To: Probate and Estate Planning Council

From: Legislative Development and Drafting Committee

Re: October 2018 Committee Report

Since our last Council meeting, our Committee has been active in the following areas:

- **Omnibus.** Our lobbyist believes that these bills may be considered in committee in November or December. There is still an opportunity to move them this legislative session.

- **Certificates of trust (HB 5362 and 5398).** These were reported out of committee with unobjectionable changes. The substitute H-2 is included with this report. As you will see, Nathan did exercise the tactical flexibility given to him by the Council. There were some unobjectionable requests from the Register of Deeds; we did not offer a formal policy position on these late-breaking requests.

- **Entireties trusts (SB 905).** Nothing to report this month. This is unlikely to move this legislative session, so it is on the backburner.

- **Attorney-in-Fact’s Authority to Create a Trust.** This will not be included in the EPIC omnibus. At best, we may have proposed legislation ready for introduction in the next legislative session.

- **Prebate.** Aaron Bartell and Dan Hilker will serve as the drafting subcommittee on this proposal. They aim to have a “decision document” listing the various policy options available to us, within about one month.

- **SLATs.** We’ve identified the potential need for a technical fix concerning spousal lifetime access trusts. Rob Tiplady is spearheading this effort. We hope to have proposed legislation ready for introduction in the next legislative session.
Good Afternoon Everyone,

We have good news to share with you today. In House Judiciary Committee the Certificate of Trust bills were voted out of committee. Rep. Tim Greimel attempted to amend the bills in a way that were unfavorable to the section, however, the committee rejected his amendments. Jim Ryan did a great job making sure all the Republicans on the committee defeated the Greimel amendments.

In House Law and Justice Committee, Rep. Kesto voted out the divided and directed trusteeship legislation with no issues.

Both issues are now on the House floor waiting for final passage in the House. It is unlikely that will occur before the end of the week, therefore, the next opportunity will be after the November election. We are still in a good position to have both issues completed before the end of the year.

Thank you to Jim Spica and Nathan Piwowarski for their testimony before committee last week.

Becky Bechler
Jim Ryan

Becky Bechler
Public Affairs Associates, LLC
120 N. Washington Sq., Ste 1050
Lansing, MI 48933
517-371-3800 (office)
517-371-3363 (fax)
bechler@paaonline.com
A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending section 7913 (MCL 700.7913), as added by 2009 PA 46.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 7913. (1) Instead of furnishing a copy of the trust
instrument to a person other than a trust beneficiary, the trustee
may furnish to the person a certificate of trust containing THAT
MUST INCLUDE all of the following information:

(a) The name of the trust, and the date of the trust, AND THE
DATE OF EACH OPERATIVE TRUST instrument, and any amendments.

(b) The name and address of the currently acting EACH CURRENT
trustee.

(c) The powers of the trustee relating to the purposes for
which the certificate OF TRUST is being offered.
(d) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.

(e) The authority of cotrustees to sign ON BEHALF OF THE TRUST or otherwise authenticate ON BEHALF OF THE TRUST and whether all or less than all OF THE COTRUSTEES are required in order to exercise powers of the trustee.

(2) A certificate of trust may be signed or otherwise authenticated by the settlor, any trustee, or an attorney for the settlor or trustee. The certificate MUST be in the form of an affidavit.

(3) A certificate of trust MUST state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certificate of trust to be incorrect.

(4) A certificate of trust need not contain the dispositive terms of the trust INSTRUMENT.

(5) A recipient of a certificate of trust may require the trustee to furnish copies of those excerpts from the original EACH trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(6) A person who acts in reliance ON a certificate of trust without knowledge that the representations contained in the certificate OF TRUST are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the TRUST AND OTHER facts contained in the certificate OF TRUST.
(7) A person who in good faith enters into a transaction in reliance on a certificate of trust may enforce the transaction against the trust property as if the representations contained in the certificate of trust were correct.

(8) A person making a demand for the trust instrument in addition to a certificate of trust or excerpts of the trust instrument is liable for damages, costs, expenses, and legal fees if the court determines that the person was not acting pursuant to a legal requirement in demanding the trust instrument.

(9) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.
CERTIFICATE OF TRUST

House Bill 5362 (proposed H-2 substitute)
House Bill 5398 (proposed H-2 substitute)
Sponsor: Rep. Peter J. Lucido
Committee: Judiciary
Complete to 9-24-18

SUMMARY:

House Bill 5362 would, among other things, revise the information required to be included in a certificate of trust and allow a certificate of trust to be provided to others instead of a copy of the trust instrument.

