

Representative David Clark proposes the following substitute bill:

TRUST DEEDS AMENDMENTS

2002 GENERAL SESSION

STATE OF UTAH

Sponsor: David Clark

This act modifies the Real Estate Title to address provisions related to trust deeds. The act modifies qualifications and duties of a trustee of a trust deed. The act prohibits certain actions by a trustee. This act addresses requirements for the sale of property. This act addresses delivery of trust deeds. This act requires detailed accounting in certain circumstances. This act makes technical changes. This act provides revisors instructions.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

57-1-21, as last amended by Chapter 236, Laws of Utah 2001

57-1-21.5, as enacted by Chapter 236, Laws of Utah 2001

57-1-22, as last amended by Chapter 236, Laws of Utah 2001

57-1-25, as last amended by Chapter 236, Laws of Utah 2001

57-1-26, as last amended by Chapter 236, Laws of Utah 2001

57-1-28, as last amended by Chapter 236, Laws of Utah 2001

ENACTS:

57-1-31.5, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **57-1-21** is amended to read:

57-1-21. Trustees of trust deeds -- Qualifications.

(1) (a) The trustee of a trust deed shall be:

(i) any active member of the Utah State Bar [~~residing in Utah~~] that maintains a bona fide office in the state;



26 (ii) any depository institution as defined in Section 7-1-103, or insurance company
27 authorized to do business and actually doing business in Utah under the laws of Utah or the United
28 States;

29 (iii) any corporation authorized to conduct a trust business and actually conducting a trust
30 business in Utah under the laws of Utah or the United States;

31 (iv) any title insurance [~~or abstract~~] company [~~authorized to do business and~~] or agency
32 that:

33 (A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct
34 insurance business in the state;

35 (B) is actually doing business in [Utah under the laws of Utah,] the state; and

36 (C) maintains a bona fide office in the state;

37 (v) any agency of the United States government; or

38 (vi) any association or corporation that is licensed, chartered, or regulated by the Farm
39 Credit Administration or its successor.

40 (b) For purposes of this Subsection (1), a person maintains a bona fide office within the
41 state if that person maintains a physical office in the state:

42 (i) that is open to the public;

43 (ii) that is staffed from 8 a.m. to 5 p.m. on regular business days; and

44 (iii) at which a trustor of a trust deed may in person:

45 (A) request information regarding a trust deed; or

46 (B) deliver funds, including reinstatement or payoff funds.

47 ~~(b)~~ (c) Subsection (1) is not applicable to a trustee of a trust deed existing prior to ~~[the~~
48 ~~effective date of this chapter] May 14, 1963~~, nor to any agreement that is supplemental to that trust
49 deed.

50 (d) The amendments in this act to Subsection (1) apply only to a trustee that is appointed
51 on or after May 6, 2002.

52 (2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the
53 beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

54 (3) The power of sale conferred by Section 57-1-23 may only be exercised by the trustee
55 of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).

56 (4) A trust deed with an unqualified trustee or without a trustee shall be effective to create

57 a lien on the trust property, but the power of sale and other trustee powers under the trust deed may
 58 be exercised only if [~~prior to the exercise of those powers;~~] the beneficiary has appointed a
 59 qualified successor trustee under Section 57-1-22.

60 Section 2. Section **57-1-21.5** is amended to read:

61 **57-1-21.5. Trustees of trust deeds -- Duties.**

62 (1) [~~The~~] Except as provided in Subsection (2), the following duties of the trustee may not
 63 be delegated:

64 (a) the preparation and execution of:

65 (i) the notice of default and election to sell;

66 (ii) the cancellation of notice of default and election to sell;

67 (iii) the notice of sale; and

68 (iv) the trustee's deed; [~~and~~]

69 [~~(v) the deed of reconveyance;~~]

70 (b) the notification of foreclosure through publication, posting, and certified or registered
 71 mail;

72 (c) the receiving and responding to requests for reinstatement or payoff requirements; and

73 (d) the handling of reinstatement or payoff funds.

74 (2) Nothing in this section is intended to prevent:

75 (a) the trustee from using clerical or office staff [~~employed by the trustee and~~];

76 (i) that is under the trustee's direct and immediate supervision; and

77 (ii) to assist in the duties described in Subsection (1) [~~or~~];

78 (b) the trustee from using the services of others for publication, posting, marketing, or
 79 advertising the sale[-]; or

80 (c) a beneficiary of a trust deed or the servicing agent of the beneficiary from directly
 81 performing the functions described in:

82 (i) Subsection (1)(c); or

83 (ii) Subsection (1)(d).

