ARIZONA
LAW REVIEW

VOLUME 5 FALL 1963 NUMBER 1

THE SUBDIVISION TRUST—A USEFUL DEVICE IN REAL ESTATE TRANSACTIONS†

GEORGE READ CARLOCK*

In the Rocky Mountain States a very substantial part of the real estate activity in recent years has been the sale of relatively large tracts of land, improved only as required for ranching or agricultural uses, to subdividers or to persons who intended to hold the land until it could be sold to subdividers, paying as little as possible on it in the meantime. The rapid growth of the population of the country as a whole, and the population movement from East to West (which all of our seers tell us will continue), point toward such transactions as being of continued importance to Rocky Mountain region lawyers.

It is characteristic of these sales that the buyer — whether a subdivider or a speculative buyer looking to the day when the land would be subdivision land — has not been in a position to pay cash for the land, and most of the usual sources of working capital for a subdivider — such as banks and insurance companies — while willing to finance construction of houses and other improvements, were not willing to finance the subdivider's land acquisitions also. The kind of investor who might finance the speculative buyer was more likely to be a speculative buyer himself and to seek to spread his resources as much as possible by devoting as little cash as possible to each transaction.

Here, then, are ambitious, aggressive, under-financed, potential buyers in a business environment which furnishes a fair chance of profit to a speculative buyer or subdivider if he can pay for his raw

† Editor's note: This article has been adapted from a speech given on June 1, 1962, before the Section of Real Property, Probate and Trust Law, American Bar Association, at a meeting in Salt Lake City, Utah. The lawyers who participated in the preparation of the attached Trust Agreement form, besides the author, were Charles R. Hoover, William S. Lindamood, B. W. O'Brien and A. J. Pfister, each of whom is a member of the State Bar of Arizona.

* Partner, Ryley, Carlock & Ralston, Phoenix, Arizona. LL.B. 1948, University of Arizona; member, State Bar of Arizona.

material — the land — as he goes, using the proceeds of the resale of the land itself to pay for it.

The anticipated resale price to a subdivider or to house purchasers has been high enough that buyers could afford to promise a far higher price for the land than its current income production would indicate — if the transaction could be arranged in such a way that the land could be at the same time the seller's security and the buyer's stock-in-trade.

Many sellers have been willing to assume the risk of permitting the buyer the freedom he needed to develop the land, subdivide it, use it as security for improvements, sell it, and, after all this, finally pay for it, because by assuming such risk — clearly much greater than in a cash sale — the seller could get a promise of a much higher price.

The success of the lawyers in the Western states in working out legal patterns to effectuate such transactions easily, effectively, and as inexpensively as possible has had, I believe, a substantial part in the rapid growth of the Western states.

Different patterns have been developed in different states. My purpose is to give a general picture of the workings of what we call a "subdivision trust," which is used extensively in Arizona and California, and has been used in other states as well. It has worked well in Arizona.

First, to analyze and define the subdivision trust by pointing out what it is not and why — an approach that is *de rigueur* for all legal writers.

Although it is essentially a security device, the subdivision trust is not a mortgage, and differs from a mortgage in several important respects. A mortgagor, for instance, in our state, has legal title and the mortgagee has a lien.[1] The mortgagor is in possession, but cannot dedicate a road[2] or effectively subdivide unless the mortgagee joins in the action.[3] Even if the mortgagee is willing to agree to do so, his unavailability, incompetence, death, or simply orneriness might cause embarrassing and expensive delays to the mortgagor-subdivider. In Arizona, at least, and, I suppose, in some of our other states, a mortgage can be foreclosed only by court action,[4] with a redemption period.[5]

[1] Mortgage Inv. Co. v. Taylor, 49 Ariz. 558, 68 P.2d 340 (1937); Steinfeld v. State, 37 Ariz. 389, 294 Pac. 834 (1930); Howell v. Wetzler, 32 Ariz. 130, 256 Pac. 365 (1927).

[2] 16 AM. JUR. *Dedication* § 10 (1938).

[3] The mortgagor cannot by any conveyance of the property relieve himself from the obligation of paying the mortgage debt, and he cannot release any of the mortgaged property from the mortgage so far as the mortgagee is concerned, without the mortgagee's consent. Seale v. Berryman, 46 Ariz. 233, 49 P.2d 997 (1935).

[4] ARIZ. REV. STAT. ANN. § 33-721A (1956).

[5] ARIZ. REV. STAT. ANN. § 12-1282A (1956).

In a contract of sale situation, legal title is still in the seller,[6] subject to the buyer's rights under the contract,[7] and quite usually with a deed in escrow to be delivered on full performance, or perhaps a series of deeds to achieve partial releases to be delivered one at a time as payments are made. The buyer's practical problems of mechanics are the same as in the mortgage situation.

Judgments or federal tax liens against the mortgagor or contract purchaser prevent sale of the land with clear title to house purchasers — a serious defect in the kind of transaction we are considering, not only for the mortgagor, or contract purchaser, whose business is thereby shut down, but for the mortgagee, or contract seller, who therefore doesn't get paid and has to foreclose, wait out the redemption period, and start all over again.

Indeed, it is a commonplace that it is difficult, if not impossible, even assuming complete agreement between buyer and seller and a good measure of mutual trust and confidence, to work out the mechanics of such a transaction with a classic mortgage or contract of sale.

In a typical subdivision trust transaction, the seller conveys the land to the trustee — typically a corporate trustee and, in Arizona, typically a title insurance company — to be held and dealt with by the trustee under a trust agreement providing typically that the seller is the First Beneficiary of the trust and the buyer is the Second Beneficiary; that the buyer, while not in default, shall be entitled to possession of the property and to cause the trustee to record subdivision plats, to impose subdivision-type restrictions, to dedicate streets, and to convey portions of the property to the buyer or at his direction, free of the trust, upon payment of specified amounts on the purchase price; and often providing even more extensive rights for the buyer, while at the same time requiring the buyer to make certain payments to the trustee for the benefit of the seller, and giving the seller the right to terminate the buyer's interest in the trust in case of the buyer's default.

Thus, if the trust is a true trust and is not a mere agency agreement or is not a passive trust executed by the Statute of Uses, each beneficiary owns a beneficial interest in the trust, which is essentially a right to require the trustee faithfully to perform its fiduciary duties, and the trustee owns the real property.

Appended to this article is a copy of a form of subdivision trust agreement which has been prepared for use in Arizona by lawyers representing title insurance company trustees, and which may be useful as furnishing illustrations of some of the typical elements of a subdivision trust arrangement.

[6] Bennett v. United States Land, Title & Legacy Co., 16 Ariz. 138, 141 Pac. 717 (1914).

[7] Shreeve v. Greer, 65 Ariz. 35, 173 P.2d 641 (1946).

Some provisions are so often the same in different trust agreements that printed or mimeographed forms are available setting forth such provisions:

For instance: The rights of the buyer (the Second Beneficiary), set forth in Section IV of the form, to possession of the land, to cause it to be subdivided and platted and subjected to restrictions and dedications of roads, alleys, and easements, and to direct the trustee as owner with respect to annexation to a city or town or a change in zoning. All these are rights normally needed by a subdivider, and normally granted by a seller. One who purchases with a view to selling all or portions of the land to a subdivider will, of course, be concerned with such provisions because he wants to be able to deal with the subdivider before he himself has fully paid for the land. The right to dedicate does not, in this form, include the right to dedicate land as a park. The reason for this omission from our prepared form is that in Arizona there seems to be no way of abandoning a park;[8] and this lack in our law has brought grief not only to sellers who reacquired land after the buyer's default and found their subsequent transactions with the land seriously affected by the inviolate and eternal existence of the dedicated park, but also to subdividers who changed their minds about how the land should be platted and secured abandonment of the streets and alleys, only to find that their replatting was dictated to some extent by the paper park which had once seemed to be such a good idea.