House Bill 5398 would revise terminology describing documents regarding trusts for real property that is conveyed or otherwise affected by a trust.

Specifically, the bills would do the following:

**House Bill 5362** would amend the Estates and Protected Individuals Code (EPIC). Under EPIC, a trustee of a trust may furnish a person, such as a bank employee, a certificate of trust rather than a copy of the trust instrument. “Trust instrument” is defined under EPIC to mean a governing instrument that contains the terms of the trust, including any amendment to a term of the trust. Unlike a trust instrument, a certificate of trust does not identify beneficiaries of the trust or contain other confidential information. A certificate of trust, however, is required under EPIC to include certain information such as the name of the trust and date of the trust instrument. The bill would make several revisions to the information required to be included in a certificate of trust.

First, in addition to the name and date of the trust, the bill would require the date of each operative trust instrument to be included. As the definition of “trust instrument” includes any amendments to terms of the trust, the bill would strike a reference to amendments contained in two provisions. Next, the bill would amend a requirement that the certificate of trust contain a statement regarding the authority of cotrustees to sign or otherwise authenticate to specify that the authority to sign or authenticate would be *on behalf of the trust*. Lastly, the bill would make numerous revisions of an editorial, rather than substantive, nature for clarity or to update the language in EPIC.

MCL 700.7913

**House Bill 5398** would amend Public Act 133 of 1991, which pertains to the use and recording of documents regarding trusts involving real property that is conveyed or affected by a trust. The bill would repeal much of the act and revise language in the act’s title and one of the two remaining sections.
Under the bill, the term “trust agreement” would be changed to “trust instrument” and defined to have the meaning of the term as defined in Section 7913 of EPIC (see above). A “certificate of trust existence and authority” would be shortened to a “certificate of trust.”

As revised, Section 1 would allow an instrument that conveys, encumbers, or otherwise affects real property, executed pursuant to an express trust, to be accompanied by either a copy of each operative trust instrument or by a certificate of trust under Section 7913 of EPIC that includes the legal description of the affected real property.

The title of the act would be amended to reflect the changes made by repealing Sections 2, 3, 4, and 6; for example, a reference to recording certain documents regarding trusts in the case of real property would be deleted. The bill would also make revisions to Section 1 that are editorial in nature.

A description of the repealed provisions follows:

Section 2: Describes the information required to be in a certificate of trust existence and authority. (Section 7913 of EPIC contains the information required to be included in a certificate of trust.)

Section 3: Lists who may execute a certificate of trust existence and authority and requires the certificate to be in the form of an affidavit. (Section 7913 of EPIC contains similar requirements for a certificate of trust.)

Section 4: As amended by Public Act 194 of 2018, Section 4 allows the trust agreement or certificate of trust existence and authority that accompanies an instrument described in Section 1, and any amendments to or revocations of, the trust agreement or certificate of trust existence and authority, to be recorded in the office of register of deeds of each county where the lands that are the subject of or affected by the trust agreement are located. If a trust agreement accompanies an instrument, Section 4 requires the trust agreement to be recorded as a separate document.

Section 6: Requires the certificate of trust existence and authority to be indexed in the records of the office of register of deeds under the title of trust, in addition to any other manner required by law.

MCL 565.431; MCL 565.432, 565.433, 565.434, and 565.436 (repealed)

FISCAL IMPACT:

House Bills 5362 and 5398 would have no fiscal impact on the state or on local units of government.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.
September 24, 2018

James Runestad, Chair
Judiciary Committee
Michigan House of Representatives
Via EMAIL: JimRunestad@house.mi.gov

RE: House Bills 5362 and 5398

Dear Chair Runestad:

Tomorrow the House Judiciary Committee is holding a hearing on House Bills 5362 and 5398, sponsored by Representative Peter J. Lucido. While the general goal of these bills – to eliminate the need to provide a third party with a copy of an entire trust instrument when real estate is held subject to a trust – is laudable, the implementation of this goal by these bills will significantly increase the opportunity for identity theft-type problems. These bills are severely flawed.

First, let me introduce myself. I am an attorney in Marquette and have been practicing for nearly 30 years. My primary area of practice involves a significant amount of real estate and trust work. For nearly a decade, I was a member of the State Bar of Michigan’s Probate and Estate Planning Section council. I have been honored to have been named in SuperLawyers every year since 2008 and in Best Lawyers in America since 2007. Our law firm, Kendricks, Bordeaux, Keefe, Seavoy & Larsen, P.C. is the largest in the Upper Peninsula, and for many years our office owned and operated a title insurance company. I am quite familiar with the issues raised by the two proposed bills, and I have significant concerns with it.

