

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 1172

INTRODUCER: Senator Simmons

SUBJECT: Land Trusts

DATE: March 11, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	Pre-meeting
2.	_____	_____	BI	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 1172 revises the laws relating to land trusts. In general, a land trust is a written instrument in which title to real property is vested in a trustee who has the authority to manage or dispose of the property.

More specifically, the bill:

- Clarifies the distinction between a land trust governed by s. 689.071, F.S., and other trusts governed by the Florida Trust Code.
- Defines a land trust based on the functional scope of the land trustee’s duties, although the power to manage or dispose of property remains an essential element of a Florida land trust.
- Relocates provisions of s. 689.071, F.S., to a newly-created section, s. 689.073, F.S. These provisions generally state that purchasers and others can rely on a land trustee’s authority over property as described in a recorded instrument. These provisions will remain equally applicable to any recorded instrument, created before or after the effective date of the bill, which conveys title to property and the power to manage or dispose of the property.
- Codifies a number of land trust practices and principles commonly used in Florida and Illinois which are derived from judicial precedents or treatises on land trusts.¹

This bill creates section 689.073, Florida Statutes.

This bill substantially amends sections 689.071, 689.073, and 736.0102 of the Florida Statutes.

¹ The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Amendments to Land Trust Act (2013)* (on file with the Senate Committee on Judiciary). By codifying the land trust practices, it will facilitate and encourage the use of land trusts in Florida real property transactions. *Id.*

II. Present Situation:

“A land trust is a unique creature of Illinois law where real estate is conveyed to a trustee under an arrangement reserving to the beneficiaries the full management and control of the property.”² Under a land trust:

[t]he trustee executes deeds, mortgages or otherwise deals with the property at the written direction of the beneficiaries. The beneficiaries collect rents, improve and operate the property and exercise all rights of ownership other than holding or dealing with the legal title.... While legal title to the real estate is held by the trustee, the beneficiaries retain ‘the power of direction’ to deal with the title, to manage and control the property, to receive proceeds from sales or mortgages and all rentals and avails on the property.³

Land trusts were initially developed in Illinois. The use of these trusts in Florida was validated by the enactment of s. 689.071, F.S., the Florida Land Trust Act, in 1963.⁴ Section 689.071, F.S., has always focused primarily on the authority of the land trustee to convey good title to third parties if the prior deed to the land trustee granted to the trustee certain powers to deal with and dispose of the property, commonly referred to as “deed powers.”⁵ Serving primarily as a “purchaser protection” statute, s. 689.071, F.S., because the statute protects third party grantees, mortgagees, and lessees who rely on the statutory authority of the trustee based on those recorded *deed powers*. Those who rely on a trustee are not required to inquire into the identity of the beneficiaries or the terms of the unrecorded trust agreement.⁶ All persons dealing with the trustee of a land trust under a recorded instrument take free of claims of beneficiaries.⁷ The interests of beneficiaries under a land trust are personal property.⁸

In Florida, the aspects of the land trust under s. 689.071, F.S., which confer legal title to the trustee, also apply to any recorded instrument that grants deed powers to a trustee.⁹ In order to obtain the *purchaser protection* aspects of the statute,¹⁰ it became common practice in Florida for conveyances to trustees to include s. 689.071, F.S., deed powers although the trust was not intended to be a land trust.

² 3A HORNER PROBATE PRAC. & ESTATES s.68:46 (2013); *In re Marriage of Gross*, 756 N.E.2d 312, 315 (1st Dist. 2001).

³ *In re Marriage of Gross*, 756 N.E.2d at 315.

⁴ Chapter 63-468, ss. 1-6, Laws of Fla. The statute was enacted to confirm the marketability and insurability of land purchased from a land trustee. Correspondence from the Real Property, Probate, and Trust Law Section of The Florida Bar (on file with the Senate Committee on Judiciary).

⁵ The Real Property, Probate, and Trust Law Section of the Florida Bar, *supra* note 1 and *also see* “Deed powers” refer to those that “the recorded instrument confers on the trustee the power and authority to protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the real property described in the recorded instrument.” Section 689.071(3), F.S.

⁶ Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 1; s. 689.071(4), F.S.

