2012 Keys From the Castle: News for Today’s Real Estate Paralegal

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Presenters

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ENTITY AUTHORITY: WHO CAN / MUST SIGN?
Entities

Secretary of State website:
- Corporation → officers
- Limited Partnership → general partner
- Limited Liability Company → member/manager

Assumed Name Certificate in Register of Deeds:
- Sole Proprietorship → individual owner
- General Partnership → partners

Power of attorney in Register of Deeds:
- Powers of attorney → attorney-in-fact

Lack of Authority: Red Flags

- Recent changes/amendments adding or deleting parties
- Conveyance or mortgage of Land to an officer, partner, member, trustee ("self-dealing")
- Foreign Executions (outside of U.S.)
- Variation in name, no matter how minor, in chain of title
- Recent conveyance without corresponding financing

Big Issues

- Does the entity exist?
- Does the person executing a document have authority to do so?
- Is there a reason to question the transaction?
Common Concepts

• Good Standing – Status with State
• Capacity – Individual’s position and authority
• Self Dealing – Conveyance to officer, member, partner…
• Foreign Execution – Special care when executed outside U.S.
• Regular Course of Business – Affects authority

Scenario #1

• ABC, LLC owns property and is in Good Standing in NC
• Recent annual report identifies Amy and Rory as managers
• Recent amendment to Articles of Organization adds Melody as a manager
• 123, Inc., plans to buy the property

Scenario #1

• Proposed deed is to be signed by Melody as manager
• Day before closing, parties indicate that deed should be made to 321, Inc. instead of 123, Inc.
• What is needed prior to closing?
Scenario #2

- Art and Al decide to start a partnership
- File Assumed Name Certificate as A & A Properties in 1980 and purchased real property under that name
- Property leased (long term) to commercial retailer
- Art dies Nov. 2, 1995. Will leaves all property to Trust

Scenario #2

- Al dies July 24, 2012. Will leaves all property to son, Randy. Al's estate is still open, but not in NC.
- Unrelated third party, Jimmy, wants to buy the property
- What is needed to convey the property to Jimmy?

Corporations

- Formation – validly formed – Articles of Incorporation
- Good Standing – Not suspended or dissolved
- Certificate of Existence – Conclusive evidence NCGS 55-1-28(c)
Corporations

• Name - Exactly as in Articles of Incorporation
  – NC Secretary of State - www.sec.state.nc.us/
  – National Assoc. – www.nass.org
  – Variations – Attempt at fraud; conveyance to wrong party; failure of title
• Merger/Name Change
  – Certificate of Merger must be filed in county where property is located
  – Deed should reference change

Corporations

• Authority
  – Board of Directors – Carry on regular course of business without shareholder approval
  – Conveyance of all or substantially all assets – need shareholder approval

Corporations

• Executing Officers – chairman, president, vice president, chief executive officer, chief financial officer, or treasurer
• Attesting officers – secretary, assistant secretary, trust officer, assistant trust officer, associate trust officer, or, if a bank, cashier or assistant cashier
Corporations

- Resolution required – Not an officer listed in statute
- Who signs resolution? – “Signed and attested resolution of the board of directors” NCGS 47-18.3(d)
- What must it say? – Authority for current transaction
- Where should it be recorded? – Attached or separately in same county as property

Corporations

- Corporate Seal
  - No longer required for recordation
  - Presumption of authority
    - Proper seal
    - Executed by person acting under authority of board of directors
    - Instrument is the act of the corporation

Corporations

- Dissolved – Administratively or voluntarily
- Convey title if to wind up affairs
  - Include “winding up” language
  - Can be to shareholders or third parties
  - Resolution of most recent board of directors
- No refinance - Cannot act as if carrying on business
Corporations

- Suspended
  - Failure to file reports/returns
  - Failure to pay taxes/fees
- Cannot convey
- Reinstatement Procedure - NCGS 105-232

Corporations

- Foreign Corporations
  - Failure to qualify with NC
    - Owning property does not require qualification
    - Can sell, mortgage, convey real property
    - Cannot maintain court actions or proceedings
    - May prevent enforcing contracts

Corporations

- Closely-Held Corporations – limited number of shareholders/stock not publicly traded or only traded on occasion
- Recent claims
  - Increased risk for false documents
  - Recent amendments require high scrutiny/independent verification
  - Risk of self dealing
Limited Liability Companies

