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THE ILLINOIS LAND TRUST: A FICTIONAL BEST SELLER

Anthony Haswell*
Barbara B. Levine**

Land trusts have become an important aspect of property law in Illinois. Although there is no definitive information regarding the extent to which land trusts are used to hold title to Illinois real estate, it has been reported that almost four out of every five parcels of land in Cook County have been or are being held in land trusts.¹ The common use of the land trust in Illinois, along with its unique legal characteristics, calls for a thorough understanding of the complexities of this legal device.²

This article will discuss the basic characteristics of the land trust, par-

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1. Letter from Illinois Legislative Council to Rep. Peggy Smith Martin (May 10, 1973), quoted in Legislative Note, *Land Trust Secrecy—Perhaps a Secret No More*, 23 DEPAUL L. REV. 509, 516 n.38 (1973) [hereinafter cited as Note, *Secret No More*]; see H. KENOE, KENOE ON LAND TRUSTS § 1.19, at 13 (1981 & Supp. 1983); Note, *Is the Land Trust Truly a Trust?—Gift Tax and Broader Implications*, 1982 U. ILL. L. REV. 503, 503 n.4 [hereinafter cited as Note, *Truly a Trust?*]. The Illinois Supreme Court, in *Chicago Fed. Sav. & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 547, 185 N.E.2d 670, 676 (1962), commented that "millions, and probably billions, of dollars have been and now are invested in similar trust arrangements and thousands of titles depend thereon for their validity." Presently, over 550 banks and other corporations in Illinois are authorized to administer trusts, and many handle only land trusts.

2. Out-of-state commentators' analyses of the so-called "Illinois" land trust generally have been favorable. Most have recommended its adoption by their own state. E.g., Ard, *A Proposed Trust Code for Indiana—An Effort at Reform*, 45 NOTRE DAME LAW. 427 (1970); Arn-tson, *The Virginia Land Trust—An Overlooked Title Holding Device for Investment, Business and Estate Planning Purposes*, 30 WASH. & LEE L. REV. 73 (1973); McKillop II, *The Illinois Land Trust in Florida*, 13 U. FLA. L. REV. 173 (1960); Resnick, *Is There Such a Thing as a California Land Trust?*, 48 L.A. B. BULL. 216 (1973); Comment, *A Device for Texas Land Development: The Illinois Land Trust*, 10 HOUS. L. REV. 692 (1973); Comment, *Land Trusts—Adaptability to Kansas Real Estate Practice*, 14 U. KAN. L. REV. 97 (1965) [hereinafter cited as Comment, *Kansas Real Estate Practices*]; Note, *Land Trust Act*, 18 MIAMI L. REV. 699 (1964); Note, *North Dakota Land Trust*, 45 N.D.L. REV. 77 (1968) [hereinafter cited as Note, *North Dakota Land Trust*]; Note, *Land Trusts in New York*, 37 ST. JOHN'S L. REV. 123 (1962) [hereinafter cited as Note, *Land Trusts in New York*]; Note, *"Illinois" Land Trusts in Indiana*, 3 VAL. U.L. REV. 298 (1969) [hereinafter cited as Note, *"Illinois" Land Trusts in Indiana*]; Note, *Land Trusts: Some Problems in Virginia*, 7 WM. & MARY L. REV. 368 (1966); see also Birnbaum & Monahan, *The Nominee Trust in Massachusetts Real Estate Practice*, 60 MASS. L.Q. 364 (1976) (discussion of Massachusetts nominee trust which has some of the same advantages as the Illinois land trust).

Several states have adopted the land trust by statute. See ARIZ. REV. STAT. ANN. § 33-401 (1983) (disclosure only); FLA. STAT. § 689.071 (Supp. 1983); HAWAII REV. STAT. § 558 (1978);

ticularly the relationship between the land trust trustee and beneficiary, the trustee's immunity from certain forms of liability, and the characterization of the beneficiary's interest as personalty. The last element, perhaps better labeled the "personal property fiction," has been a key note in most land trust decisions. This article reviews this personal property fiction in the areas of creditor's bills, freehold jurisdiction, partition, judgment liens, the beneficiary's contractual rights, collateral assignments of beneficial interests, debtor and tax relief, property tax liability, due on sale clauses, and legislative reaction to this fiction. Although there are valid reasons to choose a land trust, it will be demonstrated that some of the advantages can be obtained through other devices. The disadvantages the land trust arrangement imposes upon both the beneficiary and the public require a reevaluation of its validity. The article concludes with several proposals that will remedy some problems associated with land trusts without eliminating the land trust as a property arrangement.

BASIC CHARACTERISTICS

Absolute Ownership of Beneficiary

A typical Illinois land trust is a revocable inter vivos trust, the corpus of which usually consists solely of real estate.³ In contrast to a conventional trust, however, the Illinois land trust gives the beneficiary full and complete control over the management, use, and disposition of the property, just as if he⁴ had legal title.⁵ During the life of the land trust, the trustee can act

IND. CODE §13 (1971); N.D. CENT. CODE § 59-03-02 (1967); VA. CODE § 55-17.1 (Supp. 1981).

Use of land trusts in states other than Illinois is not limited to the above states which have enacted statutes. For an analysis of the duties which the various states impose upon the trustee in order to create a valid land trust, see The American College of Probate Counsel, Validity of Illinois Land Trusts (ACPC Study #15, 1981) (unpublished report) [hereinafter cited as ACPC Study]. Six states require no duty other than holding legal title to the property. *Id.* at 3-7. The remainder require at least one duty other than holding legal title from the trustee. *Id.* For example, seven states require that the trustee hold equitable, as well as legal title; 16 require a duty to convey the property at the request of the beneficiary; 13 require a duty to sell property at the expiration of the trust; 24 require a duty to exercise discretion in management of the property; 15 require a duty to collect rents and profits from the property; and 8 require a duty to take possession of the trust property. *Id.*

3. The land trust is "a trust in which corpus consists of real estate. . . ." BLACK'S LAW DICTIONARY 791 (5th ed. 1979). In reality, however, this definition is somewhat narrow because a land trust frequently consists of property such as leaseholds, improvements, and "personal property used in connection with the operation of the real estate." H. KENOE, *supra* note 1, § 1.3, at 5. The land trust in Illinois has been adopted and developed by the judiciary, not the legislature. See Note, *North Dakota Land Trust*, *supra* note 2, at 78.

4. Throughout this article, the authors use the personal pronoun "he" to refer to "beneficiary" and "it" to refer to "trustee." This choice is made for clarity and brevity, and is not meant to imply gender discrimination.

5. The beneficiary of a land trust collects rent or proceeds from sale or mortgage, improves and operates the property, and exercises all other rights of ownership. See *Southeast Village Assocs. v. Health Mgmt. Assocs., Inc.*, 92 Ill. App. 3d 810, 812, 416 N.E.2d 325,

only upon the direction of the beneficiary.⁶ The trustee's role is thus reduced to that of a nominee or bare legal titleholder. Unlike the conventional trust, in which the traditional objective is to confine the power of the beneficiary and to deprive him of any right to manage and dispose of the trust,⁷ the beneficiary of a land trust, is in essence, the true owner of the property.⁸

The trustee of a land trust is equivalent to the agent of the beneficiary,⁹ because the trustee can legally bind the beneficiary when, and to the extent that, the trustee acts on a valid exercise of the beneficiary's power of direction. It is not the power of direction per se which creates the agency; rather, the agency is created by the beneficiary's retention of control over the trustee

327 (1st Dist. 1981); *Robinson v. Chicago Nat'l Bank*, 32 Ill. App. 2d 55, 58, 176 N.E.2d 659, 661 (1st Dist. 1961). The roles of the beneficiary and trustee are best described as follows:

In a Land Trust the beneficiaries retain complete control over the real estate. They manage it or they may employ agents to manage it for them. They collect and distribute the income. They insure, develop, finance and direct the lease or sale of the property as they see fit. They may terminate the trust at any time or add property located anywhere in Illinois to the trust when they wish. Exclusive and full power in all such matters rests with them.

The Trustee executes deeds, mortgages and leases and otherwise deals with the title only upon written direction.

CHICAGO TITLE & TRUST CO., HOW A LAND TRUST SERVES THE REAL ESTATE OWNER 2-3 (1981) [hereinafter cited as LAND TRUST].

6. The trustee deals with the property only at the written direction of the beneficiary. The trustee must comply with any such direction, and need not inquire as to the propriety thereof. The only other duty the trustee has is to sell, at public auction, any property remaining in the trust at its termination. Land trusts are typically terminated after twenty years. The trustee is not required to pay taxes, obtain insurance on the property, or share in the responsibility for any litigation. The beneficiary pays the trustee a fee for holding legal title and reimburses the trustee for any expenses incurred in holding the title. *Robinson*, 32 Ill. App. 2d at 58, 176 N.E.2d at 661.

The unique arrangement between the trustee and beneficiary is created through the use of two instruments. The deed in trust, which conveys the legal title of the realty to the trustee, is filed for record as evidence of the trustee's title to the property. It does not identify the beneficiary nor describe the terms of the trust. The trust agreement, executed contemporaneously with the deed in trust, outlines the right of the beneficiary to retain absolute control over the property through the power of direction over the trustee, and his rights to possess, control, manage, and receive all proceeds from the property. The trust agreement is not recorded and is normally kept secret from the public. See Comment, *The Illinois Land Trust and Nebraska Law*, 47 NEB. L. REV. 101, 101-02 (1968) [hereinafter cited as Comment, *Illinois Land Trust*]. The land trust agreement also requires that sale of the trust property takes place within a specified period of time. This requirement insulates the trust from operation of the Rule against Perpetuities. See Note, *Land Trusts in New York*, *supra* note 2, at 125 n.12.

7. See *Kilgore v. State Bank*, 300 Ill. App. 409, 416, 21 N.E.2d 9, 11 (3d Dist. 1939). Looked at in a different light, a conventional trust allows a beneficiary to receive the benefits of the property constituting the corpus of the trust, without placing upon him the burdens of management. G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 373 (5th ed. 1973).

8. See *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 389 N.E.2d 540 (1979); LAND TRUST, *supra* note 5, at 2-3.

9. See W. SELL, AGENCY § 23 (1975).

and management of the business of the trust.¹⁰ Despite legal commentary to the contrary, an agency relationship indeed exists between the trustee and beneficiary of a land trust.¹¹

Because of its active beneficiary and passive trustee characteristics, a land trust would appear to be vulnerable to execution by the Statute of Uses¹² as a "dry" or "passive" trust.¹³ The Illinois courts, however, liberally construing the statute, have consistently held that even the minimal duties of a land trust trustee are sufficient to constitute an "active" trust. The Statute of Uses has thus been made inapplicable to Illinois land trusts.¹⁴

Trustee's Immunity From Certain Forms of Liability

Another characteristic of a land trust is that the trustee is neither liable for real estate taxes,¹⁵ nor for tortious¹⁶ or statutory violations¹⁷ arising out

10. See *Kessler v. Pioneer Bank & Trust Co.*, 101 Ill. App. 3d 502, 505, 428 N.E.2d 608, 611 (1st Dist. 1981). In addition to recognizing that the beneficiary/trustee relationship creates an agency, courts have held that notice to the trustee of litigation affecting the beneficiary's interests constitutes notice to the beneficiary. *Lipavsky v. 16th St. Bldg. Corp.*, 267 Ill. App. 85, 89 (1st Dist. 1932).

The power of direction, however, does not create apparent or implied authority to bind the beneficiary beyond what the beneficiary specifically authorizes. See, e.g., *Barkhausen v. Continental Ill. Nat'l Bank & Trust Co.*, 3 Ill. 2d 254, 120 N.E.2d 649 (1954) (beneficiary not personally liable on trustee's assumption of mortgage indebtedness), *cert. denied*, 348 U.S. 897 (1954); *Robinson v. Chicago Nat'l Bank*, 32 Ill. App. 2d 55, 176 N.E.2d 659 (1st Dist. 1961) (trustee not beneficiary's agent for service of process).

11. One legal commentator has denied the existence of this agency relationship. H. KENOE, *supra* note 1, § 1.22, at 18 (when a trustee acts at the direction of the beneficiary, he acts as a principal for himself and not as an agent for the beneficiary).

12. ILL. REV. STAT. ch. 30, § 3 (1983). The Statute of Uses originated in England in 1536. The statute provides that the equitable title of the beneficiary is to be converted into full legal title immediately upon creation of the trust. As did many other states, Illinois imported the statute from England. Illinois has adopted the English interpretation of the statute as not applying to "active" trusts. R. POWELL, *AMERICAN LAW OF PROPERTY* § 1.16 (1952).

13. In a passive trust, the trustee has either no duties at all or only the duty to perform a mechanical or formal act, as opposed to a discretionary act. G. BOGERT, *supra* note 7, at 167-68.

14. See *Conley v. Petersen*, 25 Ill. 2d 271, 184 N.E.2d 888 (1962) (trust not invalid merely because a single person was settlor, trustee, and life beneficiary at the time of its creation); *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952) (trust considered active and not subject to Statute of Uses because distribution and winding up remained for the trustee to do); *Robinson v. Chicago Nat'l Bank*, 32 Ill. App. 2d 55, 176 N.E.2d 659 (1st Dist. 1961) ("Illinois courts have construed the land trust as an active trust and therefore not affected by the Statute of Uses"); *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1st Dist. 1939) (Statute of Uses not applicable because trustee has active duty to make conveyances during the term of trust and to sell all real estate left in the trust at its termination). *But cf. Masters v. Smythe*, 342 Ill. App. 185, 95 N.E.2d 719 (2d Dist. 1950) (trust was merely a passive one by which the trustee acquired naked title).

15. See, e.g., *Proviso Township High School Dist. v. Hynes*, 84 Ill. 2d 229, 49 N.E.2d 276 (1980) (beneficial owner of property is liable for real estate taxes); *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 389 N.E.2d 540 (1979) (liability for unpaid real estate taxes falls upon beneficiary as true owner of property); *Gamble v. People*, 117 Ill. App. 3d 784, 454 N.E.2d 26 (1st Dist. 1983) (land trust beneficiary is liable for full amount of tax lien).

of the operation and maintenance of the trust property. Nonliability is a corollary to the trustee's nominal status. The trustee has no liability because it has no control over the management and operation of the property.¹⁸ Because of the trustee's minimal duties and limited exposure to liability,¹⁹

16. See, e.g., *Fields v. 6125 Indiana Ave. Apts., Inc.*, 47 Ill. App. 2d 55, 196 N.E.2d 485 (1st Dist. 1964) (trustee not liable for personal injuries resulting from condition of the premises where the beneficiaries had the power to manage and control the property); *Brazowski v. Chicago Title & Trust Co.*, 280 Ill. App. 293 (1st Dist. 1935) (beneficiary liable for personal injury caused by fence falling on plaintiff).

The insulation of the trustee from liability, however, is not absolute. The trustee must assert its right to exoneration. If it does not, it may be found jointly liable with the beneficiary. See *King v. Exchange Nat'l Bank*, 64 Ill. App. 3d 335, 381 N.E.2d 356 (1st Dist. 1978) (trustee found liable, along with beneficiaries, for damages resulting from fire in building).

17. See, e.g., *Robinson v. Walker*, 63 Ill. App. 2d 204, 211 N.E.2d 488 (1st Dist. 1965) (liability for personal injuries under Dram Shop Act lies with beneficiary who has control over property).

18. In appropriate cases, however, trustees may be liable in tort because their involvement goes beyond that of a bare legal title holder. For example, some recent trust agreements recite that the beneficiary agrees to comply with all building codes and ordinances. This implies an active supervisory role on the part of the trustee to see that the beneficiary complies because such an agreement is meaningless unless the trustee is involved, to some extent, in the management of the property. This amounts to an indicia of trustee management and control.

From time to time the media have publicized slumlord abuses concealed by land trusts. In response, trustees have answered that they periodically check on their land trust properties, and if they find the property deteriorating, they resign as trustees. See *Chicago Sun-Times*, July 12, 1966, at 30, col. 1 (remarks of William B. Higginbotham of the La Salle National Bank land trust department). This suggests that plaintiffs in liability suits should question the trustee in each case to determine its precise involvement in management of the property. In *Bianchi v. Western Title Ins. & Guar. Co.*, 14 Cal. App. 3d 235, 96 Cal. Rptr. 750 (1970), a trustee was held liable because it was covered by the liability insurance policy carried on the property. One commentator recommends inclusion of the land trust trustee as an additional insured party in public liability policies. H. KENOE, *supra* note 1, §§ 3.11, at 3, 5.56, at 195.

Even in the absence of any role in the management and control of the property, the trustee may be estopped to deny liability. The recorded deed in trust grants to the trustee full power and authority to deal with the property in any and all ways that an owner might deal with it. Because a recorded deed is constructive notice to all the world of its contents, see *Rosehill Cemetery Co. v. Chicago*, 352 Ill. 11, 185 N.E.2d 170 (1933), the trustee holds itself out to the public as the real owner of the property. Furthermore, the deed in trust clothes the trustee vis-a-vis the public with sufficient power over the property to enable the trustee to bring an eviction action. See *Continental Illinois Nat'l Bank and Trust Co. v. Windsor Amusement Co.*, 288 Ill. App. 57, 5 N.E.2d 606 (1st Dist. 1936). It follows that an injured member of the public is entitled to rely upon the trustee's recorded assertion of ownership and control. Thus, the trustee should be estopped from appearing in court to claim that it is only a bare legal title holder. *But cf.* *Trust Co. v. Sutherland Hotel Co.*, 389 Ill. 67, 58 N.E.2d 860 (1945) (ownership of record not sufficient to establish management and control when property was under long-term lease).

19. The trustee's liability for negligent or fraudulent administration of the trust remains, however, and is a different matter altogether. See *Lake City Corp. v. Michigan Ave. Nat'l Bank*, 33 Ill. App. 3d 100, 337 N.E.2d 251 (1st Dist. 1975); H. KENOE, *supra* note 1, § 2.31, at 36. A transferee of the beneficiary, whether a grantee, assignee for collateral, or unsecured lien creditor, acquires the beneficiary's rights against the trustee for breach of trust. See G. BOGERT, *TRUSTS AND TRUSTEES* §§ 188, 871 (1971); 76 AM. JUR. 2D *Trusts* § 105 (1971).

