



Idaho Case Law Review

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Mulberry v. Burns Concrete

Subject Matter: Seller's attempt to clear Right of First Refusal.

Facts:

- In 1999, Nora Mulberry sells (i) a parcel of real property and (ii) an ROFR for a separate parcel to Canyon Cove Development Company, LLP.
- Canyon Cove immediately transfers the Purchased Property and the ROFR to Burns Concrete, LLC, recording a Deed for the Purchased Property.
- Mulberry conveys the ROFR Property to a wholly-owned LLC, TN Properties, LLC.



Mulberry v. Burns Concrete

Lawsuit: TN Properties seeks a Declaratory Judgment that the ROFR was extinguished when Canyon Cove attempted to transfer it to 3rd party Burns Concrete. The district court agreed:

- 1 – ROFR is personal in nature. Canyon Cove could not assign.
- 2 – ROFR was a servitude to the Purchased Property. Unenforceable by Canyon Cove because it no longer held any interest in the Purchased Property (to which the ROFR was appurtenant).

Idaho Supreme Court:Yes and No....



Mulberry v. Burns Concrete

On Appeal, Idaho Supreme Court:Yes and No....

1 - Assignability

- Generally, all contract rights that are not “personal” in nature may be assigned.
- Held: In Idaho, ROFR’s are presumptively personal to the parties, absent clear language that they are assignable to successors and assigns.
- No “successors or assigns” language. Therefore, the ROFR was personal and not assignable. Therefore, Burns Concrete cannot enforce it as grantee.
- However, the ROFR not necessarily extinguished by Canyon Cove’s attempt to assign it to Burns Concrete.



Mulberry v. Burns Concrete

On Appeal, Idaho Supreme Court:Yes and No....

2 – Is the ROFR a servitude?

- What is a servitude?
 - A legal device that creates a right (benefit) or an obligation (burden) that runs with land or an interest in land.
 - “Running with the land” means that the right or obligation passes automatically to successive owners.
- Held: Where we have already decided that this ROFR is personal to the parties, it cannot run with the land and therefore cannot be a servitude.
 - Caution: NOT a declaration that ROFR’s are “personal property.” It depends on whether the instrument contains “successors and assigns.”



Monitor Finance v. Wildlife Ridge Estates

Subject: Accrual of Statute of Limitations on Foreclosure of a Deed of Trust.

Facts:

- Deed of Trust recorded December 30, 2005
 - Stated Maturity Date: June 28, 2006
 - Deed of Trust Modification – March 3, 2008
 - Partial Payment Accepted – November 8, 2012.
- Action for Judicial Foreclosure: October 7, 2016.
 - Borrowers assert affirmative defense that action is barred by statutes of limitation.



Monitor Finance v. Wildlife Ridge Estates

Idaho Supreme Court: Foreclosure not time barred, despite passage of 5 years from maturity date stated in the recorded instrument.

Deed of Trust – Statute(s) of Limitation

- Idaho Code section 45-1515:
 - The foreclosure of a trust deed...shall be commenced within the time period...as provided by law for the foreclosure of a mortgage.
- Idaho Code section 5 – 214A:
 - An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage.
 - If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness. (emphasis added)
- Recall, 2017 cases *Baughman v. Wells Fargo Bank* and *CMJ Properties v. JP Morgan Chase Bank*. Under 5-214A, the 5-year limitations periods accrued from the dates stated in the deed(s) of trust, not the acceleration notices.



Monitor Finance v. Wildlife Ridge Estates

- Idaho Code section 5-238 – Effect of Partial Payment
 - No acknowledgement or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.
- Held: Payment of interest or principal serve to restart the statute of limitations on the note. Foreclosure action not time-barred.
 - Off-record facts affect accrual of maturity date.
 - In *Baughman*, *CMJ* and *Monitor Finance*, the latest possible date applied to accrual of the statute of limitations.



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Thank you.

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Entities Underwriting

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Who Can Hold Title?

