

SB 2799

JAN 25 2010

S.B. NO. 2799

A BILL FOR AN ACT

RELATING TO UNIFORM REAL PROPERTY TRANSFER ON DEATH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 "CHAPTER

5 UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

6 § -1 Short title. This Act may be cited as the Uniform
7 Real Property Transfer on Death Act.

8 § -2 Definitions. As used in this chapter:

9 "Beneficiary" means a person that receives property under a
10 transfer on death deed.

11 "Designated beneficiary" means a person designated to
12 receive property in a transfer on death deed.

13 "Joint owner" means an individual who owns property
14 concurrently with one or more other individuals with a right of
15 survivorship. The term includes a joint tenant and tenant by
16 the entirety. The term does not include a tenant in common.

17 "Person" means an individual, corporation, business trust,
18 estate, trust, partnership, limited liability company,



1 association, joint venture, public corporation, government or
2 governmental subdivision, agency, or instrumentality, or any
3 other legal or commercial entity.

4 "Property" means an interest in real property located in
5 this State that is transferable on the death of the owner.

6 "Transfer on death deed" means a deed authorized under this
7 Act.

8 "Transferor" means an individual who makes a transfer on
9 death deed.

10 § -3 **Applicability.** This Act applies to a transfer on
11 death deed made before, on, or after July 1, 2010 by a
12 transferor dying on or after July 1, 2010.

13 § -4 **Nonexclusivity.** This Act does not affect any
14 method of transferring property otherwise permitted under the
15 laws of this State.

16 § -5 **Transfer on death deed authorized.** An individual
17 may transfer property to one or more beneficiaries effective at
18 the transferor's death by a transfer on death deed.

19 § -6 **Transfer on death deed revocable.** A transfer on
20 death deed is revocable even if the deed or another instrument
21 contains a contrary provision.



1 § -7 **Transfer on death deed nontestamentary.** A transfer
2 on death deed is nontestamentary.

3 § -8 **Capacity of transferor.** The capacity required to
4 make or revoke a transfer on death deed is the same as the
5 capacity required to make a will.

6 § -9 **Requirements.** A transfer on death deed:

- 7 (1) Except as otherwise provided in paragraph (2), must
8 contain the essential elements and formalities of a
9 properly recordable inter vivos deed;
- 10 (2) Must state that the transfer to the beneficiary is to
11 occur at the transferor's death; and
- 12 (3) Must be recorded before the transferor's death with
13 the bureau of conveyances.

14 § -10 **Notice, delivery, acceptance, consideration not**
15 **required.** A transfer on death deed is effective without:

- 16 (1) Notice or delivery to or acceptance by the designated
17 beneficiary during the transferor's life; or
- 18 (2) Consideration.

19 § -11 **Revocation by instrument authorized; revocation by**
20 **act not permitted.** (a) Subject to subsection (b), an
21 instrument is effective to revoke a recorded transfer on death
22 deed, or any part thereof, only if the instrument:



1 (1) Is one of the following:

2 (A) A transfer on death deed that revokes the deed or
3 part of the deed expressly or by inconsistency;

4 (B) An instrument of revocation that expressly
5 revokes the deed or part of the deed; or

6 (C) An inter vivos deed that expressly revokes the
7 transfer on death deed or part of the deed; and

8 (2) Is acknowledged by the transferor after the
9 acknowledgement of the deed being revoked and recorded
10 before the transferor's death in the bureau of
11 conveyances.

12 (b) If a transfer on death deed is made by more than one
13 transferor:

14 (1) Revocation by a transferor does not affect the deed as
15 to the interest of another transferor; and

16 (2) A deed of joint owners is revoked only if it is
17 revoked by all the living joint owners.

18 (c) After a transfer on death deed is recorded, it may not
19 be revoked by a revocatory act on the deed.

20 (d) This section does not limit the effect on an inter
21 vivos transfer of the property.



1 § -12 Effect of transfer on death deed during
2 transferor's life. During a transferor's life, a transfer on
3 death deed does not:

4 (1) Affect an interest or right of the transferor or any
5 other owner, including the right to transfer or
6 encumber the property;

7 (2) Affect an interest or right of a transferee, even if
8 the transferee has actual or constructive notice of
9 the deed;

10 (3) Affect an interest or right of a secured or unsecured
11 creditor or future creditor of the transferor, or even
12 if the creditor as actual or constructive notice of
13 the deed;

14 (4) Affect the transferor's or designated beneficiary's
15 eligibility for any form of public assistance;

16 (5) Create a legal or equitable interest in favor of the
17 designated beneficiary; or

18 (6) Subject the property to claims or process of a
19 creditor of the designated beneficiary.