Since recorded judgments, executions, and citations are constructive notice to the parties,

a land trust trustee can charge a relatively low fee for its services.²⁰

Secrecy of Beneficial Ownership

The recorded deed of a land trust does not identify the beneficiary.²¹ Rather, it identifies the trustee, the date of the trust's creation, and the number of the trust.²² The trust agreement, which does identify the beneficiary, is not recorded and normally is not available to the public. Since the title is recorded in the name of the trustee, the beneficiary need not record or disclose his interest in order to protect his property. Working through brokers, the beneficiary can purchase and resell the property without revealing his identity to a vendor or vendee. If a lender is willing to look exclusively to the real estate as security for the loan and to forego personal liability against the beneficiary, the beneficiary can obtain financing without disclosing his identity.²³

Beneficiary's Interest as Personalty

The interest of a beneficiary in a land trust is specifically described in the trust documents as personal property. These documents provide that both the legal and equitable title to the real estate lie with the trustee.²⁴ These

their privies, and third persons, 49 C.J.S. *Judgments* § 133 (1947), a trustee is on constructive notice of such matters as they affect beneficiaries. A trustee with notice of beneficial interest assignment is liable for a breach of trust if it subsequently conveys the property to a bonafide purchaser or otherwise fails to protect the position of the assignee. See *Alcoa Bldg. Products, Inc. v. LaSalle Nat'l Bank*, 62 Ill. App. 3d 510, 514, 379 N.E.2d 66, 69 (1st Dist. 1978); *Lake City Corp.*, 33 Ill. App. 3d at 103, 337 N.E.2d at 255. Additionally, a transferee of the beneficiary may have a cause of action against the trustee apart from breach of trust. See *Oak Brook Bank v. Hawthorne Bank*, 90 Ill. App. 3d 642, 413 N.E.2d 491 (2d Dist. 1980) (impairment of capital); 51 AM. JUR. 2D *Liens* § 60 (1970) (conversion); 1 ILLINOIS LAW AND PRACTICE *Agency* § 184 (1953) (conversion).

20. See G. BOGERT, *supra* note 7, at 513 (in deciding what is reasonable compensation for trustee, court will consider the trustee's responsibility, risk, character of work done and other relevant factors).

21. See Turner, *Some Legal Aspects of Beneficial Interests Under Illinois Land Trusts*, 39 ILL. L. REV. 216, 219 (1945); Comment, *May the Beneficiary of an Illinois Land Trust Proceed Under Chapter XII of the Bankruptcy Act?*, 10 J. MAR. J. PRAC. & PROC. 567, 568 (1977) [hereinafter cited as Comment, *Beneficiary*]; Note, *Secret No More*, *supra* note 1, at 510; Feature, *The Illinois Land Trust—Shroud with a Silver Lining?*, 5 LOY. U. CHI. L.J. 412, 426 (1974). One commentator noted that even though land trusts are not always secret, there are many legitimate reasons to insulate real estate ownership from the public. *Id.*

22. See *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 487, 389 N.E.2d 540, 543 (1979); H. KENOE, *supra* note 1, § 3.2, at 3.

23. See Comment, *Illinois Land Trust*, *supra* note 6, at 105.

24. The following is a typical deed in trust provision for the conversion of the beneficiary's interest from real property to personal property:

The interest of each beneficiary under the trust agreement and of all persons claiming under them or any of them shall be only in the possession, earnings and the avails and proceeds arising from the sale, mortgage or other disposition of the real

representations have been given effect on numerous occasions by the Illinois courts.²⁵ In contrast to a land trust, in a conventional trust where the corpus is real estate, the interest of the beneficiary is considered personal property only if his interest is limited to the earnings and proceeds of sale and if the trustee retains effective dominion and control over the property.²⁶ A beneficiary of a land trust, therefore, obtains some of the legal attributes of a personal property interest while retaining absolute ownership and control of his real estate.²⁷

Despite the unusual relationship between the trustee and beneficiary, the land trust is still a trust, and as such is still subject to the laws and legal principles generally applicable to trusts.²⁸ As the Illinois Supreme Court stated in *Schumann-Heink v. Folsom*,²⁹ "[b]ecause a new use is being made of the trust does not mean new principles of law are to be applied in determin-

estate, and such interest is hereby declared to be personal property, and no beneficiary shall have any title or interest, legal or equitable, in or to the real estate as such, but only an interest in the possession, earnings, avails and proceeds thereof as aforesaid.

H. KENOE, *supra* note 1, § 2.2, at 6. Similarly, a typical trust agreement refers to the personal property designation in the following manner:

[T]he interest of any beneficiary hereunder shall consist solely of a power of direction to deal with the title to said property . . . as hereinafter provided, and the right to receive the proceeds from rentals and from mortgages, sales or other disposition of said premises, and that such right in the avails of said property shall be deemed to be personal property, and may be assigned and transferred as such; . . . and that no beneficiary . . . hereunder at any time shall have any right, title or interest in or to any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails and proceeds as aforesaid.

Id. § 2.3, at 11.

25. See, e.g., *In re Estate of Alpert*, 95 Ill. 2d 377, 447 N.E.2d 796 (1983) (husband's and wife's joint tenancy real estate which was held in trust described as personal property); *Chicago Fed. Sav. & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 185 N.E.2d 670 (1962) (single family residence placed in trust was described as personal property); *First Fed. Sav. & Loan Ass'n v. Pogue*, 72 Ill. App. 3d 54, 389 N.E.2d 652 (2d Dist. 1979) (condominium unit held in land trust described as personal property in an action to determine priority between judgment creditors); *Hutter v. Lake View Trust & Sav. Bank*, 54 Ill. App. 3d 653, 370 N.E.2d 47 (1st Dist. 1977) (homestead held in trust described as personal property in an action for accounting and damages); see *infra* notes 57-175 and accompanying text.

26. G. BOGERT, *supra* note 7, at 135. Otherwise, the interest of the beneficiary in a conventional real estate trust is an interest in real estate. See *Gordon v. Gordon*, 6 Ill. 2d 572, 129 N.E.2d 706 (1955).

27. See *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 488, 389 N.E.2d 540, 543 (1979) (although beneficiary's interest is described as personal property, all attributes of ownership remain with him except the holding of title).

28. *Home Federal Sav. & Loan Ass'n v. Zarkin*, 89 Ill. 2d 232, 432 N.E.2d 841 (1982); cf. *Britton v. Winger*, 110 Ill. App. 3d 230, 442 N.E.2d 264 (4th Dist. 1982) (trustee may purchase trust property if it has no control over the sale, provided the beneficiary is fully informed of all facts in connection with the sale); *Ford City Bank & Trust Co. v. Ford City Bank & Trust Co.*, 110 Ill. App. 3d 123, 441 N.E.2d 1192 (1st Dist. 1982) (breach of duty for trustee to purchase its trust property for its own account).

29. 328 Ill. 321, 159 N.E. 250 (1927).

ing the rights of the trustees, the cestuis que trust or persons dealing with the trustees."³⁰

WHY CHOOSE A LAND TRUST?

Secrecy

The popularity and the notoriety of land trusts can be attributed primarily to the benefits derived from secrecy of ownership.³¹ Secret ownership, for example, provides financial privacy for the beneficiary who may not want to disclose the extent of his real estate holdings.³² Furthermore, if he is a landlord, the land trust arrangement helps him to avoid the inconvenience and annoyance of dealing directly with tenants.³³ Additionally, secrecy of ownership can facilitate the purchase of large tracts of land for development at lower prices than might be demanded if the buyer's identity were known.³⁴ Finally, secrecy of ownership helps to insulate the trust property from creditors, especially attachment creditors.³⁵

The secrecy of beneficial ownership is not unique to land trusts. Indeed, many kinds of conventional trusts provide for secrecy. In a more conventional trust, however, the beneficiary relinquishes a significant degree of control over the property and must pay the trustee a substantial fee for both performance of its duties and its exposure to potential liability. Low trustee fees and the beneficiary's retention of absolute control and management of

30. *Folsom*, 328 Ill. at 327, 159 N.E. at 252; see also *Home Fed. Sav. & Loan Ass'n v. Zarkin*, 89 Ill. 2d 232, 432 N.E.2d 841 (1982) (land trusts are to be treated the same as any other trust insofar as the relationship of trustee and beneficiary is concerned).

31. See *Lambos v. Lambos*, 9 Ill. App. 3d 530, 534, 292 N.E.2d 587, 590 (1st Dist. 1972) (advantage of land trust seen as the ability to enjoy proceeds of land anonymously without the inconvenience of being holder of record title); H. KENOE, *supra* note 1, § 3.2, at 5.

32. H. KENOE, *supra* note 1, § 3.2, at 5; see also De Witt, *The Illinois Land Trust—Its Undeveloped Potential in California*, 41 L.A. B. BULL. 20, 22 (1965) (secrecy prevents public scrutiny of assets); Note, *Truly a Trust?*, *supra* note 1, at 510 (secrecy insures privacy of beneficiary's interest, akin to privacy surrounding bank accounts and corporate stock holdings). But see Comment, *Illinois Land Trust*, *supra* note 6, at 104 n.16. The author states, "This privacy may be illusory, at least for the initial period after the land is placed in trust by the owner who became beneficiary. The astute title-searcher will, of course, be able to see who put the land into the trust, and who is presumably still the owner."

33. H. KENOE, *supra* note 1, § 3.2, at 5; see, e.g., Note, *Truly a Trust?*, *supra* note 1, at 509; Katz, *Why We Favored Limited Bill on Secret Land Trusts*, *Chicago Sun-Times*, May 30, 1980, at 40, col. 1; Hearing on S. 1090 Before the Illinois State Senate Judiciary Comm., 83d Gen. Assembly (May 3, 1983) (testimony of William R. Dillon, Corporate Fiduciaries of Illinois).

34. See H. KENOE, *supra* note 1, § 3.2, at 5; LAND TRUST, *supra* note 5, at 3. Subsequent purchase negotiations can sometimes be handled more economically when the identity of the purchaser is unknown because a seller might increase his price if he knows that the purchaser is wealthy or that the land is vital to the completion of a tract. See DeWitt, *supra* note 32, at 22; Note, *Truly a Trust?*, *supra* note 1, at 509; Note, "Illinois" Land Trusts in Indiana, *supra* note 2, at 300.

35. Anderson, *Land Trusts in Action*, REAL ESTATE NEWS, Feb. 25, Mar. 4, Mar. 11, 1955; *The New Vrdolyak*, *Chicago Lawyer*, May 1982, at 7, col. 2.

the property have made land trusts the preferred device in Illinois to achieve secrecy of ownership.

Other Advantages for Real Estate Owners

Other advantages of land trusts, besides secrecy, help to account for the popularity of land trusts among real estate owners. Because the recorded legal title is separated from the beneficial interest, a land trust arrangement facilitates voluntary transfers of the property, including tax-free exchanges, through simple assignment³⁶ of the beneficial interest rather than by deed. As a result, when the beneficial interest is transferred, the record title is not disturbed, liability for real estate transfer taxes is avoided,³⁷ reassessment for property tax purposes is delayed,³⁸ and the expense incurred in recordation and the purchase of new title insurance is circumvented.

When real estate is owned by a number of different persons, conveyance of title is simpler if the property is held in a land trust. Signatures on conveyances need not be obtained from, nor title searches made on, the individual owners. Also, a land trust prevents impairment of the legal title through involuntary transfers by, or liens against, beneficiaries, thus assuring that the legal title is insulated from bankruptcy, insanity, death, judgments, litigation, or marital disputes involving the individual beneficial owners.³⁹ This protection can be important in large development projects, where such impairment could be fatal to the successful completion of a project.⁴⁰ Use of the land trust is also advantageous in land syndication arrangements because it permits syndications to avoid the double taxation of corporate income, which is taxed first to the corporation and then, on distribution of dividends, to the shareholders.⁴¹

Land trusts can help prevent wrongful conveyances of the real estate title by individual partners and other multiple owners not authorized to make conveyances, as well as by real estate contract sellers in fraud of the rights

36. See *Kortenhof v. Messick*, 18 Ill. App. 3d 1, 309 N.E.2d 368 (1st Dist. 1974); Comment, *Beneficiary*, *supra* note 21, at 569.

37. The Real Estate Transfer Tax Act, ILL. REV. STAT. ch. 120, § 1003 (1983), imposes a transfer tax of 25¢ per \$500 value of real estate which is transferred by deed filed for record. Because an assignment of a land trust beneficial interest is not a deed and is not filed for record, a beneficial interest transfer is not subject to the act. The City of Chicago real estate transfer tax, CHICAGO, ILL., CODE § 200.1-2B (1980), is more ambiguous. Since it was enacted in 1973, however, the city has made no attempt to collect the tax on beneficial interest assignments. See H. KENOE, *supra* note 1, § 7.5, at 10.

38. H. KENOE, *supra* note 1, § 7.1, at 4.

39. *Id.* § 1.9, at 10; see Note, *Truly a Trust?*, *supra* note 1, at 510.

40. H. KENOE, *supra* note 1, § 1.9, at 10.

41. See Schwind, *Land Trusts: A Real Estate Syndication Device*, 101 TRS. & ESTS. 650 (1962); Comment, *Illinois Land Trust*, *supra* note 6, at 105; Note, *Land Trust in New York*, *supra* note 2, at 126-28. If the particular land trust arrangement gives the trustee more than ministerial duties, it risks classification as a taxable association. H. KENOE, *supra* note 1, §§ 7.22, at 23, 7.26, at 27-28; Turner, *supra* note 21, at 242; Comment, *Kansas Real Estate Practices*, *supra* note 2, at 100-01.

of the purchaser. Additionally, partition proceedings may not be available to the beneficiaries of a land trust.⁴² Land development programs benefit by avoiding time-consuming and expensive partition litigation that might result from dissension among multiple beneficiaries.

Land trusts with designated remainder beneficiaries may be used as substitutes for wills in the testamentary disposition of property, and are not invalid for failure to comply with the Statute of Wills.⁴³ Therefore, property over which the owner retains absolute control before death may be kept out of his probate estate after death. Also, land trusts can be used to avoid probate, as well as ancillary administration of real estate, owned by nonresidents or owned by residents in other states.⁴⁴ Furthermore, the real estate of a land trust beneficiary can be insulated from claims of a surviving spouse.⁴⁵ Finally, a land trust may facilitate minimization of estate and gift taxes by inter vivos transfers of the beneficiary's interest.⁴⁶

A land trust also provides advantageous methods of obtaining loans or financing. A mortgage loan can be obtained using the legal title to the real estate as the sole security without imposing personal liability on the beneficiary.⁴⁷ Alternatively, the beneficial interest, rather than the real estate, may be used as security for the loan. Because this arrangement involves the

42. As a general rule, partition proceedings are not available to land trust beneficiaries. See, e.g., *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952) (dismissal of action for partition among beneficiaries of land trust in which the corpus consisted of an apartment building); *Aronson v. Olsen*, 348 Ill. 26, 180 N.E. 565 (1932) (proceeding for dissolution of partnership, partition, and accounting remanded with directions to dismiss partition action in a land trust arrangement); *DeWitt*, *supra* note 32, at 22; Comment, *Illinois Land Trust*, *supra* note 6, at 103; Note, *Truly a Trust?*, *supra* note 1, at 510; *infra* notes 67-72 and accompanying text.

43. See *Conley v. Petersen*, 25 Ill. 2d 271, 184 N.E.2d 888 (1962); H. KENOE, *supra* note 1, § 7.40, at 42-43.

44. See H. KENOE, *supra* note 1, § 3.9, at 12; Comment, *Illinois Land Trust*, *supra* note 6, at 103; Note, *Truly a Trust?*, *supra* note 1, at 511.

45. See *Johnson v. La Grange State Bank*, 73 Ill. 2d 342, 383 N.E.2d 185 (1978); *In re Estate of Nemecek*, 85 Ill. App. 3d 881, 407 N.E.2d 655 (1st Dist. 1980); *Lesnik v. Estate of Lesnik*, 82 Ill. App. 3d 1102, 401 N.E.2d 1177 (1st Dist. 1980); *Payne v. River Forest State Bank*, 81 Ill. App. 3d 1128, 401 N.E.2d 1299 (1st Dist. 1980); *Elliott v. Alexson*, 33 Ill. App. 3d 1046, 339 N.E.2d 378 (1st Dist. 1975). Other decisions point out, however, that when the settlor of the trust retains the power of direction, there is not a completed inter vivos gift. See *Caleca v. Caleca*, 63 Ill. App. 3d 414, 380 N.E.2d 493 (3d Dist. 1978); *Rudolph v. Gersten*, 100 Ill. App. 2d 253, 241 N.E.2d 600 (1st Dist. 1968).

46. Land trust interests can be considered valid gifts and are subject to the Federal Gift Tax Act, I.R.C. § 250 (1982). To qualify for an estate tax exclusion for the value of the gift, the assignment of the beneficial interest must be such that the donor retains no control over the interest. See *Commissioner v. Marshall*, 125 F.2d 943 (2d Cir. 1942); *Estate of Mc Clure*, 608 F.2d 478 (Ct. Cl. 1979); *Wolff*, *Qualifying Gifts of Fractional Shares of Illinois Land Trusts*, 14 J. MAR. L. REV. 717, 732 (1981).

47. See, e.g., *Barkhausen v. Continental Ill. Nat'l Bank*, 3 Ill. 2d 254, 270, 120 N.E.2d 649, 658 (1954) (beneficiary was not personally liable for the assumption of mortgage indebtedness when he did not specifically authorize the trustee to so obligate him); *Lowenstein v. Chicago Title*, 340 Ill. App. 160, 163, 91 N.E.2d 96, 98 (1st Dist. 1950) (sole remedy is foreclosure under trust deed when notes so provide); *Conkling v. McIntosh*, 324 Ill. App. 292, 297, 58

pledging of personal, not real, property, the transaction is not subject to the mortgagor's rights of judicial foreclosure or redemption.⁴⁸

Lastly, some real estate owners favor the land trust because it provides immunity from judgment liens. Illinois law provides that judgment liens can only attach to real estate interests.⁴⁹ A judgment against a land trust beneficiary does not create a lien on the real estate title that comprises the corpus of the trust,⁵⁰ and such a judgment has been held not to create a lien on the beneficial interest.⁵¹

THE PERSONAL PROPERTY FICTION—HISTORY AND ANALYSIS

The representations in land trust documents that the interest of the beneficiary is personal property, and that the beneficiary has no equitable title or interest in the real estate are wholly fictional. Professor Henry W. Kenoe, a leading commentator on land trusts, has characterized them as agreements to call a dog a cat.⁵² In his article, Kenoe referred to the following description of the personal property fiction:

Alice sat across from the desk of a large white rabbit in the Land Trust Department at the Wonderland Trust Company. "Mr. Bunny," she said, "since the real estate which I hold is now in a land trust with your company, I should like to review with you, as the trust officer in charge, my duties as a landlord; and I want you to tell me how to have the leases signed."

