1. Assisted Reproductive Technology Ad Hoc Committee

   Continued discussion regarding the definitions of the terms "sign" and "record". No new materials.

2. Legislation Development and Drafting Committee

   Review and discuss proposed reconciliation revisions to certificate of trust statutes MCL 700.7913 and MCL 565.431.

3. Legislation Development and Drafting Committee

   Review, discuss, and vote to approve proposed revisions to certificate of trust statutes MCL 700.7105 and 700.7815.

Note: The Insurance Legislation Ad Hoc Committee will discuss the status of SB 1010 during its committee report.
Gents:

Being somewhat anal, but also acknowledging that I have more time on my hands these days, I tackled the assignment given to me by the EPIC Update Committee over this summer with regard to cleaning up the Trust Certificate statutes. I am uncertain who is the chair of the committee, or who handed out the assignments, and to whom I am supposed to report. By default, I picked the two of you. Please let me know if I am wrong in my guesses.

Attached is my preliminary effort to edit/rewrite both MCL 565.431 et al and MCL 700.7913. Some brief comments follow:

- I recalled from a Council meeting a couple of years ago, Geoff may remember, that Nancy Welber expressed frustration with the requirement under MCL 565.432 that the Certificate had to list all trustees, including all named successor trustees. Nancy found the requirement to identify all successor trustees who might never serve under the trust instrument, or who may be replaced in a subsequent trust amendment, as unnecessary. Moreover, Nancy expressed concern that disclosing all successor trustees might even be a disruptive disclosure to some trust beneficiaries who arguably do not know who the settlor named as a successor trustee— at least until the settlor’s death. With Nancy’s comments in mind, I eliminated any reference to the need to include all named successor trustees in a Certificate of Trust Existence and Authority;

- I tried to use the consistent language in each of the two statutes, e.g. replacing 'trust agreement' with 'trust instrument';

- I eliminated reference to a 'grantor', when the use of 'settlor' seemed to be more precise since the statutes deal with real estate held in a trust;

- I tried to eliminate as much 'passive voice' terminology in MCL 565.431 et seq. - admittedly 'passive voice' is something of a 'pet peeve' of mine.

Finally, no doubt a proposal that will probably precipitate a raging debate either at the Council or from the Real Estate Section of the Bar, is to try to consolidate the two statutes into one and a half. I thought it redundant to have two different statutes that essentially address the same topic— what needs to be in a Certificate of Trust Existence and Authority. As such, you will find an optional short MCL 565.431 that simply refers to the need to meet the requirements of MCL 700.7913, but include in the Certificate the 'legal description of the affected real property.'

If I could figure out a way to completely eliminate all of MCL 565.431 et al, and include all of the requirements for a Certificate in MCL 700.7913 I would do so in a heartbeat. The thought of actually eliminating existing legislation would be my lasting legacy to the bar.

I welcome your thoughts, observations, or simply tell me where I screwed up. Thanks

George Bearup
Senior Trust Advisor

Greenleaf Trust

Traverse City office:
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Thank you.
A bill to amend 1991 PA 133, entitled "Recording Trust Agreement or Certificate of Trust Existence and Authority," by amending section 1, section 2, section 3.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sect. 1. An instrument conveying, encumbering, or otherwise affecting an interest in real property, executed pursuant to an express trust, may be accompanied either by a copy of the trust agreement or by a certificate of trust existence and authority, as described in sections 2 and 3, that complies in all respects with MCL 700.7913 and that contains the legal description of the affected real property interest.

Sec. 2. A certificate of trust existence and authority shall contain all of the following information:

(a) The title of the trust.
(b) The date of the trust agreement and any amendments to the trust agreement.
(c) The name of the settlor or grantor and the settlor's or grantor's address.
(d) The names and addresses of all of the trustees and successor trustees.
(e) The legal description of the affected real property.
(f) Verbatim reproductions of provisions of the trust agreement, and any amendments to the trust agreement, regarding all of the following:
(i) The powers of the trustee or trustees relating to real property or any interest in real property and restrictions on the powers of the trustee or trustees relating to real property or any interest in real property.
(ii) The governing law.
(iii) Amendment of the trust relating to the trust provisions described in subdivision (a) to (f)(ii).
(g) Certification that the trust agreement remains in full force and effect.
(h) A list of names and addresses of all persons who, at the time the certificate of trust is executed, are trustees of the trust.