84 (3) The amendments in this act to Subsection (2) do not apply to a foreclosure if the notice
 85 of default related to the foreclosure was filed before May 6, 2002.

86 (4) (a) Except as provided in Subsection (4)(c), a trustee may not solicit or receive any fee
 87 from a third party based on the trustee referring business to the third party.

- 88 (b) Fees prohibited under Subsection (4)(a) include:
- 89 (i) a commission;
- 90 (ii) a referral based fee, including a fee for the referral of:
- 91 (A) title work;
- 92 (B) posting services; or
- 93 (C) publishing services; or
- 94 (iii) a fee similar to a fee described in Subsection (4)(b)(i) or (ii).

95 (c) Subsection (4)(a) does not apply to fees received by a trustee for the trustee acting as
96 co-legal counsel, if the trustee is otherwise permitted by law to receive fees as co-legal counsel.

97 (5) A trustee may not charge a borrower a fee for publishing or posting a notice that
98 exceeds the actual costs incurred by the trustee to publish or post the notice for that borrower.

99 (6) (a) A person that violates Subsection (4) or (5) is guilty of a class B misdemeanor.

100 (b) In addition to a person's liability under Subsection (6)(a), if a person violates
101 Subsection (4) or (5), that person is liable to the trustor for an amount equal to the greater of:

- 102 (i) the actual damages of the trustor as a result of the violation; or
- 103 (ii) \$1,000.

104 (c) In an action brought under Subsection (6)(b), the party that does not prevail in the
105 action that is brought under Subsection (6)(b) shall pay the attorney fees of the prevailing party.

106 Section 3. Section **57-1-22** is amended to read:

107 **57-1-22. Successor trustees -- Appointment by beneficiary -- Effect -- Substitution**
108 **of trustee -- Recording -- Form.**

109 (1) (a) The beneficiary may appoint a successor trustee at any time by filing for record in
110 the office of the county recorder of each county in which the trust property or some part of the trust
111 property is situated, a substitution of trustee.

112 (b) The new trustee shall succeed to all the power, duties, authority, and title of the trustee
113 named in the deed of trust and of any successor trustee.

114 (c) The beneficiary may, by express provision in the substitution of trustee, ratify and
115 confirm action taken on the beneficiary's behalf by the new trustee prior to the recording of the
116 substitution of trustee.

117 (2) The substitution shall:

- 118 (a) identify the trust deed by stating:

- 119 (i) the names of the original parties to the trust deed[;];
- 120 (ii) the date of recordation[;]; and
- 121 (iii) (A) the book and page where the [~~same~~] trust deed is recorded; or
- 122 (B) the entry number;
- 123 (b) include the legal description of the trust property;
- 124 (c) state the name and address of the new trustee; and
- 125 (d) be executed and acknowledged by all of the beneficiaries under the trust deed or their
- 126 successors in interest.

127 (3) (a) If not previously recorded, at the time of recording a notice of default, the successor

128 trustee shall file for record, in the office of the county recorder of each county in which the trust

129 property or some part of it is situated, the substitution of trustee.

130 (b) A copy of the substitution of trustee shall be sent in the manner provided in Subsection

131 57-1-26(2) to [~~all persons to~~] any:

132 (i) person who requests a copy of any notice of default or notice of sale under Subsection

133 57-1-26(1)(a); and

134 (ii) person who is a party to the trust deed to whom a copy of a notice of default would be

135 required to be mailed by [Subsections] Subsection 57-1-26[~~(1)(a) and~~] (3).