"Well, young lady," said Mr. Bunny, "as a preliminary matter, let me dispose of a misunderstanding on your part. You no longer hold the real estate. We do. The deed which you gave to us clearly states that Wonderland Trust Company has all of the legal and equitable title in the property which was once yours." And then noting Alice's rising alarm, he continued: "But do not be afraid for we can do nothing with the property except upon your written direction, it says so right in the Trust Agreement."

Alice's fears seemed to subside, but Mr. Bunny continued to reassure her. "Besides you are entitled to the management and control of the property and to the rents, issues, proceeds and avails. That too is right here in the Trust Agreement."

"That sounds like a schizophrenic arrangement to me" said Alice. "Oh

N.E.2d 304, 305 (1st Dist. 1944) (when trust deed provides that only security is the real estate and that no personal liability will result, in case of default the sole remedy is foreclosure on trust deed); see also H. KENOE, *supra* note 1, § 1.10, at 10.

48. H. KENOE, *supra* note 1, § 5.34, at 139-41.

49. ILL. REV. STAT. ch. 110, §§ 12-101, -105 (1983).

50. See *Chicago Fed. Sav. & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 185 N.E.2d 670 (1962); *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1st Dist. 1939).

51. See *First Fed. Sav. & Loan Ass'n v. Pogue*, 72 Ill. App. 3d 543, 389 N.E.2d 652 (2d Dist. 1979); *Sterling Sav. & Loan Ass'n v. Schultz*, 71 Ill. App. 2d 94, 218 N.E.2d 53 (1st Dist. 1966); see also *infra* notes 115-17 and accompanying text.

52. Kenoe, *Land Trust Financing and the Uniform Commercial Code*, 52 CHI. B. REC. 419, 421 (1971) [hereinafter cited as Kenoe, *Land Trust Financing*].

no" said Mr. Bunny, "we have finally achieved the goal of the Philosophers. We have now separated Pure Form from Pure Substance."⁵³

Illinois courts have noted the fictional nature of the personal property designation of the beneficiary's interest. In 1979, the Illinois Supreme Court stated that land trusts are a fiction under which the beneficiary has "what is referred to as a personal property interest [while in fact having] most of the usual attributes of real property ownership."⁵⁴ More recently, the court noted the "paradoxical characterization of the beneficiary's interest as personal property, although the subject of the trust is realty."⁵⁵ An appellate court once referred to "the make-believe which hovers over land trusts."⁵⁶

Given the fictional nature of these personal property representations, an inquiry must be made into whether the use of this fiction promotes justice and sound public policy. It is the authors' contention that it does not. The examination of Illinois case law which follows indicates that the validity of this personal property designation is diminishing. The fiction seems particularly inappropriate in land trust cases in which third parties assert valid claims based upon the true nature of the beneficial interest as real estate.

Creditor's Bills

The earliest case commonly cited for the proposition that the beneficial interest in a land trust is personal property is *Kerr v. Kotz*.⁵⁷ In *Kerr*, the beneficiary argued that his interest was real estate, and therefore, not reachable by a creditor's bill, a remedy used by creditors to reach personal property of the debtor. The court held, however, that the representation in the trust documents that the beneficiary's interest was personal property was sufficient to subject this interest to a creditor's bill.⁵⁸

Rather than characterize the interest of a land trust beneficiary as per-

53. *Alice Revisited*, 41 CHI. B. REC. 195 (1960); see Kenoe, *Land Trust Financing*, *supra* note 52, at 419 n.3.

54. *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 488, 389 N.E.2d 540, 543 (1979); see also *Melrose Park Nat'l Bank v. Melrose Park Nat'l Bank*, 123 Ill. App. 3d 282, 286, 462 N.E.2d 741, 744 (1st Dist. 1984) (land trust is a "legal fiction").

55. *Home Fed. Sav. & Loan Ass'n v. Zarkin*, 89 Ill. 2d 232, 238, 432 N.E.2d 841, 845 (1982).

56. *Madigan v. Buehr*, 125 Ill. App. 2d 8, 17, 260 N.E.2d 431, 435 (1st Dist. 1970); see also *Jacobs v. Carroll*, 46 Ill. App. 3d 74, 79-80, 360 N.E.2d 136, 139 (2d Dist. 1977) (quoting *Madigan*).

57. 218 Ill. App. 654 (1st Dist. 1920) (abstract opinion). Although the court did not discuss the matter, it may be argued that, since the beneficiary was in partnership, his interest was personal property by operation of partnership law regardless of the terms of the trust. *But see Berning v. Berning*, 320 Ill. App. 686, 51 N.E.2d 997 (1st Dist. 1943) (abstract opinion) (in the face of a creditor's bill, the beneficiary was bound by the personal property recitations).

58. *Kerr*, 218 Ill. App. at 654. The creditor's bill is now rarely used in Illinois. An equivalent remedy is included in the supplementary citation proceedings statute. ILL. REV. STAT. ch. 110, § 2-1402(a) (1983).

sonalty, the court should have based its decision in *Kerr* upon a theory of estoppel. Once the beneficiary has agreed with the trustee to label his interest personal property, he should be estopped from later asserting that he owns real estate. Such an assertion is in essence an effort to defeat a creditor who, in reliance upon the beneficiary's representation, has selected a remedy applicable to personal property.⁵⁹ The person who calls his dog a cat must be consistent; he cannot later change his position and assert that it really is a dog to the prejudice of one who relied upon the characterization of it as a cat.⁶⁰

Freehold Jurisdiction

The personal property fiction has been invoked by the Illinois Supreme Court in several cases, beginning with *Duncanson v. Lill*,⁶¹ under the scope of its former freehold jurisdiction.⁶² The *Duncanson* court held that a land trust beneficiary did not own a freehold because he owned only a personal

59. The Illinois Supreme Court has provided the following definition of estoppel:

[W]here a party by his statements or conduct leads another to do something he would not have done but for the statements or conduct of the other, the one guilty of the expressions or conduct will not be allowed to deny his utterances or acts to the loss or damage of the other party. The party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts.

Dill v. Widman, 413 Ill. 448, 455-56, 109 N.E.2d 765, 769 (1953). It may be argued that the requirement of justifiable reliance was not met in *Kerr* and *Berning* because the unrecorded trust agreements disclosed that the true interest of the beneficiaries was an interest in real estate. An unsecured creditor is not, however, likely to have access—and presumably did not have such access—to the trust agreement before initiating proceedings to enforce the judgment. Hence, the creditor can rely on the recorded deed in trust, which asserts that the beneficiary's interest is personal property.

60. The most succinct recognition of estoppel in a land trust case appears in *In re Application of County Treasurer*, 113 Ill. App. 2d 50, 251 N.E.2d 757 (1st Dist. 1969). The court denied a land trust beneficiary the status of a party "interested in the real estate" who as such is entitled to notice of an application for a tax deed, stating that beneficiaries "cannot be permitted to adopt a legal entity and be blessed with both a sword and a shield depending upon the various facts and circumstances." *Id.* at 57, 251 N.E.2d at 760-61.

In another case, land trust beneficiaries entered into a real estate sales contract which implied that they owned legal title to the property they were selling. *Rizakos v. Kekos*, 56 Ill. App. 3d 404, 371 N.E.2d 896 (1st Dist. 1977). The buyers assumed that the sellers could convey title. Later, the sellers argued that since they were only land trust beneficiaries and did not have legal title, the contract could not be enforced against them. The court held that the beneficiaries were estopped from asserting that because they did not have title, they could not convey the land. The court emphasized instead that the sellers had full power to direct the trustee to convey it. *Id.*

61. 322 Ill. 528, 153 N.E. 618 (1926).

62. ILL. CONST. of 1870. A freehold estate is "an estate for life or in fee." BLACK'S LAW DICTIONARY 598 (5th ed. 1979). The Illinois Supreme Court reviewed, on direct appeal, cases involving freehold estates. This provision was abolished by the 1964 Judicial Article included in the Illinois Constitution adopted in 1970. ILL. CONST. art. VI, § 4.

property interest.⁶³ The court, however, went on to describe the beneficiary's interest as encompassing the "right to do what in equity would entitle the party to a freehold,"⁶⁴ in other words, the right to direct the trustee to convey the legal title to the beneficiary himself. This right is equivalent to an equitable title to the real estate because a person entitled to the conveyance of the legal title to real estate is the equitable owner.⁶⁵ Thus, *Duncanson* was correctly decided not because the beneficial interest was personal property, but because an equitable right, title, or interest in real estate is not equivalent to a freehold.⁶⁶

Partition.

In *Aronson v. Olsen*,⁶⁷ the Illinois Supreme Court denied multiple land trust beneficiaries the right to sue for partition because the trust documents asserted that their interests were personal property, which is not legally partitionable.⁶⁸ The result is correct not because of the personal property designation, but because the parties were partners.⁶⁸ Partnership property is not subject to partition unless the purposes of the partnership have been

63. *Duncanson*, 322 Ill. at 533, 153 N.E. at 620; see *Seno v. Franke*, 20 Ill. 2d 70, 169 N.E.2d 335 (1960); *Cohen v. Oguss*, 384 Ill. 353, 51 N.E.2d 461 (1943); *Davis v. Oliver*, 371 Ill. 287, 20 N.E.2d 582 (1939); *Sweesy v. Hoy*, 324 Ill. 319, 155 N.E. 323 (1927). *But cf.* *Korziuk v. Korziuk*, 13 Ill. 2d 238, 148 N.E.2d 727 (1958) (beneficiaries considered to have a real property interest in partnership real estate held in a land trust).

64. *Duncanson*, 322 Ill. at 534, 153 N.E. at 620.

65. See *Harris v. Ingleside Bldg. Corp.*, 370 Ill. 617, 19 N.E.2d 585 (1939) (right to maintain an action for specific performance to convey the legal title to real estate is equivalent to an equitable title in the real estate); *cf.* *Johnson v. Filson*, 118 Ill. 219, 223, 8 N.E. 318, 320 (1886) (exclusive control and possession of premises constitutes equitable title in real estate). A land trust beneficiary has the absolute right at any time to direct the trustee to convey legal title to himself or to anyone else he chooses. Hence, notwithstanding the representations to the contrary in the trust agreement, the beneficiary, not the trustee, owns equitable title to the real estate.

66. See *Kirchoff v. Union Mut. Life Ins.*, 128 Ill. 199, 204, 20 N.E. 808, 810 (1889).

67. 348 Ill. 26, 180 N.E. 565 (1932). While it has been held that parties to a real estate sales contract may agree that the buyer does not acquire equitable title until the final payment is made, *Eade v. Brownlee*, 29 Ill. 2d 214, 193 N.E.2d 786 (1963), such an agreement does not affect the state of facts as to the buyer's equitable title at the time he tenders final payment and demands a deed.

68. 348 Ill. at 28-29, 180 N.E.2d at 566; see also *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952). In *Breen*, it was determined that partition was not available after termination of a trust equitably converted the beneficiaries' interest to personal property. Furthermore, the beneficiaries were bound by the recitations in a trust, established for their benefit by their parents, which provided that the property was not to be sold for less than \$165,000, thereby implying that it was not to be partitioned.

69. Although the trust agreement itself did not provide for a partnership, the opinion makes clear that the trust property was, in fact, acquired and operated by the beneficiaries as partners. *Aronson*, 348 Ill. at 29, 180 N.E. at 567. A later decision indicates that multiple beneficiaries of land trusts are considered partners as a matter of law unless the facts indicate otherwise. *Harmon v. Martin*, 395 Ill. 595, 71 N.E.2d 74 (1947).

achieved,⁷⁰ or the partnership has been dissolved.⁷¹ It, therefore, appears that in the absence of other circumstances, such as an ongoing partnership or a valid equitable conversion, the trust agreement recitations that the beneficiaries' interest is personalty are apparently insufficient to operate as an agreement not to partition.⁷²

Judgment Liens

a. Chicago Title and Trust Company v. Mercantile Trust & Savings Bank

A judgment is a lien on an interest in real estate that is effective even if the real estate interest is not recorded.⁷³ The Illinois judgment lien statute provides that the term "real estate" includes not only lands, tenements, and hereditaments, but also all of the legal and equitable rights and interests therein.⁷⁴ It further defines mere leaseholds of over five years as interests in real estate subject to judgment liens.⁷⁵ Nevertheless, the Illinois courts have consistently held that a judgment lien does not attach to a land trust beneficial interest because such an interest is personal property.⁷⁶

The Illinois Appellate Court laid the philosophical foundation for this interpretation in *Chicago Title and Trust Co. v. Mercantile Trust & Savings Bank*.⁷⁷ In *Chicago Title*, the court held that a land trust is not executed by the Statute of Uses.⁷⁸ Since the legal title, therefore, remains in the trustee, a judgment creditor's lien against the beneficiary does not attach to the title of the real estate.⁷⁹ The court, however, was not content to simply hold that the trustee had sufficient active duties to save the trust from the operation of the statute.⁸⁰ It went on to hold that the Statute of Uses was also

70. *Whitaker v. Scherrer*, 313 Ill. 473, 145 N.E. 177 (1924) (since land trust beneficiaries were engaged in a joint venture to subdivide and sell the trust real estate, partition sought by beneficiaries would be contrary to the purpose of the venture, and therefore, an agreement not to partition would be implied).

71. *Korziuk v. Korziuk*, 13 Ill. 2d 238, 148 N.E.2d 727 (1958).

72. *See Gallagher v. Drovers Trust & Sav. Bank*, 404 Ill. 410, 88 N.E.2d 870 (1949); *Harrison v. Kamp*, 395 Ill. 11, 69 N.E.2d 261 (1946); *see also Korziuk v. Korziuk*, 13 Ill. 2d 238, 148 N.E.2d 727 (1958) (court allowed partition of land trust real estate without discussion of personal property question).

73. *See Niantic Bank v. Dennis*, 37 Ill. 381 (1865).

74. ILL. REV. STAT. ch. 110, § 12-105 (1983).

75. *Id.*

76. *Melrose Park Nat'l Bank v. Melrose Park Nat'l Bank*, 123 Ill. App. 3d 282, 462 N.E.2d 741 (1st Dist. 1984); *First Fed. Sav. & Loan Ass'n v. Pogue*, 72 Ill. App. 3d 54, 389 N.E.2d 652 (2d Dist. 1979); *Sterling Sav. & Loan Ass'n v. Schultz*, 71 Ill. App. 2d 94, 218 N.E.2d 53 (1st Dist. 1966).

77. 300 Ill. App. 329, 20 N.E.2d 992 (1st Dist. 1939).

78. *Id.* at 335, 20 N.E.2d at 996.

79. *Id.* at 336, 20 N.E.2d at 996.

80. *Id.* at 340, 20 N.E.2d at 997.

inapplicable because the beneficiary's interest was personal property.⁸¹ In so doing, the court erred both in its interpretation of the Statute of Uses⁸² and in its analysis of the nature of the beneficiary's interest.⁸³

The court relied upon three bases for its holding: partnership law, the doctrine of equitable conversion, and the trust agreement itself. Regarding partnerships, the court correctly stated that "an agreement creating an interest in the profits or proceeds of the sale of real estate creates no interest in or lien upon the land itself."⁸⁴ This statement, however, does not describe the property interest of a sole land trust beneficiary, such as the judgment debtor in *Chicago Title*, who, because of the nature of the land trust, was absolute owner of the real estate.

The court next asserted that under the doctrine of equitable conversion, the beneficiary's interest was personal property because the trust agreement required the trustee to sell the property and pay the proceeds to the beneficiary twenty years after the commencement of the trust.⁸⁵ The court's

81. *Id.*

82. Under the Statute of Uses, determination of whether the trust is real or personal property depends upon the nature of the res or corpus, not upon the beneficial interest. *Kirkland v. Cox*, 94 Ill. 400, 412 (1880). The statutory language is clear that the property affected is the property owned by the trustee for the use of the beneficiary. ILL. REV. STAT. ch 30, § 3 (1983). Furthermore, in the two cases cited by the court in *Chicago Title*, the corpus of the trusts was personal property. See *Smith v. Smith*, 254 Ill. 488, 98 N.E. 950 (1912); *Lord v. Comstock*, 240 Ill. 492, 88 N.E. 1012 (1909). The latter case involved the Rule in *Shelly's Case* and not the Statute of Uses. *Id.* at 497, 88 N.E. at 1015. Hence, the court's conclusion that the beneficial interest was personal property was irrelevant to the application of the Statute of Uses.

83. Although not discussed in *Chicago Title*, there is language in decisions and commentaries which suggests that the interests of beneficiaries in "active" trusts are personal property, and therefore, not subject to judgment liens. See *Potter v. Couch*, 141 U.S. 296 (1891); *Brandies v. Cochrane*, 112 U.S. 344 (1884); *Moll v. Gardner*, 214 Ill. 248, 73 N.E. 442 (1905); *Kratovil & Harrison, Jr., Enforcement of Judgments Against Real Property*, 1951 U. ILL. L.F. 1, 20-21; *Annot.*, 30 A.L.R. 526 (1924). These sources, however, deal with conventional trusts in which the trustee has actual control over the real estate and the beneficiaries, who were entitled only to the income, owned only a personal property interest. Under different circumstances, a trust may be sufficiently "active" to escape the Statute of Uses, while at the same time the beneficiary's rights and interest may be sufficient to warrant finding he has an equitable interest in the real estate. See *Gordon v. Gordon*, 6 Ill. 2d 572, 129 N.E.2d 706 (1955).

84. 300 Ill. App. at 336, 20 N.E.2d at 995.

85. *Id.* at 338, 20 N.E.2d at 996. The doctrine of equitable conversion is applied to wills and conventional trusts which direct the executor or trustee to sell the real estate upon the death of the testator or the termination of the trust, and divide the proceeds among the devisees or remainder beneficiaries. See *In re Estate of Krotzsch*, 60 Ill.2d 342, 326 N.E.2d 758 (1975); *Keller v. Schobert*, 58 Ill. 2d 137, 317 N.E.2d 510 (1974). From the creation of the trust, the devisees or beneficiaries realize their interest in the form of money—in other words, personal property—even though the parties have a legal right, if they all agree, to take the real estate directly. See, e.g., *8930 S. Harlem, Ltd. v. Moore*, 77 Ill. 2d 212, 396 N.E.2d 1 (1979); *Keller v. Schobert*, 58 Ill. 2d 137, 317 N.E.2d 510 (1974). The equitable conversion doctrine is also applied in litigation involving real estate contracts. Unless the parties agree otherwise, the buyer under an executory real estate sales contract is regarded as owning the

application of the doctrine is inappropriate for several reasons. First, an equitable conversion does not take place as long as the beneficiary can dictate the price for which the property is sold.⁸⁶ Because the land trust beneficiary has absolute control over the terms by which the property may be sold during the twenty-year life of the land trust, the trustee has no power to sell the real estate unless so directed by the beneficiary.⁸⁷

Second, if the trustee's duty to sell is contingent upon an event that may or may not occur, conversion does not take place until the event actually occurs.⁸⁸ Because the trustee's duty to sell the land trust real estate at the termination of the trust is contingent upon the real estate remaining in the trust at that time, conversion cannot take place until termination.

