Taking Title In Trust
A New Law In Ohio

The rule is that title to real property must be held by the trustee of a trust. A trust is not a legal entity capable of holding title to real property. A deed purporting to convey title to a trust is void *ab initio*. This means it is as if the deed never existed and title to the property remains with the grantor. As a result, any attempt to cure such a deed by filing an affidavit of fact or filing a memorandum of trust would not succeed in curing the defective deed and title remains with the grantor.

For example, a deed to “Bill Smith, Trustee of the Smith Family Trust” is valid. A deed to the “Smith Family Trust” is void.

Ohio has recently passed a bill that will allow such defects to be cured. The Ohio legislature has passed S.B. 117, which was signed by the governor on December 21, 2011 and will become effective on March 22, 2012. It makes a significant change to O.R.C. § 5301.071 by adding subsection (E) which provides:

Sec. 5301.071. No instrument conveying real estate property, or any interest therein in real property, and of record in the office of the county recorder of the county within this state in which such that real estate property is situated shall be deemed considered defective nor shall the validity of such that conveyance be affected because of any of the following:

(A) The dower interest of the spouse of any grantor was not specifically released, but such that spouse executed said the instrument in the manner provided in section 5301.01 of the Revised Code.

(B) The officer taking the acknowledgment of such the instrument having an official seal did not affix such that seal to the certificate of acknowledgment.

(C) The certificate of acknowledgment is not on the same sheet of paper as the instrument.

(D) The executor, administrator, guardian, assignee, or trustee making such the instrument signed or acknowledged the same individually instead of in his a representative or official capacity.
(E)(1) The grantor or grantee of the instrument is a trust rather than the trustee or trustees of the trust if the trust named as grantor or grantee has been duly created under the laws of the state of its existence at the time of the conveyance and a memorandum of trust that complies with section 5301.255 of the Revised Code and contains a description of the real property conveyed by that instrument is recorded in the office of the county recorder in which the instrument of conveyance is recorded. Upon compliance with division (E)(1) of this section, a conveyance to a trust shall be considered to be a conveyance to the trustee or trustees of the trust in furtherance of the manifest intention of the parties.

(2) Except as otherwise provided in division (E)(2) of this section, division (E)(1) of this section shall be given retroactive effect to the fullest extent permitted under section 28 of Article II, Ohio Constitution. Division (E) of this section shall not be given retroactive or curative effect if to do so would invalidate or supersede any instrument that conveys real property, or any interest in the real property, recorded in the office of the county recorder in which that real property is situated prior to the date of recording of a curative memorandum of trust or the effective date of this section, whichever event occurs later.

New Subsection 5301.071(E)(1) provides that an otherwise fatal defect in a deed conveying real property to a trust can be retroactively cured provided two criteria are met. First, the trust must have been properly created at the time of the conveyance. Second, a memorandum of trust must be filed in the county where the real property is located and must include a legal description of the property. Upon filing of the curative memorandum of trust in the county, title will be deemed vested in the trustee of the trust.

New Subsection 5301.071(E)(2) provides that the cure in subsection (E)(1) is to be retroactive to the date of filing the defective deed; provided, that such retroactive effect does not invalidate or supersede an intervening conveyance of the property. In other words, a trustee would not be able to file a memorandum of trust and reclaim the property for the trust if doing so would invalidate a prior transfer to another party.

This new law makes it easy to correct a defective deed and conforms the result to the parties’ original intentions.

Bruce E. Cweiber, Esquire is President of Precision Title Agency, Inc. He assists clients in complex commercial transactions throughout Ohio. He can be reached via email at bec@precisiontitle.com or via phone at (216) 397-9499.