136 (4) A substitution of trustee shall be in substantially the following form:

Substitution of Trustee

(insert name and address of new trustee)

139 is hereby appointed successor trustee under the trust deed executed by ____ as

140 trustor, in which ____ is named beneficiary and ____ as trustee, and filed for record

141 _____(month\day\year), and recorded in Book ____, Page ____, Records of ____ County,

142 (or filed for record _____(month\day\year), with recorder's entry No. ____, ____ County),

143 Utah.

(Insert legal description)

Signature_____

(Certificate of Acknowledgment)

147 Section 4. Section **57-1-25** is amended to read:

148 **57-1-25. Notice of trustee's sale -- Description of property -- Time and place of sale.**

149 (1) The trustee shall give written notice of the time and place of sale particularly describing

150 the property to be sold:

151 (a) by publication of the notice[;];

152 (i) at least three times[;];

153 (ii) once a week for three consecutive weeks[;];

154 (iii) the last publication to be at least ten days but not more than 30 days [~~prior to~~] before
155 the date the sale[;] is scheduled; and

156 (iv) in a newspaper having a general circulation in each county in which the property to
157 be sold, or some part of the property to be sold, is situated; and

158 (b) by posting the notice[;];

159 (i) at least 20 days before the date [~~of~~] the sale[;] is scheduled; and

160 (ii) (A) in some conspicuous place on the property to be sold; and [~~also~~]

161 (B) at the office of the county recorder of each county in which the trust property, or some
162 part of it, is located.

163 (2) (a) The sale shall be held at the time and place designated in the notice of sale.

164 (b) The time of sale shall be between the hours of 8 a.m. and [~~8~~] 5 p.m.

165 (c) The place of sale shall be clearly identified in the notice of sale under Subsection (1)

166 and shall be [~~one of the following: (i)~~] at a courthouse serving the county in which the property to
167 be sold, or some part of the property to be sold, is located[; ~~or~~].

168 [~~(ii) at the property to be sold, provided that:~~]

169 [~~(A) if the described property comprises more than one acre, the location on the property
170 where the sale will be conducted is specifically described; and]~~

171 [~~(B) the property is accessible to the public at the time of the sale.]~~

172 (3) The notice of sale shall be in substantially the following form:

173 Notice of Trustee's Sale

174 The following described property will be sold at public auction to the highest bidder,
175 payable in lawful money of the United States at the time of sale, at (insert location of sale)

176 _____ on _____(month\day\year), at __.m. of said day, for the purpose of

177 foreclosing a trust deed originally executed by ____ (and ____, his wife,) as trustors, in favor of

178 ____, covering real property located at ____, and more particularly described as:

179 (Insert legal description)

180

181 The current beneficiary of the trust deed is _____ and the record
182 owners of the property as of the recording of the notice of default are _____ and
183 _____.

184 Dated _____(month\day\year). _____
185 _____ Trustee

186 Section 5. Section 57-1-26 is amended to read:

187 **57-1-26. Requests for copies of notice of default and notice of sale -- Mailing by**
188 **trustee or beneficiary -- Publication of notice of default -- Notice to parties of trust deed.**

189 (1) (a) Any person desiring a copy of any notice of default and of any notice of sale under
190 any trust deed shall~~[-, at any time subsequent to the filing for record of the trust deed and prior to~~
191 ~~the filing for record of a notice of default of the trust deed,]~~ file for record ~~[in the office of the~~
192 ~~county recorder of any county in which the trust property, or any part of the trust property, is~~
193 ~~situated,]~~ a duly acknowledged request for a copy of any notice of default and notice of sale~~[-];~~

194 (i) in the office of the county recorder of any county in which the trust property or any part
195 of the trust property is situated; and

196 (ii) at any time:

197 (A) subsequent to the filing for record of the trust deed; and

198 (B) prior to the filing for record of a notice of default.

199 (b) Except as provided in Subsection (3), the request described in Subsection (1)(a) may
200 not be included in any other recorded instrument.

201 (c) The request described in Subsection (1)(a) shall:

202 (i) set forth the name and address of the one or more persons requesting copies of [those
203 notices] the notice of default and the notice of sale; and [shall]

204 (ii) identify the trust deed by stating:

205 (A) the names of the original parties to the trust deed[-];

206 (B) the date of filing for record of the trust deed[-];

207 (C)(I) the book and page where the trust deed is recorded; or

208 (II) the recorder's entry number[-]; and

209 (D) the legal description of the trust property.

210 (d) The request described in Subsection (1)(a) shall be in substantially the following form:

211 REQUEST FOR NOTICE

212 The undersigned requests that a copy of any notice of default and a copy of notice of sale
213 under the trust deed filed for record _____(month\day\year), and recorded in Book _____,
214 Page _____, Records of _____ County, (or filed for record _____(month\day\year), with
215 recorder's entry number _____, _____ County), Utah, executed by _____ and _____
216 as trustors, in which _____ is named as beneficiary and _____ as trustee, be mailed to _____ (insert
217 name) _____ at _____ (insert address) _____.

