

## **G.S. 45-10 and Unnamed Trustees According to Shakespeare**

**By Mike Feiereisel, NC Director of Claims / Branch Manager**

For years, real estate practitioners have pondered the age old question “To substitute or not to substitute.” That is the question when a trustee is not named in a deed of trust. With all apologies to Will Shakespeare, the writer’s guild (the North Carolina Legislature) has waxed poetic with the passage of an amendment to G.S. 45-10. “Substitution of Trustees in Mortgages and Deeds of Trust.”

Using the powerful quill presented to them by their respective constituencies, the scribes that make up the General Assembly rewrote and then enacted: SECTION 1. G.S. 45-10. “Substitution of Trustees in Mortgages and Deeds of Trust” to read in its entirety:

A) In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon, may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a written document properly recorded pursuant to Chapter 47 of the North Carolina General Statutes.

B) IF THE NAME OF A TRUSTEE IS OMITTED FROM AN INSTRUMENT THAT APPEARS ON ITS FACE TO BE INTENDED TO BE A DEED OF TRUST, THE INSTRUMENT SHALL BE DEEMED TO BE A DEED OF TRUST, THE OWNER OR OWNERS EXECUTING THE DEED OF TRUST AND GRANTING AN INTEREST IN THE REAL PROPERTY SHALL BE DEEMED TO BE THE CONSTRUCTIVE TRUSTEE OR TRUSTEES OF RECORD FOR THE SECURED PARTY OR PARTIES NAMED IN THE INSTRUMENT, AND A SUBSTITUTION OF TRUSTEE MAY BE UNDERTAKEN UNDER SUBSECTION (A) OF THIS SECTION. HOWEVER, NO SUCH CONSTRUCTIVE TRUSTEE SHALL HAVE THE AUTHORITY OR POWER TO TAKE ANY OF THE FOLLOWING ACTIONS WITHOUT THE CONSENT AND JOINDER OF THE HOLDERS OR OWNERS OF A MAJORITY IN AMOUNT OF THE OBLIGATIONS SECURED BY THE DEED OF TRUST: (I) EFFECT A SUBSTITUTION OF TRUSTEE, (II) EFFECT THE SATISFACTION OF THE DEED OF TRUST, (III) RELEASE ANY PROPERTY OR ANY INTEREST THEREIN FROM THE LIEN OF THE DEED OF TRUST, OR (IV) MODIFY OR AMEND THE TERMS OF THE DEED OF TRUST. ANY SUBSTITUTE TRUSTEE NAMED UNDER THE AUTHORITY OF SUBSECTION (A) OF THIS SECTION SHALL SUCCEED TO ALL THE RIGHTS, TITLES, AUTHORITY, AND DUTIES OF THE TRUSTEE UNDER THE TERMS OF THE DEED OF TRUST WITHOUT REGARD TO THE LIMITATIONS IMPOSED BY THIS SUBSECTION ON THE AUTHORITY OF A CONSTRUCTIVE TRUSTEE.

[\*2] SECTION 2. This act is effective when it [\*2] becomes law and applies to all instruments recorded before, on, or after that date.

As the notable playwright, Title Counsel and Raleigh Branch Manager from the east (Don Merritt) previewed in September’s edition of the Attorneys Title newsletter, the legislature has provided a practical answer to the historically debated question: “What becomes of a deed of trust when the trustee is inadvertently omitted?” Traditionally, the divided Houses of the Capulets and the Montagues have extolled the virtues of their rival theories: The Capulets suggesting that the lack of a trustee means a two party mortgage, with the Montagues countering that it is a valid deed of trust awaiting substitution of the unnamed trustee.

While this argument does not divide the two Houses with the same fervency as the debate over the star-crossed lovers, it has led to confusion over the correct type of foreclosure action required. In response to this uncertainty, Attorneys Title has been required to place the following Exception on policies insuring deeds of trust without a named trustee:

“Instrument insured hereunder is a two-party mortgage and this policy does not insure any matters arising out of the inability of the lender/beneficiary under said Mortgage to foreclose non-judicially under NCGS Chapter 45 et seq. in the event of default unless and until a separate legal entity or person is substituted as Trustee.”

With one fell swoop of their mighty pen, the Legislature has quieted the debate and brought peace upon these two Houses. By officially labeling the borrower as the “Constructive Trustee” or the “Trustee of Record”, the Legislature has given a name to that anonymous foil that has beguiled and tormented real estate professionals and Title Companies for a fortnight. With the borrower securely in place as the “Constructive Trustee” or “Trustee of Record,” the elements needed to create a deed of trust are clearly present and the insured lender can substitute their desired trustee at any time under GS 45-10(A). This foresight has ended any need for Attorneys Title to use the aforementioned Exception when insuring a deed of trust without a named trustee.

But alas, the peace that has settled over these two mortal enemies cannot survive as there is continued discourse surrounding deeds of trust where the Lender and Trustee are but one. Should this scenario arise, Attorneys Title will continue to apply the Exception noted above to policies insuring deeds of trust where the Lender is both the Trustee and Mortgagee.

Attorneys Title hopes that you have enjoyed this rendition of Shakespeare Theatre and, more importantly, gained helpful information about the newly rewritten G.S. 45-10 and our underwriting process. Please know that Attorneys Title is prepared, ready and able to assist you and your clients with any title question that “Plagues” the house that you are closing.