The Nebraska Trust Deeds Act

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I. History of the Trust Deeds Act

The Nebraska Trust Deeds Act (the "Act"), Neb. Rev. Stat. §76-1001-1018, was enacted by the Legislature in 1965. Although authorized since 1965, the trust deed did not become popular with lenders in Nebraska until the recession and ag crisis of the mid-1980s. Until the mid-1980s, the real estate security device of choice in Nebraska was the real estate mortgage. Starting in about 1984 or 1985, most lenders moved away from reliance on real estate mortgages and started using trust deeds on real estate loans.

The trust deed has a number of advantages for the lender. The primary advantage is the right to have the real estate securing the debt sold at a trustee's sale without the need of going through an expensive and time consuming judicial foreclosure. There is no automatic stay of a trustee's sale under the Act whereas in a typical judicial foreclosure a borrower would be entitled to a stay of the sheriff's sale for anywhere from three to nine months depending upon the maturity date of the real estate mortgage. As a general rule, given the fact that lenders in the early 1980s were operating with very short maturity dates, most mortgages, other than the traditional thirty year home mortgage, had a maturity date of less than five years, which meant that a borrower was almost always entitled to a nine month stay of a sheriff's sale. That had the effect, coupled with the delays inherent in the judicial system, of making judicial foreclosure a process that took at least a year and probably as many as eighteen months to complete. And during the whole foreclosure process, there was no way to compel the borrower to make payments. Under the Act, the real property can be sold in a much shorter time frame. If the property involved is not agricultural real estate, a sale can generally be held approximately ninety (90) days after the filing of the notice of default. If the property is agricultural property, the trustee's sale could be held approximately one hundred twenty (120) days after the filing of the notice of default.

II. Introduction to Trust Deeds

Under the Act, a borrower conveys property to a trustee in trust for the benefit of the lender. A trust deed may secure for any kind of indebtedness where the owner of the property has a property right that can be conveyed. That would include, for example, leasehold interests of a tenant, remainder interests, and any other property interest. The trust deed may secure exiting indebtedness, future indebtedness or the performance of any other obligation of the person granting the trust deed.

The Act provides certain categories of persons and entities that may act as trustees. All state and federally chartered banks and savings and loan institutions are authorized to serve as trustees, including acting as trustee in instruments in which the bank or savings and loan association is also the beneficiary. Other parties who qualify as trustees under the Act are duly licensed members of the Nebraska State Bar Association, real estate brokers licensed in Nebraska and title insurance companies. Before selecting a person as

a trustee, the beneficiary should be certain that the trustee is authorized to serve under the Act.

There have not been any cases with regard to whether a conveyance to a trustee who is not qualified under the Act to serve as a trustee would void the power of sale under the trust deed. It is believed, however, that the old common-law maxim that a trust does not fail for the want of a trustee would be applied and that the beneficiary would be permitted to substitute a qualified trustee to exercise the power of sale under the trust deed.

The trust deed may secure present indebtedness and it may also secure future indebtedness of a borrower. The amount of the future advance is customarily specified in the trust deed. The trust deed may also provide that the lien continues to exist even if the balance under the obligation secured by the deed of trust reaches zero from time to time. This is how lenders are able to offer home equity financing where the home equity loan is secured by a trust deed with the balance increasing, decreasing and even reaching zero from time to time. This feature eliminates the need of having to re-execute security documents prior to every advance under a home equity line.

III. Procedure to Foreclose the Trust Deed

The Act specifies the steps for nonjudicial foreclosure of the trust deed. The beneficiary under the trust deed has the power and the right to institute judicial foreclosure of the trust deed, but if that occurs the borrower would be entitled to the benefit of all of the delays inherent in the judicial foreclosure system, including the automatic stay of the sheriff's sale. For that reason, absent extraordinary circumstances, most lenders will not use their right to judicially foreclose the trust deed. One exception where a judicial foreclosure may be necessary is a situation where there is an error in the legal description and the legal description would have to be reformed prior to the entry of a foreclosure decree. With that one possible exception, there is absolutely no advantage to foreclosing a trust deed judicially when the nonjudicial method is available.

A nonjudicial foreclosure is initiated by the trustee filing a notice of default in the county in which all or a part of the real estate described in the trust deed is located. For trust deeds describing nonagricultural land, the notice of default must identify the trust deed and set forth a general description of the default and the trustee's decision to exercise the power of sale.

In cases where the trust deed involves agricultural property, the notice of default contain information concerning the current balances in default under the terms of the trust deed and the amount necessary to cure the default as of the date of filing the notice of default.

The notice of default is required to be mailed on parties to the trust deed by registered or certified mail within ten (10) days after the notice of default is recorded. The notice of default must contain the recording information showing the date of the recording and the instrument number or book and page where the notice of default was recorded. It is important to note that the requirement is simply that the notice of default be mailed. There is no requirement that the borrower actually receive notice of the filing of the

notice of default. Mailing is sufficient and is also sufficient to start the time running that the borrower has to reinstate the loan secured by the trust deed.

