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February 6, 2023

The Honorable Donna Campbell, M.D.
Chair, Senate Committee on Nominations
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0424

Re: Whether a corporate entity may serve as a substitute trustee for purposes of conducting a mortgage foreclosure sale under Property Code chapter 51 (RQ-0466-KP)

Dear Senator Campbell:

You ask whether a corporate entity may serve as a substitute trustee for the purpose of conducting a mortgage foreclosure sale under Property Code chapter 51.¹ You explain that confusion exists on the question whether a person acting as a substitute trustee under that chapter may be a legal entity or if a substitute trustee must be a natural person, i.e., an individual human being. *See* Request Letter at 1–2.

Property Code chapter 51 provides the law governing enforcement of a deed of trust which creates a lien against real property. *See generally* TEX. PROP. CODE §§ 51.0001–.016. Subsection 51.0001(8) identifies the trustee as the person who is authorized to “exercise the power of a sale under the terms of a security instrument . . .” *Id.* § 51.0001(8); *see also id.* §§ 51.0001(6) (defining “security instrument” to mean “a deed of trust, mortgage, or other contract lien on an interest in real property”), 51.0074(a) (providing that “[o]ne or more persons may be authorized to exercise the power of sale under a security instrument”). Subsection 51.0001(7) defines a “[s]ubstitute trustee” as “a *person* appointed by the current mortgagee or mortgage servicer under the terms of the security instrument to exercise the power of sale.” *Id.* § 51.0001(7) (emphasis added). As you point out, chapter 51 does not define “person.” *See generally id.*; *see also* Request Letter at 1.

Chapter 311, Government Code, provides definitions of common terms that “apply unless the statute or context . . . requires a different definition[.]” TEX. GOV’T CODE § 311.005. It defines “person” to include a “corporation, organization, government or governmental subdivision or

¹*See* Letter from Honorable Donna Campbell, M.D., Chair, Comm. on Veterans Affairs & Border Sec., Tex. State Senate, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (July 7, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0466KP.pdf> (“Request Letter”).

agency, business trust, estate, trust, partnership, association, and any other legal entity.” *Id.* § 311.005(2); *see also id.* § 311.001 (identifying chapter 311 as the “Code Construction Act”). The Property Code states that the Code Construction Act applies to the construction of provisions in the Property Code except as otherwise expressly provided by the Property Code. TEX. PROP. CODE § 1.002 No language in chapter 51 limits the term “person” to only a human individual. Moreover, other provisions elsewhere in the Property Code define the word “person” broadly to include corporate and legal entities. *See, e.g., id.* §§ 111.004(10) (defining “person” for purposes of the Texas Trust Code to include different types of corporate and legal entities), 163.003(6) (defining “person” for purposes of the management of institutional funds to include different types of corporate and legal entities), 301.003(12) (defining “person” for purposes of the Texas Fair Housing Act to include different types of corporate and legal entities). A court would likely utilize Government Code chapter 311’s definition of “person” to define the term for purposes of chapter 51 of the Property Code.

You refer us to a 2013 bankruptcy court case as support for this interpretation.² *See* Request Letter at 2. In *In re AMRCO, Inc.*, the United States Bankruptcy Court for the Western District, Austin Division, looked at the precise question at issue: whether only natural persons can be appointed as trustee or substitute trustee in a foreclosure sale. *See* 496 B.R. 442, 445 (W.D. Tex. 2013). The court noted the case law makes clear that corporations are “persons” who may serve as a “mortgage servicer” or “mortgagee” as those terms are defined and used in section 51.0001. *Id.* (citing *Jones v. Deutsche Bank Nat. Trust Co.*, No. 3:12-CV-3929-L, 2013 WL 3455716, at *8 (N.D. Tex. July 9, 2013)); *see also* TEX. PROP. CODE § 51.0001(3) (defining “mortgage servicer”), (4) (defining “mortgagee”). The court observed that to construe chapter 51 to allow an artificial person to serve as a mortgage servicer or mortgagee under subsections 51.0001(3) and (4), but not allow an artificial person to serve as a trustee or substitute trustee under subsections 51.0001(7) and (8) violates “the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning.” *In re AMRCO, Inc.*, 496 B.R. at 445 (quoting *Nat’l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 481 (1998)). The court concluded that an artificial person may “serve as Trustee or Substitute Trustee.” *Id.*; *see also Pate v. Zientz*, No. 4-09-CV-643, 2011 WL 1576943, at *5 (E.D. Tex. Mar. 9, 2011) (holding that Deutsche Bank, a corporate entity, validly acted as a trustee under a deed of trust).

For these reasons, a court would likely conclude that a corporate entity is a “person” and thus may serve as a substitute trustee for purposes of conducting a mortgage foreclosure sale under Property Code chapter 51.³

²State courts find federal authority particularly persuasive in home-mortgage litigation. *See, e.g., Schuetz v. Source One Mortg. Servs. Corp.*, No. 03-15-00522-CV, 2016 WL 4628048, at *3, n.3 (Tex. App.—Austin Sept. 1, 2016, no pet.); *Standiford v. CitiMortgage, Inc.*, No. 03-14-00344-CV, 2015 WL 6831578, at *3, n.7 (Tex. App.—Austin Nov. 3, 2015, pet. denied).

³Though you ask specifically about only a “substitute trustee,” the analysis would be the same for a trustee. *See generally* Request Letter at 1–2.

S U M M A R Y

Property Code chapter 51 relates to liens created against real property as enforcement of a deed of trust. It authorizes a trustee or a substitute trustee to conduct a foreclosure sale and defines both using the term “person.” Absent limitation in chapter 51 and utilizing the general definition of “person” from the Code Construction Act, a court would likely conclude that a corporate entity is a “person” and thus may serve as a substitute trustee for purposes of conducting a mortgage foreclosure sale under Property Code chapter 51.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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