



**House
Legislative
Analysis
Section**

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TRUSTS INVOLVING REAL ESTATE

House Bill 5706 as passed by the House
First Analysis (10-19-90)

Sponsor: Rep. Roland G. Niederstadt
Committee: Towns and Counties

THE APPARENT PROBLEM:

Ideally an accurate public record would be kept of all owners or others who have some legal interest in each piece of real estate (or "real property"), so that when the property was transferred (by sale or otherwise) from one person to another, the parties involved all would know of everyone who had a legal interest in the property. Unfortunately, this is not always the case, and buyers of real estate, even after having a title search carried out, can find themselves involved in legal proceedings should it turn out that the seller did not have clear title to the property or that the property was otherwise encumbered.

Trusts can have provisions that pertain to real estate, whether those provisions convey the property in question to a beneficiary or otherwise somehow give someone a legal interest in ("encumber") the property. Since the contents of a trust need not be made public, a piece of property offered for sale, for example, by a trustee could potentially involve people (other than the trustee) who had legal rights to the property.

In recent years some people have started to publicly record abbreviated forms of trusts (called "certificates of trust") involving real estate, in an attempt to assure potential property buyers that a seller of a piece of property affected by a trust does in fact have the legal power to transfer the property. However, at present there is no legal requirement that these certificates of trust be used, and even when they are used, there is no uniformity regarding what should be included in such a document. At the request of the Michigan Land Title Association, legislation has been introduced to begin to address this issue.

THE CONTENT OF THE BILL:

The bill would create a new act to allow the use of trust agreements or certificates of "trust existence and authority" when real property was conveyed or otherwise affected by a trust. A trust agreement or certificate (and any amendments) could be recorded in the office of the register of deeds in each county where the land affected by the trust agreement was located.

The bill would require that a certificate of trust existence and authority be in the form of an affidavit and be executed by the settlor, the grantor, the attorney who drafted the trust agreement, or a bank officer.

Certificates would have to contain:

- the title of the trust,
- the date of the trust agreement,
- the names and addresses of the person establishing the trust and of all of the trustees, and
- exact copies of those sections of the trust agreement regarding:
 - (1) establishment of the trust,
 - (2) the powers of, and restrictions on, the trustees relating to real property or any interest in real property,
 - (3) the governing law,
 - (4) revocation of the trust,
 - (5) appointment of successor trustees, and
 - (6) any amendment of the trust relative to all the above.

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A certificate also would have to include certification that the trust agreement remained in full force and effect.

The bill would specify that buyers (and others) could rely on the information contained in recorded certificates of trust unless (a) a written record amending or revoking the trust agreement or certificate was recorded in the same office where the trust agreement or certificate was recorded and (b) the buyer (or others) was not required to further examine the trust agreement.

FISCAL IMPLICATIONS:

Fiscal information is not available. (9-26-90)

ARGUMENTS:

For:

The Michigan Land Title Standards, which is published by the Michigan Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan and which is based on statute and case law, holds that in order for a trustee to be able to convey a "marketable" (that is, clear) deed to a beneficiary (or "grantee") in a trust, the written document ("instrument") containing the trust terms must be publicly recorded. The committee notes that although a good title may in fact be conveyed despite there being no public record, nevertheless the only sure way to determine the marketability of a title is by examining the complete trust agreement. But unless the trust agreement is publicly recorded there is no assurance that it would be available for such an examination. The committee also notes that in certain parts of Michigan various "certificates" are recorded as substitutes for the recording of the entire trust agreement (objections often are raised to recording trust agreements in their entirety). However, the committee points out, this practice of recording certificates is not uniformly accepted nor uniform with regard to the content of what is included in such certificates. The bill would establish in statute both the legal authority of certificates of trust and would require that certain standard information be included in each certificate.

Against:

The bill is permissive rather than mandatory, so it would not solve the problem of identifying real estate that is affected by a trust for which there is no public record.

Response: Although some people believe that it would be desirable to require that all real estate affected by trusts be publicly recorded in the form of certificates of trust, others believe that mandating such public records would infringe too much on the privacy of those who set up trusts

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and those who benefit from the trusts. At least the bill would give statutory authority to a certificate of trust when someone chose to use such a document, and, further, would ensure that there would be uniformity in the information recorded in such certificates.

POSITIONS:

The Michigan Land Title Association supports the bill. (9-28-90)

The Michigan Bankers Association supports the bill. (9-26-90)