Third, equitable conversion does not occur if the trustee has the option either to sell the real estate or to convey it in kind to the beneficiaries.⁸⁹ Thus, equitable conversion is precluded by the land trust trustee's option to resign at any time, and to convey the legal title to the beneficiary.⁹⁰

Finally, equitable conversion may be invoked only to effectuate the intent of the testator or settlor.⁹¹ Land trust settlors seldom intend that the property remain in the trust until its termination, to be sold by the trustee.⁹² In the rare instances when the property does remain in the trust for the duration, it is through the negligence or inadvertance of the trustee or beneficiary. Accordingly, because it does not effectuate the intent of the settlor, equitable conversion should not be applied to land trusts.

real estate while the seller has only a personal property interest in the sale proceeds, even though the seller still has legal title and is owed money. See *Shay v. Penrose*, 25 Ill. 2d 447, 185 N.E.2d 218 (1962); *Hartman v. Hartman*, 11 Ill. App. 3d 524, 297 N.E.2d 199 (1st Dist. 1973).

86. *Hazlett v. Moore*, 372 Ill. 192, 195, 23 N.E.2d 57, 58 (1939).

87. *Cf. Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952), in which a trust agreement resulted in a valid equitable conversion because the twenty years had passed. The trustee's duty to sell "became imperative upon the expiration of the twenty year period." *Id.* at 213, 103 N.E.2d at 629.

The *Chicago Title* court asserted that the power of direction was merely a recitation of the right of "reconversion" which would be accorded the beneficiary by operation of law even if no mention was made in the trust agreement, and that the beneficial interest would not be "reconverted" to real estate unless and until the beneficiary elected to do so by directing a conveyance to himself. *Chicago Title*, 300 Ill. App. at 336, 20 N.E.2d at 995. By the terms of the trust agreement, however, the power of direction was effective immediately. The trustee's duty and power to sell was free of the control of the beneficiaries and, hence, the beneficiary's right to "reconvert" would not arise until the termination of the trust 20 years later.

88. 27 AM. JUR. 2D *Equitable Conversion* § 5 (1966); 18 C.J.S. *Conversion* §§ 12, 23 (1939).

89. *Lynch v. Cunningham*, 131 Cal. App. 164, 173, 21 P.2d 154, 157 (1933); *Keller v. Schobert*, 58 Ill. 2d 137, 142, 31 N.E.2d 510, 513 (1974).

90. See *Swiderski v. Chicago Title & Trust Co.*, 102 Ill. App. 3d 783, 430 N.E.2d 339 (1st Dist. 1981) (normal procedure for trustees is to resign rather than to let the twenty years run out and force the sale of the property). As Professor Kenoe stated, "The trustees will make every effort to avoid a public sale as a procedure for terminating the trust." H. KENOE, *supra* note 1, § 4.32, at 50.

91. *Yedor v. Chicago City Bank*, 376 Ill. 121, 33 N.E. 220 (1941).

92. "As a practical matter, this duty is never expected to be performed (contrary directions are invariably delivered to the trustee)." ACPC Study, *supra* note 2, at 2.

Based upon the above reasons, there should be no equitable conversion of the beneficial interest of land trusts from realty to personalty until the trust terminates.⁹³ The specific recitations in land trust agreements that the beneficiaries' interests are personal property and that they have no legal or equitable title in the real estate are not sufficient to cause an equitable conversion.⁹⁴

The doctrine of equitable conversion should especially not be applied to third parties such as judgment creditors, whose claims are not based on the trust agreement or on the rights of parties thereto.⁹⁵ As an equitable principle, rather than a rigid rule of law,⁹⁶ the doctrine should be applied only to the extent appropriate to meet the ends of equity and justice.⁹⁷ It should never be invoked in the aid of fraud or wrong.⁹⁸ To the extent that a conveyance into a land trust makes the property immune from judgment liens

93. This conclusion is not altered by the rule that a positive direction to sell upon the death of the testator results in an equitable conversion even though the time of sale is postponed until the death of a life tenant. *See* *Lash v. Lash*, 209 Ill. 595 (1904). During the life of the tenant, the remainder beneficiaries, unlike land trust beneficiaries, have no power to compel the executor to convey the real estate. As to the remaindermen, the executor's duty to sell is mandatory and irrevocable upon the death of the testator. Hence the remainder interest is fixed as personal property at that time, although its enjoyment is postponed.

94. These recitations, however, are effective for some purposes as a contractual conversion which is binding on the parties and others claiming under the agreement. *Gallagher v. Drovers Bank*, 404 Ill. 410, 88 N.E.2d 870 (1949); *Harrison v. Kamp*, 395 Ill. 11, 69 N.E.2d 261 (1946); *Baker v. Commissioner*, 253 Mass. 130, 148 N.E.593 (1925). In *Smith v. Kelley*, 387 Ill. 213, 56 N.E.2d 360 (1944), the interests of the beneficiaries were personal property not because of the recitations but, as explained in *Gallagher*, 404 Ill. at 413, 88 N.E.2d at 872, because the agreement worked an equitable conversion by vesting in the trustees "an imperative duty and complete power to sell."

95. The courts have specifically held that the doctrine of equitable conversion will not be invoked either for or against third parties whose claims are not based on the instrument or on the rights of parties thereto. For example, in *First Nat'l Bank v. Boston Ins. Co.*, 17 Ill. 2d 147, 160 N.E.2d 802 (1959), the court denied equitable conversion to an insurance company which suffered a loss when the owner entered into a contract of sale at a much lower price than a previous appraisal. According to the court, equitable conversion

evolved in order to carry out the intention of the parties to the contract. To that end it acts upon the rights of the parties to the contract and those who claim under them. But it has been frequently held and stated that it should have no effect upon the rights of others.

Id. at 150-51, 160 N.E.2d at 804; *see also* *Eade v. Brownlee*, 29 Ill. 2d 214, 193 N.E.2d 786 (1963).

In *Lang v. Klinger*, 34 Cal. App. 3d 987, 110 Cal. Rptr. 532 (1973), a contract to sell real estate was held not to have converted the seller's interest to personalty so as to deprive his creditor of a judgment lien. The court stated that equitable conversion "does not become effective as to persons whose claims or rights to the property are purely incidental, not at all connected with its devolution or transfer from the author or through the instrument." *Id.* at 992, 110 Cal. Rptr. at 534.

96. As one scholar stated, "[w]hen we speak of conversion we are not describing a condition of the property for all purposes with respect to everybody but are giving a name to a situation resulting from the application of equitable doctrines to a state of facts between certain parties." Pound, *The Progress of the Law, 1918-1919*, 33 HARV. L. REV. 813, 831 (1920).

97. *City of Chicago v. Salinger*, 384 Ill. 515, 520, 52 N.E.2d 184, 187 (1944).

98. *Vigli v. Davis*, 79 Cal. App. 2d 237, 255, 179 P.2d 586, 597 (1947).

through conversion to personal property, such a conveyance hinders and delays creditors in the satisfaction of their just debts. It is, therefore, a conveyance in fraud of creditors.⁹⁹ Equitable conversion should thus not be applied when doing so would deprive creditors of a valid judgment lien.¹⁰⁰

99. A "fraudulent conveyance" has been defined as a "conveyance or transfer of property, the object of which is to defraud a creditor, or hinder or delay him, or to put such property beyond his reach." BLACK'S LAW DICTIONARY 596 (5th ed. 1979).

A conveyance of real estate by a debtor to another, to be held wholly or in part in trust for him, is a fraud on creditors whether so intended or not, as it places beyond their reach a valuable right and gives to the debtor the beneficial enjoyment of what rightfully belongs to them. In such a case the conveyance is void as to existing and subsequent creditors. The fraud is a continuing one, and may actually operate as such as well in reference to debts contracted after as before the conveyance.

McKey v. Cochran, 262 Ill. 376, 384-85, 104 N.E. 693, 696 (1914). One appellate court stated: No effort of a debtor to hinder or delay his creditors is more severely condemned by law than an attempt to place his property where he can enjoy it, but require his creditors to await his pleasure for the payment of their claims out of it. A man cannot be the beneficial owner of property and still have it exempt from his debts. Subsequent as well as existing creditors may have such transaction declared fraudulent. A conveyance to the use of the grantor is fraudulent in law, and void as to creditors, without regard to the intent with which it was made.

Crane v. Illinois Merchants Trust Co., 238 Ill. App. 257, 262 (1st Dist. 1925). The court made clear that this rule applies without regard to whether the beneficial interest is secret.

100. It may be argued that the unavailability of judgment liens is of little consequence to creditors since execution liens, see *Asher v. United States*, 570 F.2d 682 (7th Cir. 1978); *Kaiser-Ducett Corp. v. Chicago-Joliet Livestock Marketing Center*, 86 Ill. App. 3d 216, 407 N.E.2d 1149 (3d Dist. 1980); *Levine v. Pascal*, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1st Dist. 1968), and citation liens, see *Mid-West Nat'l Bank v. Metcoff*, 23 Ill. App. 3d 607, 319 N.E.2d 336 (2d Dist. 1974); *Bank of Broadway v. Goldblatt*, 103 Ill. App. 2d 243, 243 N.E.2d 501 (1st Dist. 1968), do attach to land trust beneficial interests. Upon execution, however, the beneficial interest may not be levied upon and sold by the sheriff; to obtain the property, the judgment creditor must stand the expense of citation proceedings. *Kaiser-Ducett*, 86 Ill. App. 3d at 219, 407 N.E.2d at 1151. Furthermore, execution liens last only 90 days. ILL. REV. STAT. ch. 110, § 12-110 (1983). In contrast, a judgment lien lasts seven years. *Id.* § 12-101. A citation lien may not be effective until service of the citation on the debtor, giving him an opportunity to transfer or encumber the property.

It may also be argued that unsecured creditor liens of any kind against land trust beneficial interests are of limited value because the beneficiary can destroy the lien by directing the trustee to convey the property to a "bonafide purchaser" without notice of the creditor's interest. See *Chicago Fed. Sav. & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 185 N.E.2d 670 (1962) (federal tax lien attaching to beneficial interest was destroyed by subsequent mortgage to "innocent" mortgagee in good faith and without knowledge of beneficiary's identity). Unlike the situation in *Cacciatore*, in most transactions involving land trust property, the buyer or broker deals directly with the beneficiary, knows who he is, and therefore is on constructive notice of judgments against the beneficiary along with any executions and citations issued pursuant thereto. See *Eckland v. Jankowski*, 407 Ill. 263, 95 N.E.2d 263 (1950); *Clark v. Levitt*, 335 Ill. 184, 166 N.E.2d 538 (1929); 49 C.J.S. *Judgments* § 133 (1947). Hence he is not a bonafide purchaser without notice. Furthermore, even in a bonafide purchaser fact situation, the creditor may be able to get satisfaction by suing the trustee. See *supra* note 19.

As a general rule, equitable conversion will not be enforced to circumvent public policy as expressed in statutes.¹⁰¹ Furthermore, a lawful purpose is a prerequisite for its application.¹⁰² The judgment lien statute is a clear legislative expression of public policy in favor of enforcement and satisfaction of judgments.¹⁰³ Equitable conversion should not be used to countermand this policy.¹⁰⁴

The *Chicago Title* court also found that the nature of the beneficiary's interest was controlled by the trust agreement provisions labeling the interest as personal property. In other words, the trust agreement achieved a contractual, as distinct from an equitable, conversion.¹⁰⁵ This rationale is weak for several reasons. First, the nature and extent of a judgment lien are statutorily created. Generally, statutes should be construed in a way which will defeat subterfuges, expediencies, or evasions.¹⁰⁶ Statutorily created rights of third parties relating to interests in real estate should turn upon what the property is in fact, not upon what the parties to a trust agreement say it is.

Second, a buyer and seller of real estate cannot, by voluntary agreement, affect a judgment creditor's lien on the buyer's interest.¹⁰⁷ Neither can parties to a mortgage foreclosure agree to cut off the statutory rights of redemption vested in third party judgment creditors.¹⁰⁸ As a general rule, contractual obligations are limited to the contracting parties and cannot be enforced against strangers to the contract.¹⁰⁹ Thus, the personal property and equitable title recitations in land trust agreements should not be binding on those who

101. See 27 AM. JUR. 2D *Equitable Conversion* § 3 (1966); 18 C.J.S. *Conversion* § 7 (1939).

102. See *Bennett v. Bennett*, 282 Ill. 266, 118 N.E. 391 (1918).

103. *Durham v. Heaton*, 38 Ill. 264, 275 (1862); *Cochran v. Cutler*, 39 Ill. App. 3d 602, 609, 350 N.E.2d 59, 64 (2d Dist. 1976).

104. In *Chicago Title* the court stated that, "[I]t has frequently been held that where a trust accomplished an equitable conversion of land, a judgment against a beneficiary of the proceeds of such conversion was not a lien on the land." 300 Ill. App. at 338, 20 N.E.2d at 996. The cases cited by the court involved multiple beneficiaries of wills and trusts. The equitable reason why a judgment lien should not attach in such cases is that if a judgment creditor of only one of several beneficiaries of a will or trust were to levy execution and force partition, thus blocking a sale by the executor or trustee, the other innocent beneficiaries would suffer a loss. See *Robison v. Botkin*, 181 Ill. 182, 54 N.E. 915 (1899); *Baker v. Copenbarger*, 15 Ill. 103 (1853). *Chicago Title*, however, involved a sole beneficiary. Moreover, the equitable considerations underlying this rule are absent when multiple land trust beneficiaries voluntarily set up the land trust for their own benefit. They can protect their property against the financial problems of one beneficiary by forming a partnership or by agreeing not to partition.

105. *Chicago Title*, 300 Ill. App. at 336, 20 N.E.2d at 995.

106. 73 AM. JUR. 2D *Statutes* § 252 (1974).

107. *Gorham v. Farson*, 119 Ill. 425, 10 N.E. 1 (1887); cf. *Cochran v. Cutler*, 39 Ill. App. 3d 602, 350 N.E.2d 59 (2d Dist. 1972) (purchaser-debtor may not defeat judgment lien by conveying property to third party).

108. See *Williams v. Williston*, 315 Ill. 178, 146 N.E. 143 (1924).

109. See 17 AM. JUR. 2D *Contracts* § 294 (1964); 17A C.J.S. *Contracts* § 520 (1963). "A contract which is personal in its character and effect will not bind third persons unless they become parties thereto by express or implied assumption of its obligations." 12A ILLINOIS LAW AND PRACTICE *Contracts* § 281 (1983).

are not claiming through the trust agreement or through the parties to it.

Public policy favors satisfaction of judgments and opposes fraudulent conveyances. Thus, the agreement between beneficiary and trustee to classify real estate as personal property should not be enforced by the courts when a violation of public policy would result.¹¹⁰ Since the mid-eighteenth century, courts have stressed that legal fictions should be limited to situations in which they serve the interest of justice and should not be permitted to work a wrong or injury.¹¹¹ Fictions "are not allowed to obscure the facts, when the facts become important," and "when logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way."¹¹²

b. *Impact of Chicago Title*

The *Chicago Title* court stopped short of deciding whether the beneficial interest was an interest in real estate for purposes of the judgment lien statute as distinct from the Statute of Uses. Problems thus arose in subsequent interpretations of lien statutes. For example, the federal statute providing for a lien against assets of delinquent taxpayers states that such liens attach to "all property and rights to property, whether real or personal."¹¹³ In *Chicago Federal Savings & Loan Association v. Cacciatore*,¹¹⁴ the appellate court held that such liens do not attach to land trust beneficial interests because such interests are not property interests per se.¹¹⁵ Citing *Chicago Title*, the court added, in dicta, that "a judgment against a land trust beneficiary did not constitute a lien against the real estate."¹¹⁶ The court further stated that "[p]urchasers and lenders . . . were repeatedly assured by courts of review that the trust beneficiaries had no interest in real estate, and that even so strong a charge as a judgment lien against a trust beneficiary was, therefore, no encumbrance against the real estate title."¹¹⁷

Even though on appeal the supreme court stated that the beneficial in-

110. See H. KENOE, *supra* note 1, § 5.34, at 139.

111. See *United States v. 1960 Bags of Coffee*, 12 U.S. 398, 415 (1814); *Johnson v. Smith*, 97 Eng. Rep. 654 (1760).

112. See *Blackstone v. Miller*, 188 U.S. 189, 204, 206 (1903).

113. 26 U.S.C.A. § 6321 (1954 & Supp. 1983-1984).

114. 33 Ill. App. 2d 131, 178 N.E.2d 888 (1st Dist. 1961).

115. *Id.* at 139, 178 N.E.2d at 893. *But cf.* *Southwest Fed. Sav. & Loan Ass'n v. Cosmopolitan Nat'l Bank*, 23 Ill. App. 2d 174, 161 N.E.2d 697 (1st Dist. 1959) (tax lien attaches to land trust beneficial interest). The *Cacciatore* appellate court's position was rejected by the Illinois Supreme Court, which stated that the beneficial interest (the power of direction) was a property right or interest to which the tax lien attached. *Chicago Fed. Sav. & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 544-45, 185 N.E.2d 670, 675 (1962). The decision of the appellate court, however, was affirmed on a substantially different ground—that the subsequent mortgagee claiming priority over the tax lien was a bona fide purchaser of the legal title interest without notice of the tax lien against the equitable interest of the beneficiary, and that the subsequent mortgagee had no duty to inquire into the propriety of the trustee's conveyance. *Id.* at 546-48, 185 N.E.2d at 675-76.

116. *Cacciatore*, 33 Ill. App. 2d at 139, 178 N.E.2d at 893.

117. *Id.* at 140, 178 N.E.2d at 893.

terest was subject to the tax lien, nonetheless it stated that "[t]he basic question here is not . . . whether the lien of the government attaches to the real estate—concededly, it does not."¹¹⁸ The court elaborated:

Both the trust agreement and the deed to the trustee contain clauses used for many years in the creation of an Illinois land trust. We have recognized the validity of such a procedure to place in the trustee the full, complete and exclusive title to the real estate, both legal and equitable. The trust here is an active trust, and Cacciatore's beneficial interest is personal property by the terms of the recorded trust deed, the trust agreement itself, and by settled Illinois law.¹¹⁹

The *Cacciatore* court, however, like the *Chicago Title* court, stopped short of specifically holding that a judgment lien does not attach to a land trust beneficial interest, as distinct from the real estate title in the hands of the trustee.