Neither is the right to vote or petition for inclusion in improvement districts included in this form. The reason for this omission is that such inclusion in many states subjects the seller to a much greater risk than is normally contemplated, since bonds for such projects as streets, alleys, sidewalks, sewer systems, water systems, light systems, and other improvements may all represent liens prior to the seller's rights — much to the seller's discomfiture and often to his surprise.

It is possible, of course, that the seller would want to restrict the buyer to subdividing only a portion of the land at a time. This can be accomplished by additional language in the trust agreement.

The Second Beneficiary (the buyer) is typically given the right to have released to him by the trustee certain portions of the land as payments are made on his obligation. These release provisions vary so from transaction to transaction that prepared forms usually have blank pages for such provisions, with no attempt made to provide suggested language for anticipated situations. In the preparation of the appended form we have been a little more ambitious than

[8] Mere nonuser for forty years is not abandonment. County of Yuma v. Leidendeker, 81 Ariz. 208, 303 P.2d 531 (1956).

that, setting forth for possible inclusion in Section VI of the trust agreement language which will be appropriate, we think, in a great many cases, covering the release of both lots and unplatted acreage, situations in which accrued interest must be paid separately, in addition to the stated release price, each time property is released, as well as situations in which the release price is large enough to permit its application to both accrued interest and principal. These suggested provisions are set forth in attachments to the appended form of trust agreement. It is normal, of course, for the schedule of release prices to be such that not all of the land will have been released before payment in full of the price of the land.

The ratio of land released to payments made, and whether or not land will be released for the down payment are among the points on which buyer and seller must have a meeting of the minds.

The release provisions are among the several most crucial provisions in any subdivision trust agreement, and may bear a very close relationship to restrictions on platting. In case of default by the buyer, the seller may have to retake the unreleased land. It is to the seller's interest to have the land he retakes chopped up as little as possible by an unsuccessful subdivider's idea of how streets and lots should be laid out, and for the land retaken to be of a size and shape and with access permitting its effective use. For example, a farmer seller may have to take into consideration the irrigation pattern of the land and the location of wells and prescribe a pattern and sequence of releases and platting that would not keep him from farming the land again should the buyer default. Or some part of the land may be more valuable than other parts by reason of street frontage or terrain, and separate release prices or a requirement that some land not be released (except, of course, on final payment) may be in order.

The appended form, in Section XVI, defines released property as that property for which a release price has been paid *and* which the buyer has designated within thirty days after service of a Notice of Default as provided in Section X-A. The reason for this provision is that there have been cases of the buyer's having paid enough to be entitled to the release of a parcel of property of his choosing, without having claimed any particular parcel even as late as the time he was forfeited out because of his default. The seller then has a title problem, because the buyer may thereafter assert a claim to a portion of the property. What portion? Any portion of suitable size that he may select. Marketability of title to the entire property may be clouded. This form is so drafted that if the buyer defaults he may still claim property which he is entitled to have released until expiration of the thirty day period provided in Section X-A, but if he does not claim it by then all the property is unreleased property affected by cancellation and forfeiture proceedings under Section X, and the buyer has no further rights to secure the release of property.

It is not uncommon for buyers of land for resale to subdividers or to purchasers of vacant lots who are not immediately concerned with construction financing to be granted the right to require the trustee to make deferred payment sales which will be binding on the seller of the whole tract (our First Beneficiary), even though the lot seller (our Second Beneficiary) may himself later default in his payments. Such a provision may be agreeable to a seller on the theory that it will speed up the Second Beneficiary's disposition of the land and will thus speed up payment of the whole purchase price. Such a provision is set forth in Section VIII of the form. In the case such sales are permitted, the price, terms, and distribution of proceeds are obviously of importance to the First Beneficiary (the seller of the whole tract). Looking at it from his viewpoint, the first principle is that the sales price of a parcel resold on a deferred payment arrangement shall be high enough to pay the release price of that parcel, and that the proceeds of the resale are so allocated that he gets the release price. The allocation of the proceeds of the resale between the seller (First Beneficiary) and the buyer (Second Beneficiary) affects not only whether or not the release price is paid, but when it is paid. For example, if all the resale proceeds of a lot are allocated to the Second Beneficiary (the buyer for resale) until the unpaid balance of the resale contract equals the release price, and all proceeds received thereafter go to the First Beneficiary to apply on the sale price of the whole tract and the release price of the lot sold, the Second Beneficiary has his money and is gone before the First Beneficiary, who owned the land to start with, starts getting paid at all.

A seller who agrees to this type of provision usually has in mind that if his buyer defaults, at least he, the seller, will get subsequent payments made by the lot purchaser. While this is true, it can result in the money coming in at a much slower rate and over a much longer period than contemplated if there are no restrictions on the buyer (Second Beneficiary) with respect to the length of the term of the contract of resale.

For all these reasons it is quite usual for a seller (First Beneficiary) who grants this right of time resales to specify minimum down payments, the interest rate, and the maximum pay-out period, and sometimes to impose a requirement that deferred payments become due at regular intervals and in approximately equal amounts.

The form covers some but not all of these points. It specifies in Section VIII that the resale price must be high enough to pay all expenses of sale and the release price, and it specifies in the distribution of funds section — see Section IX — that proceeds of such resales shall be used first to pay the expenses of the sale and then shall go to the First Beneficiary until the release price for the lot or parcel sold has been paid, after which the buyer (Second Beneficiary) gets the remainder. It does not cover some of the other points I have raised here; this is intended as a basic form, and the other points can be covered by additional provisions if the parties desire. The group which prepared this form believed that there was not enough uniformity of practice with respect to such points to make it feasible to include provisions covering them in a printed form.

These provisions for platting, dedicating streets, imposing restrictions, and releasing portions of the property represent complete normalcy in subdivision trust agreements. The provision for deferred payment sales of unreleased land is quite common.

Less common, but not unusual, is the grant of the right to the Second Beneficiary to require the trustee to convey a lot or parcel to him for an instant to permit recordation of a mortgage securing a construction loan, after which he is to reconvey it to the trustee to be held again as one of the assets of the trust, subject, however, to the mortgage.

Clearly and obviously, the First Beneficiary's security is reduced in such a situation, since part of the land is now subject to a mortgage superior to any claim of his. When such a provision is included, it is usual for restrictions to be imposed as to the amount of unreleased land which can be subjected to such mortgages at any one time.

Such a provision is not so common that we included it in our printed form, but is usual enough that we prepared a suggested basic text for inclusion in the trust agreement as a special additional provision in Section VI. In doing so we included all the language we thought might prevent the imposition of any encumbrance other than the contemplated mortgage during the instant title was in the Second Beneficiary, but we don't really know how effective this language is. A seller who believes it is in his interest to grant the buyer such a right — and there are situations in which it may well be a good idea — might want to require payment of the release price out of the loan proceeds according to some schedule related to the contemplated advance of the funds to be lent on such a mortgage.

The subdivision trust arrangement is not all a grant of rights to the buyer with such restrictions on those rights as the seller in a particular situation may believe essential for his own protection. It must also provide remedies for the seller should the buyer default.

The form of trust agreement provides that one remedy of the seller is forfeiture of the buyer's interest in the trust. In Arizona, by statute,[9] a seller cannot forfeit out a buyer's interest in a contract for the sale of real property until after expiration of a statutory grace period after default, the length of the grace period depending on the proportion of the total price which the buyer has paid. It varies from thirty days upwards, the longest period being nine months for a buyer who had paid half or more of the total price. We believe in Arizona that this means that we have implied statutory sanction for forfeiture at the end of such a period; and it has been the practice in Arizona to regard forfeiture of the buyer's interest for his continued default under the trust agreement as so closely analogous to forfeiture of the buyer's interest because of default under a contract of sale that the grace period could safely and properly be determined by reference to that statute. This, of course, may not be a safe or proper assumption in other states. It may be that forfeiture is not the sole remedy, but that specific performance and foreclosure as a mortgage, with deficiency judgment rights, are also available to the seller. Sometimes the parties may negotiate for denial of some of these rights to the seller — as, for instance, a limitation of the seller's remedies to forfeiture of the buyer's interest in the trust, without any right to damages or specific enforcement.