20 § -13 Effect of transfer on death deed at transferor's
21 death. (a) Except as otherwise provided in the transfer death
22 deed, in this section, or sections 560:2-603, 560:2-706, 560:2-



1 707, 560:2-804, 560:2-803, 560:20-702, and section 560:2-202, on
2 the death of the transferor, the following rules apply to the
3 property that is the subject of a transfer on death deed and
4 owned by the transferor at death:

5 (1) Subject to paragraph (2), the interest in the
6 property is transferred to the designated beneficiary
7 in accordance with the deed;

8 (2) The interest of a designated beneficiary is contingent
9 on the designated beneficiary surviving the
10 transferor. The interest of a designated beneficiary
11 that fails to survive the transferor lapses;

12 (3) Subject to paragraph (4), concurrent interest are
13 transferred to the beneficiaries in equal and
14 undivided shares with no right of survivorship; or

15 (4) If the transferor has identified two or more
16 designated beneficiaries to receive concurrent
17 interest in the property, the share of one which
18 lapses or fails for any reason is transferred to the
19 other, or the others in proportion to the interest of
20 each in the remaining property held concurrently.

21 (b) Subject to the recording provisions of chapter 502, a
22 beneficiary takes the property subject to all conveyances,



1 encumbrances, assignments, contracts, mortgages, liens, and
2 other interest to which the property is subject at the
3 transferor's death. For purposes of this subsection and the
4 recording provisions of chapter 502, the recording of the
5 transfer on death deed is deemed to have occurred at the
6 transferor's death.

7 (c) If a transferor is a joint owner and is:

8 (1) Survived by one or more other joint owners, the
9 property that is the subject of a transfer on death
10 deed belongs to the surviving joint owner or owners
11 with right of survivorship; or

12 (2) the last surviving joint owner, the transfer on death
13 deed is effective.

14 (d) A transfer on death deed transfers the property
15 without covenant or warrant of title even if the deed contains a
16 contrary provision.

17 § -14 Disclaimer. A beneficiary may disclaim all or
18 part of the beneficiary's interest as provided by chapter 526,
19 at the Uniform Disclaimer of Property Interests Act.

20 § -15 Liability for creditor claims and statutory
21 allowances. A beneficiary of a transfer on death deed is liable
22 for an allowed claim against the transferor's probate estate and



1 statutory allowances to a surviving spouse and children to the
2 extent provided in section 560:2-102.

3 § -16 Uniformity of application and construction. In
4 applying and construing this uniform act, consideration must be
5 given to the need to promote uniformity of the law with respect
6 to its subject matter among the states that enact it.

7 § -17 Relation to electronic signatures in global and
8 national commerce act. This Act modifies, limits, and
9 supersedes the federal Electronic Signatures in Global and
10 National Commerce Act, 15 U.S.C. 7001, et seq., but does not
11 modify, limit, or supersede section 101(c) of that act, 15
12 U.S.C. 7001(c), or authorize electronic delivery of any of the
13 notices described in section 103(b) of that act, 15 U.S.C.
14 7003 (b)."

15 SECTION 2. Section 526-12, Hawaii Revised Statutes, is
16 amended by amending subsection (f) and (g) to read as follows:

17 "(f) In the case of an interest created by a beneficiary
18 designation [~~made~~] which is disclaimed before [~~the time~~] the
19 designation becomes irrevocable, [a] the disclaimer must be
20 delivered to the person making the beneficiary designation.



1 (g) In the case of an interest created by a beneficiary
2 designation ~~[made]~~ which is disclaimed after ~~[the time]~~ the
3 designation becomes irrevocable~~[-]~~:

4 (1) [a] The disclaimer of an interest in personal property
5 must be delivered to the person obligated to
6 distribute the interest~~[-]~~; and

7 (2) The disclaimer of an interest in real property must be
8 recorded in the bureau of conveyances."

9 SECTION 3. Section 526-15, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "[[]§526-15[]] **Recording of disclaimer.** If an instrument
12 transferring an interest in or power over property subject to a
13 disclaimer is required or permitted by law to be filed,
14 recorded, or registered, the disclaimer may be so filed,
15 recorded, or registered. ~~[Failure]~~ Except as otherwise provided
16 in section 526-12(g), failure to file, record, or register the
17 disclaimer does not affect its validity as between the
18 disclaimant and persons to whom the property interest or power
19 passes by reason of the disclaimer."