Perhaps the best way to express the concern is to consider the following scenario:

Assume a chain of title ownership in the local register of deeds office for a parcel of real estate shows that a parcel was conveyed from “Thomas Jones” to “Thomas Jones as Trustee of the Thomas Jones Trust” in 2005. Thomas Jones’ obituary appears in the local paper in late 2017. In early 2018, Mary Smith engages a real estate agent to help sell the house, which was occupied by Thomas Jones until his death. Mary accepts an offer to sell the house and engages a title insurance company to insure title in the buyer. The buyer’s bank similarly engages a title insurance company to insure the bank’s mortgage interest.

This is all normal. There is nothing unusual about the form of this transaction.
But who is Mary Smith? Her name doesn’t appear in the chain of title. She might be Thomas Jones’s daughter, acting as trustee for Mr. Jones’s trust, and Smith is her married name. She might be a neighbor, who was a good friend of Mr. Jones, and he asked her to do this favor. But she might also be a complete stranger to the title and to Thomas Jones’s family. Or she might be “the black sheep” of the family—the one for whom Thomas Jones explicitly provided in the trust document would not receive anything from his estate.

Who will make sure Mary is really the trustee and has authority to sell the property? Not the real estate agent, the title company or the bank. Under the new proposal, “A person that acts in reliance on a certificate of trust without knowledge that the representations included in the certificate of trust are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the trust and other facts included in the certificate of trust.” Given this blanket protection for anyone acting “without inquiry,” no rational real estate agent, title company or bank will ask questions.

The buyer similarly has no reason to ask questions. The proposed statute further states that “a person that in good faith enters into a transaction in reliance on a certificate of trust may enforce the transaction against the trust property as if the representation included in the certificate of trust were correct.” In other words, if Mary lies (or, less cynically, just doesn’t understand this whole trust business) and signs the certificate, the buyer will get the property - free of any claims of the real beneficiaries of Thomas Jones. Therefore, the buyer has no incentive to do anything but accept Mary’s signed certificate without inquiry. And the proposed statute insures that, even if Mary’s certificate is false or misinformed, the buyer will still get the property.

To make matters worse, the new proposal goes even further to insure the certificate of trust won’t be questioned. In Section (8), the proposal states: “A person that makes a demand for the trust instrument in addition to a certificate of trust or excerpts of the trust instrument is liable for damages, costs, expenses, and legal fees if the court determines that the person that made the demand did not act pursuant to a legal requirement to demand the trust instrument” (emphasis added). Picture this: The real estate agent says to Mary, “Are you the trustee? I didn’t think Thomas had any daughters. Can I see a copy of the trust?” Mary, having read the law, replies, “There is no legal requirement for you to see the trust. If you ask me about this again, you will be liable for all of my costs and for the damages incurred if this deal doesn’t go through.” One such experience is likely to prevent any real estate agent, title insurance company or banker from asking questions.

The current statute relating to certificates of trust involving real estate (MCL 565.431 et seq), which was adopted in 1991, requires that a certificate which is not executed by the settlor be executed by “an attorney for the settlor, grantor or trustee; or an officer of a banking institution or an attorney if then acting as a trustee.” This requires someone who, at least arguably, understands the terms and effect of the trust ownership and the powers of the trustee. It provides a check and balance in the system to protect everyone involved in the transaction. It assures there will be someone – other than the putative seller – reviewing the terms of the trust agreement, which is very often the last wishes of a decedent.

The proposed statute makes the grieving family, the incapacitated person and the unwary vulnerable to fraud. It protects everyone, who regularly deals with this intersection of real estate
and trust law. Protections would be given to all of those industries and entities with political influence and an understanding of the legislative process—inequitable real estate agents, title insurance companies and banks in Section (6) and to buyers in Section (7). The proposed statute would protect everyone who has an incentive to “get the deal done.” It eliminates the protections to help make sure the deal gets done right.

The drafters of the 1991 legislation had it right. The statute should not be changed.

Very truly yours,

KENDRICKS, BORDEAU, KEFEF, SEAYOY & LARSEN, P.C.