By now it may appear to you, and truly so, that I believe a subdivision trust arrangement is an extremely effective, efficient, and flexible means of handling the kind of real estate sales we are considering.

I conceive its basic virtues to be that it places in a responsible corporate third party, acting in a fiduciary capacity, both the authority and responsibility for permitting exercise by the buyer of his specified rights, subject to whatever limitations are imposed. It could be a severe handicap to a buyer, and an inconvenience to a seller, for the buyer's exercise of the rights he and the seller had agreed he should have to depend on affirmative action by the seller. A provision in a contract of sale or mortgage permitting the buyer to resell free and clear of the interest of the seller or mortgagee would not be likely to be satisfactory to a lawyer for a lot purchaser or an institutional lender which proposed to finance improvements on the lot, unless the buyer had such general power to deal with the land that the rights of the contract seller or mortgagee could be ignored, in which case the mortgage might be illusory, both as to its practical protection to the seller and its legal effect as to third persons.

But with title to the property held by a financially responsible trustee with power to deal with the property, and whose authority is absolute so far as bona fide third persons are concerned, the buyer's mortgagee or lot purchaser has assurance that his transaction can be accomplished. The buyer has assurance of his ability to exer-

[9] ARIZ. REV. STAT. ANN. § 33-741 (1956).

cise the rights he has bargained for, regardless of the availability of the seller to sign more papers or the seller's incompetence, death or intransigence. On the other hand, the seller can prescribe standards for and limitations on the buyer's rights and can look to the trustee for observance of those standards and limitations, because the trustee will be liable in damages to the seller if he does some act, at the buyer's direction, which the buyer was not entitled to require the trustee to do.

Thus, I believe that the subdivision trust device is of extreme usefulness in the type of transaction we are discussing.

An additional dollars-and-cents advantage to the buyer has been that the buyer, who furnishes title insurance to his lot purchasers and pays the premiums for that insurance, traditionally has been given a very substantial discount in the otherwise normal premium rate, chiefly on the grounds that the title search was easier for the title company trustee who also insured the title, because it had been the owner of all the lots since they were platted and had already insured title at that time.

The federal income tax treatment of subdivision trusts deserves a word. I know of only two cases on the tax aspects.

In one of them, *Lawler v. Commissioner,*[10] decided by the 9th Circuit Court in 1935, it was held that because the buyer had no duty to pay for any property except that actually platted and subdivided, there was a series of options and not an indivisible contract of sale.

In the other, *Margolis v. Commissioner,*[11] decided by the Tax Court on April 19, 1962, the taxpayer had sold the buyer's beneficial interest in several trusts (which appear from the court's statement of the facts to have been the kind of trusts we have under consideration). The question was whether the resulting gain was taxable as ordinary income or as long-term capital gain. The taxpayer argued that although he was a dealer in real property, these beneficial interests were personal property and that there was no evidence that he was a dealer in personal property. The Tax Court, predictably, I believe, held that for federal income tax purposes the sales of the beneficial interest would be treated as sales of real property.

The usual practice among Arizona taxpayers is to treat the transfer of the property to the trustee under a subdivision trust arrangement in which the buyer promises to pay a purchase price as a sale of the property by the seller (First Beneficiary) and a purchase by the buyer (Second Beneficiary). This is consistent with the ultimate economic effect of the transaction and has not, so far as I know, been

---

[10] 78 F.2d 567 (9th Cir. 1935).
[11] Margolis v. Commissioner, 1962 CCH Tax Ct. Rep. 86 (April 19, 1962).

questioned by the Internal Revenue Service. It is, I believe, not inconsistent with the *Lawler* case or the *Margolis* case. If the seller cannot require the buyer to pay the purchase price, but has as his only remedy termination of the buyer's interest in the trust, we have what may be a series of options resulting in separate purchases of separate parcels of the property — a series of completed sales by the seller instead of one installment sale, perhaps, and different holding periods for separate parcels in the buyer's hands.

Some lawyers have worried a little that retention of too extensive a veto power by the seller over the details of the buyer's handling of the property could give rise to the argument that the seller and the buyer were really joint venturers in the subdivision and sale of real property and that the seller's gain was therefore ordinary income rather than capital gain. This worry is aggravated in the case of a contingent price for the property — that is, a price to be computed in the future with reference to the prices at which the buyer resells the property. We have consistently recommended that the seller's control over how the property is handled be exercised by prescribing standards for the trustee's action, and limitations on the buyer's rights, in advance, as matters of general application rather than leaving them to be determined by the seller's discretion as the deal progresses.

There are, of course, some areas of uncertainty and some problem areas in the use of subdivision trusts.

There is a notable lack of any great body of judicial decisions in cases involving subdivision trust arrangements. When we contrast this scarcity of precedent in decided cases with the great mass of judicial opinions on all phases of mortgage transactions, we can see that in dealing with subdivision trusts we are relying to a very great extent on general propositions of law, analogy, and care in draftsmanship, and very little on cases directly in point on the facts. This is, of course, not an aid to certainty or assurance in advising clients, and sometimes we wish our path was more plainly marked by the guideposts of published judicial opinions.

Perhaps the question of the greatest substance to the successful operation of a subdivision trust is whether the trust is active or passive. In a state in which the Statute of Uses is part of the law — as is the case in Arizona — a passive trust is executed, and the effect of execution of this type of trust would probably be that the buyer's interest in the trust would be real property rather than personal property, and that he would own the land itself, subject to the seller's right of repossession on default, instead of owning only a beneficial interest in the trust. This might not be seriously detrimental to the effectiveness of the seller's security, but could be highly detrimental to the successful completion of the buyer's program of development and resale, and this in turn could affect when or whether the buyer could satisfy his obligation to the seller.

For example, if the buyer owns only an interest in the trust, and has no ownership interest in the land itself, a federal tax lien against the buyer would be a lien on his beneficial interest in the trust, but would not be a lien on the land itself. Thus, although the buyer might not be able to transfer his beneficial interest, and the trustee might not be able to pay to the buyer moneys otherwise payable to him, the trustee could still convey good title to the lots in the subdivision to lot purchasers and could still pay to the seller the moneys payable to him. The whole transaction would not necessarily come to a halt. But if the trust, being passive, is executed by the Statute of Uses, then the buyer owns the land itself and lot purchasers would have to take subject to the tax lien. This *would* bring the whole transaction to a halt.

Further, if the trust is executed by the Statute of Uses, then in states such as Arizona a recorded judgment against the buyer would be a lien on the land itself and might prevent further resales.

Also, if the trust is executed by the Statute of Uses the buyer owns real property requiring ancillary probate proceedings in the event of the buyer's death; whereas if the buyer owns only a beneficial interest in an unexecuted trust, it is personal property and would be governed by the domiciliary probate proceedings.