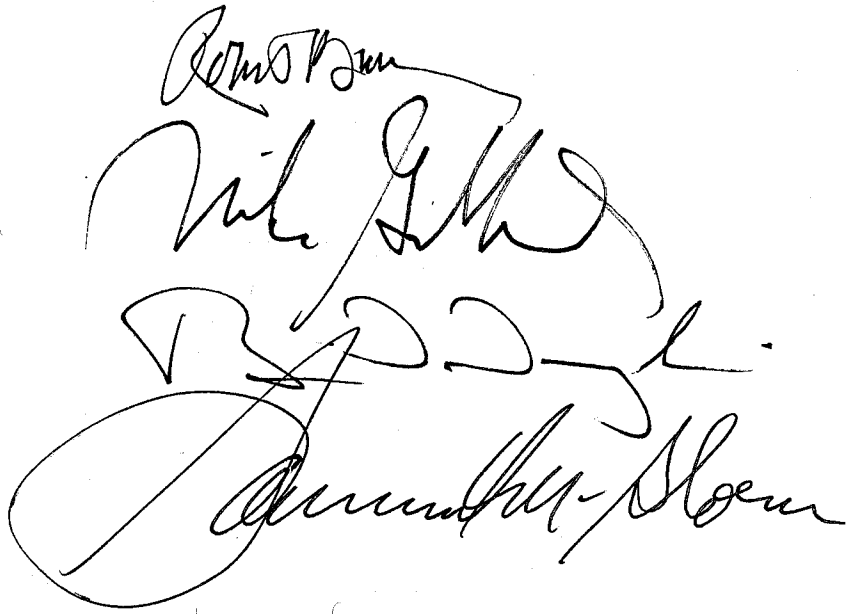
20 SECTION 4. Statutory material to be repealed is bracketed
21 and stricken. New statutory material is underscored.



1 SECTION 5. This Act shall take effect on July 1, 2010.

2

INTRODUCED BY: 





Report Title:

Real Property; Probate

Description:

Adopts Uniform Real Property Transfer on Death Act. Allows owner of real property to designate beneficiaries to receive real property upon death of owner without requirements of probate or formalities of wills.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.





The Judiciary, State of Hawaii

**Testimony to the Twenty-Fifth State Legislature, Regular Session of 2010
Senate Committee on Commerce and Consumer Protection**

The Honorable Rosalyn H. Baker, Chair
The Honorable David Y. Ige, Vice Chair
Wednesday, February 03, 2010, 8:30 a.m.
State Capitol, Conference Room 229

By

Roy S. Yanagihara
Deputy Registrar

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No. 2799, Relating to Uniform Real Property Transfer on Death.

Purpose: Adopts Uniform Real Property Transfer on Death Act. Allows owner of real property to designate beneficiaries to receive real property upon death of owner without requirements of probate or formalities of wills.

Judiciary's Position:

The Land Court takes a neutral position with regards to this bill and offers the following comments.

The provisions of this measure would transfer interests in real property to beneficiaries named in a deed upon the death of the interest holder who is referred to as the "transferor" in this measure. From a legal perspective, the transfer of a decedent's interest to the named beneficiaries would be similar to the way interests are transferred when held by Joint Tenancy or Tenancy by Entirety, the primary difference being that the beneficial interest would be inchoate during the lifetime of the interest holder. Administratively, beneficiaries or other interest holders



Senate Bill No. 2799, Relating to Uniform Real Property Transfer on Death
Senate Committee on Commerce and Consumer Protection
Wednesday, February 3, 2010
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would have to note the death of the transferor by petitioning the Land Court, pursuant to §501-196, HRS, to amend the Certificate of Title to note the succession in interest.

It is suggested that language be inserted to address situations involving simultaneous deaths. Pursuant to the terms of the measure, a beneficial interest lapses if the beneficiary predeceases the interest holder. However it is not clear what would happen if the transferor and beneficiary die simultaneously or under circumstances where it is not possible to determine which died first.

Thank you for the opportunity to provide testimony on this measure.

Karen T. Takahashi, Special Projects Coordinator
Special Projects / Legislative Coordinating Office
The Judiciary, State of Hawaii
Phone: (808) 539-4896
Fax: (808) 539-4991
E-mail: Karen.T.Takahashi@courts.state.hi.us

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON S.B. No. 2799

RELATING TO UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT.

**BEFORE THE SENATE COMMITTEE ON COMMERCE AND CONSUMER
PROTECTION**

DATE: Wednesday, February 3, 2010, at 9:00 a.m.
Conference Room 229, State Capitol

PERSON(S) TESTIFYING: LANI EWART or PETER HAMASAKI
Commission to Promote Uniform Legislation

WEB: <http://www.capitol.hawaii.gov/emailtestimony>

Chair Baker and Members of the Committee:

Hawaii's Uniform Law Commissioners support passage of S.B. No. 2799, the Uniform Real Property Transfer on Death Act.

The The Uniform Real Property Transfer on Death Act enables an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by operation of law by means of a recorded transfer on death (TOD) deed.

During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed. On the owner's death, the property passes to the beneficiary, much like the survivorship feature of joint tenancy.

