form** POA – very helpful if used
- The statutory POA is a “check the box” form
- All POA’s executed after the effective date of the Act and which are governed by it are **Durable**, unless specifically say they are not

Fiduciaries using POAs

Generally → **NO**

- Trustees → **Possibly**
- Corps / LLCs / Partnerships → **NO**

Would prefer a Corporate Resolution

Legal Analysis

vs.

Risk Assessment

“<u>Underwrite</u>”

to fully examine risk and determine whether we will accept it.

"Be decisive. Right or wrong, make a decision. The road of life is paved with flat squirrels who couldn't make a decision."

~Unknown~

Consider the legal context

- mechanics lien law
- foreclosure law
- Statutory/case law *(support or silence)*
- Probate code
- Trust code
- Entity formation issues

Sometimes, UW may go a step further than what the law requires

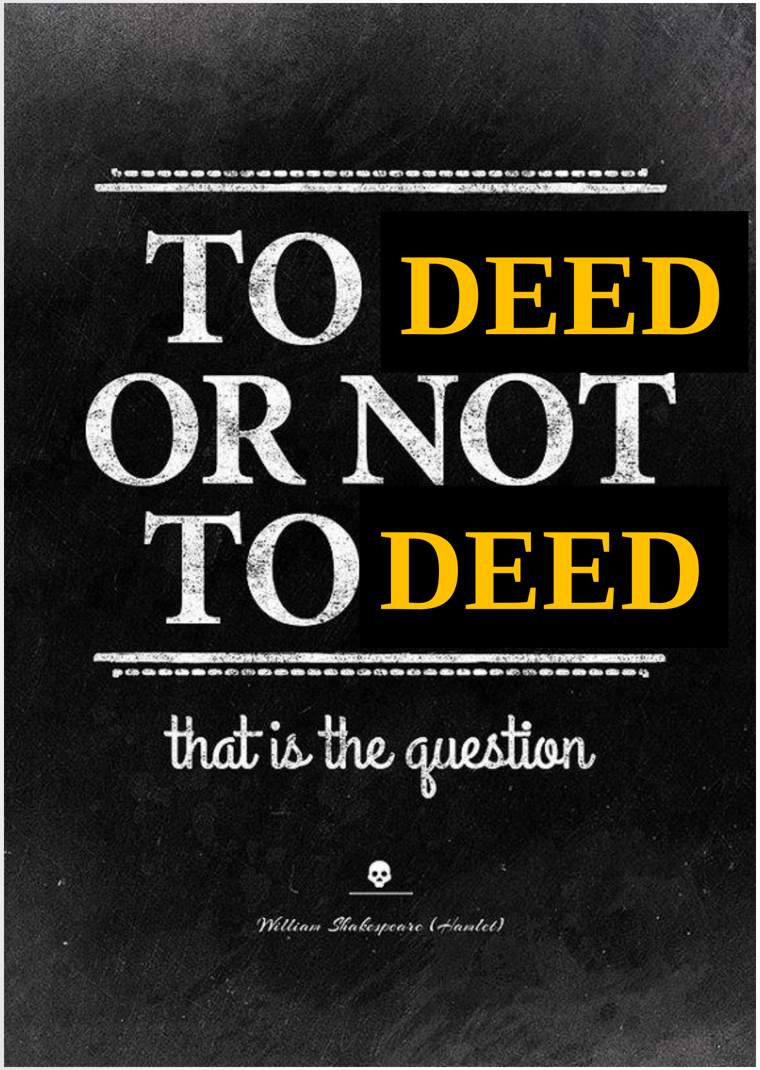
Proving you ARE correct

- Discover an Underwriting issue in the chain of title
- Perform

- Find a case from 1920 **(that's on point)**

*"you stand to make **$1,000** on the transaction, but it is going to cost me **$5,000** to prove you were **CORRECT**"*

Single Member LLCs



ESTATES and PROBATE

Real Estate passes by

Intestate Succession

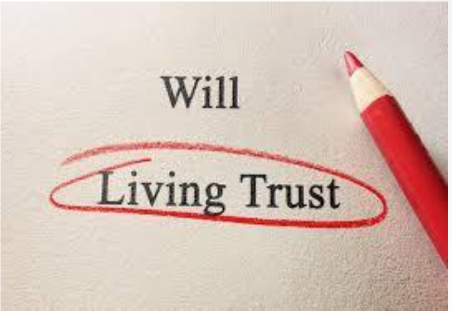
"to the **HEIRS** according to <u>**State Law**</u>"

Ark. Code §28-9-201 et.seq.

subject to divestment under the Will

Do we really need a deed from the Executor to the Devisees?

vs.



- 1100+ acres in Pope County
- *Owner sets up a Living Trust* ***(property to be placed in Trust)***

- **NO DEED EVER RECORDED**
- ~ 10-12 years later → **Owner dies**

- **Trust wants to sell the property**

What do we do?

Homestead & Dower/Curtesy

- Mortgage ≠ **DEBT**

(Promissory Note = DEBT)

- **Ark. Code §18-12-403 (Purchase Money Mortgage)**

*[n]o conveyance, **mortgage**, or other instrument affecting the homestead of any married person shall be of any validity, except for taxes, laborers' and mechanics' liens, and **purchase money**, <u>unless his or her spouse joins in the execution of the instrument, or conveys by separate document, and acknowledges it</u>*

Takes 1 to Purchase & 2 to Sell or Refinance

Homestead & Dower/Curtesy

Fitton v. Bank of Little Rock, 2010 Ark. 280, 365 S.W.3d 888

RELINQUISHMENT OF RIGHTS
KNOW ALL MEN BY THESE PRESENTS:

THAT, ______________ ("Grantor"), a married person whose spouse is, ________________, ("Borrower"), for and in consideration of Ten Dollars ($10.00) and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged and to induce [Lender], its successors and/or it's assigns to make a certain loan to Borrower secured by a mortgage lien against the following-described real property located in Washington County, Arkansas, (the "Property"), does hereby *waive, release, relinquish, and convey unto the Lender any and all of Grantor's right of homestead exemption in, and statutory redemption of, the Property, right of appraisement of the Property, and all applicable rights of dower or curtesy in the Property*:

[LEGAL DESCRIPTION]

DEMOLITION = COMMENCEMENT OF CONSTRUCTION


What's Wrong with this Picture?


Link-Belt
Future Home of ACS
OPENING FALL 2020
eua
IMEG

THANK YOU

First National Title Company

FNF FAMILY OF COMPANIES

CHICAGO TITLE INSURANCE COMPANY

Commonwealth LAND TITLE INSURANCE COMPANY

Fidelity National Title Insurance Company