If the buyer's interest is real property, instruments for the transfer thereof would require federal documentary tax stamps, whereas they might not if his interest was purely personal property — but in this connection let me refer you again to the recent *Margolis* case in the Tax Court.[12]

One other respect in which it may make a difference whether the buyer's interest is real or personal property is in the nature of the proceedings necessary to foreclose a mortgage or assignment of his interest. In Arizona, for instance, a mortgage of personalty may be foreclosed by notice and sale, without redemption,[13] but a mortgage of realty can be foreclosed only by court action,[14] and there is a six-months redemption period.[15]

It is our opinion that the appended form of trust agreement creates, in Arizona, at least, personal property interests in the beneficiaries. We depend chiefly on three things: first, that the parties agree that the beneficial interests are personal property — not conclusive, of

[12] Margolis v. Commissioner, *supra* note 11.
[13] ARIZ. REV. STAT. ANN. § 33-757 (1956).
[14] ARIZ. REV. STAT. ANN. § 33-721 (1956).
[15] ARIZ. REV. STAT. ANN. § 12-1282 (1956).

course, but a court may give it weight;[16] second, the duty of the transferee to enter into sales agreements — this being not a mere ministerial act done as agent of another, but a transaction by the trustee with outsiders as owner of the property, in which the trustee is itself a party; and third, the duty of the trustee, set forth in Section XII of this form of trust agreement, to sell the property, or any of it still in the trust, five years after the due date of the final installment of the purchase price. This is such an affirmative duty on the trustee as to make the draftsmen of this provision pretty confident that an active trust is created.[17] This direction to the trustee to sell should not cut short the parties' transaction, since by five years after the due date of the last installment of the purchase price either the price has long been paid, in which case the buyer (Second Beneficiary) can direct the trustee to convey to him, or the buyer is long in default, and the seller has had plenty of time to complete forfeiture or foreclosure proceedings. Of course, if the parties by agreement extend the due date, then the five years would run from the due date as extended and not from the original due date.

As is always the case when buildings and other improvements are constructed, we have with us the problem of mechanics' and materialmen's liens, and the question of what interest in what property is affected by such liens. If the buyer (Second Beneficiary) fails to pay his bills for labor and materials incorporated in improvements on the property, do the resulting liens attach only to the Second Beneficiary's interest in the trust — that is, the buyer's interest — or do they affect the seller's interest also? The general rule — and the rule consistently followed in Arizona — is that work or materials furnished to a lessee or vendee in possession affects only the interest of that lessee or vendee, and does not affect the interest of the lessor or vendor unless an agency relationship exists between them.[18] Our courts have never found such an agency relationship *except* where the vendee or lessee in possession was *required* by his agreement with his vendor or lessor to make the improvements; and have been consistent in holding that mere *permission* or *knowledge* would not justify finding the necessary agency relationship.[19] We have no cases on this question involving subdivision trusts, but it seems clear to me that the analogy between second beneficiaries of subdivision trusts on the one hand and lessees and contract vendees on the other hand is so close that no agency relationship between a First Beneficiary

---

[16] Breen v. Breen, 41 Ill. 206, 103 N.E.2d 625 (1952).

[17] Restatement (Second), Trusts § 69 (1959); Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

[18] Ernst v. Deister, 42 Ariz. 379, 26 P.2d 648 (1933); Demund Lumber Co. v. Franke, 40 Ariz. 461, 14 P.2d 256 (1932).

[19] Mulcahy Lumber Co. v. Ohland, 44 Ariz. 301, 36 P.2d 579 (1934); Foltz v. Noon, 16 Ariz. 410, 146 Pac. 510 (1915).

(seller) and a Second Beneficiary (buyer) could be found in our typical subdivision trust situation. The appended form does what it can in this respect by the provision in Section XXVI that the Second Beneficiary is not required to improve the property and is not the agent of the First Beneficiary for that purpose.

The question of whether or not to record the trust agreement and subsequent instruments transferring or encumbering beneficial interests requires some comment. It has been the uniform practice, until very recently at least, not to record any such instruments, and in Arizona we have been pretty well satisfied that recordation was not necessary for the protection of any of the parties. This squared with the desires of the subdividers in most instances that the details of their acquisition and financing remain as confidential as possible. This practice of non-recordation has been based very largely on the 9th Circuit Court's opinion in *Barringer v. Lilley*,[20] in which the fact that record title was in the trustee was held to be constructive notice to the world that the Second Beneficiary (buyer) did not own the property, and on this basis the First Beneficiary (seller) was held to be entitled to enforce the trust agreement against the trustee in bankruptcy of the Second Beneficiary.

Nothing in any litigation up to now shakes our confidence in that case as justification for non-recordation of the trust agreement itself. But the theory has recently been advanced in bankruptcy litigation in Arizona that record title in the trustee gives notice to the world of the existence of the trust agreement itself, but not of the existence of subsequent instruments for the transfer or encumbrance of beneficial interests in the trust created by the trust agreement. Adoption of this theory would lead to the result that there was no necessity from the First Beneficiary's point of view to record the trust agreement, but that persons claiming under, by or through any beneficiary needed the protection of recordation of the instrument under which they claimed. It may be urged against this theory that recording acts apply only to legal interests, and that the transfer of equitable instruments is not within their purpose. On this subject, I recommend to you an article by William H. Rehnquist, a Phoenix lawyer, in a recent issue of the *Arizona Law Review*.[21]

The current general practice in Arizona is not to record the trust agreement. The practice as to recordation of subsequent instruments transferring or encumbering beneficial interests is at present not at all uniform. From the viewpoint of title insurance company trustees, recordation of such a subsequent instrument, if it describes the land

---

[20] 96 F.2d 607 (9th Cir. 1938).

[21] Rehnquist, *Subdivision Trusts and the Bankruptcy Act*, 3 ARIZ. L. REV. 165 (1961).

held in the trust, without recordation of the trust agreement, puts on record what is apparently a "wild" instrument, which might cause questions and doubts as to the status of title and ownership of beneficial interests. For this reason, title company trustees in Arizona currently try to get on record a memorandum setting forth the names of the beneficiaries and the description of the property when such a subsequent instrument is recorded by anyone. Recordation of a memorandum in place of an entire instrument is sanctioned by our case of *Carley v. Lee.*[22]

If, as is generally agreed to be the rule of *Barringer v. Lilley,*[23] the fact that record title in the trustee gives notice to the world of the existence of a trust agreement, is it necessary that persons thereby put on inquiry shall be able, by such inquiry, to discover the nature of the interest of each party? If one has notice only of such facts as he could have discovered by diligent inquiry, what good does it do to put him on inquiry, and then, in response to his inquiries, refuse to give any information? It has seemed to us as draftsmen of the form of trust agreement referred to herein that the inquirer could not be met with a complete refusal of disclosure, if the theory of constructive notice was going to do the parties any good. On the other, hand, it seemed to us that the trustee, to whom inquiries would come initially, had no business throwing its files open to all who might choose to inquire. For this reason, there is included, in Section XIV, the provision that the trustee shall, on inquiry of any person, disclose the identity and address of each person owning or holding any beneficial interest in the trust, either absolutely or as security. This, we believe, would direct the inquirer to the persons who could give him such further information as they might choose — and on whom would fall any loss occasioned by nondisclosure.

I have tried to give a description of the real estate trust as a device useful in appropriate kinds of real estate transactions. It has not superseded, and will not supersede, traditional contracts of sale or mortgages in all transactions; but, in the specialized situations which led to its development, it can be made to perform well. It seems to be firmly established as a part of our pattern of real estate transactions in Arizona. It may be worthy of consideration for use in other states.

---

[22] 58 Ariz. 268, 119 P.2d 236 (1941).
[23] 96 F.2d 607 (9th Cir. 1938).

APPENDIX

ESCROW NO.____________ TRUST NO.____________

TRUST AGREEMENT

THIS AGREEMENT, made and entered into this____________ day of ____________________, 19____, by and between Title Company "X", an Arizona Corporation, as Trustee, and the following named First Beneficiary:

and the following named Second Beneficiary:

the beneficial interests to be vested as set forth on Schedule "A", attached hereto and made a part hereof by reference;

WITNESSETH:

WHEREAS, there is being conveyed to Trustee title to the real property, described in that certain memorandum title report, a copy of which is immediately hereafter set forth as Page 2 of this agreement, said property being subject to the matters shown therefor; which is to be held in Trust by Trustee under the terms of this agreement; and

WHEREAS, First Beneficiary and Second Beneficiary (and their respective successors in interest) may hereinafter be referred to jointly as "the Beneficiaries" and this Trust Agreement and the Trust hereby established, as "this Trust" or "Trust No. ( ) of the Title Company "X":

COPY OF TITLE REPORT

NOW, THEREFORE, in consideration of the premises, and of the mutual covenants, conditions and agreements herein contained, the Beneficiaries herein and Trustee herein agree as follows:

SECTION I

The above described and designated property is hereby declared to be held in Trust by Trustee for the Beneficiaries; Trustee holds and will hold title to said property in Trust for the purposes herein set forth and for the purpose of deeding, selling, conveying, receiving payment or the otherwise handling the property upon such terms and conditions and for such prices as Trustee may be instructed in writing so to do by Second Beneficiary or his authorized representative, subject, however, to the provisions hereof. Trustee is hereby granted full power to do all lawful acts necessary to accomplish the purposes of this trust. The "trust estate" shall consist of the legal title to said property and all funds received by Trustee from the lease or sale of said property or any interest in said property (including but not limited to funds received for the granting of licenses, easements or rights, and all rents, issues or profits in, to or upon said property) and all funds received by Trustee as performance of the obligations of the Beneficiaries created by this Trust Agreement.

