

Legislative Analysis



CERTIFICATE OF TRUST

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House Bill 5362 (H-2) as reported from committee
House Bill 5398 (H-4) as reported from committee

Analysis available at
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Sponsor: Rep. Peter J. Lucido

Committee: Judiciary

(Enacted as Public Acts 491 and 492 of 2018)

Complete to 11-26-18

BRIEF SUMMARY: House Bill 5362 would, among other things, amend the Michigan Trust Code to revise the information required to be included in a certificate of trust.

House Bill 5398 would replace the use of a certificate of trust existence and authority (used in transactions involving property that is conveyed or otherwise affected by a trust) with a certificate of trust as specified under the Michigan Trust Code and repeal provisions that currently specify the information required to be included in a certificate of trust existence and authority; restrict execution of the certificate by only the settlor or grantor, or an attorney for the settlor, grantor, or a trustee; and require the document to be indexed in the records of the office of register of deeds under the title of the trust.

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

THE APPARENT PROBLEM:

A certificate of trust is a sworn document that is used in a transaction involving assets that are held in a trust instead of furnishing a copy of the complete trust agreement to a third party. It provides key information about the trust, such as the name of the trust, the name and address of the current trustee or trustees and the powers of a trustee, as it relates to the purpose for which a certificate of trust is being provided to a third party. In short, the certificate of trust provides assurance to an entity who is a party to a transaction involving assets held in trust that the trust exists and that the trustee has the authority to conduct a transaction in which assets in the trust are transferred, invested, or sold without the trustee's having to provide the trust agreement (which may be quite a large document and which may also contain confidential information inconsequential to the transaction at hand).

When the Michigan Trust Code (MTC) was enacted in early 2010, it provided guidelines as to what information should be included in a certificate of trust and also provided protections to third parties who relied on a person's representation that the person was indeed a trustee and had authority to represent the trust in the transaction. However, some felt that a weakness in the 2010 legislation was that it preserved a separate statutory provision regarding certificates of trust used in real estate transactions. Though the information to be included in the certificate is similar, the documents differ in that a trustee cannot sign a certificate of trust in a real estate transaction, though the trustee can sign a certificate in any other transaction involving trust assets. Some believe that merging the two systems would mitigate confusion and could possibly reduce costs to a trust if the need to hire an attorney for a real estate transaction were eliminated. Legislation to address these concerns has been offered.

THE CONTENT OF THE BILLS:

House Bill 5362 would amend Article VII (Michigan Trust Code, or MTC) of the Estates and Protected Individuals Code. Under the MTC, a trustee of a trust may furnish a person, such as a bank employee, with a *certificate of trust* rather than a copy of the trust instrument. “Trust instrument” is defined under the MTC 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 the MTC 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” already 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 instead specify that the authority of cotrustees to sign or authenticate would be *on behalf of the trust*, and whether all or less than all of the cotrustees are required to exercise powers of the trustee. Lastly, the bill would make numerous revisions of an editorial, rather than substantive, nature, for clarity or to update the language in the MTC.

MCL 700.7913

House Bill 5398 would amend Public Act 133 of 1991, which pertains to the use and recording of documents involving real property that is conveyed or affected by a trust. The bill would repeal several sections of the act and replace references to a *certificate of trust existence and authority* with *certificate of trust* instead.

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 the MTC (see above). Provisions requiring, or referring to, a “certificate of trust existence and authority” would instead require, or refer to, a “certificate of trust.” [Information currently required to be included in a certificate of trust existence and authority differs in some respects from the information House Bill 5362 would require to be included in a certificate trust.]

As revised, Section 1 of the act 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 the MTC that includes the legal description of the affected real property. Currently, the instrument must be accompanied by a copy of the trust agreement or by a certificate of trust existence and authority.

As amended by Public Act 194 of 2018, Section 4 currently allows the trust agreement or certificate of trust existence and authority that accompanies an instrument that conveys, encumbers, or otherwise affects real property, 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. The bill would apply the provision to a “trust instrument” and “certificate of trust” and require either the trust instrument or certificate of trust that accompanies an instrument to be recorded as a separate document.

The bill would also make revisions to Sections 1 and 5 that are editorial in nature.

A description of the provisions repealed by the bill 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: Restricts execution of a certificate of trust existence and authority to 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. Section 3 also requires the certificate to be in the form of an affidavit. (Under Section 7913 of the MTC, a settlor, any trustee, or an attorney for the settlor or trustee could sign or otherwise authenticate a certificate of trust.)

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, 565.434, and 565.435; MCL 565.432, 565.433, and 565.436 (repealed)

ARGUMENTS:

For:

House Bill 5362 would include in the information required to be included in a certificate of trust the date of each operative trust instrument. House Bill 5398 would end the current practice of having a separate type of certificate of trust for transactions involving real estate. Many feel that the information currently required to be on a certificate of trust under the Michigan Trust Code (MTC) is sufficient to provide needed protections for even real estate transactions. Further, the current requirement to hire a lawyer to sign a certificate of trust for a real estate transaction would be repealed, and guidelines under the MTC, which allow either the person establishing the trust (settlor) or a trustee to sign the certificate, would prevail. Some believe that this will save both time and money when buying or selling real estate for a trust. According to testimony presented in committee, there is no evidence that a lawyer’s signature on a certificate prevents fraud. Having only one system to follow will also eliminate confusion on the part of settlors, trustees, and entities who are parties to a real estate transaction involving trust assets regarding the process to follow and the information needed to be included on the certificate. Protections afforded to third parties under the MTC for non-real estate transactions would also apply to third parties in real estate transactions. For instance, if a person fraudulently posed as a trustee, or a trustee misrepresented his or her authority regarding the ability to represent the trust, the third party who relied on the veracity of the trustee and the certificate in good faith could enforce the transaction against the real estate held in trust as if the representations included in the certificate were correct. This would put real estate transactions involving trust property on par with other types of property held in trust. However, House Bill 5398 would retain the ability to record a trust instrument or certificate of trust, and

any amendments to or revocations to either document, in a county register of deeds office where real estate holdings in the trust are located. To some, this enables the parties to a real estate transaction to get the maximum benefit of both the MTC and Public Act 133 of 1991.

Against:

Concerns have been raised that merging the two systems will make it easier for a person to commit fraud in real estate transactions. For instance, under Section 7913 of the MTC, a person who in good faith relies on the information in a certificate of trust to be accurate, and relies on a trustee to be acting within that trustee's true authority, could enforce the transaction even if the information in the certificate was incorrect or the person acting as a trustee did not have the authority to sign off on the transaction or was not a trustee at all. Further, the provisions of Section 7913 discourage parties to a transaction from verifying the certificate against the trust instrument, as the party is liable for damages, costs, expenses, and legal fees if the court determines that the request was not pursuant to a legal requirement. The current system is working, and some believe that restricting signing off on real estate transactions to only the settlor or an attorney, and not discouraging a party from doing due diligence in verifying the accuracy of information on a trust certificate, adds needed protections against fraud.

POSITIONS:

A representative of the Probate and Estate Planning Section of the State Bar of Michigan testified in support of the bills. (9-25-18)

The Michigan Bankers Association indicated support for the bills as substituted. (9-25-18)

The Michigan Association of Registers of Deeds indicated support for the bills. (10-2-18)

The Real Property Law Section of the State Bar of Michigan indicated opposition to the bills. (10-2-10)

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■ 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.