The TOD deed offers a number of advantages over joint tenancy. Because the TOD deed does not convey an immediate interest to the beneficiary, the property is not subject partition or to the beneficiary's creditors. The deed remains revocable, enabling the owner to make a different disposition of the property. It does not trigger an acceleration clause in a mortgage or a property tax reassessment during the transferor's life. Nor does it create adverse Medicaid consequences for either the owner or the beneficiary.

A decedent routinely passes personal property to a named beneficiary outside of probate. Common examples include a beneficiary designation in a life insurance policy or pension plan, registration of securities in TOD form, and a pay on death bank account. But a straightforward, inexpensive, and reliable means of passing real property (which may be the decedent's major asset) directly to a beneficiary is not generally available.

Thirteen states have previously enacted legislation authorizing a TOD deed: Missouri (1989), Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana. The TOD deed is popular in those states and experience with it is favorable. The TOD deed has proved to be a useful addition to the tools available to an estate planner.

The Uniform Real Property Transfer on Death Act, which was adopted in 2009, builds on the existing state statutes. It spells out the operation and effect of the TOD deed and provides a standardized method for the straightforward nonprobate transfer of real property. It has been developed with the assistance of the estate planning, real property, title insurance, banking, and senior legal communities.

We would like to suggest one technical amendment to new section -15, which would be added by section 1 of S.B. No. 2799. The uniform act contains two alternate provisions for section -15. The provision included in S.B. No. 2799 is a cross-reference to section 2-102 of the Hawaii Uniform Probate Code. However, the cross-reference contained in the uniform act refers to a provision in the Uniform Probate that has not been adopted in Hawaii and we therefore believe that section -15 should be amended to incorporate the second alternative in the uniform act as follows:

§ - 15 Liability for creditor claims and statutory allowances.

~~[A beneficiary of a transfer on death deed is liable for an allowed claim against the transferor's probate estate and statutory allowances to a surviving spouse and children to the extent provided in section 560:2-102.]~~

(a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under subsection (a) is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than eighteen months after the transferor's death.

Statutory material to be deleted is bracketed and stricken. New statutory material is underscored.

Thank you for the opportunity to testify in support of the Uniform Real Property Transfer on Death Act. A summary sheet is attached for further information.



Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

SUMMARY

Uniform Real Property Transfer on Death Act

Asset-specific mechanisms for the non-probate transfer of personal property and funds at death are now common. They are known informally as "will substitutes." The proceeds of life insurance policies and pension plans, securities registered in transfer on death form, and funds held in pay on death bank accounts, are examples of personal property that have benefitted from this trend in modern law to recognize and support the use of will substitutes. However there is no generally available straightforward, inexpensive, and reliable means of passing real property, which may be a decedent's major asset, directly to a beneficiary at death. The Uniform Real Property Transfer on Death Act (URPTODA), promulgated by the Uniform Law Commission in 2009, enables an owner of real property to pass the property to a beneficiary on the owner's death simply, directly, and without probate.

Under URPTODA, real property passes by means of a recorded transfer on death (TOD) deed. URPTODA establishes the requirements for the creation and revocation of a TOD deed and clarifies the effect of the TOD deed on all parties while the transferor is living and after the transferor dies. URPTODA provides optional forms to create or revoke a TOD deed.

Key elements of URPTODA include:

The TOD deed is not subject to the statute of wills and passes title directly to the named beneficiary without probate.

The TOD deed must contain all of the essential elements and formalities of a properly recordable inter vivos deed. The TOD deed must state that the transfer to the beneficiary occurs on the transferor's death and must be properly recorded during the transferor's lifetime in the office of the recorder of deeds where the property is located.

The capacity required to create a TOD deed is the same as the capacity to make a will.

A TOD deed does not operate until the transferor's death and remains revocable until then. The transferor may revoke the deed by recording a revocatory instrument such as a direct revocation of the TOD deed or a subsequent TOD deed that names a different beneficiary. If the transferor disposes of the property during lifetime, the TOD deed is ineffective.

Until the transferor's death, a recorded TOD deed has no effect — it does not affect any right or interest of the transferor or any other person in the property. The TOD deed creates no legal or equitable interest in the designated beneficiary; it does not affect the designated beneficiary's eligibility for public assistance; it does not subject the property to the designated beneficiary's creditors.

Assuming the transferor dies owning the property and has not revoked the TOD deed and assuming that the designated beneficiary survives the transferor, the TOD deed passes the property to the designated beneficiary on the transferor's death.

Liability of the beneficiary and property for claims against the transferor's estate is limited to cases where the estate is insolvent.

A designated beneficiary may disclaim all or part of the transferred interest.

Before promulgation of URPTODA some states enacted legislation to enable a TOD deed of real property. URPTODA builds on these statutes. It provides an uncomplicated, effective, and affordable option to pass this important type of asset at death.

© Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

tel: (312) 450-6600 | fax: (312) 450-6601