- Common Law - only human beings, or “natural persons.”
- Today – a conveyance may be made to a natural person *or legally recognized “Entity.”*
- Idaho Code section 55-103: “Any person, whether citizen or alien.”
- Idaho Business Organizations Code (Title 30, Ch. 21):
 - “Person” - an individual, corporation, LLC, partnership, or any other legal or commercial entity.
 - “Entity” - any person that has a legal existence separate from any interest holder of the person.



Types of Entities

- Corporations 
- Limited Liability Companies 
- Partnerships 
- Trusts-NOT recognized as "person in being" 



General Standards of Review

- Does the Entity exist?
 - Entities are “creatures of statute” and exist solely by virtue of legislatures that establish the laws that enable their existence.
 - Statutory powers and requirements are specific and must be met in order for Entity to be in existence.
 - An Entity must be in existence in order for a conveyance to the Entity to be valid.
- Is the Entity in good standing with the State in which it was created?
- Who has the capacity and authority to bind the entity?
- Execution by the proper person?



Corporations



- Minimum requirements for corporate existence.
 - Articles of Incorporation;
 - Board of Directors; and
 - Bylaws
- Incorporators and shareholders elect Directors.
- Directors adopt Bylaws, appoint Officers and chart the course of the business.
 - Officers implement the vision of the Board of Directors.
- Governed by Title 30, Chapters 29 (profit), 30 (non-profit), and 20 (benefit) .



Corporations

- Articles of Incorporation are filed with Secretary of State by one or more “incorporators.”
- Articles must include:
 - Corporate Name
 - Name and address of Registered Agent
 - Number of shares authorized for issuance
 - Name and address of each Incorporator
- Articles may include:
 - Names and addresses of Initial Directors
 - Purposes, power, limitations on powers
- Corporate existence begins when Secretary of State accepts the Articles for filing. However, its authority to act is dependent upon existence of Directors and Bylaws.



Corporations

- Name-
 - Name must contain the words:
 - “corporation,” “incorporated,” “company,” or “limited” OR
 - “Corp.,” “Inc.,” “Co.,” or “Ltd.”
 - Professional Entities may use:
 - “Chartered,” “professional association,” “P.A.,” “P.C.,” “CHTD.”



Corporations

Powers – Idaho Code Section 30-29-302.

Every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including:

- (1) to sue and be sued in its corporate name;
- (3) to make and amend bylaws, not inconsistent with its articles of incorporation;
- **(4) to purchase, lease, or otherwise acquire and own real or personal property;**
- (5) to sell, convey, mortgage, pledge, lease or otherwise dispose of its property;
- (7) to make contracts and guarantees, borrow money;
- (10) to conduct its business within or without this state;
- (11) to elect directors and appoint officers, employees and agents of the companies, define their duties.



Corporations

- Review Bylaws - adopted by incorporators or board of directors.
 - Contain provisions for managing and regulating business of corporation.
 - Must be consistent with Articles.
- Review Resolutions.
 - Determine the identity of the designated signatory.
- Verify no self-dealing.



Corporations

- Resolution
 - Signed by all Directors (or minimum number required by Bylaws)
 - Confirm that the details of the transaction are spelled out (i.e. sales price, mortgage amount, relevant terms etc.)
 - Clearly indicates who is authorized to sign on behalf of the corporation
 - Certified by corporate secretary (or appropriate authority in the bylaws)

If involves substantially ALL of corporations assets Bylaws will usually require shareholder consent - Verify appropriate consent has been obtained.



Corporations

- Review documents to be executed (deed, mortgage etc.)
 - The signatory is described on the document to be insured according with the appropriate authorization that you reviewed
 - The notary block/acknowledgement has the correct information
 - Review all signatures and verify they match
 - Sample:
 - Signature block should read: "The ABC Corporation, by Jerry Garcia, President"
 - Notary block should read: "Jerry Garcia, President of The ABC Corporation"



Types of Entities-Limited Liability Company

Idaho Uniform Limited Liability Company Act (Title 30, Ch. 25)

- Created by Certificate of Organization
- Consists of Members (owners) and/or Managers
- Business and control spelled out by an Operating Agreement
- Combines the flexible business operations of a partnership with the limited liability of a corporation.