SECTION II

A. Throughout the term of this Agreement and the duration of the Trust hereby established, the whole legal title to said property hereinbefore described shall be vested in said Trustee except as hereinafter provided and no legal interest in and to said property shall be vested in either First Beneficiary or Second Beneficiary. The sole right and power of the Beneficiaries is to enforce the performance of the terms of this Trust as expressly set forth herein.

B. The interest of the Beneficiaries in this Trust is personal property, and, except as provided herein, the Beneficiaries have not and shall not have any right or power to apply for or secure the dissolution or termination of this Trust, or the partition or division of any of the trust property.

SECTION III

A. Second Beneficiary and persons claiming under Second Beneficiary shall have the right to possession of the above described property during the duration of Second Beneficiary's interest in this Trust.

B. Second Beneficiary, when not in default hereunder, may cause said property or a part thereof to be subdivided and improved, provided any subdivision plat or plats thereof shall comply with all existing governmental rules and regulations. Trustee is further authorized by First Beneficiary to file for record such restrictions as Second Beneficiary may submit. All expenses in connection with subdividing and improving said property including but not limited to installing streets, water lines, sewers or any public utilities, shall be the obligation of Second Beneficiary.

C. Upon the instruction of Second Beneficiary, when not in default hereunder, Trustee is authorized to dedicate to public use roads, alleys or easements and to convey any portions so dedicated to the county in which said property is located or to a city, if said property is located within the boundaries of a city.
D. Upon the instruction of Second Beneficiary, when not in default hereunder, Trustee is authorized to execute petitions seeking annexation to a city or a town or change in zoning for all or a portion of the trust real property.

SECTION IV

Any lien or encumbrance created, suffered or permitted by Second Beneficiary shall not affect the interest of First Beneficiary or Trustee except to the extent which may be specifically permitted by First Beneficiary under the provisions hereof. Adjudication by any court of competent jurisdiction that the unreleased trust real property, or any part thereof, or the interest of Trustee or of First Beneficiary therein, is subject to any lien or encumbrance arising from any act or omission of Second Beneficiary (except as permitted by the provisions of this Trust) shall be a breach hereof by Second Beneficiary and a condition of default hereunder on the part of Second Beneficiary; provided, however, that such breach and default may be remedied by causing such lien or encumbrance to be discharged or at Second Beneficiary's election by procuring and keeping in effect, at Second Beneficiary's expense, a good and sufficient bond, in form and with sureties acceptable to First Beneficiary, for the payment of any sums finally adjudged to be required to discharge such lien or encumbrance, and securing and keeping in effect a proper court order staying all proceedings for the sale of the property or the affected portion thereof or the interest of First Beneficiary therein.

SECTION V

First Beneficiary agrees to sell and Second Beneficiary agrees to buy the entire beneficial interest and to pay to Trustee for the account of First Beneficiary and on account of the purchase price of said beneficial interest the full sum of ______________________________

______________________________ ($______________________),
said sum to be payable as follows:

(1) The sum of $______________________ heretofore paid to Trustee as Escrow Agent under escrow No. ______________ on the records of said Escrow Agent, together with an additional $______________________ to be paid into said escrow on or before the ______________ day of ______________________, 19______, said sums constituting an initial payment of $______________________.

(2) The balance of $______________________, as follows:

SECTION VI

Here set forth special provisions such as:

1. Release provisions (for example, see attachments).
2. Mortgaging privileges, if granted (for example, see attachments).

SECTION VII

Second Beneficiary does hereby assume and agree to pay all taxes and assessments levied and assessed upon and against or secured by lien upon the trust real property for the year in which this trust becomes effective and all subsequent years. In the event Second Beneficiary shall fail to pay said taxes or assessments prior to the delinquency thereof, or any other charges which are the obligation of Second Beneficiary, then First Beneficiary shall have the right to advance any amounts necessary to pay the same, and any payments so made by First Beneficiary shall be prima facie evidence of the necessity therefor, and the amounts so paid shall be repaid to First Beneficiary by Second Beneficiary on demand, together with interest thereon at the same rate as provided for in the principal obligation hereinbefore provided, from the date of such payment by First Beneficiary.

SECTION VIII

Any provisions of this Trust Agreement to the contrary notwithstanding, whenever Second Beneficiary is not in default in any of his obligations hereunder, then Trustee is authorized to sell pursuant to Second Beneficiary's direction through an escrow in the Escrow Department of Title Company "X", all of the above described property or any of the lots or parcels into which the property has been subdivided or any portion of the trust property which has not been subdivided, (or all or any portion of the Second Beneficial Interest herein as it relates to such property). PROVIDED, HOWEVER, that until the purchase price as set out in Section V hereof has been paid in full the principal of the sale price of the property sold shall be of an amount which is sufficient to pay the release price of the property sold, taxes or assessments or the seller's prorated share thereof necessary to close said sale, and expenses of sale including but not limited to any real estate commission involved in such sale. Trustee shall be entitled to execute and deliver all instruments and perform all acts necessary or appropriate to the completion of any sale made pursuant to and in accordance with this Section, regardless of any default of Second Beneficiary or forfeiture of his interest in this Trust occurring after such sale. Second Beneficiary shall be entitled to modify the provisions of or rescind any sale made pursuant to this Section provided said sale if modified is consistent with the provisions of this Trust Agreement. Any such sale may be made either:

1. For Cash; or
2. For part cash, with the balance on deferred payments to be evidenced by an Agreement for Sale in the form then used by Trustee; or

3. For part cash, with the balance on deferred payments to be evidenced by a Junior Trust Agreement wherein Second Beneficiary herein will be First Beneficiary in said Junior Trust Agreement. Such Junior Trust Agreement shall be subject to all the provisions of this Trust Agreement.

SECTION IX

A. All funds constituting a portion of the trust estate shall be distributed by Trustee according to the following priorities:

1. *First:* To reimburse Trustee for any payment made by Trustee which is reimbursible under the provisions hereof.

2. *Second:* To the payment of all damages, if any, incurred by Trustee in the administration of this Trust.

3. *Third:* To the payment of fees, expenses and charges of Trustee.

4. *Fourth:* To the account of the Beneficiaries under whichever of the following alternatives is applicable:

   a. To First Beneficiary those funds paid by Second Beneficiary on account of his installment obligations hereunder, either principal or interest, or on account of a release price, except as provided in (b) and (c) hereof;

   b. Upon the sale of all of the real property legal title to which is held by Trustee and in which First Beneficiary has an interest at the date of said sale, the balance of all funds arising from said sale shall be distributed by Trustee according to the following priorities:

      First Priority: The portion of said sale price constituting the down payment shall be paid to Second Beneficiary provided, however, that if the remaining unpaid balance upon said sale shall not equal or exceed the amount of the then unpaid principal to be paid to First Beneficiary under the provisions of this trust, then the down payment shall be divided between First Beneficiary and Second Beneficiary in such a manner that the principal balance remaining to be paid to First Beneficiary under this trust subsequent to said division, shall be equal to the remaining principal balance to be paid on said sale, excluding any provision whatsoever for interest.