218 (Insert legal description)

219 (Certificate of Acknowledgement)

220 [~~(b) Upon filing for record of]~~

221 (e) If a request for a copy of a notice of default and notice of sale is filed for record under
222 this section, the recorder shall index the request in:

223 (i) the mortgagor's index[;];

224 (ii) mortgagee's index[;]; and

225 (iii) abstract record.

226 (f) Except as provided in Subsection (3), the trustee under any deed of trust is not required
227 to send notice of default or notice of sale to any person not filing a request for notice as described
228 in this Subsection (1)[~~(a)~~].

229 (2) (a) Not later than ten days after recordation of a notice of default, the trustee or
230 beneficiary shall mail[~~, by certified or registered mail, with postage prepaid;~~] a signed copy of the
231 notice of default;

232 (i) by certified or registered mail, with postage prepaid;

233 (ii) with the recording date shown[;];

234 (iii) addressed to each person whose name and address are set forth in a request that has
235 been recorded prior to the filing for record of the notice of default[;]; and

236 (iv) directed to the address designated in the request.

237 (b) At least 20 days before the date of sale, the trustee shall mail[~~, by certified or registered~~
238 mail, return receipt requested with postage prepaid;] a signed copy of the notice of the time and
239 place of sale[;];

240 (i) by certified or registered mail, return receipt requested, with postage prepaid;

241 (ii) addressed to each person whose name and address are set forth in a request that has
242 been recorded prior to the filing for record of the notice of default[;]; and

243 (iii) directed to the address designated in the request.

244 (3) (a) Any trust deed may contain a request that a copy of any notice of default and a copy
245 of any notice of sale under the trust deed be mailed to any person who is a party to the trust deed
246 at the address of the person set forth in the trust deed.

247 (b) A copy of any notice of default and of any notice of sale shall be mailed to any person
248 requesting the notice who is a party to the trust deed at the same time and in the same manner
249 required in Subsection (2) as though a separate request had been filed by each person as provided
250 in Subsection (1)~~[(a)-]~~ except that a trustee shall include with a signed copy of a notice of default
251 and the signed copy of a notice of sale the following information current as of the time the notice
252 of default and the notice of sale is provided:

253 (i) the name of the trustee;

254 (ii) the mailing address of the trustee;

255 (iii) the address of a bona fide office of the trustee meeting the requirements of Subsection
256 57-1-21(1)(b);

257 (iv) the hours during which the trustee can be contacted regarding the notice of default and
258 notice of sale, which hours shall include the period between 8 a.m. and 5 p.m. in a regular business
259 day; and

260 (v) a telephone number that the person may use to contact the trustee during the hours
261 described in Subsection (3)(b)(iv).

262 (4) If no address of the trustor is set forth in the trust deed and if no request for notice by
263 the trustor has been recorded as provided in this section, ~~[a copy of the notice of default shall,]~~ no
264 later than 15 days after the filing for record of the notice of default, ~~[either]~~ a copy of the notice
265 of default shall be:

266 (a) mailed to the address of the property described in the notice of default; or

267 (b) posted on the property.

268 (5) ~~[No request for a copy of any notice filed for record under Subsections (1) and (3), nor~~
269 ~~any statement or allegation in any of those requests, nor any record of those requests,]~~ The
270 following shall not affect the title to trust property or be considered notice to any person that any
271 person requesting copies of notice of default or of notice of sale has or claims any right, title or
272 interest in, or lien or claim upon, the trust property~~[-]~~:

273 (a) a request for a copy of any notice filed for record under Subsection (1) or (3);

274 (b) any statement or allegation in any request described in Subsection (5)(a); or

275 (c) any record of a request described in Subsection (5)(a).

276 Section 6. Section **57-1-28** is amended to read:

277 **57-1-28. Sale of trust property by trustee -- Payment of bid -- Trustee's deed**

278 **delivered to purchaser -- Recitals -- Effect.**

279 (1) (a) The purchaser at the sale shall pay the price bid as directed by the trustee.