• Formation – Operating Agreement/Comply with statutory scheme
• Secretary of State – Articles of Organization, Application of Certificate of Authority for LLC
• Existence and Good Standing – Must be validly formed and in existence at time of acquiring title

Limited Liability Companies

• Members/Managers
  – Members – ownership interest
  – Managers – handle normal business operations/identified in operating agreement or Annual Report
  – Authority – Managers can carry out acts in the normal course of business including conveyances
  – Delegation – if allowed by operating agreement

Limited Liability Companies

• Name
  – Must include “Limited Liability Company”, “L.L.C.”, or “LLC”
  – Must match Articles of Organization
  – Confirm with NC Secretary of State - www.secstate.state.nc.us/
Limited Liability Companies

• Merger/Name Change
  – Certificate regarding merger, conversion, amendment changing name must be filed in county where property is located
  – Deed should reference change

• Foreign LLCs
  – Subject to rules of home state
  – Should qualify to do business, but are exempted if only hold title or have isolated transaction (no court access)
  – Someone other than a manager may be designated to convey real property

• Dissolved
  – Administratively or voluntarily dissolved
    • Can distribute to members or convey to third parties
    • Include “winding up” language
    • Resolution of most members preferred
    • Cannot purchase, refinance or otherwise act as if continuing business
Limited Liability Companies

• Suspended
  – Failure to file reports/returns
  – Failure to pay taxes/fees
• Cannot convey
• Reinstatement Procedure - NCGS 105-232

Partnerships

An association of two or more persons/entities to carry on business for profit

• Two types
  – General Partnership
    • All partners participate in management and are personally liable
  – Limited Partnership
    • General partner manages and operates
    • Limited partner – investors with limited liability

General Partnerships

• Formation – Two or more persons as an association carrying on business for profit
  – Assumed Named Certificate – NCGS 66-68
  – Partnership Agreement – memorialize the operation and management (need not be recorded)
General Partnerships

• Partners’ Authority
  – Ordinary course of business – partner may convey **held in partnership name** subject to limitations in partnership agreement
  – Not ordinary course of business – joinder of all general partners

General Partnerships

• How Property Vested – determines who is needed to convey property
  – Partnership name – partners may convey
    • Property not subject to liens against individual partners or marital interests of a spouse
  – Some or all of the partners’ names – record owners (named partners) and spouses.
    Property is subject to liens against individual partners or marital interests of a spouse

General Partnership

• Dissolution
  – Voluntary or court order
  – Changes partners’ relationship
  – Terminates ability to bind partners
  – Can convey consistent with “winding up affairs”
  – Surviving Partner – Must comply with statutory provisions (bond, inventory…) to continue business
  – Deceased Partner – Heirs/devisees receive personal property interest in partnership
Limited Partnerships

- Formation – Certificate of Limited Partnership filed with Secretary of State
- Mergers, conversions, amendments - certified copies filed in county where property is owned

Limited Partnerships

- Partners’ Authority
  - General Partner
    • Convey in ordinary course of business or as authorized by partnership agreement
    • Outside ordinary course/partnership agreement – requires all general partners
  - Limited Partner
    • Not authorized to convey property

Limited Partnerships

- Property Vested
  - Should be vested in partnership name
    • General partner can convey
    • Not subject to liens against partners or marital interests
  - Vested in partnership name and individual partner’s name
    • General partner, named partner and spouse required to convey
    • Subject to liens against named partner and marital interests
### Limited Partnerships

- **Foreign Limited Partnerships**
  - Required to register with NC Secretary of State
    - Failure does not prevent holding title
- **Names** – Must include “Limited Partnership”
  - ABC Company, a Virginia limited partnership, doing business in NC as ABC Company Limited Partnership

### Limited Partnerships

- **Dissolution**
  - Voluntary or court order
  - Changes partners’ relationship
  - Terminates ability to bind partners
  - Can convey consistent with “winding up affairs”

### Trusts

- A trust is a fiduciary arrangement under which property interests are conveyed by the owner (trustor) to a second party (trustee) for the purpose of holding, managing and administering the property for the benefit of a third party (beneficiary).
Trusts