⁷ Section 689.071(5), F.S.

⁸ Section 689.071(6), F.S.

⁹ Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 1.

¹⁰ Section 689.071, F.S.

The primary purpose of this bill is to provide greater clarity in the manner that the Florida Land Trust Act and the Florida Trust Code¹¹ are intended to relate to each other by specifying a comprehensive statutory definition of land trust.¹²

III. Effect of Proposed Changes:

General overview

The bill clarifies the distinction between a land trust governed by s. 689.071, F.S. and other express trusts governed by the Florida Trust Code,¹³ but preserves the “title protection” benefits of the existing statute for any conveyance to trustee containing deed powers. To do so, the bill:

- Defines land trusts based on the functional scope of the land trustee’s duties, although deed powers remain an essential element of a Florida land trust.
- Relocates all the *purchaser protection* provisions of s. 689.071, F.S., to a newly-created section, s. 689.073, F.S., which will remain equally applicable to any conveyance containing deed powers to a trustee of any trust.
- Codifies a number of land trust practices and principles commonly used in Florida and Illinois which are derived from judicial precedents or treatises on land trusts.¹⁴

Purchaser Protection Provision transferred to Section 689.073, F.S.

The bill transfers and amends the purchaser protection provisions in ss. 689.071(3), (4), and (5), F.S., to newly-created s. 689.073, F.S.

The existing ss. 689.071(3), (4), and (5), F.S., are that are transferred to s. 689.073, F.S., are intended to have exactly the same legal effect: the provisions protect a purchaser who buys or leases land from a trustee if the trustee acquired the land by a recorded deed or other instrument that granted certain powers “deed powers” to the trustee. If those deed powers are recorded, then the statute protects the purchaser by confirming that:

- The trustee is vested with title to the property and is fully able to transfer the title to the purchaser;
- The purchaser is protected from title assaults by the beneficiaries of the trust;
- The beneficiaries need not be disclosed;
- The trust document need not be disclosed; and
- The purchaser may safely deal with the trustee without inquiring whether the trustee has authority to deal with the land.¹⁵

¹¹ Chapter 736, F.S.

¹² Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 1.

¹³ Chapter 736, F.S.

¹⁴ Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 1. By codifying the land trust practices, it will facilitate and encourage the use of land trusts in Florida real property transactions. *Id.*

¹⁵ Correspondence from the Real Property, Probate, and Trust Law Section of The Florida Bar (on file with the Senate Committee on Judiciary).

The new statute deletes language that vests both legal and equitable title in the trustee; removes a reference to real property “in this state” in the current law, thereby confirming that out-of-state lands may be held in Florida land trusts.¹⁶ Additionally, the new statute requires that the statute apply without regard to whether any reference is made in the recorded instrument to the beneficiaries of such trust or to any separate collateral unrecorded declarations or agreements, without regard to the provisions of any unrecorded trust agreement or declaration of trust, and without regard to whether the trust is governed by the Florida Land Trust Act or the Florida Trust Code. This statute applies both to recorded instruments that are recorded after the effective date of this bill and to recorded instruments that were previously recorded and governed by similar provisions contained in s. 689.071(3), F.S. (2012). The statute validates all previous conveyances as vesting the trustee with the requisite deed powers.

Definition of Land Trust under s. 689.071(2), F.S.

The bill revises the remaining provisions of s. 689.071, F.S., which were not moved to the newly-created s. 689.073, F.S. The revised definition of land trust in s. 689.071(2)(c), F.S., still requires a conveyance to a trustee by a recorded instrument containing deed powers, but beginning with the effective date of the bill, this definition focuses on the key functional distinction between land trust and other express trusts. Under a land trust, a land trustee functions almost entirely as the agent of the beneficiaries or the person holding the power of directions under the trust agreement. Whereas, a trustee who is subject to the Florida Trust Code in ch. 736, F.S., has more extensive fiduciary duties and responsibilities to the trust beneficiaries, along with more extensive potential liability if the trustee fails to perform the trustee’s discretionary duties prudently.¹⁷