      Second Priority: To First Beneficiary until all of the unpaid principal and interest to be paid First Beneficiary under the provisions hereof have been paid in full.

      Third Priority: To Second Beneficiary the remainder of said funds.

   c. Upon the sale of any portion which is less than all of the real property legal title to which is held by Trustee and in which First Beneficiary has an interest at the date of said sale, the balance of all funds arising from said sale shall be distributed by Trustee according to the following priorities:

First Priority: To the payment of the escrow fees, title insurance premiums, taxes or assessments on the trust property or the seller's prorated share thereof, and real estate broker's commissions in connection with said sale, provided that all real estate broker's commissions paid under the provisions of this priority shall not exceed ten percent (10%) of said sales price.

Second Priority: To First Beneficiary until sufficient funds have been paid to First Beneficiary to permit the release of said portion of said property from the interest of First Beneficiary and until it is so released, funds payable under this priority shall not be applied toward the release of any property other than the property which is the subject of said sale.

Third Priority: To Second Beneficiary the remainder of said funds.

d. The balance of all funds constituting a portion of the trust estate which are not specifically provided for in sub-paragraphs (a), (b), and (c) of this Fourth Priority of paragraph A of this Section IX shall be distributed to the Second Beneficiary.

B. All disbursements made by Trustee may be made in either cash, check, draft or money order as the Trustee determines. Trustee shall have no duty or obligation to make distribution to any of the Beneficiaries more frequently than monthly. Trustee is authorized to accept cash, checks, drafts or money orders as payment, and the date of receipt thereof shall constitute the date of receipt of payment by the Beneficiaries for all purposes under the provisions of this trust; provided, however, that in the event that such check, draft or money order is not paid upon presentation then and in such event such receipt shall not constitute payment; provided further, all payments to remedy a default shall be made in cash, cashier's check, certified check, or bank or postal money order.

SECTION X

A. If Second Beneficiary fails to pay any installment of principal or interest as and when due hereunder or fails to pay any other sum properly payable hereunder or breaches any covenant, condition or stipulation hereof, then First Beneficiary by written instruction to the Trustee may declare a default or breach and direct the Trustee to serve a Notice of Default on Second Beneficiary and such written instruction shall specify the nature of the default or breach. Second Beneficiary shall not be deemed in default until receipt by Trustee from First Beneficiary of such written instruction. Said Notice of Default may contain a notice of reinstatement of the time of the essence clause, if the Trustee deems it necessary. If said default or breach be not remedied within thirty days after service of said Notice of Default upon Second Beneficiary then First Beneficiary may declare all sums agreed to be paid hereunder immediately due and payable. The election to accelerate shall be effective upon receipt by Trustee of written notice of such election from First Beneficiary. If the First Beneficiary so elects to accelerate he shall cause notice of such election to be served by Trustee upon Second Beneficiary. First Beneficiary may also upon expiration of said thirty day period and failure by Second Beneficiary to remedy said default or breach within said period, pursue any available remedy at law or in equity or as an alternative may enforce a forfeiture by notice in the manner hereinafter agreed upon.

B. Forfeiture by notice shall be made in the following manner: First Beneficiary by written instruction to Trustee shall cause Trustee to serve a Notice and Declaration of Forfeiture upon Second Beneficiary. Said Notice and Declaration of Forfeiture shall contain notice of acceleration, if so elected; a statement as to the nature of the default or breach; and the period during which Second Beneficiary shall be entitled to perform his obligations hereunder which shall be equal to the period which would apply under Section 33-741 Arizona Revised Statutes, if the sale were of real property. Upon failure by Second Beneficiary to correct said default or breach within said period, then, without further notice, all right, estate and interest created by this Trust Agreement or then existing in favor of Second Beneficiary or any one who claims under him, in and to all unreleased property, shall cease, terminate and become null and void, and all equitable and legal interest and estates in all such unreleased property and any improvements on any such unreleased property and all other appurtenances, together with all sums of money theretofore paid by Second Beneficiary hereunder, shall revert to, vest in and become the sole property of Trustee for the benefit of First Beneficiary as liquidated damages for such default or breach and not as a penalty. All sums of money received by Trustee for the account of Second Beneficiary from the sale of unreleased property subsequent to service of Notice of Default shall be impounded by Trustee for the use and benefit of Second Beneficiary to remedy his default or breach; provided, however, upon failure by Second Beneficiary to remedy said default or breach, all sums impounded shall revert to and vest in First Beneficiary as liquidated damages as hereinabove provided in this Section.

C. Upon expiration of the period specified in said Notice and Declaration of Forfeiture Trustee may serve a Notice of Completion of Forfeiture upon Second Beneficiary; however, effectiveness of the forfeiture shall not be conditioned upon service of such Notice of Completion of Forfeiture. After completion of forfeiture, First Beneficiary may instruct Trustee to convey all unreleased property and to deliver all funds held by Trustee for the account of First Beneficiary to First Beneficiary and Trustee shall have thirty days within which to comply with such instruction.

D. Within the context of this Section wherever notice is required to be served on Second Beneficiary Trustee shall cause copies of said notice to be served on any party having a derivative interest from Second Beneficiary as shown on Schedule "A" hereof.

E. As a condition to the remedy of any default or breach as provided in this section Second Beneficiary shall within said period as provided herein pay all costs of Trustee for administering the provisions of this Section.

SECTION XI

A. Trustee shall not be required, in dealing with the trust property or in otherwise acting hereunder, (1.) to enter into any contract or other obligation in its proprietary corporate capacity, nor (2.) to make itself individually liable to pay or incur the payment of any damages, attorneys' fees, fines, penalties, forfeitures, costs, charges or other sums of money whatsoever. Trustee shall have no individual liability or obligation whatsoever, arising from its ownership, as Trustee hereunder, of the legal title to the trust property, or with respect to any act done or contract entered into or indebtedness incurred in relation to the trust property or in otherwise acting hereunder. Trustee reserves the right to incorporate the above limitations of its liability in any instrument or document executed in connection with this trust.

B. Trustee shall not be required to pay, discharge or attend to the release of any claim, lien or encumbrances (including but not limited to mechanics or materialmen's liens, real and personal property taxes, assessments, income taxes, inheritance or estate taxes, excise taxes, special assessments or penalties and interest thereon) involving this trust or any property or interest hereunder, or any transaction relating to the trust. If there shall be asserted any such claim, lien, or encumbrance of any nature against the trust property, Trustee shall have no duty or responsibility to defend against such assertion or to take any other action with respect thereto.

C. If Trustee shall pay or incur any liability to pay any money on account of this trust, or incur any liability to pay any money on account of any litigation as a result of holding title to the trust property or otherwise in connection with this trust, whether because of breach of contract, injury to person or property, fines or penalties under any law, or otherwise, the Beneficiaries jointly and severally shall pay on demand to Trustee, with interest thereon at the rate of 8% per annum until paid, all such payments made by Trustee together with its expenses, including reasonable attorney's fees, and they shall indemnify and hold Trustee harmless of and from any and all liabilities incurred by it for any reason whatsoever in connection with this trust. Trustee shall have a lien on trust property to secure performance of the obligations of the Beneficiaries under this trust, which lien shall be senior to the respective interests of the Beneficiaries. Trustee shall not be required to convey or otherwise deal with the trust property so long as any money is due Trustee under this trust, nor shall Trustee be required to advance or pay any money, or to appear in, prosecute, or defend any legal proceedings on account of or involving this trust or any property or interest hereunder or any transaction relating to the trust.