In a 1966 decision, *Sterling Savings & Loan Association v. Schultz*,¹²⁰ the appellate court took the final step and, relying primarily on *Chicago Title* and *Cacciatore* (appellate decision), held squarely that a judgment lien does not reach the beneficiary's interest in a land trust:

Since the only interest of a beneficiary under a land trust is considered to be personal property, a judgment cannot attach to such interest. The Illinois Statute relating to judgments against real estate specifically states that a judgment is a lien on real estate. It makes no mention of personal property, nor of the interest of a beneficiary under a land trust.¹²¹

A definitive decision as to whether a judgment lien attaches to a land trust beneficial interest remains to be made by the Illinois Supreme Court.¹²² Based upon law, logic, and sound public policy, the supreme court should disregard the lower court opinions on the subject. The beneficiary has the

118. *Cacciatore*, 25 Ill. 2d at 544, 185 N.E.2d at 674.

119. *Id.* at 543, 185 N.E.2d at 674.

120. 71 Ill. App. 2d 94, 218 N.E.2d 53 (1st Dist. 1966).

121. *Id.* at 107, 218 N.E.2d at 60.

122. *Chicago Title* and *Cacciatore* (appellate decision) were also relied upon by the appellate court to hold that a lien under the Public Aid Code upon "all legal and equitable interests of recipients in real property," ILL. REV. STAT. ch. 23, § 3-10 (1983), did not reach land trust real estate. *Nelson v. Folegstrom*, 5 Ill. App. 3d 804, 806, 284 N.E.2d 339, 341 (3d Dist. 1972). *Sterling* was cited and followed in *First Fed. Sav. & Loan Ass'n v. Pogue*, 72 Ill. App. 3d 54, 389 N.E.2d 652 (2d Dist. 1979) (judgment lien does not attach to beneficial interest). See also *Melrose Park Nat'l Bank v. Melrose Park Nat'l Bank*, 123 Ill. App. 3d 282, 462 N.E.2d 741 (1st Dist. 1984) (assignment of beneficial interest of land trust as security for a loan creates a personal property security interest and not an equitable mortgage so that judgment lien does not attach).

On the other hand, two earlier appellate court decisions assumed, without discussion, that beneficial interests were subject to judgment liens. See *Southwest Fed. Sav. & Loan Ass'n v. Cosmopolitan Bank*, 23 Ill. App. 2d 174, 161 N.E.2d 697 (1st Dist. 1959); *Johnson v. Watson*, 309 Ill. App. 440, 33 N.E.2d 130 (1st Dist. 1941) (abstract opinion).

absolute right to manage, possess, and control the land trust property.¹²³ Furthermore, he has the absolute power and right to direct the trustee to convey or mortgage the title to the property to anyone, including himself, at any time, during the life of the trust. The trustee in turn has an absolute obligation to comply with the beneficiary's direction.¹²⁴ As noted earlier, this arrangement gives the beneficiary equitable title to the real estate.¹²⁵ Certainly this equitable title is sufficient to qualify as a right to, or interest in, the real estate for the purposes of the judgment lien statute.

An unsecured creditor who asserts a judgment lien against a land trust beneficial interest is a third party who does not assert his claims against the property either through the trust agreement or through a party who is bound by its terms. Such a creditor, therefore, should not be bound by the agreement to classify the beneficiary's interest as personal property. Nor should the creditor be otherwise estopped from asserting that the beneficiary has a real estate interest. Because the judgment lien statute specifically includes equitable rights and interests, the lack of legal title in the beneficiary should be irrelevant.

Contractual Powers and Rights of the Beneficiary

At one time, the Illinois courts took the position that land trust beneficiaries could not make a contract to convey title or a lease because they had only a personal property interest and did not have legal title.¹²⁶ This broad doc-

123. Possession of real estate is an "interest in land" for purposes of the Statute of Frauds. See *Catlett v. Dougherty*, 21 Ill. App. 116 (3d Dist. 1886). The right to real estate rentals is an interest in real estate for purposes of the Recording Act. See *Kahn v. Deerpark Inv. Co.*, 115 Ill. App. 2d 121, 253 N.E.2d 121 (1st Dist. 1969). "[O]ne who has an unrestricted right to the use and enjoyment of real estate has the estate itself." *Garwood v. Garwood*, 244 Ill. 580, 587, 91 N.E. 672, 675 (1910). Land trust beneficiaries have all of these rights *Robinson v. Chicago Nat'l Bank*, 32 Ill. App. 2d 55, 176 N.E.2d 659 (1st Dist. 1961).

124. The beneficiary has "control of the selling" of the trust real estate. See *First Nat'l Bank v. Oldenburg*, 101 Ill. App. 3d 283, 427 N.E.2d 1312 (2d Dist. 1981); *Lampinen v. Hicks*, 73 Ill. App. 3d 376, 391 N.E.2d 1105 (2d Dist. 1979); *Madigan v. Buehr*, 125 Ill. App. 2d 8, 260 N.E.2d 431 (1st Dist. 1970). According to the Illinois legislature, "the legislature recognized that the direction and control of the real estate was in the hands of the beneficiaries because the trustee acted solely as holder of the legal title and was subject at all times to the direction and control of the beneficiaries." ILL. REV. STAT. ch. 148, § 81(1)(a)(3) (1983). The courts have specifically held that the power of direction in a land trust is a property interest. See *Kavanaugh v. Estate*, 86 Ill. App. 3d 33, 407 N.E.2d 856 (1st Dist. 1980); *Favata v. Favata*, 74 Ill. App. 3d 979, 394 N.E.2d 443 (1st Dist. 1979). Since it is the power to direct conveyances of real estate, it follows that it is a property interest in real estate.

125. See *supra* note 65 and accompanying text.

126. See, e.g., *Marshall Sav. & Loan Ass'n v. Chicago Nat'l Bank*, 56 Ill. App. 2d 372, 379, 206 N.E.2d 117, 120 (2d Dist. 1965) (beneficiary cannot contract to convey title); *Koehler v. Southmoor Bank and Trust Co.*, 40 Ill. App. 2d 195, 200-01, 189 N.E.2d 22, 24-25 (1st Dist. 1963) (beneficiary denied status of lessor on lease executed by trustee); *Schneider v. Pioneer Trust & Sav. Bank*, 26 Ill. App. 2d 463, 466, 168 N.E.2d 808, 809 (1st Dist. 1960) (beneficiary cannot contract to convey title); *Liberty Nat'l Bank v. Kosterlitz*, 329 Ill. App. 244, 246-47, 67 N.E.2d 876, 877 (1st Dist. 1946) (land trust beneficiary could not be lessor).

trine, however, has been steadily eroded.¹²⁷ In *Madigan v. Buehr*,¹²⁸ for example, the court ruled that the beneficiary could lawfully contract to sell the real estate, but could not represent herself as the owner with power to convey title.¹²⁹ The court recited the personal property fiction as support for the proposition that the beneficiary was not the owner of the legal title and, therefore, only the trustee could execute a contract in that capacity.¹³⁰

Several appellate court decisions have cited the personal property fiction to emphasize that the beneficiary, having no title, cannot contract, represent, or otherwise act in the name of, or on behalf of, the legal titleholding trustee.¹³¹ The problems posed in these cases would have been better resolved

127. See, e.g., *Madigan v. Buehr*, 125 Ill. App. 2d 8, 260 N.E.2d 431 (1st Dist. 1970) (beneficiary can contract to sell real estate); *Klein v. Ickovitz*, 121 Ill. App. 2d 191, 257 N.E.2d 187 (1st Dist. 1970) (approved beneficiary leases); *Keessen v. Zarattini*, 119 Ill. App. 2d 284, 256 N.E.2d 377 (1st Dist. 1969) (beneficiary did not need title to contract for an easement).

128. 125 Ill. App. 2d 8, 260 N.E.2d 431 (1st Dist. 1970).

129. *Id.* at 16-17, 260 N.E.2d at 434-35.

130. *Id.* at 11-12, 260 N.E.2d at 432-33. The *Madigan* court stated:

[T]he nature of the land trust is such that, if the trust is to be preserved, the powers of the beneficiary and the trustee must be kept distinct. In negotiating for the sale of trust property, and in the contract of sale or articles of agreement, the beneficiary cannot . . . deal with the property as if no trust existed.

Id. at 16, 260 N.E.2d at 435. *But cf.* *Lampinen v. Hicks*, 73 Ill. App. 3d 376, 391 N.E.2d 1105 (2d Dist. 1979) (contract upheld because court refused to distinguish between a seller's legal capability to sell property to which he does not presently have title and a land trust beneficiary's capacity to direct his trustee to transfer the title). The *Lampinen* court criticized the *Madigan* decision, stating that "[i]t may well be that the time has come to void or avoid land trusts in Illinois." *Lampinen*, 73 Ill. App. 3d at 379, 391 N.E.2d at 1107. In *Favata v. Favata*, 74 Ill. App. 3d 979, 394 N.E.2d 443 (1st Dist. 1979), a land trust settlor-beneficiary had amended his trust agreement to direct the trustee that, upon his death, the precise "real estate" that was held in the trust should go to his son. A previous amendment had directed that his "interest under this trust" go to his daughter. The court ruled in favor of the daughter, reasoning that since the original trust agreement provided that the beneficiary's interest was personal property, the trustee was not bound by any subsequent amendment which referred to the beneficiary's interest as real estate. As set forth in a strong dissent by Justice McGlooin, the court erred in its literal interpretation of the beneficiary's language. There could have been absolutely no doubt in the mind of the trustee as to the intent of the settlor.

131. See, e.g., *Kurek v. State Oil Co.*, 98 Ill. App. 3d 6, 8, 424 N.E.2d 56, 58 (1st Dist. 1981) (notice of intent to exercise option to extend lease must be given to trustee and such notice to beneficiary held ineffective); *Seaberg v. American Nat'l Bank & Trust Co.*, 35 Ill. App. 3d 1065, 1069-71, 342 N.E.2d 751, 754-55 (1st Dist. 1976) (lease executed by beneficiary acting as authorized agent of trustee held invalid); *Feinberg v. Great Atlantic & Pacific Tea Co.*, 131 Ill. App. 2d 1087, 1089-90, 266 N.E.2d 401, 403-04 (1st Dist. 1970) (beneficiary could not act as agent of the trustee to execute a binding lease which designated the land trustee as lessor); *Schneider v. Pioneer Trust & Sav. Bank*, 26 Ill. App. 2d 463, 466, 168 N.E.2d 808, 809 (1st Dist. 1960) (when an offer to purchase real estate is directed to the trustee, the beneficiary cannot accept it). *But see Seaberg*, 35 Ill. App. 3d at 1074, 342 N.E.2d at 757 (Simon, J., concurring) (concurring opinion pointed out that the majority opinion shows the "artificialities" needed to handle the land trust beneficiary/trustee relationship in Illinois). The rationale of *Schneider* was mentioned in *First Nat'l Bank v. Oldenburg*, 101 Ill. App. 3d 283, 288, 427 N.E.2d 1312, 1316 (2d Dist. 1981), but was distinguished on the ground that the offerors in *Oldenburg* knew that they were dealing with the beneficiaries.

by recognizing that, whenever the trustee contracts, it is contracting at the direction of the beneficiary and, therefore, is the agent of the beneficiary.¹³² It follows that the beneficiary should be able to contract and otherwise act in the name of his trustee.

Regarding a beneficiary's standing to sue, the Illinois courts have held that since the beneficiary has no title and only a personal property interest, he has no standing to sue to enforce a lease¹³³ or to revoke a plat of dedication for highway purposes.¹³⁴ In a more recent case, however, the court held that a land trust beneficiary is considered to be an "owner" of or to have an "interest" in real estate that is being condemned, therefore, entitling him to intervene in the condemnation litigation affecting his property.¹³⁵ As with contract questions, recognition that the trustee is the agent of the beneficiary should lead to a decision allowing the beneficiary to sue in the trustee's name. Alternatively, the beneficiary could assert his position as a third-party beneficiary of the trustee's contract, with standing to sue for its breach.

Collateral Assignments of Beneficial Interests

The Illinois Supreme Court applied the land trust personal property fiction to collateral assignments in *Horney v. Hayes*.¹³⁶ In *Horney*, the plaintiff placed his apartment building in a land trust in November 1948. The trust agreement contained the usual representations that the beneficiary's interest was personal property and that the beneficiary had no legal or equitable title to the real estate. In April 1950, the plaintiff borrowed \$3000 from

132. See *Kessler v. Pioneer Bank*, 101 Ill. App. 3d 502, 428 N.E.2d 608 (1st Dist. 1981); *supra* notes 9-11 and accompanying text; see also *Okey, Inc. v. American Nat'l Bank & Trust Co.*, 96 Ill. App. 3d 987, 422 N.E.2d 221 (1st Dist. 1981) (payment of rent to beneficiary held effective to reinstate lessor's rights under the lease even though lease was executed by trustee); *Devon Bank v. Schlinder*, 72 Ill. App. 3d 147, 151-52, 390 N.E.2d 447, 450-51 (1st Dist. 1979) (court upheld contract to purchase land trust real estate which listed trustee as seller but was signed by beneficiaries). The rationale for the *Devon Bank* decision was as follows:

The defendants [contract purchasers] concede that the beneficiaries had the 'sole right of direction' under the terms of the underlying trust agreement. The Agreement itself clearly indicated that the plaintiff was the seller only in its capacity as the trustee of a particular trust and that the persons who signed the document were the beneficiaries of the same trust. . . . [A]lthough the plaintiff held the legal title, the beneficiaries, if they possessed the sole right of direction, had the power to bind both themselves and the trustee in an agreement such as the one before us. . . . The defendants do not argue that the entire contract was null and void because it was not signed by the plaintiff.

Id.

133. See *Jakovljevic v. Alvarez*, 113 Ill. App. 2d 302, 252 N.E.2d 60 (1st Dist. 1969) (beneficiary has no right to bring action when only the trustee is party to lease).

134. *Robinette v. Department of Pub. Works and Bldgs.*, 2 Ill. App. 3d 438, 276 N.E.2d 804 (2d Dist. 1971).

135. *Department of Conservation v. Franzen*, 43 Ill. App. 3d 374, 356 N.E.2d 1245 (2d Dist. 1976).

136. 11 Ill. 2d 178, 142 N.E.2d 94 (1957).

the defendant. As security for the loan, he assigned the beneficial interest in the land trust to the defendant, giving him the right to sell the interest at a private sale should the plaintiff default on the loan. The plaintiff defaulted and the defendant sold the beneficial interest. The plaintiff sued to set aside the sale and compel the defendant to initiate a judicial foreclosure, providing the plaintiff with the right to redeem.¹³⁷ The plaintiff asserted that the loan transaction amounted to a real estate mortgage and that under Illinois law, sale of the property must be by judicial foreclosure.¹³⁸ The court ruled that the defendant had sold only the beneficial interest, which was personal property and, therefore, that the sale of the certificate was not prohibited.¹³⁹

The result reached by the *Horney* court did not necessarily depend upon a finding that the beneficial interest of a land trust is personal property. Just as easily and perhaps more appropriately, it could have been upheld on principles of estoppel. The borrower represented to the lender that his interest was personal property. This representation induced the lender to make the loan because it gave him a more secure position than he would have had under the real estate mortgage laws. As the parties contracted with this understanding, the borrower should have been estopped from changing his position to the lender's detriment.¹⁴⁰ The *Horney* court noted that the land trust in question was not originally created as security for a debt and that the loan transaction occurred sixteen months after the creation of the trust,¹⁴¹ implying that the loan would have been subject to the mortgage laws had these factors not been present.¹⁴² Later decisions have been more explicit.¹⁴³

137. *Id.* at 180, 142 N.E.2d at 95. Illinois law gives a defendant six months to redeem property sold to satisfy a judgment. ILL. REV. STAT. ch. 110, § 12-122 (1983).

138. 11 Ill. 2d at 180, 142 N.E.2d at 95.

139. *Id.* at 183, 142 N.E.2d at 97.

140. See 31 C.J.S. *Estoppel* § 107 (1964) (theory of quasi-estoppel excuses the element of justifiable reliance). While *Illinois Trust Co. v. Bibo*, 328 Ill. 252, 159 N.E. 254 (1927), indicates that borrowers are not estopped from asserting mortgage foreclosure and redemption rights, *Horney* impliedly overrules that principle where a land trust was set up for a different purpose in advance of the loan and hence the representation was not required, induced, or solicited by the lender.

141. 11 Ill. 2d at 184, 142 N.E.2d at 97. The pledge of the beneficial interest "does not provide for sale of the real estate . . . nor was the trust itself created as security for a debt. The transaction between plaintiff and Hayes occurred subsequent to the creation of the trust, and concerned only the beneficial interest represented by the certificate." *Id.*

142. As one commentator warned,

Beneficial interest financing transactions should involve trusts that were created before the loan transaction was negotiated. Requiring the property to be placed in a land trust and its beneficial interest assigned as a condition to a loan may subject the lender to the possibility that the transaction will be held to be a mortgage and require foreclosure with statutory redemption rights attending it.

H. KENOE, *supra* note 1, § 5.34, at 141.

143. See, e.g., *Melrose Park Nat'l Bank v. Melrose Park Nat'l Bank*, 123 Ill. App. 3d 282, 462 N.E. 2d 741 (1st Dist 1984) (where parties to transaction do not intend that it be an equitable mortgage, it is not a mortgage); *Landino v. American Nat'l Bank*, 120 Ill. App. 3d 740, 458 N.E.2d 1070 (1983) (where creation of trust is purely for purpose of serving as security for

This interpretation, however, is widely ignored by lenders.¹⁴⁴

In *Levine v. Pascal*,¹⁴⁵ the appellate court held that because a land trust beneficial interest was personal property, a collateral assignment of the beneficial interest made to secure a loan was not exempt from the Uniform Commercial Code (UCC) requirement that a financing statement be filed with the Secretary of State.¹⁴⁶ As in *Horney*, the same result could have been reached by the *Levine* court using estoppel principles. The assignee stepped into the shoes of the beneficiary and, therefore, was bound by the recitations of the trust agreement. He should have been estopped from later asserting that the beneficial interest was real estate in order to defeat a judgment creditor who, in reliance on the UCC and on the personal property recitations, perfected a lien against the debtor's beneficial interests.