Where the land involved is nonagricultural land, the borrower has one month after the date of the filing of the notice of default to reinstate the loan by paying the amount necessary to bring the loan current. If the property involved is agricultural real estate, the cure period is two months from the date of the filing of the notice of default. Absent some provision in a real estate mortgage obligating the lender to accept a reinstatement, there was no way under mortgage foreclosure law to obligate the lender to accept reinstatement payments.

If the borrower has not reinstated the loan within the time period set forth above, the trustee may sell the property. At least one month after the filing of the notice of default, or two months after filing the notice of default where agricultural land is involved, the trustee may begin publishing notice of trustee's sale. The notice is required to be published once a week for five (5) consecutive weeks in a newspaper of general circulation in the county in which part or all of the property is located. The advertisement must set forth the time, date and place of the trustee's sale, which are required to be held at the county courthouse of the county in which a part or all of the property is located. The sale must occur between the hours of 9:00 a.m. and 5:00 p.m. Any sale conducted outside of the required time frame is invalid. The trustee may postpone the sale for upto twenty-four (24) hours without having to readvertise. The trustee may sell the property in one or more parcels, at the trustee's discretion.

The trustee conducts the trustee's sale and there are no requirements on how long the sale should remain open. There are also no requirements on the terms under which the property can be sold at the trustee's sale. Those terms vary from payment in cash of the full amount of the bid at the trustee's sale to trustees who permit people to make a down payment of a portion of the purchase price at the time of the sale with closing to occur relatively shortly after the date of the sale. It is the author's policy to require a ten-percent down payment by cashier's check at the time of the sale with closing to occur no later than thirty (30) days after the date of the sale. These terms may be modified depending upon the desires of the lender, the condition of the particular piece of property involved and the amount of the debt. For example, if the total debt secured by the property is less than $5,000 to $10,000, it is very likely that the terms of the sale will require that the entire purchase price be paid on the day of the sale.

The purchaser at a trustee's sale receives a trustee's deed to the property. The deed makes no warranties as to the condition of the property. Trustee's sales are exempt from the requirement of providing a seller's disclosure statement, and absent abnormal circumstances, most trustees are unable to provide potential purchasers with an opportunity to view the property before the sale. Trustee's sales (and sheriff's sales) are the last refuge of caveat emptorãlet the buyer beware!

IV. Deficiencies

What if there is a balance due under the note following the trustee's sale? The Act limits the time in which a lender may seek a personal judgment against a borrower for a deficiency. Under the Act the deficiency action must be filed no later than three months after the trustee's sale. If the lender does not get the case filed in a timely basis, there can be no deficiency. In a deficiency case, the lender is limited to the difference between the balance due under the obligation secured by the trust deed and the fair market value of the property sold at the sale or the amount bid at the sale, whichever is greater. Presumably, this requirement prevents lenders from bidding very low at the trustee's sale and then seeking a large deficiency. The deficiency action is like any other suit on a promissory note, with the exception that the Act requires the court to make findings of fact concerning the fair market value of the real property at the time of the trustee's sale as a part of any deficiency judgment.

V. So I Am Being Foreclosed, What Now?

You should consult with an attorney as early in the process as possible. There are very few remedies available to prevent or delay the sale. One alternative to stop a sale is the filing of a bankruptcy case. There may be other alternatives short of bankruptcy. If you have substantial equity in your home, or any other piece of real estate, you should, under no circumstances, permit the property to be sold at trustee's sale. A private sale will almost always generate a higher purchase price than a forced sale under a trust deed. In the author's experience, competitive bidding occurs in less than ten percent of trustee's sales. Normally, the lender's bid is the only bid received and the lender has no incentive to bid more than the debt. The trustee has no incentive to market the property in a manner designed to generate the maximum bid at the sale. Even in cases where there is competitive bidding, the bidders' incentive is to obtain title to the property at the lowest possible price, so that the bidder can reap the profit potential of the property. That incentive can result in "partnerships" being formed by bidders at the time of the sale to reduce competition, and reduce the amount that bidders will bid on the property. The key to preserving the equity is to attempt to sell the property before the trust deed goes to foreclosure. Generally, lenders do not refer debt obligations to attorneys for collection until the debt is sixty to ninety days past due and the lender's own internal collection efforts have failed. Once the matter is referred for collection, however, most lenders will not delay foreclosure proceedings or delay a sale to permit additional time for a private sale to close, absent unusual and exceptional circumstances that guaranty that the private sale will close. Lenders generally will not cancel a sale if a borrower contacts the lender a few days before the sale and claim to have listed the property with a realtor. The key to preserving the equity in the property is to act quickly and to act before the lender acts.

For further information, you may contact:

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