D. In the event Trustee is instructed or requested to do any act (or refrain from doing any act) performance of which (or non-performance of which), in Trustee's sole opinion, would subject Trustee to unreasonable risk of liability, expense or litigation, Trustee shall have no obligation to perform such act (or to refrain from performing such act) except upon being furnished instructions or indemnity adequate, in Trustee's sole, absolute and uncontrolled discretion, to protect Trustee against such risk of liability, expense, or litigation, or except in accordance with an adjudication by a court of competent jurisdiction (and the determination of all appeals and expiration of all applicable appeal periods) in any appropriate legal or equitable proceeding, including, without limiting the generality of the foregoing, an action for an accounting or to secure approval of an accounting, a suit for a declaratory judgment, an interpleader action, or a suit for instructions to Trustee. In any such action the Trustee shall be entitled to a judgment against all the Beneficiaries for any expenses or costs including reasonable attorney's fees incurred in such action, to the extent that the court may determine.

E. Any instruction notice to Trustee shall be in writing and in such form as Trustee may require; provided, however, that Trustee may, in its discretion, act on oral instruction or notice.

F. Trustee shall have no liability to any Beneficiary or his successors or assigns on account of electing to act in accordance with any provision hereof, as reasonably construed by Trustee, regardless of whether or not such provision may subsequently be reformed or declared invalid or unenforceable or otherwise construed in any litigation or proceeding.

SECTION XII

A. Five (5) years following the due date for the final installment of the purchase price as herein provided, Trustee shall sell all of the real property remaining in the trust which is not subject to an Agreement for Sale. Such sale shall be free of any right, title or interest of the Beneficiaries; and no Beneficiary shall have any right of redemption therefrom. Such sale shall be for cash and shall be conducted by Trustee following the same procedure as though the property were being sold by the sheriff as required for Sales Under Execution as prescribed by A. R. S. Section 12-1621, *et seq.*, or as said Sections may be amended. Written notice of the time and place of such sale shall be served at least thirty (30) days prior to the date for such sale upon all persons having an interest in said property as indicated in Schedule "A" hereto attached. Trustee shall distribute the proceeds from such sale, first to the payment of all its costs, fees, charges and damages; second, to First Beneficiary any amount remaining due and owing under the terms hereof; and third, to Second Beneficiary.

B. This Trust shall terminate upon conveyance of all of the property by Trustee in accordance with the provisions hereof, and the distribution of all of the funds in the hands of the Trustee to the person or persons entitled thereto in accordance with the terms hereof.

SECTION XIII

This Trust Agreement may be amended only by a written amendment hereto delivered to Trustee and accepted in writing by Trustee, and no purported amendment hereto not complying herewith shall be effective for any purpose as regards the obligations of Trustee. No assignment or transfer, either absolute or as security, of any interest of any Beneficiary shall be effective (nor shall it confer upon the purported assignee or transferee any rights against Trustee or any other party, or create any interest in this trust or in the trust estate), except an assignment or transfer accomplished by a proper amendment hereto. Trustee shall be entitled to treat any written instrument purporting to constitute an assignment or transfer of any interest of any Beneficiary as such a proper amendment. Amendments to this Trust Agreement not affecting any provision hereof except the identity of the persons having rights with respect to beneficial interests hereunder shall not require the concurrence of parties (other than Trustee) whose rights and obligations are not thereby affected, except as may otherwise be provided in Section VI hereof. Trustee shall accept any such amendment presented to it with proof satisfactory to Trustee of its genuineness, unless it shall purport to create obligations or risk of liability on Trustee which Trustee is not willing to assume; and upon accepting any such amendment Trustee shall endorse a notation thereof upon Schedule "A" of Trustee's official copy of this Trust Agreement as to any assignment or transfer of any interest of any Beneficiary, and, as to any other amendment, on the schedule of amendments attached hereto and made a part hereof as Schedule "B"; and upon such endorsement the amendment shall become a part of the Trust Agreement for all purposes to the same effect as though set forth in full herein. Trustee shall for this purpose designate one counterpart or copy as its official counterpart or copy, and shall make notation of such designation on the face thereof.

SECTION XIV

Trustee shall upon inquiry by any person, disclose to such person the identity, address as shown by Trustee's records, and nature of the interest of each person owning or holding, absolutely or as security, any beneficial interest in this trust.

SECTION XV

Service of any notice of any kind upon any beneficiary by Trustee may be made in person or by mail shall be deemed complete when delivered, in person to the Beneficiary, or when deposited in the United States mail, ordinary postage prepaid, addressed to the Beneficiary at the mailing address reflected on page one of Schedule "A" or the last mailing address of the Beneficiary filed in writing with Trustee.

SECTION XVI

"Released property" is all that real property conveyed to Trustee which Second Beneficiary shall be entitled to have conveyed to him or his nominee, free and clear of any right, title, claim or interest of First Beneficiary, by reason of any provision hereof or of any payment made by Second Beneficiary pursuant hereto, and which Second Beneficiary shall have designated by written instrument delivered to Trustee while not in default or before expiration of the thirty day period provided for in the Notice of Default set forth in Section X-A.

"Unreleased property" is all the real property conveyed to Trustee which is not released property.

SECTION XVII

Time is of the essence in the performance of each and every obligation hereby imposed.

Waiver of any breach hereof or default hereunder by any party shall not constitute a waiver of or consent to any continued, additional or separate breach or default, whether of the same or similar nature or otherwise.

SECTION XVIII

"Trustee" means ______________________________, only in its capacity as Trustee of this trust, and not in its proprietary corporate capacity nor as trustee of any other trust.

SECTION XIX

In any litigation between Beneficiaries concerning their respective rights and obligations hereunder, the prevailing Beneficiary shall be entitled to a judgment for his expenses and attorney's fees therein reasonably incurred.

SECTION XX

Trustee shall have the right to include the real property held hereunder in the Comprehensive General Liability Insurance Policy carried by Trustee and the cost of the prorata portion of said policy premium applicable to said real property shall be paid by the Second Beneficiary.

SECTION XXI

Trustee shall receive for its services in connection with this Trust, the following fees:

FEE SCHEDULE

All fees charged by reason of the number of First Beneficiaries and subsequent transactions involving only the First Beneficial Interest shall be the obligation of First Beneficiary.

Note: A reasonable charge will be made for extraordinary services rendered.

SECTION XXII

As between First Beneficiary and Second Beneficiary except as herein specifically provided to the contrary, it is agreed that all fees shall be payable by Second Beneficiary; provided, however, that Trustee may look to any property or funds in its hands for payment thereof.

SECTION XXIII

Each provision hereof granting a right or privilege to Second Beneficiary (including, without limiting the generality of the foregoing, the provisions permitting subdividing and improving of the property) and not expressly imposing an obligation on Second Beneficiary creates only a right or privilege in Second Beneficiary, which Second Beneficiary may or may not exercise, at Second Beneficiary's sole option; and Second Beneficiary has no obligation to exercise such right or privilege. Notice is hereby given that Second Beneficiary is not the agent of First Beneficiary for the purpose of subdividing or improving the property or for any other purpose.

SECTION XXIV

Trustee shall not be obligated to warrant title to any property sold or conveyed by it except as against the acts of the Trustee only.

SECTION XXV

An applicable policy of title insurance of Title Company "X" in the regular form then in use shall be issued in connection with each transaction involving trust property, if the nature of transaction creates an insurable interest or unless such issuance is specially waived by Trustee.

SECTION XXVI

The accounting records of Trustee shall at all reasonable times be open to the inspection of the interested parties to this Trust, as set forth on Schedule "A". The Beneficiaries shall be entitled to monthly statements from the Trustee showing all the receipts and disbursements and charges made in connection with this Trust.

SECTION XXVII

No advertising shall indicate that Trustee is the author thereof, and the Trustee shall not be liable for any statement or representation made therein.

SECTION XXVIII

No person dealing with Trustee shall be obligated to ascertain whether or not Trustee has exceeded its powers in any act it may perform or cause to be performed incident to or in connection with the management, control, sale, application, distribution, disposal or otherwise handling of the trust estate.

SECTION XXIX

This Trust shall be exempt from the provisions and operation of the Uniform Principal and Income Act of Arizona.

