

## RESOLUTION 02-01-2012

### DIGEST

#### Trust Deed Defined as Mortgage

Amends Civil Code section 2920, to include deeds of trust in the definition of a “mortgage.”

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Civil Code section 2920, to include deeds of trust in the definition of a “mortgage.” This resolution should be approved in principle because it makes the statute consistent with both the interpretation courts have given to deeds of trusts and the common understanding of deeds of trust.

As an initial point of clarification, this resolution would only amend Civil Code section 2920(b), to strike out the words “other than a deed of trust.” The words “Section 2924,” “2924h” and “Section 2985”, which are underlined in the resolution, are currently part of the statute and therefore would not make any additional changes to existing law.

In 1969, the court in *Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543, 553, noted that “in California there is little practical difference between mortgages and deeds of trust, that they perform the same basic function, and that a deed of trust is ‘practically and substantially only a mortgage with power of sale (*citations omitted*).’” Specifically citing Civil Code sections 2920 through 2953, that same court went on to note that “deeds of trust are analogized to mortgages and the same rules are generally applied to deeds of trust that are applied to mortgages.” (*Ibid.*) For all practical purposes, the courts have interpreted “deeds of trust” as “mortgages,” since a deed of trust is a mortgage; it just has a power of sale attached to it. Further, Civil Code section 2924, includes deeds of trust (the transfer of an interest in property as security for the performance of another act) in the definition of a “mortgage.” Therefore, because courts have interpreted deeds of trust as being interchangeable with the rules and procedures governing mortgages, there is now little reason to exclude “deeds of trust” from the definition of a mortgage.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommend that legislation be sponsored to amend Civil Code section 2920 to read as follows:

1 § 2920

2 (a) A mortgage is a contract by which specific property, including an estate for years in real  
3 property, is hypothecated for the performance of an act, without the necessity of a change of possession.

4 (b) For purposes of Sections 2924 to 2924h, inclusive, “mortgage” also means any security device  
5 or instrument, ~~other than a deed of trust~~, that confers a power of sale affecting real property or an estate  
6 for years therein, to be exercised after breach of the obligation so secured, including a real property sales  
7 contract, as defined in Section 2985, which contains such a provision.

8 (Proposed new language underlined; language to be deleted stricken.)

9

**PROPONENT:** Bar Association of Northern San Diego County

### **STATEMENT OF REASONS**

Existing Law: Civil Code section 2920, subdivision (b) appears to exclude Trust Deeds from the definition of Mortgage. This appears to be based on the old fiction (somewhat technically true) that someone who executes a Trust Deed actually “conveys” the property to the trustee who then owns legal title for the benefit of the beneficiary, subject to “reconveyance” to the trustor upon satisfaction of the obligation giving rise to the necessity for security to the beneficiary the Trust Deed represents. This distinction is based on the idea that if the encumbrance is a true “mortgage,” a lawsuit must be filed to “foreclose” on the “equity of redemption.”

This Resolution: This Resolution would recognize that a Trust Deed is nothing more than a mortgage with a power of sale and without an equity of redemption.

The Problem: If one were to ask a lay homeowner whether she or he had a “mortgage,” chances are the response would be yes. This is because the definition of mortgage in Civil Code section 2920, subdivision (a) actually describes the Trust Deed transaction which is, as to a lay person, signing a document to secure repayment of a promissory note with the understanding that if the repayment terms are not met, the property will be lost. No one does the old-fashioned mortgage with requirement of foreclosure of equity of redemption any more. It only comes up after the fact in situations where, for example, someone gives a grant or quitclaim deed to someone to secure an obligation where the intention was never to convey fee title, and where there is no power of sale in such deed.

The point of this resolution is to clarify the fact that any document given to secure the repayment of a promissory note that is in the chain of title of the “mortgagor-trustor’s” real property is a mortgage. It would also clarify the fact that persons who broker Trust Deed loans are Mortgage Brokers as the term is defined in Civil Code section 2923.1.

### **IMPACT STATEMENT**

This resolution might affect the interpretation of Civil Code section 2923.1.

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