A land trustee has a fiduciary relationship to the land trust beneficiaries and the person holding the power of direction over the actions of the land trustee, just as any agent is bound a fiduciary to the principal for whom the agent acts.¹⁸ In practice, land trustees are rarely delegated discretionary duties under a land trust agreement, beyond ministerial and administrative matters.¹⁹ This lack of duties is a logical parallel to the exemption that land trustees enjoy from ch. 736, F.S., responsibilities and liabilities.²⁰ The bill makes clear this practical distinction in the revised definition of a land trust in s. 689.071(2)(c), F.S., by stating that the trustee has limited duties as specified in the statute.²¹

For trust created on or after the effective date of the bill, the revised definition limits the duties of a trustee of a land trust to:

- The duty to exercise the trustee’s deed powers as directed by the beneficiary or by the holder of the power of direction (the agent’s fiduciary duty to follow the principal’s directions);
- The duty to dispose of the trust property at the termination of the trust;
- The duty to perform ministerial and administrative functions delegated to the trustee; and

¹⁶ Real Property, Probate and Trust Law Section of The Florida Bar, *supra* note 1.

¹⁷ *Id.*

¹⁸ *Id.* See also, *Raborn v. Menotte*, 974 So. 2d 328 (Fla. 2008).

¹⁹ *Id.* See also, “The trustee is a mere vessel of title.” *Brigham v. Brigham*, 11 So. 3d 374, 385 (Fla. 3d DCA 2009).

²⁰ Real Property, Probate and Trust Law Section of The Florida Bar, *supra* note 1.

²¹ *Id.*

- The duties required of certain timeshare trustees by chapter 721, F.S.²²

If the trustee's duties exceed the foregoing limited duties and the trust is created after the effective date of the bill, then the trust will not be treated as a land trust and will not be excluded from the operation of the Florida Trust Code.²³ Because the purchaser protection provisions of the statute operate on any conveyance containing deed powers, the classification of the trust as a land trust will have no effect on the title to any real property held by the trustee.²⁴

Other Definitions

The bill revises the definition for "holder of the power of direction" to "power of direction. The phrase, "person or entity" is shortened to "person."

The bill creates new definitions for some basic trust concepts, such as "trust agreement," "trust property," and "recorded instrument." "Trustee" is redefined to mean the trustee of a land trust or the trustee of another trust. Numerous references to "trustee" in s. 689.071, F.S., are revised in the bill to specifically refer to "trustee of a land trust" where appropriate.

Vesting of Legal and Equitable Title Revisions to s. 689.071(3), F.S.

The bill continues the existing statutory statement that a land trustee is vested with both legal and equitable title to the trust property. This concept does not appear in the transferred purchaser protection provisions in s. 689.073, created in the bill because it universally applies to any type of trust with deed powers.²⁵

The bill makes technical revisions to s. 689.071(3), F.S., to maintain a consistent use of defined terms such as "land trust," "trust agreement," and "trust property."

Statute of Uses and Doctrine of Merger – Revisions to ss. 689.071(4) and (5), F.S.

When s. 689.071, F.S., was first enacted for the purpose of validating the use of Illinois land trusts in Florida, one commonly assumed result was that land trusts would not be executed as "passive trusts" or "dry trusts" by the statute of uses, which is codified in Florida in s. 689.09, F.S.²⁶ The bill makes that result explicit with respect to a land trust, overriding not only s. 689.09, F.S., but also the common-law statute of uses.²⁷

New subsection 689.071(5), F.S., overrides the doctrine of merger with respect to a land trust, so that a land trust will not be extinguished if the trustee is the sole beneficiary.²⁸

²² *Id.* Section 721.08, F.S., provides that time-share accommodations may be placed into a trust.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Personal Property Option

Currently s. 689.071, F.S., provides that the recorded instrument may define and declare the interests of land trust beneficiaries as personal property under Florida law. The bill clarifies that this designation of personal property must be made in the recorded instrument or the trust agreement, or it will be considered real property. Subsection 689.071(6), F.S., is modified to allow the optional personal property declaration to be made in the recorded instrument or in the trust agreement.