Section 3. A certificate of trust existence and authority shall be executed 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. The certificate shall be in the form of an affidavit.
A bill to amend 1998 PA 386, entitled "Estates and protected individuals code,
by amending section 7913 (MCL 700.7913), as amended by 2000 PA 177
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 WHICH SHALL CONTAIN containing all of the following information:
(a) The name of the trust and the date of the trust instrument and any THE DATE OF CURRENTLY EFFECTIVE amendments to THE TRUST INSTRUMENT.
(b) The name and address of the currently acting trustee OR COTRUSTEES OF THE TRUST.
(c) The powers of the trustee THAT RELATE 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 EACH any person WHO HOLDS holding a power to revoke the trust.
(e) The authority of cotrustees to sign ON BEHALF OF THE TRUST or otherwise authenticate THE TRUST and whether less than ALL OF THE COTRUSTEES are required in order to exercise power of the trustee.
(2) A certificate of trust may be signed or otherwise authenticated by the settlor, any trustee, or any attorney for the settlor or the trustee. The certificate shall be in the form of an affidavit.
(3) A certificate of trust shall 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 trust instrument and later CURRENTLY EFFECTIVE amendments TO THE TRUST INSTRUMENT that designate the trustee and confer upon the trustee the power to act in the pending transaction.
(6) A person who acts in reliance upon a certificate of trust without knowledge that representations contained in the certificate are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certificate OF TRUST.
(7) A person who in good faith enters into a transaction in reliance upon 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 is liable for damages, costs, expenses, and legal fees if the court determines that the person did was not acting pursuant to a legal requirement in demand 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 THAT CONCERNS concerning the trust.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 7105.

(1) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

(2) The terms of a trust prevail over any provision of this article except the following:

(a) The requirements under sections 7401 AND 7402 for creating a trust.

(b) The duty of a trustee to administer a trust in accordance with section 7801.

(c) The requirement under section 7404 that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(d) The power of the court to modify or terminate a trust under sections 7410, 7412(1) to (3), 7414(2), 7415, and 7416.

(e) The effect of a spendthrift provision, a support provision, and a discretionary trust provision on the rights of certain creditors and assignees to reach a trust as provided in part 5.

(f) The power of the court under section 7702 to require, dispense with, or modify or terminate a bond.

(g) The power of the court under section 7708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.

(h) Except as permitted under section 7809(2), the obligations imposed on a trust protector in section 7809(1).

(i) The duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.

(j) The power of the court to order the trustee to provide statements of account and other information pursuant to section 7814(4).

(k) The effect of an exculpatory term under section 7809(8) or 7908.

(l) The rights under sections 7910 to 7913 of a person other than a trustee or beneficiary.
(m) Periods of limitation under this article for commencing a judicial proceeding.

(n) The power of the court to take action and exercise jurisdiction.

(o) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 7203 and 7204.

(p) The requirement under section 7113 that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

Sec. 7815.

(1) A beneficiary of a discretionary trust provision as described in section 7505 has no property right in a trust interest that is subject to a discretionary trust provision, and has no right to any amount of trust income or principal that may be distributed only in the exercise of the trustee's discretion. However, except as provided in subsection (2) and notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", a trustee abuses the trustee's discretion in exercising or failing to exercise a discretionary power if the trustee does any of the following:

(a) Acts dishonestly.

(b) Acts with an improper motive, even though not a dishonest motive.

(c) Fails to exercise the trustee's judgment in accordance with the terms and purposes of the trust.

(2) Unless the trust instrument expressly provides otherwise, A trustee is not liable to a beneficiary for failure to exercise the power described in section 7820a or the power described in section 5a of the powers of appointment act of 1967, 1967 PA 224, MCL 556.115a.

(3) Subject to subsection (5), the following rules apply to a trustee's exercise of a power unless the terms of the trust expressly indicate that the rule does not apply:

(a) A person other than a settlor who is a trust beneficiary and trustee of a trust that confers on the trustee a power to make distributions pursuant to a discretionary trust provision to or for the trustee's benefit may exercise the power only in accordance with an ascertainable standard.

(b) A trustee may not exercise a power to make distributions pursuant to a discretionary trust provision in a manner to satisfy a legal obligation of support that the trustee personally owes another person.

(4) A power whose exercise is limited or prohibited by subsection (3) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If
the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(5) Subsection (3) does not apply to any of the following:

(a) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or 2523(e) of the internal revenue code, 26 USC 2056 and 2523, was previously allowed.

(b) Any trust during any period that the trust may be revoked or amended by its settlor.

(c) A trust if contributions to the trust qualify for the annual exclusion under section 2503(c) of the internal revenue code, 26 USC 2503.