SECTION XXX

Wherever the context of this instrument so requires words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word person includes a corporation, company, partnership, or association, or society as well as a natural person. Every reference to any Beneficiary or to the Beneficiaries collectively shall be deemed to constitute a reference to all successors in interest or assigns of the party referred to.

SECTION XXXI

The provisions of this instrument and the terms and conditions hereof and of this Trust shall be binding upon and inure to the benefit of the executors, administrators, legatees, devisees, heirs, successors and assigns of the parties hereto.

APPROVED BY:	APPROVED BY:
______________________________	______________________________
Attorney for First Beneficiary	Attorney for Second Beneficiary
FIRST BENEFICIARIES	SECOND BENEFICIARIES
______________________________	______________________________
______________________________	______________________________

Executed by Trustee this ________ day of ________________, 19_____.

TITLE COMPANY "X"

BY: ______________________________
Assistant Vice President

ATTEST: ______________________________
Assistant Secretary

SCHEDULE "A" OF TRUST NUMBER____________
Page 1

At the inception of this Trust Number ____________ the First Beneficial interest is vested as follows:

Mailing address:

and the Second Beneficial interest is vested as follows:

Mailing address:

SCHEDULE "A" OF TRUST NUMBER____________
Page 2

Item #	Assignor	Assignee	Interest Affected	Nature of Instrument and Date	Date of Accept.	Released

SCHEDULE "B" OF TRUST NUMBER____________
Page______

Item #	Date of Amendment	Date of Acceptance	Remarks Not a Part of Schedule "B"

ATTACHMENTS TO TRUST AGREEMENT

Release Provision — Interest Included in Stated Release Price

For possible inclusion in Section VI

At any time when Second Beneficiary is not in default hereunder, any portion of the property shall be released from any further right, title, interest, claim or demand of First Beneficiary (and Trustee shall convey such portion of the property in accordance with Second Beneficiary's directions) upon payment to Trustee for the benefit of First Beneficiary of a release price of $__________ per acre, plus Trustee's fees, costs and expenses in connection with such release and conveyance, and any amounts then owed by Second Beneficiary to Trustee which if unpaid would entitle Trustee to withhold all or any part of the release price from First Beneficiary. The initial payment of $______________ shall not entitle Second Beneficiary to the release of any property. Any amount paid as a release price shall be applied first to interest on the unpaid portion of the purchase price to the first day of the month next succeeding the date of such payment (unless the release price is paid on or before the fifteenth day of the month, in which event the interest need be paid only to the first day of such month), and the balance to be applied to principal. All portion of the release price applied to principal shall apply toward payment of the next principal installment or installments to become due in the order of their maturity. The periodic principal payments shall apply cumulatively toward the release of property. The term "acre" as used herein means the entire area of any portion of the property to be released to the center line of any abutting street, alley or other public way, the area of which was included in the property at the inception of this Trust (or in the case of such a public way abutting the exterior boundary of the property, to such exterior boundary). At the time of or prior to the time of requesting release of any portion of the property, Second Beneficiary shall furnish Trustee with a description of and a statement of the acreage included in such portion of the property signed by a civil engineer or land surveyor licensed in Arizona, and Trustee shall be entitled to rely on such statement in determining the release price of such portion of the property; provided, however, that as to any portion of the property subdivided into lots of substantially uniform size, the release price of each lot may be determined, in Trustee's discretion, by dividing the number of such lots into the release price for the entire portion of the property so subdivided; and provided, further, that Trustee shall be entitled to treat any section as being 640 acres in area and any fractional subdivision thereof as having a proportionate area. The rights of Second Beneficiary to release property in accordance with terms of this Section shall be subject to the terms of Section XVI hereof.

Release Provision — Interest in Addition to Stated Release Price

For possible inclusion in Section VI

At any time when Second Beneficiary is not in default hereunder, any portion of the property shall be released from any further right, title, interest, claim or demand of First Beneficiary (and Trustee shall convey such portion of the property in accordance with

Second Beneficiary's directions) upon payment to Trustee for the benefit of First Beneficiary of a release price of $____________ per acre, together with interest on the then unpaid portion of the purchase price to the first day of the month next succeeding the date of such payment (unless the release price is paid on or before the fifteen day of the month, in which event the interest need be paid only to the first day of such month), plus Trustee's fees, costs and expenses in connection with such release and conveyance, and any amounts then owed by Second Beneficiary to Trustee which, if unpaid, would entitle Trustee to withhold all or any part of the release price from First Beneficiary. The initial payment of $________________________ shall not entitle Second Beneficiary to the release of any property. Any amount paid as a release price shall be applied toward payment of the next principal installment or installments to become due in the order of their maturity, and any amount paid as interest in connection with the payment of such release price shall be applied on interest. The periodic principal payments shall apply cumulatively toward the release of property. The term "acre" as used herein means the entire area of any portion of the property to be released to the center line of any abutting street, alley or other public way, the area of which was included in the property at the inception of this Trust (or in case of such a public way abutting the exterior boundary of the property, to such exterior boundary). At the time of or prior to the time of requesting release of any portion of the property, Second Beneficiary shall furnish Trustee with a description of and a statement of the acreage included in such portion of the property signed by a civil engineer or land surveyor licensed in Arizona, and Trustee shall be entitled to rely on such statement in determining the release price of such portion of the property; provided, however, that as to any portion of the property subdivided into lots of substantially uniform size, the release price of each lot may be determined, in Trustee's discretion, by dividing the number of such lots into the release price for the entire portion of the property so subdivided; and provided, further, that Trustee shall be entitled to treat any section as being 640 acres in area and any fractional subdivision thereof as having a proportionate area. The rights of Second Beneficiary to release property in accordance with terms of this Section shall be subject to the terms of Section XVI hereof.

Provision to Permit Mortgaging of Property to Secure Construction Loans

For possible inclusion in Section VI

Any provision of this Trust Agreement to the contrary notwithstanding, whenever Second Beneficiary is not in default hereunder, then Second Beneficiary shall be entitled to direct Trustee to convey, and Trustee is authorized to convey to Second Beneficiary or Second Beneficiary's nominee, the legal title to any platted portion of said property for which a release provision is herein contained and into which the said property or any portion thereof has been subdivided as herein provided, for the sole purpose of allowing the recordation of a mortgage covering said portion as security for any loan (including any refinancing, renewal or increase thereof) in connection with the construction of houses or any other improvements except public sidewalks, streets, water lines, sewers or any public utilities on said portion, title to any portion so conveyed to be immediately reconveyed to the Trustee and to be thereafter governed by the terms of this Trust Agreement subject to said mortgage. Any such conveyance or reconveyance of such legal title shall be accomplished by the consecutive recordation by Trustee, without the intervention of any other recorded document, of first, a deed from Trustee to Second Beneficiary or Second Beneficiary's nominee, as Grantee, second, a mortgage wherein said Grantee is the mortgagor, and third, a deed from said mortgagor to Trustee for the reconveyance of legal title subject to said mortgage on such portion. Any such conveyance of legal title to said Grantee shall not convey any beneficial interest in said portion, legal title to which is so conveyed, and the beneficial interest and ownership of said portion shall be governed by this Trust Agreement, the only right to be created by such conveyance to be the right to encumber such portion by a mortgage as above set forth. The exercise of the rights granted in this paragraph shall create a valid mortgage lien prior and superior to the interest of all beneficiaries, their successors and assigns, on said portion so conveyed, but the exercise of said rights shall not create any other lien or encumbrance thereon. Any condition of default with respect to any such mortgage or any note or other obligation secured thereby shall be a default under this Trust Agreement. The Trustee shall have no responsibility or liability for any liens, encumbrances or rights to liens or encumbrances which may arise or be claimed by reason of such conveyance. Such portion shall be reconveyed to said mortgagor at such time as the release price for such portion has been paid. The Trustee shall have no responsibility or liability for the expenditure of the proceeds of said mortgage loan provided for herein.