Beneficiary Provisions

Currently, customary provisions in land trusts are based upon treatises by Illinois land trust authorities. The bill revises s. 689.071(8), F.S., in a number of respects to codify these land trust practices.²⁹

The bill adds s. 689.071(8)(b), F.S., as a statutory endorsement of flexible beneficial ownership techniques described in the *Kenoe* treatise.³⁰ The purpose of including these provisions directly in the Florida Land Trust Act is to increase public awareness that such techniques are available without making reference to the treatise, thereby promoting the usage of land trusts in Florida generally.³¹

The bill revises s. 689.071(8)(c), F.S., to reconcile the Florida Land Trust Act with the Uniform Commercial Code Article 9 exclusion of interests in real property.³² Caselaw³³ holds that a beneficial interest in a land trust is a general intangible within the scope of the Florida Uniform Commercial Code, and this result is codified in the present version of s. 689.071(8)(c), F.S., which provides that Uniform Commercial Code Article 9 governs the perfection of a security interest in a beneficial interest in a land trust. However, if the beneficial interest is defined as real property under s. 689.071(6), F.S., then there is a possible contradiction between the Florida Land Trust Act (which says Article 9 applies to beneficial interests) and the Uniform Commercial Code (which says Article 9 excludes real property interests).

The Florida Vacation Plan and Timeshare Act³⁴ authorizes the creation and marketing of timeshare estates through trusts.³⁵ Because timeshare estates are defined as real property,³⁶ the purchasers of Florida timeshare estates typically finance their purchase with a mortgage recorded against the timeshare estate. However, if the timeshare estate is created as a beneficial interest in a timeshare trust a land trust is created. As a result, two different statutes prescribe two different methods of perfection, causing possible confusion in the mechanics of perfecting the lien.³⁷

²⁹ *Id.*

³⁰ *Id.* Henry W. Kenoe wrote a number of treatises on land trusts. *Id.*

³¹ *Id.*

³² These provisions are found in s. 679.1091(4)(k), F.S.

³³ *In re Cowser*, 14 B.R. 335 (Bankr.S.D.Fla. 1981).

³⁴ Chapter 721, F.S.

³⁵ See s. 721.08(2)(c)4, F.S.

³⁶ See s. 721.05(34), F.S.,

³⁷ The conflict exists between the Uniform Commercial Code Article 9 and the Florida Land Trust Act.

The bill revises s. 689.071(8)(c), F.S., to resolve this apparent contradiction by clarifying that the Uniform Commercial Code governs perfection if the beneficial interest in a land trust is declared to be personal property (as was the case in *Cowsert*), but that a mortgage instrument recorded in the real estate records is the proper method of perfection if the beneficial interest in a land trust is declared to be real property. If real property is involved, the proper county for recording the mortgage may be specified in the recorded instrument or in a declaration of trust or memorandum that is recorded in the same county as the recorded instrument; otherwise the location of the trust property determines the proper county for recording the mortgage. The bill provides a transition rule to provide for the continuation of perfection for any Uniform Commercial Code financing statement that may have been filed before the effective date of this clarification.³⁸ It is an abbreviated version of the transition rules that were included in Revised Uniform Commercial Code Article 9 in 2001.³⁹

The bill revises s. 689.071(8)(c), F.S., to state more clearly that a lien or security interest perfected against a beneficial interest in a land trust does not affect in any way the legal or equitable title of the land trustee to the trust property. Section 689.071(8)(d), F.S., is amended to make explicit a concept that is inherent in a beneficiary's ability to encumber a beneficial interest as described in existing s. 689.071(8)(c), F.S. The trustee's legal and equitable title to the trust property is separate and distinct from the beneficiary's beneficial interest in the land trust and the trust property. A lien, judgment, mortgage, security interest or other encumbrance against one interest does not automatically attach to the other interest. Section 689.071(8)(e), F.S., is also revised to clarify this same point. Documents recorded by a beneficiary to transfer or encumber a beneficial interest do not affect the legal and equitable title of the trustee or the deed powers granted to the trustee in the recorded instrument.

The bill adds s. 689.071(8)(i), F.S., which is intended to end the reported occasional practice by some judges of appointing a guardian ad litem to represent the interests of land trust beneficiaries in a foreclosure or other litigation affecting title to the trust property.⁴⁰ Because a land trustee is vested with both legal and equitable title to the trust property, joinder of the land trustee in the action is sufficient without a party incurring the additional expense of a guardian ad litem.⁴¹

Successor Trustee Provisions – Revisions to s. 689.071(9), F.S.