[Signature]

Kenneth J. Seavoy
September 24, 2018

James Runestad, Chair  
Judiciary Committee  
Michigan House of Representatives  
Via EMAIL: JimRunestad@house.mi.gov

RE: House Bills 5362 and 5398

Dear Chair Runestad:

I have read the attached letter from Kenneth J. Seavoy regarding House Bills 5362 and 5398 and I am in complete agreement. I have practiced real estate in the Upper Peninsula of Michigan for nearly 50 years and I similarly see the danger of the proposed legislation. I served in the legislature for 6 years on the Judiciary Committee and while I understand how these proposals come forward, this would be disastrous.

Very truly yours,

[Signature]

Stephen F. Adamini
September 27, 2018

Representative Tim Greimel  
Michigan House of Representatives  
Via EMAIL: TimGreimel@house.mi.gov

Dear Representative Greimel:

Thank you for taking the time to speak with us. We truly appreciate the dedication and concern you have demonstrated. The purpose of this correspondence is to expand on our earlier letter and to, hopefully, better articulate our position and concerns with House Bills 5362 and 5398.

At the outset, let us say that everyone agrees there should be no need to record the entire trust instrument. We applaud the general purpose of these bills.

However, because the full trust should not be recorded and become public record, there is a need for some type of “abstract” of the trust instrument. Such an abstract should provide essential information about the trustee, the powers of the trustee, and the terms of the trust. This is essential to allow a third party to know that the terms of the trust allow the proposed transaction regarding trust property.

The legislature has previously recognized this. Currently there are two statutory provisions relating to “Certificates of Trust”:

1) MCL 565.431 (Act 133 of 1991) which provides for Certificates of Trust relating to real estate. This section permits a Certificate to be signed, by “the settlor or grantor; an attorney for the settlor, grantor or trustee; or an officer of a banking institution or an attorney if then acting as a trustee” (MCL 565.433); and

2) MCL 700.7913 (Act 386 of 1998 – part of the Michigan Trust Code) which provides for certificates for other, non-real estate, matters. It permits a Certificate to be signed by “the settlor, any trustee, or an attorney for the settlor or trustee”.

The current proposed legislation essentially asks that these two provisions be harmonized. To that goal, we have no objection.

Our concern stems from the fact that the proposed statute allows all Certificates of Trust to be signed by “any trustee”. Under the current law relating to real estate, a Certificate of Trust
Representative Tim Greimel  
Page 2  
September 27, 2018

may not be signed by a mere trustee – it must be signed by an attorney for the trustee or an officer of a banking institution if then acting as trustee.

Our fear is that allowing “lay” trustees to execute Certificates of Trust will lead to problems.

These problems might result from fraud. A nefarious actor might simply sign a certificate of trust stating he or she is a trustee when he or she is a complete stranger to the title.

These problems might also result from simple misunderstanding. A well-meaning child of a decedent who is acting as successor trustee for a parent may not read or understand all of the provisions of the trust. The trust may contain restrictions on the disposition of real estate that a lay person may not understand or be aware of.

The purpose of law should be to protect the public. We understand and sympathize with the desire to allow Certificates of Trust to be used rather than requiring the entire trust instrument to become public record. That protects the privacy of members of the public.

We also understand and sympathize with the desire for anyone who relies upon a Certificate of Trust to be protected in the event the Certificate is eventually shown to be false or incorrect. That protects the members of the public (title companies, real estate agents, banks and buyers) who are critical to encouraging the free transferability of real estate held subject to trusts and gives third parties an incentive to accept Certificates.

Our problem with this proposal is that it allows lay persons to certify the terms of a trust instrument. Frankly, in our combined more than 75 years of trust and real estate law practice, it is abundantly clear that very few lay persons have an understanding of what it means when real estate to be held subject to a trust or have a complete understanding of the terms of a trust instrument.

The law should require some exhibited minimum level of understanding of the trust document. When a Certificate is executed by someone who has that minimum level, the rest of the world should be entitled to rely on that Certificate. The real question is: Who has that minimum level of understanding of the trust?

We believe the current standard for who can certify the terms of a trust for real estate remains appropriate. It requires that such minimum level of understanding be demonstrated in one of three ways: (1) by being the person who established the trust – the settlor. After all, the terms of the trust are supposed to express the will and intent of the settlor, (2) by having obtained a law degree, having passed the bar exam, and being subject to disciplinary action of that profession or (3) by being a bank trust officer, subject to all of the regulatory requirements of that industry.