Limited Liability Companies

- Entity Existence
 - Certificate of Organization is filed with the Secretary of State by one or more organizers.
 - The Certificate of Organization must state
 - The name and address of the principal office;
 - Registered agent;
 - Name and address of at least one “governor”; and
 - For professional entities, statement of the profession.
 - Entity exists when the Certificate of Organization becomes effective.



Limited Liability Companies

- Name
 - The name of a limited liability company shall include:
 - Words "limited liability company" or "limited company" OR
 - Abbreviations "LLC," "L.L.C.," "LC," or "L.C."
 - Also, certain words may be abbreviated:
 - "Limited" may be abbreviated as "Ltd."
 - "Company" may be abbreviated as "Co."



Limited Liability Companies

- Statutory powers: “all things necessary to carry on its activities and affairs.”
- Business and control set forth in Operating Agreement.
 - Managers and/or Members may have authority to manage the affairs and make decisions for the LLC
 - Member has no authority by virtue of being a member - authority is derived from the Operating Agreement.



Limited Liability Companies

- Review that LLC is in good standing in the state it was created
 - Review Idaho SOS for registration if foreign LLC
- Review Operating Agreement
 - Verify who has authority to execute documents on behalf of LLC
 - Managing Member or other appointed Manager?
- Review Resolution when necessary
 - Signed by all members .
 - Confirm the details of the transaction are spelled out (i.e. sales price, mortgage amount, and any other relevant terms.
 - Appointment of member or manager with authority to execute documents.



Limited Liability Companies

- Statement of Authority
 - Permitted, not required. If filed with SOS, must comply with its terms or require withdrawal or amendment.
- Bankruptcy - Single Member vs. Multiple Member LLC's
 - Note that bankruptcy court decisions have determined that a single member LLC is the alter ego to its sole member. The bankruptcy of a single member subjects the LLC and therefore its property to the control of the bankruptcy trustee and court.
 - Not a concern where there is more than one member.



Types of Entities-Partnerships

- An association of 2 or more “persons” to carry on as co-owners of a business.
 - Common law only an association of natural persons and not legal entity.
 - Partners can include a natural person, corporation, or another partnership.
- Types:
 - General Partnerships (Title 30, Chapter 23) “Idaho Uniform Partnership Act”
 - Includes *Limited Liability* Partnerships.
 - Limited Partnerships (Title 30, Ch. 24) “Idaho Uniform Limited Partnership Act”
 - Includes *Limited Liability* Limited Partnerships



General Partnership

- All partners typically participate in the operation of the business and share personal liability for its debts.
- May register with Secretary of State for limited liability protection.
 - Registration makes it a “Limited Liability Partnership.” (LLP)
 - As such, individual partners’ liability for partnership debts is limited to their investment in the partnership.
- May file Statement of Partnership Authority.



General Partnership

- Authority of partners, generally:
 - All partners are agents for actions “apparently within the ordinary course of business.”
 - Otherwise, consent of all Partners is required.
- Review Partnership agreement and all amendments.
- Require Resolution –if less than all partners are signing and partnership agreement does not give authority.
 - Details should be spelled out within the Resolution. (sales price, mortgage amount, and any other relevant terms)



Limited Partnerships

- Composed of one or more general partners who operate the business and are liable for partnership debts, AND
- One or more limited partners whose liability is limited to the amount of their investment and they are restricted from participation in the operation of the business.
- Must register with Secretary of State.
 - Thereby becomes “Limited Liability Partnership.”
- May register for limited liability protection.
 - Thereby becomes a “Limited Liability Limited Partnership.”



Limited Partnerships

- Certificate of Limited Partnership must be filed with SOS.
- Review Partnership Agreement and any amendments to determine authority.
- If less than all general partners are signing, review specific authority being granted (Resolution)
 - Specifics of transaction should be included in the document (sales price, mortgage amount or any other relevant terms)



Partnerships

- Names-
 - Limited Partnership: Limited Partnership or LP
 - Limited Liability Partnership: [Registered] Limited Liability Partnership, LLP or RLLP
 - Limited Liability Limited Partnership: [Registered] Limited Liability Limited Partnership, LLLP or RLLLP
 - Variations with periods permissible.