- A trust created by:
  - an express Trust Agreement (an inter vivos trust)
  - A Last Will and Testament of a decedent (a testamentary trust)
  - Court Order
  - Constructive Trust, Oral Trust, Resulting Trust – not addressed
  - Trust documents must name the trustee(s) and describe their responsibilities and authority

Trusts

- Vesting Title
  - Preferred method – Title should be acquired and conveyed in name of trustee for the trust
  - NCGS 39-6.7 – Confirmed title can be conveyed into the trust or the trustee for the trust and title can be conveyed by the trust or the trustee for the trust

Trusts-UTC

- Uniform Trust Code – NCGS Chapter 36
  - Creates scheme for management of certain trusts, including acquiring and conveying real property
  - Applies to testamentary trusts, inter vivos trusts, and trust created pursuant to court order
Trusts-UTC

• Conveyance of real property
  – Broad powers for trustee:
    • To acquire, or sell property for cash or credit, at
      public or private sale
    • To exchange, partition or otherwise change the
      nature of trust property
    • To borrow money, with or without security...and
      mortgage or pledge trust property for a period
      within or extending beyond the duration of the trust

Trusts-UTC

• Co-Trustees – NCGS 36C-7-7-3
  – Unanimity is required for two trustees to act
  – A majority decision is required where there are more
    than two trustees
  – If a vacancy occurs, the remaining trustees may
    exercise all trustee powers unless limited by the
    terms of the trust
  – If a co-trustee is unavailable to act due to absence,
    illness, disqualification under law or “other temporary
    incapacity” AND prompt action is necessary, the
    remaining co-trustee or a majority of the remaining
    co-trustees may act for the trust

Trusts-UTC

• Reliance on Trustee/Certification of Trust
  – Not required to review trust and inquire into
    trustee’s powers (exception – beneficiaries)
  – Old rule – constructive notice of facts which a
    reasonable investigation would disclose
• Certification of Trust (NCGS 36C-10-1013)
  – May be furnished instead of a copy of the
    trust instrument for purposes of determining
    the existence of the trust and the trustee’s
    powers
Trusts-UTC

- Certification of Trust
  - Reliance - A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

Trusts-UTC

- Certification of Trust
  - Information -
    1. The existence of the trust and the date the trust instrument was executed;
    2. The identity of the settlor, unless withheld under a provision in the trust instrument;
    3. The identity and address of the currently acting trustee;
    4. The powers of the trustee;

Trusts-UTC

- Certification of Trust
  - Information -
    5. The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
    6. The authority of co-trustees to sign or otherwise authenticate and whether all, or less than all, are required in order to exercise powers of the trustee;
    7. The trust's taxpayer identification number; and
    8. The manner of taking title to trust property.
Business Trusts

• NCGS 39-44 –
  – unincorporated association
  – engaged in any business or trade
  – written instrument or declaration of trust
  – beneficial interest therein is divided into shares represented by certificates or shares of beneficial interest.

Business Trust

• Property Vested
  – Trust name
  – Trustees in capacity as trustees of the business trust
  – Conveyances – trust’s name
    • Executed by trustee, president, VP, or duly authorized officer
    • Memorandum of trust must be recorded
      – Name, date, place of filing or location of declaration of trust

Red Flags

The existence of any of the following factors indicate the potential for an issue with the authority of a person executing on behalf of an entity. Extra caution is required to protect the parties to the transaction. Note any such factors in an opinion on title and advise your title insurer of the situation.
Red Flags

- State Filing Change - A recent change in the state filings of the entity that adds or deletes parties with authority or a change in the trust instrument or partnership/LLC agreement that attempts to do the same.

- Self-Dealing - Any transaction that involves conveying or mortgaging of land by or to an officer of a corporation, partner of a partnership, member of an LLC or parties to a trust must be approved by state counsel.

- Foreign Executions - When Directors or other entity officials are not located in the United States or the corporate documents reveal the owners are not located in the United States.

Red Flags

- Amendment to Partnership - Any recent amendment to the partnership agreement adding or deleting parties to the partnership.

- Amendment to LLC - Any recent amendment to the LLC agreement adding or deleting members or managing members.

- Amendment to Trust - Any recent amendment to the Trust agreement adding or deleting trustees or beneficiaries.

Red Flags

- Name Variation - Any variation in name, no matter how minor, in chain of title or the documentation submitted to support the chain of title.

- No Financing - Any recent conveyance without corresponding financing.