In much the same way that a beneficiary is bound by his representations that his interest is personalty, so also are his heirs and devisees. In a recent decision, the Illinois Supreme Court rejected the contention that a decedent's security assignment of the beneficial interest of property that was held in joint tenancy was an equitable real estate mortgage.¹⁴⁷ The court asserted

debt, transaction is equitable mortgage subject to right of redemption); *In re Farnik*, 17 Bankr. 856 (Bankr. N.D. Ill. 1982) (where creation of trust, borrowing of funds, and assignment of beneficial interest are one transaction, land trust may not be used to circumvent right of redemption); *Quinn v. Pullman Trust & Sav. Bank*, 98 Ill. App. 2d 402, 405, 240 N.E.2d 791, 793 (1st Dist. 1968) (assignment of beneficial interest of land trust as security for a loan will not constitute a real estate mortgage if the trust agreement itself contains no provision for the sale of the real estate corpus of the trust, and "where [the trust] is set up for purposes other than as security for a debt, where the pledge of the beneficial interest is subsequent to the creation of the trust, and where the pledge security transaction is of the trust beneficial interest only. . . ."). See generally Lindberg, *Assignments of Beneficial Interests in Illinois Land Trusts as Security for a Debt*, 70 ILL. B. J. 576 (1982) (discussing multiple aspects of beneficial land trust interests in Illinois). *But cf.* *First Fed. Sav. & Loan Ass'n v. Pogue*, 72 Ill. App. 3d 54, 389 N.E.2d 652 (2d Dist. 1979) (transactions did not amount to a mortgage when the loan was secured by a pledge of the beneficial interest made three days after creation of the land trust by the same bank that served as the land trustee).

144. A borrower recounted the following experience:

We recently were required to obtain a bank loan to get funds needed for our business. The bank made us put up our home as security for the loan. Originally, I thought we would be giving the bank a second mortgage, but it turned out that the papers we signed actually put title to the house in the bank's name instead of ours. It was explained to us that we were simply putting title into a land trust that was being established by us in the bank's trust department. We were told that we would be the beneficiaries of the trust, but that we were executing an assignment of this beneficial interest to the bank as security for the loan.

The loan officer said that this was a very common way for banks to make loans to business people. We needed the money so we signed whatever we had to sign to get it.

Chicago Sun-Times, Apr. 8, 1983, *Homelife*, at 29, col. 1.

145. 94 Ill. App. 2d 43, 236 N.E.2d 425 (1st Dist. 1968).

146. *Id.* at 52, 236 N.E.2d at 429. As a general rule, Illinois law usually exempts any interest in or lien upon real estate from the Uniform Commercial Code. ILL. REV. STAT. ch. 26, § 9-104(j) (1983).

147. *Estate of Alpert*, 95 Ill. 2d 377, 447 N.E.2d 796 (1983).

that the "trustee of an Illinois land trust has both legal and equitable title [and a] beneficiary's interest in an Illinois land trust is personal property and not real property."¹⁴⁸ This recitation of the personal property fiction can be interpreted as support for the proposition that, as against the lender, the decedent and those claiming under him are bound by the agreed characterization of the decedent's interest as personal property. Heirs and devisees are bound by representations of ancestors and testators that would have been binding on the latter during their lifetimes.¹⁴⁹

In situations where the secured assignment creditor is also the trustee of the land trust, the security interest is considered an interest in real estate which is exempt from the provisions of the UCC.¹⁵⁰ Furthermore, such a transaction is arguably equivalent to a real estate mortgage subject to foreclosure and redemption. In *Home Federal Savings & Loan Association v. Zarkin*,¹⁵¹ the court held that a land trust trustee had a high degree of fiduciary duty to its beneficiary, and therefore, was barred from purchasing the trust property at a foreclosure sale.¹⁵² It can be implied from *Zarkin* that the fiduciary duty may be violated when a trustee loans money to its beneficiary on terms that result in the beneficiary's loss of foreclosure and redemption rights. The fiduciary obligations of a trustee-lender should require, at the very least, an explicit disclosure to the borrower of the legal consequences of a beneficial interest assignment transaction.

Debtor and Tax Relief

Two areas in which the land trust personal property fiction have been greatly eroded are debtor relief and taxation. Under the Illinois Homestead Act, a debtor is exempt from the claims of his creditors to the extent of \$7500 in "the farm or lot of land and buildings thereon, . . . owned or rightly possessed by lease or otherwise."¹⁵³ This language was originally held to require a legal title interest; therefore, a land trust beneficiary's personal property interest did not qualify.¹⁵⁴ In 1981, however, the legislature amended the Homestead Act to extend the homestead exemption to homeowners whose property interest is "personal property."¹⁵⁵

A homestead exemption from property taxes extends to any person over sixty-five who is "an owner of record of a legal or equitable interest in

148. *Id.* at 382, 447 N.E.2d at 798.

149. See 31 C.J.S. *Estoppel* § 132 (1964); 18 ILLINOIS LAW AND PRACTICE *Estoppel* § 35 (1956).

150. See *Estate of McGaughey*, 60 App. 3d 150, 376 N.E.2d 259 (1st Dist. 1978).

151. 89 Ill. 2d 232, 432 N.E.2d 841 (1982).

152. The trustee-creditor argued unsuccessfully that since the land trust served only to hold title, the trustee had no fiduciary duty. *Id.* at 239, 432 N.E.2d at 845. *But see* H. KENOE, *supra* note 1, § 15.11, at 3.

153. ILL. REV. STAT. ch. 110, § 12-901 (1983).

154. See *Hutter v. Lake View Trust & Sav. Bank*, 54 Ill. App. 3d 653, 370 N.E.2d 47 (1st Dist. 1977); *Sterling Sav. & Loan Ass'n v. Schultz*, 71 Ill. App. 2d 94, 113, 218 N.E.2d 53, 63 (1st Dist. 1966).

155. ILL. REV. STAT. ch. 110, § 12-901 (1983).

[a] cooperative apartment building."¹⁵⁶ The statute has been liberally construed by the tax assessor; consequently, this statutory provision has been honored in favor of beneficiary co-owners of a cooperative apartment building, title to which was in a land trust.¹⁵⁷

A land trust beneficiary is considered an "owner" or person "interested" or "having an interest in" real estate for purposes of redemption at state¹⁵⁸ and federal¹⁵⁹ property tax sales. One court which took this position, however, asserted that nonetheless the beneficiary does not have a legal or equitable interest in the real estate.¹⁶⁰

Despite his possession of an interest that is labeled personalty, a beneficiary also has the status of a "mortgagor" of real estate for the purpose of curing a default on a legal title mortgage executed by the trustee.¹⁶¹ Additionally, a land trust beneficiary is an "equitable owner of real property" eligible for relief under Chapter 12 of the Bankruptcy Act.¹⁶²

Property Tax Liability

In 1979, the Illinois Supreme Court held that land trust beneficiaries were real estate "owners" for real estate tax purposes. In *People v. Chicago Title & Trust Co.*,¹⁶³ the state sued to recover unpaid real estate taxes on land held in land trusts. The defendants were land trust beneficiaries as well as banks and trust companies in both their corporate and their land trust trustee capacities. The supreme court held the beneficiaries liable for the taxes.¹⁶⁴ The court cogently analyzed the land trust relationships as follows:

In a land trust the legal and equitable title lies with the trustee and the beneficiary retains what is referred to as a personal property interest. It is important to note, however, that though referred to as personal property, most of the usual attributes of real property ownership are retained by the beneficiary under the trust agreement. . . . The term "owner" as applied to land, has no fixed meaning applicable under all circumstances and as to any and every enactment. It usually denotes a fee simple estate, but in Illinois it may include "one who has the usufruct control or occupation of land with a claim of ownership, whether his interest be an absolute fee or less estate." Title to property does not necessarily involve ownership of the property. Title refers only to a legal relationship to the land, while ownership is comparable to control and denotes an interest in the real estate other than that of holding title thereto. . . .

156. *Id.* ch. 120, § 500.23-1.

157. See *Brandzel v. Koretzky*, 66 Ill. App. 3d 717, 384 N.E.2d 128 (1st Dist. 1978) (personal property recitations were ignored).

158. See *In re Application of County Treasurer (Spachman v. Overton)*, 16 Ill. App. 3d 385, 306 N.E.2d 743 (2d Dist. 1974).

159. See *DiFoggio v. United States*, 484 F. Supp. 233 (N.D. Ill. 1979).

160. See *County Treasurer*, 16 Ill. App. 3d at 389-90, 306 N.E.2d at 748.

161. See *Evergreen Sav. v. Barnard*, 65 Ill. App. 3d 492, 382 N.E.2d 467 (1st Dist. 1978).

162. See *Matter of Gladstone Glen*, 628 F.2d 1015 (7th Cir. 1980) (quoting *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 389 N.E.2d 540 (1979)).

163. 75 Ill. 2d 479, 389 N.E.2d 540 (1979).

164. *Id.* at 494, 389 N.E.2d at 546.

In examining a land trust it is apparent that true ownership lies with the beneficiaries though title lies with the trustee. The trustee derives all of his power from the beneficiary and acts solely on the beneficiary's behalf. The beneficiary may withdraw or modify the trustee's authority at any time. Indeed, there is not a single attribute of ownership, except title, which does not rest in the beneficiary. The rights of creation, modification, management, income and termination all belong to the beneficiary. In reality the transfer to the trustee is a formality involving a shifting of legal documents. The land trust, is, in fact, a fiction which has become entrenched in the law of this State and accepted as a useful instrument in the handling of real estate transactions. Outside of relationships *based on legal title*, the trustee's title has little significance.¹⁶⁵

The court reasoned that the purpose of the revenue act was the collection of taxes for benefits received, and thus concluded that imposition of tax liability on the beneficiary, who received all the benefits of land ownership, was appropriate.¹⁶⁶

Due on Sale Clauses

Many mortgages contain "due on sale" clauses providing that the entire amount remaining on the mortgage will be due if the mortgagor conveys, or agrees to convey, the property. In a recent case, *Wachta v. First Federal Savings & Loan Association*,¹⁶⁷ the mortgage contained a due on sale clause that referred to conveyance of "title to the real estate." The land trust beneficiary subject to this mortgage later assigned the beneficial interest. The lender could not enforce the due on sale clause against the beneficiary because, according to the court, an assignment of the beneficial interest was not a conveyance of title to the real estate.¹⁶⁸ Although the court recited the personal property and equitable title fictions,¹⁶⁹ the underlying basis for its decision was that the due on sale clause should be strictly construed against the party who drew it up—the lender.¹⁷⁰ Strictly construing the due on sale clause, the term "title" was thus limited to its ordinary meaning of legal title.

A slightly different situation was considered in *Damen Savings and Loan Association v. Heritage Standard Bank and Trust Co.*¹⁷¹ In that case, conveyance of the legal title into a land trust occurred after the mortgage was closed. This action was held sufficient to trigger a due on sale clause aimed at both sale of the real estate and transfer of the title.¹⁷² The court did not regard the due on sale clause, as construed, to be an unreasonable restraint on alienation, even in light of the fact that the mortgagor would

165. *Id.* at 488-89, 492-93, 389 N.E.2d at 543-45.

166. *Id.* at 493, 389 N.E.2d at 546.

167. 103 Ill. App. 3d 174, 430 N.E.2d 708 (2d Dist. 1981).

168. *Id.* at 178, 430 N.E.2d at 712.

169. *Id.* at 181, 430 N.E.2d at 714.

170. *Id.* at 183, 430 N.E.2d at 716.

171. 103 Ill. App. 3d 301, 431 N.E.2d 34 (2d Dist. 1982).

172. *Id.* at 304, 431 N.E.2d at 36.

continue to hold the beneficial interest.¹⁷³ The *Damen* court reasoned that the transfer of the title into the trust potentially impaired the lender's security to the same extent as a transfer of the title to a third party. This was so because the beneficial interest could subsequently be transferred without triggering the due on sale clause. The clause would not be triggered because such a transfer of the beneficial interest would be neither a transfer of title nor a sale of the real estate.¹⁷⁴ The court added that, even if a subsequent transfer of a beneficial interest triggered the clause, the lender would receive no notice because transfers of the beneficial interest are not recorded, and the clause would, therefore, be useless.¹⁷⁵

Legislative Enactments

The Illinois legislature has enacted several statutes which recite or otherwise impact on the personal property fiction of land trusts.¹⁷⁶ For example, in 1963, the legislature passed a statute which required disclosure of land trust beneficiaries to the building code enforcement authorities.¹⁷⁷ Looking beyond the personal property nature of a beneficiary's interest, this statute realistically defines trust beneficiaries as those who have "present use and enjoyment" of real property.¹⁷⁸ The Real Estate Transfer Tax Act,¹⁷⁹ enacted in 1967, describes a land trust trustee as "a mere repository of record legal title with a duty of conveying the real estate only when and if directed in writing by the . . . beneficiaries. . . ." ¹⁸⁰ The implication of this language is that the beneficiaries have a substantial interest in the real estate.

An Illinois statute enacted in 1969 requires disclosure of "the identity of every owner and beneficiary having any interest, real or personal, in such property" sold or leased to government agencies.¹⁸¹ In the authors' view, this language should not be interpreted as giving legislative credence to the personal property fiction. Rather, at most, the statute merely acknowledges the existence of trust agreements which assert a personal property interest in the beneficiaries.

Another statute enacted in 1969 requires disclosure of the beneficiary when land trust property is sold under real estate installment sales contracts.¹⁸²

173. *Id.*

174. *Id.* *But cf.* *Williams v. First Fed. Sav. & Loan Ass'n*, 651 F.2d 910 (4th Cir. 1981) (suggests an opposite result under such circumstances).

175. *Damen*, 103 Ill. App. at 304, 431 N.E.2d at 36.

176. *See generally* Note, *Secret No More*, *supra* note 1 (discussion of bills introduced into Illinois General Assembly to address problems of land trust secrecy).

177. ILL. REV. STAT. ch. 80, § 81(1) (1983).

178. *Id.* In part, the statute reads: "A trustee who pursuant to a trust instrument has title to but no beneficial interest in real property . . . shall disclose the identity of every owner and beneficiary . . . to the department. . . ." *Id.*

179. *Id.* ch. 120, § 1003 .

180. *Id.*

181. *Id.* ch. 102, § 3.1.

182. *Id.* ch. 29, § 8.32.

The statute defines a land trust as "any arrangement under which the title . . . to real property, is held by a trustee and the interest of the beneficiary is personal property [and] the beneficiary . . . has the exclusive power to direct or control the trustee."¹⁸³ This statute has been cited as a legislative recognition of the personal property fiction.¹⁸⁴ It could be construed just as easily, however, as merely describing land trusts in the terms that are customarily used in land trust agreements, rather than as legislatively defining the beneficial interest as personal property. Similarly descriptive sections, also subject to the same interpretation, were included in a 1973 law that requires disclosure of land trust beneficiaries by anyone applying for a government license or permit relating to the trust real estate,¹⁸⁵ and in a 1981 amendment to the Uniform Gifts to Minors Act.¹⁸⁶

A 1981 amendment to the Homestead Act that defines a homestead estate as including "personal property" occupied as a residence¹⁸⁷ made no specific reference to land trusts. The amendment could be interpreted as encompassing homesteads which the owner labels as personal property, whether land trust beneficial interests or mobile homes, without regard to whether the homestead is, in fact, personal property.

In August 1982, legislation was enacted which allowed land trust trustees to loan money to their beneficiaries while retaining the same rights on default as any other secured creditor.¹⁸⁸ This was a legislative reaction to *Home Federal Savings & Loan v. Zarkin*,¹⁸⁹ which held that a trustee's fiduciary obligations barred it from purchasing its own trust property at a foreclosure sale.¹⁹⁰ The following language was included in the preamble to the legislation:

Disclosure [of owners of beneficial interests] was required by this legislature in particular instances because the legislature recognized that the direction and control of the real estate was in the hands of the beneficiaries because the trustee acted solely as holder of the legal title and was subject at all times to the direction and control of the beneficiaries. . . .¹⁹¹

This language constitutes a legislative recognition that the beneficial interest in a land trust is an equitable right to, and interest in, real estate. Although the statute states further that "'land trust' means any express

183. *Id.* § 8.31.

184. *See, e.g.*, *DiFoggio v. United States*, 484 F. Supp. 233 (N.D. Ill. 1979); *First Nat'l Bank v. Oldenburg*, 101 Ill. App. 3d 283, 427 N.E.2d 1312 (2d Dist. 1981); *In re Application of County Treasurer (Spachman v. Overton)*, 16 Ill. App. 3d 385, 306 N.E.2d 743 (2d Dist. 1974).

185. ILL. REV. STAT. ch. 148, §§ 71-73 (1983); *see Note, Secret No More, supra* note 1, at 512-13.

186. ILL. REV. STAT. ch. 110 ½, § 201(1)(d) (1983).

187. *Id.* ch. 52, § 1.

188. *Id.* ch. 148, §§ 81-84.

189. 89 Ill. 2d 232, 432 N.E.2d 841 (1982).

190. *Id.* at 240, 432 N.E.2d at 846; *see supra* text accompanying notes 151 & 152. The Illinois Supreme Court has since held that the retroactive application of this statute is unconstitutional. *Sanelli v. Glenview State Bank*, No. 57935 (Ill. App. Ct. April 27, 1984).

191. ILL. REV. STAT. ch. 148, § 81(1)(a)(3) (1983).

agreement or arrangement . . . under which the interest of the beneficiary is personal property only,"¹⁹² the legislative purpose in using such language, as in the earlier statutes previously discussed, could be construed as describing a typical land trust agreement which is subject to the act, rather than as codifying the legal characteristics of a beneficial interest. The authors conclude that while the Illinois legislature has recognized the existence of land trust agreements in which the interest of the beneficiary is described as personal property, it has not legislatively defined such interests as personal property.¹⁹³

Current Status of the Personal Property Fiction: Summation

The land trust personal property fiction seems to be losing judicial support, especially when the fiction is challenged by third persons whose claims against beneficiaries are based on statutory rights against real estate owners. After the supreme court's frank discussion of a land trust arrangement in *People v. Chicago Title & Trust Co.*,¹⁹⁴ very little vitality remains in the personal property fiction under such circumstances. In addition to property tax liability, the courts have held that land trust beneficiaries are the owners of real estate or have an interest in real estate for determining dram shop liability,¹⁹⁵ mechanics lien liability,¹⁹⁶ and compliance with the Recording Act.¹⁹⁷ It no longer seems tenable to argue that land trust beneficial interests in Illinois are not interests in real estate with respect to third parties such as judgment creditors who claim statutory rights based on such interests.¹⁹⁸

Even in situations where the beneficiary has claimed a benefit intended for real estate owners, recent decisions have allowed the beneficiary to contradict his prior assertion of a personal property interest and thereby escape the fiction.¹⁹⁹ Moreover, the courts have routinely ignored the personal property fiction in land trust cases when it has not been a direct issue in the litigation.²⁰⁰

192. *Id.* § 82(2)(a).