Trusts

- Trusts are typically not recognized as separate entities.
- Parties to trust:
 - Grantor/Trustor/Settlor – all the same.
 - Trustee – often, not always, same as Grantor.
 - Beneficiaries.
- Title must be vested in natural person as Trustee of the Trust.
 - Typically: “John Doe, as Trustee of The John Doe Family Trust dated March 7, 2019”
- Conveyance to a “Trust” results in a void deed.
 - Title remains vested in grantor. Easily fixable if grantor is also trustee.



Trusts

- Must review relevant portions of the Trust Agreement in order to determine:
 - Current Trustee(s)
 - Authority of Trustee to convey/mortgage etc.
 - Limitations on Trustee?
 - Removal of Trustee
- Certificates of Trust
 - Must be signed by Trustee.
 - Not a substitute for the Trust agreement.
 - Useful for affirmation of facts leading to successor trustees.



Trusts

- Authority of Trustee
 - Generally, as set forth in the Trust Agreement.
 - See, I.C. 68-106, for exhaustive list of powers, subject to Trust Agreement.
 - Where more than one Trustee, authority as set forth in Trust Agreement, but Idaho Code provides default rules:
 - 2 Trustees must agree.
 - 3 or more Trustees may act by majority vote.
 - Powers generally not delegable.



Other Considerations

- Multi-Layered Entities

- Requirements must contain a request for each form of entity
- Keep track of signatory lines

Biggest Corporation, an Idaho corporation

By: Slightly Smaller LLC, an Idaho limited liability company

**By: Even Smaller Limited Partnership,
an Idaho limited partnership**

By: _____ (SEAL)

John Doe, Managing Partner



Foreign Entities

- A foreign entity may not “do business” in Idaho until it registers with the Secretary of State.
 - Isolated transactions, ownership of property, without more, do not constitute “doing business” under the foreign business registration statute.
 - Must file “Foreign Registration Statement” with Idaho SOS.
- The law of the jurisdiction in which a foreign entity is formed governs its internal affairs.
- Registration in Idaho does not reflect whether the corporation is in existence in its state of formation.
 - Verify in good standing within the State of incorporation.



Judgments and FTL's

- Judgments: Judgments against shareholders, directors, members and partners do not constitute liens on the property of the entity.
 - Judgments against general partners may create a lien if the partnership is not disclosed to the creditor. Who is holding title?
 - Trusts are not separate entities, so trust assets may be foreclosed to satisfy a grantor's debts.
- IRS Liens: FTL's against an individual shareholder, member or partner do not attach to the property of the entity....unless noted in FTL.



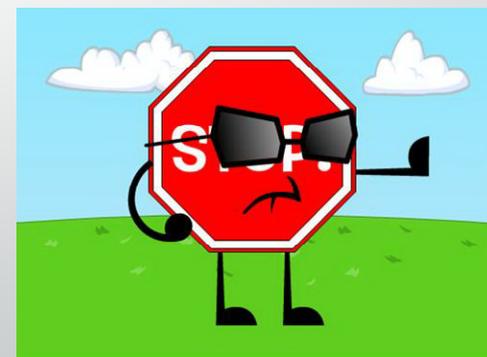
Entities – Powers of Attorney

- Power of Attorney - can they be used by Entities?
- Look for specific authority in Entity documentation.
- Individual POA most likely cannot exercise authority on behalf of a representative of entity.
- Alternative method is by the use of Resolution to authorize person signing on behalf of entity for this transaction.



Entity Underwriting - Red Flags

- Good reasons to call your underwriter:
 - Does the transaction involve self-dealing?
 - Does the transaction involve all of the assets of entity, or substantially all?
 - Dissolved Entity?
 - Winding up of a corporation?
 - Any recent changes to structure of entity?
 - Statutory Trusts, Religious Organizations?



Feel free to call/email with questions:

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