The use of “each and every successor trustee” is substituted in s. 689.071(9), F.S., for the shorter expression: “each successor trustee.”

The bill redesignates the existing paragraph 689.071(9)(f), F.S., as paragraph 689.071(9)(e), F.S., to provide that a trust agreement may authorize, in addition to beneficiaries, the person holding the power of direction, to direct the land trustee to convey the trust property to another trustee.

³⁸ Real Property, Probate and Trust Law Section of The Florida Bar, *supra* note 1.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Trustee as a Creditor

The bill amends s. 689.071(10)(a), F.S., to include a reference to a mortgage and a security interest against a beneficial interest in a land trust to conform to other changes in the bill.

Notice to Trustee Provisions – Revisions to s. 689.071(11), F.S.

The bill adds a new s. 689.071(11), F.S., to assure that the right parties receive any third-party notices concerning property held in a land trust by requiring that notice to a land trustee include certain identifying information if it appears in the recorded instrument.

Transition Rule Provision; Timeshare Trusts- Revisions to s. 689.071(12), F.S.

The revised definition of “land trust” in the bill contains a cross-reference to a transition rule that appears in s. 689.071(12), F.S. This transition rule exempts existing land trusts from the new duties-based test in s. 689.071(2)(c), F.S.; rather, an existing trust is a land trust (or not) based on the intentions expressed in (or discernible from) the existing trust agreement.⁴² As a practical matter, the overwhelming majority of existing land trusts sharply curtail the discretionary duties of the land trustee, such that those existing trusts would meet the new duties-based “land trust” definition even if it were applied to them retroactively.⁴³ But, because there are some land trust agreements that vest the land trustee with greater discretion, the transition rule provision does not apply the duties-based test to any existing land trust agreement that says the trust is a “land trust” or clearly was intended to be a land trust.⁴⁴ In this way, existing obvious land trusts are “grandfathered” into the land trust statute.⁴⁵

There are two necessary exceptions to the transition rule provision: (1) if it is not obvious from reading the existing trust agreement that the parties intended to create a land trust, then the duties-based test applies; and (2) if an existing land trust agreement is amended to add or expand duties of the trustee, then the duties-based test is applied only to the added or expanded duties that were not found in the trust agreement before the effective date of the amended act. In either case, if the trustee has or adds too many duties beyond those in the land trust definition, the result is that the trustee becomes subject to the tougher trustee standards of ch. 736, F.S., but there is no effect on the title to the trust property.

As noted above in the discussion of timeshare interests, current statutes⁴⁶ authorize the use of trusts for the creation and marketing of timeshare estates and specify similar requirements for using trusts for multi-site vacation clubs.⁴⁷ These statutes specify that certain provisions of the Florida Trust Code govern the liability of the trustees of such qualifying trusts,⁴⁸ and these provisions are usually recited in the ch. 721, F.S., trust agreements. If such an existing timeshare trust were created as a land trust, however, then the trust agreement would contain provisions

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Chapter 721, F.S.

⁴⁷ Section 721.53(1)(e), F.S.

⁴⁸ See specifically, ss. 736.08125, 736.08163, 736.1013, and 736.1015, F.S.

stating that the trust is a land trust (making it a land trust)⁴⁹ and would also refer to governance by ch. 736, F.S.

Florida Trust Code – Revisions to s. 736.0102, F.S.

The bill includes a conforming amendment to s. 736.0102, F.S., of the Florida Trust Code. The bill divides this section into two subsections, and a third subsection is added to address the exclusion of land trusts from the Florida Trust Code. The newly-created s. 736.0102(3), F.S., provides that the Trust Code does not apply to land trusts under s. 689.071, F.S., except to the extent provided in s. 689.071(7), F.S., of the Land Trust Act and in the two provisions of ch. 721, F.S., that apply parts of ch. 736, F.S., to timeshare trusts.

Effective date

The bill directs the Division of Law Revision and Information to replace the phrase “effective date of the act” wherever it occurs in this bill with such date.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

⁴⁹ See s. 689.071(14)(b)1, F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