193. For an example of a statute which for all purposes defines a beneficial interest as personal property, see FLA. STAT. § 689.071(4) (Supp. 1983).

194. See *supra* text accompanying note 165.

195. *Robinson v. Walker*, 63 Ill. App. 2d 204, 211 N.E.2d 488 (1st Dist. 1965).

196. *Dunlop v. McAtee*, 31 Ill. App. 3d 56, 333 N.E.2d 76 (2d Dist. 1975). The court stated, "The Illinois courts have repeatedly and consistently held that a holder of an equitable interest in the land, including a beneficiary under a land trust, is an 'owner' within the meaning of the Illinois Mechanics Lien Act, and we again so hold." *Id.* at 59, 333 N.E.2d at 78.

197. *Bezin v. Ginsburg*, 59 Ill. App. 3d 429, 438, 375 N.E.2d 468, 476 (1st Dist. 1978).

198. Other examples not yet definitively litigated include substituted service of process on a nonresident defendant owning the beneficial interest to land trust real estate in Illinois, see *Gordon v. Gordon*, 6 Ill. 2d 572, 129 N.E.2d 706 (1955), and the prohibition against alien ownership of Illinois real estate for a period of more than six years, ILL. REV. STAT. ch. 6, § 2 (1983). See *infra* note 244 and accompanying text.

199. See *supra* text accompanying notes 153-62.

200. See, e.g., *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975) ("properties owned by various land trusts in which the defendant . . . had an equitable interest as beneficiary"); *People v. Savaiano*, 66 Ill. 2d 7, 359 N.E.2d 475 (1976) (defendant beneficiary "purchased

Furthermore, many benefits of land trusts are not dependent upon the conversion of the beneficiary's real property interest to personal property. The simplicity of beneficial interest assignments is not dependent upon the legal nature of the beneficial interest as personal property, but upon the less formal nature of the instrument and the continuity of record title in the trustee. Real estate transfer taxes are imposed only on deeds,²⁰¹ and presumably would not attach to beneficial interest transfers, even if such interests were considered real estate. The ease of title conveyance and the insulation of the title from liens, claims, and charges against individual beneficiaries do not stem from the characterization of the beneficiary's interests as personal property, but rather from the separation of the beneficial interest from the legal title; from the fact that the beneficial interest is not recorded;²⁰² and from the placement of the legal title in the name of a trustee who has full power to make title conveyances upon direction of less than all of the beneficiaries. Avoidance of double taxation is related not to the nature of the property interest, but to the nature of the ownership entity. Protection against wrongful conveyances depends upon the trustee's legal title to the assets, rather than their real or personal characteristics. Immunity of land trust beneficiaries from partition results either from a partnership relation or from an agreement not to partition, not from the personal property representations.²⁰³ The utility of a trust to avoid probate, whether domestic or ancillary, does not depend upon a conversion of beneficial interests from real to personal property as long as the trust agreement designates a remainder beneficiary. The trustee adjusts his records upon satisfactory proof of death without the intervention of probate.²⁰⁴ Also, since the abolition of dower, spousal rights in decedents' estates are not affected by the nature of the property interest as real or personal. In cases regarding gift tax liability on transfers of fractional beneficial interests, the personal property question is once again not an issue. Instead, the issue is whether the donee receives a present or future interest.²⁰⁵

20 acres of land," had "ownership of realty" . . . "owned land" . . . had an "interest in the land"); *Lake City Corp. v. Michigan Ave. Nat'l Bank*, 33 Ill. App. 3d 100, 337 N.E.2d 251 (1st Dist. 1975) (a beneficiary "filed suit, asking for the return of its real estate"); *Ellis Realty v. Chapelski*, 28 Ill. App. 3d 1008, 329 N.E.2d 370 (1st Dist. 1975) (beneficiary had "equitable ownership" of the property); *City of Chicago v. Hart Bldg. Corp.*, 116 Ill. App. 2d 39, 253 N.E.2d 496 (1st Dist. 1969) (defendant beneficiary was "the real title holder" and had "ownership in the properties").

201. See *supra* note 37.

202. See, e.g., *Chicago Fed. Sav. & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 185 N.E.2d 670 (1962) (federal tax lien which attached to the beneficial interest of a land trust was destroyed by a subsequent legal title mortgage by the trustee to a bona fide purchaser who was without knowledge of the beneficiary's interest).

203. See *supra* notes 67-72 and accompanying text.

204. On the death of a life tenant, whether under a legal life estate or a trust, interest does not pass to his executor or administrator but goes directly to the remainderman. *Chicago Title v. Colby*, 297 Ill. App. 176, 17 N.E.2d 350 (1938); *Nott v. Heitman Trust*, 285 Ill. App. 450, 2 N.E.2d 143 (1936).

205. See *supra* note 46 and accompanying text.

The personal property fiction is also irrelevant to the making of mortgage loans that impose no personal liability on the borrower. Whether personal liability exists depends upon whether the parties contracted that there be such liability.²⁰⁶ In order, however, for a borrower to obtain a loan on real estate by giving up the traditional real estate mortgage rights of judicial foreclosure and redemption, it is essential that he assert a personal property interest in the security pledged.²⁰⁷

Immunity of land trust beneficial interests from judgment liens is a direct consequence of classifying the beneficial interest as personal property rather than as real estate. As discussed earlier, however, there is serious doubt about the soundness of the legal theories underlying the rule that land trust beneficial interests are personal property for purposes of the judgment lien statute; furthermore, this rule leads to results contrary to public policy.²⁰⁸

It thus appears that the land trust personal property fiction is of considerably less significance than is commonly assumed. If legislation were enacted that specified the circumstances under which real estate mortgages could be made without the rights of judicial foreclosure and redemption, the utility of the fiction in circumstances consistent with public policy would virtually disappear.

WHY NOT CHOOSE A LAND TRUST?

Disadvantages to Beneficiaries

The benefits of land trusts to real estate owners should be weighed both against the cost of legal and trustee fees incurred in the creation and administration of the trusts and against certain disadvantages of owning a beneficial interest. Some of these disadvantages are directly related to the fact that the beneficiary's interest is not recorded. For example, a beneficiary has no right to notice of a real estate tax deed proceeding.²⁰⁹ He is not considered a necessary party to a real estate mortgage foreclosure,²¹⁰ real estate condemnation suit,²¹¹ suit to quiet title,²¹² mechanics lien proceeding,²¹³

206. See *supra* note 47 and accompanying text.

207. See *supra* notes 140-53 and accompanying text.

208. See *supra* notes 77-125 and accompanying text.

209. See *First Lien Co. v. Marquette Nat'l Bank*, 56 Ill. 2d 132, 306 N.E.2d 23 (1973); *In re Application of County Treasurer (Winnetka Inv. Co. v. Fried)*, 113 Ill. App. 2d 50, 251 N.E.2d 757 (1st Dist. 1969).

210. See *Marshall v. Solomon*, 335 Ill. App. 302, 309, 81 N.E.2d 777, 781 (2d Dist. 1948).

211. See *Chicago Land Clearance Comm'n v. Darrow*, 12 Ill. 2d 365, 146 N.E.2d 1 (1957); *Chicago N. Sh. & M.R.R. v. Chicago Title & Trust Co.*, 328 Ill. 610, 160 N.E. 226 (1928); *Department of Conservation v. Franzen*, 43 Ill. App. 3d 374, 356 N.E.2d 1245 (2d Dist. 1976).

212. See *Crawford Realty & Dev. Corp. v. Woodlawn Trust & Sav. Bank*, 382 Ill. 354, 47 N.E.2d 81 (1943).

213. The sale of property to satisfy the lien is authorized under the Mechanics Lien Act, ILL. REV. STAT. ch. 82, § 14 (1983). Because the lien is directed at the title of the property, the beneficiary is not a necessary party to the litigation. *Lipavsky v. 16th St. Bldg. Corp.*, 267 Ill. App. 85, 89 (1st Dist. 1932); cf. *Case Int'l Co. v. American Nat'l Bank & Trust Co.*, 18 Ill. App. 3d 297, 309 N.E.2d 750 (1st Dist. 1974) (the trustee is a necessary party).

or partition action.²¹⁴ He also cannot avail himself of an "exculpatory clause" in favor of the lessor in a lease executed by the trustee at the beneficiary's direction.²¹⁵ Moreover, an undisclosed beneficiary is statutorily barred from the right to redeem at a tax sale.²¹⁶

In a number of instances, the intent of beneficiaries can be frustrated by procedural and technical errors despite the absence of any real ambiguity. In a will or testamentary direction to the trustee, for example, a beneficiary cannot refer to the beneficial interest as "real estate."²¹⁷ Nor can he accept an offer to purchase the property if the offer was directed to the trustee;²¹⁸ contract to sell the property as "owner" thereof;²¹⁹ execute a lease as "agent" of the trustee;²²⁰ or sue to enforce a lease executed by the trustee.²²¹

Under some circumstances, when the beneficial interest of a land trust of Illinois real estate is owned by a nonresident decedent, the beneficial interest may be subject to inheritance taxes both in the state of residence and in Illinois.²²² Also, the title of the assignee of a beneficial interest is subject to numerous infirmities and hazards that may be avoided by taking record title to the real estate. This is compounded by the fact that title insurance may not always be available to assignees of a beneficial interest.²²³

Finally, a potentially significant disadvantage is that standard land trust agreements contain sweeping exculpatory clauses that exempt the trustee from any liability arising out of the administration of the trust.²²⁴ If the courts were to uphold such clauses, the trustee could wrongfully dispose of the property, leaving the beneficiary with no recourse.

214. See *Kaiserman v. Ellenson*, 17 Ill. App. 3d 923, 308 N.E.2d 813 (4th Dist. 1974).

215. See *Koehler v. Southmoor Bank & Trust Co.*, 40 Ill. App. 2d 195, 201, 189 N.E.2d 22, 25 (1st Dist. 1963).

216. See ILL. REV. STAT. ch. 120, § 734 (1983). The statute states, "no redemption shall be held invalid by reason of the failure of the person redeeming to have an interest of record in the property redeemed, other than undisclosed beneficiaries of Illinois land trusts." *Id.*

217. *Favata v. Favata*, 74 Ill. App. 3d 979, 394 N.E.2d 443 (1st Dist. 1979).

218. *First Nat'l Bank v. Oldenburg*, 101 Ill. App. 3d 283, 427 N.E.2d 1312 (2d Dist. 1981); *Schneider v. Pioneer Trust & Sav. Bank*, 26 Ill. App. 2d 463, 168 N.E.2d 808 (1st Dist. 1960).

219. *Madigan v. Buehr*, 125 Ill. App. 2d 8, 260 N.E.2d 431 (1st Dist. 1970).

220. *Seaberg v. American Nat'l Bank & Trust Co.*, 35 Ill. App. 3d 1066, 342 N.E.2d 751 (1st Dist. 1976); *Feinberg v. Great Atl. & Pac. Tea Co.*, 131 Ill. App. 2d 1087, 266 N.E.2d 401 (1st Dist. 1970).

221. *Jakovljevic v. Alvarez*, 113 Ill. App. 2d 302, 252 N.E.2d 60 (1st Dist. 1969).

222. See H. KENOE, *supra* note 1, § 7.15, at 18.

223. See *id.* §§ 5.6, 5.7, 5.9, 5.45, 5.50.

224. A typical exculpatory clause follows:

It is further understood and agreed that neither _____ & Trust Co. of Chicago individually or as Trustee, nor its successor or successors in trust shall incur any personal liability or be subjected to any claim, judgment or decree for anything it or they or its or their agents or attorneys may do or omit to do in or about the said real estate or under the provisions of said deed or deeds in trust or this Trust Agreement, or any amendment thereof, or for injury to person or property happening in or about said real estate, any and all such liability being hereby expressly waived and released.

Disadvantages to the Public

The prevalence of secret land trusts makes it obvious that real estate owners find them useful and convenient. This does not mean, however, that secret ownership of real estate is socially appropriate or consistent with sound public policy. Although judicial commentary on either the benefits or detriments of land trust secrecy has been sparse,²²⁵ it is the authors' opinion that scrutiny of many of the alleged benefits of secret ownership reveals that those benefits, with the exception of financial privacy, are contrary to the public interest.

Landlords might better fulfill their obligations to tenants if tenants could contact them directly with grievances regarding rent increases, failure to maintain the building, and failure to provide utilities.²²⁶ If an owner is known to his tenants, he might take more pride in management and upkeep of the property he owns.²²⁷ Moreover, improved landlord-tenant communication might lessen the need for increased governmental regulation to vindicate tenants' rights.

Property owners may be less likely to violate building codes or zoning ordinances if they are under the direct scrutiny of the tenants, neighbors,

225. In *Lambos v. Lambos*, 9 Ill. App. 3d 530, 292 N.E.2d 587 (1st Dist. 1972), the appellate court found that the settlors had created the trust "so that with little inconvenience to them they could enjoy its proceeds during their lifetime. In fact, these are the advantages of an Illinois land trust." *Id.* at 534, 292 N.E.2d at 590. Presumably the court was talking about secrecy. See H. KENOE, *supra* note 1, § 3.2, at 5. In *Schneider v. Pioneer Trust & Sav. Bank*, 26 Ill. App. 2d 463, 466, 168 N.E.2d 808, 809 (1st Dist. 1960), the court noted that secrecy was an advantage and benefit to land trust beneficiaries. In *Hanley v. Kuser*, 61 Ill. 2d 452, 337 N.E.2d 1 (1975), the court stated:

There is no doubt that a trust is an artificial legal device by which some of the consequences that would ordinarily attach to the ownership of property by a natural person may be avoided. The objective . . . may be in part to conceal actual ownership, as in the case of the land trust.

Id. at 461, 337 N.E.2d at 6 (citing G. BOGERT, *TRUSTS AND TRUSTEES* § 250 (1971)). The BOGERT reference cited by the court simply lists secrecy as among the advantages accruing to settlors and beneficiaries of land trusts. The Illinois Supreme Court has commented that "the land trust has, over the years, served as a useful vehicle in real estate transactions for maintaining secrecy of ownership and allowing ease of transfer. Despite [limited disclosure statutes], the land trust remains a widely utilized and useful device." *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 487, 389 N.E.2d 540, 543 (1979).

226. Slum buildings with numerous code violations or in a state of disrepair are often the object of litigation which arises out of those conditions. See *Chicago Land Clearance Comm'n v. Darrow*, 12 Ill. 2d 365, 146 N.E.2d 1 (1957) (suit to condemn 23 parcels of land held in secret land trust for slum clearance); *King v. Exchange Nat'l Bank*, 64 Ill. App. 3d 335, 381 N.E.2d 356 (1st Dist. 1978) (suit for damages arising from fire in building maintained in poor condition).

227. See, e.g., *Hibbs v. Neighborhood Org. to Rejuvenate Tenant Hous.*, 433 Pa. 578, 580, 252 A.2d 622, 624 (1969) (tenants permitted to picket residence of landlord because of landlord's secret methods of doing business); see also Indritz, *The Tenants' Rights Movement*, 1 N.M.L. REV., 28-37 (1971); Whitman, *Secrecy and Real Property*, 27 AM. U.L. REV. 251, 251-252 & n.3 (1978); Note, *Tenant Unions: Their Law and Operation in the State and Nation*, 23 U. FLA. L. REV. 79, 96-97 (1970).

and community organizations in building and zoning controversies.²²⁸ Time-consuming, expensive, and sometimes ineffective government intervention will be virtually unnecessary if corrective action can be taken as a result of informal discussion among the parties.

Prospective purchasers of land can make a more accurate appraisal of the property's value if they can gain direct access to the seller rather than being forced to rely upon secondhand, and possibly incomplete, representations of the seller's broker.²²⁹ Furthermore, in the event of fraud or nonperformance, knowledge of the seller's identity can facilitate the buyer's recourse against him after the closing.²³⁰

The rights of individual property owners would appear to be abused when a major developer or corporation, attempting to assemble a large tract of land, by concealing its initial purchases acquires the remaining property from owners who would have demanded a higher price had they known the identity of the buyer.²³¹ Secrecy of ownership thereby tilts the market in favor of the buyer by denying vital information to the seller,²³² resulting in a sort of condemnation by deception. For the free market system to function effectively traders must have full information about all factors that may affect prices. If a situation arises in which the public interest in the economic benefits associated with real estate development requires a land owner to sell his property to a developer at a "fair market" price, the appropriate procedure would be to extend to the developer the power of eminent domain similar to that accorded to urban renewal authorities.²³³ The property owner

228. An example of how secret land trusts can be used to delay and frustrate enforcement of building regulations is found in *City of Chicago v. Hart Bldg. Corp.*, 116 Ill. App. 2d 39, 253 N.E.2d 496 (1st Dist. 1969). In *Hart*, the City of Chicago filed numerous suits against various corporations to force them to correct building code violations. The court appointed a receiver to take control of the property and, pursuant to court order, to correct the violations. The receiver, meanwhile, purchased the property under a secret land trust agreement. Later, when the court suspected a breach by the receiver of its fiduciary relationship to the court, he refused to cooperate with the court in its request for disclosure of ownership. The receiver was eventually held in contempt of court. For an excellent description of slumlord abuses concealed by land trusts, see *Top Slumlords Unmasked*, Chicago Tribune, May 6, 1973, at 1, col. 4.

229. See Whitman, *supra* note 227, at 254.

230. Recourse against the seller involves identification, location, and service of process. These steps are made more difficult, and the buyer's chances of recovery are lessened, when a secret land trust is used to effect the sale. Whitman, *supra* note 227, at 259.

231. See W. GARRETT, *LAND TRUSTS* 6 (1971) [hereinafter W. GARRETT]; Note, *Secret No More*, *supra* note 1, at 510 n.5; see also Whitman, *supra* note 227, at 253 n.6. Whitman discussed the "classic illustration" of the assemblage of land, involving the town of Columbia, Md., during the early 1960's. Despite the developer's use of many undisclosed agents to buy the land, however, the purchase prices of the last-obtained parcels were much higher than those of the first purchases. *Id.*

232. See Whitman, *supra* note 227, at 258 (identity of land owner can be relevant to free market debate).

233. See *Berman v. Parker*, 348 U.S. 26 (1954), in which the Supreme Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945. The Court stated that it was constitutional for urban renewal authorities to take appellant's building and land

would then have the benefit of the procedural safeguards in legal condemnation actions, and could not later claim he was deceived into selling his property for less than what it was worth.