The proposed statute would lower the standard for signing a Certificate of Trust to, essentially, “anyone who says they are the trustee”. Further, as noted, the proposed statute provides protection for all third parties that are entitled to rely, without inquiry, on a Certificate of Trust executed by anyone who swears they are the trustee. The new lower standard also effectively provides protection for the legal profession as there would no longer be a need for anyone to consult a lawyer to certify what is in someone else’s trust document. But the proposed new standard gives no protection for the public.
Representative Tim Greimel  
Page 3  
September 27, 2018

At the hearing, there was a statement that there have been no real problems with lay trustees signing non-real estate Certificates. However, real estate is different. If a lay trustee executes a fraudulent or incorrect Certificate of Trust for anything other than real estate, the beneficiaries of the trust who are harmed can sue that lay trustee to recover their monetary damages. However, if Blackacre is sold, it can not be recovered. The common law appropriately treats all real estate as unique. You cannot replace Blackacre with a monetary damage (even if the offending lay trustee is collectible). Certificates of Trust for real estate should therefore require a higher standard than Certificates relating to property other than real estate.

As we said at the outset, we believe that some unification of the two statutory provisions regarding Certificates of Trust is appropriate and welcome. However, we urge the House to retain the current requirements for executing Certificates of Trust relating to real estate.

Thank you for your consideration of our concerns.

Very truly yours,

KENDRICKS, BORDEAU, KEEFE, SEAVOY & LARSEN, P.C.

[Signature]

[Signature]

Kenneth J. Seavoy

Stephen F. Adamini
A bill to amend 1991 PA 133, entitled
"An act to allow the use and recording of certain documents regarding trusts in the case of real property that is conveyed or otherwise affected by a trust; and to prescribe their effect,"
by amending sections 1, 4, and 5 (MCL 565.431, 565.434, and 565.435), section 4 as amended by 2018 PA 194; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. An instrument conveying, encumbering, affecting real property, executed pursuant to an express trust, may be accompanied either by a trust agreement or by a TRUST INSTRUMENT. AS USED IN THIS SUBDIVISION, "TRUST INSTRUMENT" MEANS THAT TERM AS DEFINED IN SECTION 7103 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7103.
(B) A certificate of trust existence and authority, as described in sections 2 and 3, UNDER SECTION 7913 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913, THAT INCLUDES THE LEGAL DESCRIPTION OF THE AFFECTED REAL PROPERTY.

Sec. 4. A trust agreement INSTRUMENT or certificate of trust existence and authority UNDER SECTION 7913 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913, that accompanies an instrument as described in section 1, and any amendments to or revocations of the trust agreement INSTRUMENT or the certificate of trust existence and authority, UNDER SECTION 7913 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913, may be recorded in the office of the register of deeds of each county where the lands that are the subject of or affected by the trust agreement INSTRUMENT are located. If a trust agreement INSTRUMENT OR CERTIFICATE OF TRUST UNDER SECTION 7913 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913, accompanies an instrument AS DESCRIBED IN SECTION 1, the trust agreement INSTRUMENT OR CERTIFICATE OF TRUST UNDER SECTION 7913 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913, must be recorded as a separate document. AS USED IN THIS SECTION, "TRUST INSTRUMENT" MEANS THAT TERM AS DEFINED IN SECTION 7103 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7103.

Sec. 5. A purchaser or other party relying upon ON the information contained INCLUDED in a recorded certificate of trust existence and authority shall be afforded UNDER SECTION 7913 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913,
HAS the same protection as is provided to a subsequent purchaser in
good faith under section 29 of chapter 65 of the Revised Statutes
of 1846, being section 565.29 of the Michigan Compiled Laws, and
shall 1846 RS 65, MCL 565.29. A PURCHASER OR OTHER PARTY DESCRIBED
IN THIS SECTION IS not be required to further examine the trust
agreement, INSTRUMENT, unless an instrument amending or revoking
the trust agreement, INSTRUMENT or certificate of trust existence
and authority UNDER SECTION 7913 OF THE ESTATES AND PROTECTED
INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913, is recorded in the
same office in which the trust agreement, INSTRUMENT or certificate
of trust existence and authority UNDER SECTION 7913 OF THE ESTATES
AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7913, was
PREVIOUSLY recorded. AS USED IN THIS SECTION, "TRUST INSTRUMENT"
MEANS THAT TERM AS DEFINED IN SECTION 7103 OF THE ESTATES AND
PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.7103.

Enacting section 1. Sections 2, 3, and 6 of 1991 PA 133, MCL
565.432, 565.433, and 565.436, are repealed.