280 (b) The beneficiary shall receive a credit on the beneficiary's bid in an amount not to
281 exceed the amount representing:

282 (i) the unpaid principal owed[;];

283 (ii) accrued interest as of the date of the sale[;];

284 (iii) advances for the payment of:

285 (A) taxes[;];

286 (B) insurance[;]; and

287 (C) maintenance and protection of the trust property [~~and~~];

288 (iv) the beneficiary's lien on the trust property[;]; and

289 (v) costs of sale, including reasonable trustee's and attorney's fees. [~~Upon receipt of~~
290 ~~payment, the trustee shall execute and deliver the trustee's deed to the purchaser.~~]

291 (2) (a) (i) Within three business days of the day the trustee receives payment of the price
292 bid, the trustee shall make the trustee's deed available to the purchaser.

293 (ii) If the trustee does not comply with this Subsection (2)(a), a trustee is liable for any loss
294 incurred by the purchaser because of the trustee's failure to comply with this Subsection (2)(a).

295 (b) The trustee's deed may contain recitals of compliance with the requirements of Sections
296 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property
297 described in the trustee's deed, including recitals concerning:

298 (i) any mailing, personal delivery, and publication of the notice of default[;];

299 (ii) any mailing and the publication and posting of the notice of sale[;]; and

300 (iii) the conduct of sale. [~~These~~]

301 (c) The recitals described in Subsection (2)(b):

302 (i) constitute prima facie evidence of compliance with Sections 57-1-19 through
303 57-1-36[;]; and

304 (ii) are conclusive evidence in favor of bona fide purchasers and encumbrancers for value

305 and without notice.

306 (2) The trustee's deed shall operate to convey to the purchaser, without right of redemption,
307 the trustee's title and all right, title, interest, and claim of the trustor and the trustor's successors in
308 interest and of all persons claiming by, through, or under them, in and to the property sold,
309 including all right, title, interest, and claim in and to the property acquired by the trustor or the
310 trustor's successors in interest subsequent to the execution of the trust deed, which trustee's deed
311 shall be considered effective and relate back to the time of the sale.

312 Section 7. Section **57-1-31.5** is enacted to read:

313 **57-1-31.5. Accounting of costs and fees paid.**

314 (1) For purposes of this section, "compensation" means anything of economic value that
315 is paid, loaned, granted, given, donated, or transferred to a trustee for or in consideration of:

316 (a) services;

317 (b) personal or real property; or

318 (c) other thing of value.

319 (2) If a trustee receives a request from the trustor for a statement as to the amount required
320 to be paid to reinstate or payoff a loan, the trustee shall include with that statement a detailed
321 listing of:

322 (a) any of the following that the trustor would be required to pay to reinstate or payoff the
323 loan:

324 (i) attorneys fees;

325 (ii) trustee fees; or

326 (iii) any costs including:

327 (A) title fees;

328 (B) publication fees; or

329 (C) posting fees;

330 (b) any compensation that the trustee pays or receives related to:

331 (i) a foreclosure of the loan; or

332 (ii) a business operation involving the trustee that is incidental to the foreclosure of the

333 loan; and

334 (c) any relationship the trustee has with a third party that assists the trustee with the

335 ministerial duties related to the foreclosure of the loan including any contracts or other agreements.

336 Section 8. **Revisors instructions.**

337 It is the intent of the Legislature that, in preparing the Utah Code Database for publication,
338 the Office of Legislative Research and General Counsel shall replace the reference in Subsections
339 57-1-21(1)(d) and 57-1-21.5(3) from "this act" to its designated chapter number in the Laws of
340 Utah.

Legislative Review Note
as of 1-17-02 5:56 PM

The modifications to qualifications of trustees in this bill may raise constitutional issues. The bill requires attorneys and title insurance agencies who serve as trustees to maintain a bona fide office in the state. In striking down the current residency requirement for attorney trustees as unconstitutional, Utah's federal district court indicated that requiring a bona fide office in the state would not implicate constitutional concerns. *See Kleinsmith v. Shurtleff*, No. 2:01cv0310 (D. Utah August 13, 2001). However, United States Supreme Court cases and case law in other courts are mixed on the issue of whether in-state office requirements are constitutional. The rulings are often dependent on the facts of the case with the courts generally looking at what the state's interest is in having an in-state office requirement, whether the in-state office requirement relates to that interest, and whether less burdensome means could be used in achieving that interest. In determining whether the in-state office requirement of this bill is sufficiently related to the state's interests, a court would likely consider the burden of maintaining an office in the state that is staffed and open to the public during business hours.

Office of Legislative Research and General Counsel