Secrecy of ownership makes it difficult to determine the extent to which condominiums are being acquired for investment and rental or resale purposes rather than for individual home ownership.²³⁴ To the extent that the acquisition of condominiums is being used for investment purposes, the major purpose behind condominiums, which is promoting and encouraging home ownership, is not being fulfilled. Also, secret ownership of condominiums hinders the condominium association's enforcement of timely payment of dues, assessments, and other obligations of unit owners.

Secret land trusts are also convenient for those speculators who prey on fear and ignorance to acquire property at depressed prices and resell at a large profit. One example is seen in racially changing neighborhoods. In these neighborhoods whites are panicked into selling at below-market prices and blacks are willing to pay a premium for better housing.²³⁵

Certainly it is not in the public interest for secrecy of land ownership to be used to frustrate valid rezoning efforts. Yet, owners of property zoned for highrise buildings have consistently opposed community efforts to have the property rezoned to control undesirable increases in density. Secret land trusts enable those owners to escape neighborhood scrutiny and accountability.²³⁶

Secret ownership of real estate in land trusts hampers attachment creditors from discovering debtors' property,²³⁷ delays judgment creditors in subjecting debtors' property to the satisfaction of judgments,²³⁸ and facilitates transfers of mortgaged property, in violation of the "due on sale" clause contained in many mortgages.²³⁹ It has been the law in Illinois for many

under the power of eminent domain, pursuant to a comprehensive plan for the redevelopment of a large area of the District of Columbia. *Id.* at 34-35. Condemnation of property for this purpose is considered a valid exercise of the state's police power, aimed at improving the public welfare. *Id.* at 33; see also *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984) (condemnation power properly exercised to redistribute land from large estate). Similarly, extending the power of eminent domain to land developers in order to provide for the public welfare should be an acceptable exercise of the police power.

234. See *Condomania in Chicago*, *FORBES*, Nov. 13, 1978, at 56-57.

235. *Chicago Sun-Times*, Dec. 12, 1976, § 2, at 1.

236. Campaign to Control High Rises, Lakeview Citizens Council, Chicago, Jan. 30, 1975.

237. An attachment creditor is "[o]ne who has caused an attachment to be issued and levied on the property of his debtor." *BLACK'S LAW DICTIONARY* 332 (5th ed. 1979). Attachments are issued prior to judgment, before the creditor has a chance to interrogate the debtor about his assets. Hence the creditor must know what assets the debtor owns.

238. A judgment creditor is "[o]ne who has obtained a judgment against his debtor, under which he can enforce execution." *BLACK'S LAW DICTIONARY* 758 (5th ed. 1979). Even if a judgment or execution is effective as a lien, the creditor can expedite actual satisfaction if he can identify the property without the need for supplementary discovery proceedings. *ILL. REV. STAT.* ch. 110, § 2-1402 (1983).

239. See *Damen Savings & Loan Ass'n v. Heritage Bank*, 103 Ill. App. 3d 301, 431 N.E.2d 34 (2d Dist. 1982). An assignment of a beneficial interest in a land trust will not activate a

years that a conveyance on a secret trust for the benefit of the grantor is a fraud on creditors.²⁴⁰ Such conveyances should not be encouraged.

Because of land trust secrecy, persons with claims against property owners concealed by land trusts must first file suit against the trustee to ascertain the identity of the beneficiaries.²⁴¹ Thus, there is no opportunity for informal settlement prior to litigation. When the trustee appears in court to disclose the owner, a summons must then be served on the beneficiary. The result is unnecessary delay and expense imposed on both litigants and the court system.

Secret ownership facilitates avoidance of property taxes by shielding property owners who repurchase, usually at a bargain price, their own tax-delinquent property at "scavenger" sales.²⁴² Elements of organized crime have found secret land trusts to be a convenient device for concealing their activities from law enforcement agencies and the public.²⁴³ Aliens have utilized the land trust device to achieve secrecy and in so doing have avoided the six year time limit imposed on alien ownership of real property in Illinois.²⁴⁴ Lastly, public officials have utilized secret land trusts to conceal real estate transactions that would be subject to criticism because of conflicts of interest.²⁴⁵

"due on sale" clause unless the clause is written very specifically to extend to all interests. See H. KENOE, *supra* note 1, § 6.38, at 66. *But see* Williams v. First Fed. Sav. and Loan Ass'n, 500 F.Supp 307 (E.D. Va. 1980) (use of land trust to avoid "due on sale" clause will not succeed).

240. See McKey v. Cochran, 262 Ill. 376, 384, 104 N.E. 693, 696 (1914); Bostwick v. Blake, 145 Ill. 85, 34 N.E. 38 (1893); Franceschi v. Franceschi, 326 Ill. App. 494, 62 N.E.2d 1 (2d Dist. 1945).

241. In tort litigation involving a secret land trust, suit is initially filed against the trustee since it is the legal title holder of record. The trustee is a party to the litigation only so long as necessary to reveal the beneficiary. See H. KENOE, *supra* note 1, § 6.12, at 17.

242. See Johnson, *Personal View*, Chicago Sun-Times, Sept. 28, 1983, at 44, col. 1.

243. See, e.g., Chicago Sun-Times, Sept. 12, 1983, at 5, col. 1, Sept. 13, 1983, at 30, col. 2 (El Rukn gang); Chicago Sun-Times, Apr. 7, 1980, at 36, col. 4 (arson); Chicago Sun-Times, June 10, 1977, at 3, col. 1 (pornographic literature distribution). Several land trusts were outlawed in Arizona after revelation of major abuses by criminal elements, culminating in the murder of a newspaper reporter. See NEW YORK, Sept. 6, 1976, at 39; Wall Street Journal, Feb. 25, 1977, at 3, col. 1.

244. ILL. REV. STAT. ch. 6, §§ 1, 2 (1983); see Allen, Jr. & Olausson, *Problem Areas Concerning Foreign Investment in Real Estate*, 61 CHI. B. REC. 263, 265 (1980). Moreover, this time restriction does not apply to alien acquisition of personal property. ILL. REV. STAT. ch. 6, § 7 (1983); see also Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (1974) (national concern over foreign investment in United States). See generally Note, *Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Reaction?*, 28 U. FLA. L. REV. 491 (1976) (discussing recent foreign investments in United State real estate, as well as state and federal regulation of investments).

245. See, e.g., United States v. Keane, 522 F.2d 534 (7th Cir. 1975) (documenting former Chicago Alderman Thomas E. Keane's involvement with secret land trusts); People v. Saviano, 66 Ill. 2d 7, 359 N.E.2d 475 (1976); Note, *Secret No More*, *supra* note 1, at 511 n.10; Royko, *Our Mr. Fastback*, Chicago Sun-Times, Mar. 26, 1982, at 2, col. 1, Apr. 13, 1982, at 2, col. 1, July 12, 1983, at 19, col. 1 (Alderman and Cook County Democratic Chairman Edward

Defenders of secret ownership of real estate argue that investors should have the same right of financial privacy with regard to their real estate holdings as they do in ownership of other personal property, such as stocks and bonds.²⁴⁶ Such a claim has some viability. The public's interest in knowing who owns a given parcel of land, however, must take precedence over an owner's desire for financial privacy. Abuses in the ownership and use of land can cause injury to both individuals and the surrounding community.²⁴⁷

If secrecy were abolished, it is quite possible that other legal devices, such as corporations, limited partnerships, nominees, or conventional trusts, would be used for the same purposes. Unlike the trustee of a land trust, however, a corporation, partnership, nominee, or ordinary trustee can be held legally responsible for the property.²⁴⁸ Furthermore, the identity of corporate directors, general partners, nominees, and trustees is more readily accessible to the public than is the identity of secret land trust beneficiaries.

Perhaps the clearest indication that secret ownership is against the public interest can be found in recent legislation aimed at minimizing the circumstances in which such secrecy will be tolerated. In 1972 the legislature amended the tax sale redemption statute to exclude undisclosed beneficiaries of land trusts from the category of persons entitled to redeem at tax sales.²⁴⁹ The Internal Revenue Service requires all land trustees to notify the IRS of the establishment and termination of land trusts and of each transfer of beneficial interests.²⁵⁰ The legislature has responded to complaints about land trust secrecy abuses by requiring limited disclosure of beneficiaries to certain parties, primarily government agencies, under certain circumstances.²⁵¹

R. Vrdolyak); Chicago Sun-Times, June 15, 1980, at 3, col. 1 (Alderman Edward R. Vrdolyak); Chicago Sun-Times, Apr. 6, 1973, at 1, col.1 (former Chief Circuit Judge John S. Boyle); Chicago Sun-Times, Dec. 17, 1972, § 1A, at 4, col. 2 (former Illinois Secretary of State John W. Lewis).

246. See H. KENOE, *supra* note 1, § 3.2, at 5. Professor Kenoe states that:

On principle there seems to be no reason why real estate ownership should be more a matter of public record than ownership of bank accounts or corporate stocks or bonds. The characterization of the land trust as a 'secret trust' seems to convey a sinister connotation which would be equally applicable to a 'secret bank account.'

Id.; see also W. GARRETT, *supra* note 231, at 6.

247. See Note, *Secret No More*, *supra* note 1, at 510.

248. A corporation has the capacity to sue and can be sued in its corporate name. ILL. REV. STAT. ch. 32, §157.5(b) (1983). In a limited partnership, all general partners are jointly and severally liable for the actions of the partnership. *Id.* ch. 106 ½, §15(a). An ordinary trustee is liable because its holding of the title to the trust property is the same as if it owned the property absolutely. G. BOGERT, *supra* note 7, at 341.

249. ILL. REV. STAT. ch. 120, § 734 (1983).

250. I.R.C. § 6903(b) (1954); Treas. Reg. § 301.6903-1(a)(b) (1954).

251. Examples of legislative response to complaints about land trust secrecy include: (1) for real estate being sold under installment contracts, disclosure to purchasers is required, ILL. REV. STAT. ch. 29, §§ 8.31, 8.32 (1983), (2) for property included in applications for low-cost insurance in urban areas, disclosure to the Insurance Industry Placement Facility is required, *id.* ch. 73, § 1065.72-4(2), (3) for buildings in violation of health or safety regulations, disclosure

The limited disclosure required by these statutes is a step in the right direction, but it falls short of what is necessary in the public interest.²⁵² Government agencies are often handicapped by procedural red tape, inadequate staff resources, and bureaucratic inertia. The present statutes are of little or no help in vindicating tenants' and creditors' rights, providing full information both to noninstallment buyers and to sellers, controlling undesirable speculation, or identifying criminal and alien real estate ownership. There is no substitute for direct access to ownership information by those individual citizens who are adversely affected by the acts or omissions of land trust real estate owners.

Land trusts are contrary to the public interest not only because of secrecy, but in several other respects as well. Land trust trustees, for example, as previously discussed, are immune from tort liability and property taxes and are not responsible for compliance with applicable statutes and ordinances.²⁵³ Avoidance of real estate transfer taxes and of proper reassessment for property tax purposes deprives state and local governments of badly needed revenue and shifts the tax burden from affluent commercial real estate owners onto individual homeowners who do not use land trusts.

To the extent that insulation of estates from claims of surviving spouses is a factor in the use of land trusts in estate planning, it seems contrary to the public policy objective of the Probate Act²⁵⁴ which is to assure that surviving spouses are provided for regardless of the wishes of the decedent. Also, use of land trusts to insulate the beneficiary from judgment liens is contrary to longstanding Illinois public policy favoring satisfaction of judgments and making real estate subject to the claims of creditors.²⁵⁵

Finally, to the extent that permitting borrowers to waive their rights to judicial foreclosure and redemption of mortgaged property is consistent with the public interest, they should not be compelled to pay a fee to a land trustee in order to do so, nor have to engage in the deceptive act of labelling their real estate as personal property.

to building code enforcement agencies upon notice of complaint is required. With regard to residential buildings in violation of the regulations, disclosure to the public is necessary 180 days after disclosure to the agency, if violation has not been corrected, *id.* ch. 80, § 81, (4) for buildings damaged or destroyed by fire, disclosure to arson investigators is necessary, *id.* § 81.1; *id.* ch. 127 ½, § 8, (5) for real estate being sold or leased to government agencies, disclosure to the agency is required, *id.* ch. 102, § 3.1, (6) for real estate subject to real estate transfer tax (nonresident of Illinois beneficiaries only), disclosure to the Department of Revenue is required, *id.* ch. 120, § 1003, (7) for real estate involved in applications to government agencies for licenses, permits, or benefits, disclosure to the agency is required, *id.* ch. 148, § 72. The legislature is presently considering a bill to require beneficiary disclosure of land trust real estate acquired by the Chicago World's Fair Authority. Chicago Sun-Times, June 8, 1984, at 22, col. 5.

252. See Note, *Secret No More*, *supra* note 1, at 512.

253. See *supra* notes 15, 16, & 37 and accompanying text.

254. ILL. REV. STAT. ch. 110 ½, § 2-8 (1983).

255. See *supra* note 103 and accompanying text.

*Some Advantages Not Dependent on
Land Trust Arrangement*

Some of the proclaimed advantages of land trusts can accrue as a matter of law in some situations without the need for any kind of trust. Partnerships obtain the benefits of simplified assignment transfers of beneficial interests, simplified legal title conveyances, and avoidance of impairment of legal title through the provisions of the Uniform Partnership Act²⁵⁶ or by agreement of the partners. A partnership, like a trust, is not ordinarily subject to double income taxation. Moreover, any association facing this threat may file an election under Subchapter S of the Internal Revenue Code²⁵⁷ to be taxed as a partnership. Partnerships may prevent wrongful transfers by limiting an individual partner's apparent authority to make conveyances. Partnership property cannot be partitioned.²⁵⁸

Wrongful transfers in real estate sales contract situations can be prevented by either recording the contract, placing the real estate in escrow, or doing both. Non-partnership multiple ownership real estate can be immunized from partition by a simple agreement among the owners.²⁵⁹ Finally, parties to a mortgage loan may contract that no personal liability will be incurred, without the necessity of setting up a trust.²⁶⁰

CONCLUSION: SOME REMEDIAL PROPOSALS

In light of the foregoing discussion, one approach to land trusts would be to absolutely abolish them by subjecting them to the Statute of Uses.²⁶¹ The result would be that in every instance in which a land trust was created, full legal title would immediately vest in the beneficiary. Application of the Statute of Uses to the land trust problem, however, is not necessary. Nominee

256. ILL. REV. STAT. ch. 106 ½, §§ 1-73 (1983). For example, partnership interests may be freely transferred by assignment. Such assignments do not dissolve the partnership and do not disturb the title to partnership real estate, which may be placed in the name of the partnership rather than that of the individual partners. *Id.* ch. 106 ½, § 27. The partners may agree in advance that assignees acquire full partnership rights and status. Additionally, conveyances of legal title to partnership real estate may be simplified by appointing a managing partner to make conveyances. The record title to partnership realty is specifically protected against problems of individual partners, such as death, incompetency, judgments. *Id.* § 25. Claims and liens against individual partners do not affect the title to partnership real estate. The partnership agreement may specify that death and other problems of individual partners will not cause a dissolution of the partnership requiring a transfer of legal title, 29 ILLINOIS LAW AND PRACTICE *Partnership* §§ 211, 220 (1957).

257. I.R.C. §§ 1361-1379 (1983).

258. *Whitaker v. Scherrer*, 313 Ill. 473, 145 N.E. 177 (1924); *see* ILL. REV. STAT. ch. 106 ½, § 25 (1983).

259. 29 ILLINOIS LAW AND PRACTICE *Partition* §§ 20, 21 (1957).

260. *Schumann-Heink v. Folsom*, 328 Ill. 321 (1927); 59 C.J.S. *Mortgages* § 774 (1944).

261. ILL. REV. STAT. ch. 30, § 3 (1983). The statute does not presently apply to land trusts. *See supra* notes 9-11 and accompanying text.

or title-holding trusts are not an evil per se. Furthermore, even if the Statute of Uses were strictly applied to current standard land trust agreements, the statute might subsequently be avoided by including additional ministerial duties to be performed by the trustee.²⁶² Specific problems of land trusts would be better dealt with by the following specific remedies.

First, all land trust trustees should be required to disclose, to any person so requesting, the name and address of all beneficiaries and holders of the power of direction. Support for disclosure has come from public leaders who speak on behalf of the public's interest in having ready access to this information. During his visit to Chicago in July 1966, Dr. Martin Luther King, Jr. called for public disclosure of secret land trust beneficiaries.²⁶³ It is well past time to achieve this goal.

Second, to the extent that beneficiaries and holders of the power of direction are not required to be disclosed, land trust trustees should be held jointly liable with beneficiaries for torts, property taxes, obligations toward tenants, and compliance with statutes and ordinances applicable to the trust real estate. Justification for this requirement lies in the fact that the land trust trustee is the owner of record of the property and earns a profit in his capacity as trustee.

Third, land trust beneficial interests should be considered interests in real estate for purposes of the judgment lien statute and all other statutes conferring rights against real estate interests to third parties whose claims are not grounded on the trust agreement or assisted through the parties to the agreement. Landowners should not be able to escape judgment liens and other such claims through payment of trustee fees. Avoidance of valid liens and claims through the use of land trusts was a result obviously not contemplated by the legislature when it enacted the statutes.

Fourth, a surviving spouse should have the right to claim a statutory share against any assets placed by the decedent in a land trust.

Fifth, the real estate transfer tax laws should be interpreted or amended to apply to transfers by assignments of land trust beneficial interests to the same extent as to transfers by deeds filed for record.

Sixth, the law on mortgage foreclosures and redemptions should be revised to reflect public policy goals regardless of the legal device employed. Perhaps sound public policy should allow private sales without the right of redemption for any mortgaged property other than homesteads. Conversely, homestead owners should have the present protection regardless of whether their property is in a land trust.

The Illinois State Bar Association tells us correctly that "the legal system should function in a manner that commands public respect."²⁶⁴ In interpreting the land trust, judges and lawyers have told the people of Illinois

262. See generally H. KENOE, *supra* note 1, §§ 1.20, at 15-18, 8.17, at 86-87.

263. Chicago Sun-Times, July 12, 1966, at 30, col. 1.

264. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1980).

that what in fact is real estate is, in law, personal property. Such a doctrine erodes respect for the law and legal institutions. Quite apart from substantive public policy issues, the law should not lie; it should say what it means and mean what it says.

