

# SB105

**Measure Title:** RELATING TO UNIFORM REAL PROPERTY TRANSFER ON DEATH.

**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. Effective July 1, 2011.

**Companion:**

**Package:** None

**Current Referral:** CPN, WAM

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

**ON S.B. No. 105**

**RELATING TO THE UNIFORM REAL PROPERTY TRANSFER ON DEATH  
ACT.**

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

**DATE:** Wednesday, February 9, 2011, at 8:30 a.m.  
Conference Room 229, State Capitol

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

E-MAIL to [CPNTestimony@capitol.hawaii.gov](mailto:CPNTestimony@capitol.hawaii.gov).

---

Chair Baker and Members of the Committee:

Hawaii's Uniform Law Commissioners support passage of S.B. No. 105, the Uniform Real Property Transfer on Death Act.

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. The Uniform Real Property Transfer on Death Act has been endorsed by the American Bar Association Commission on Law on Aging and the American Bar Association Real Property, Trust and Estate Law Section. It also has been endorsed by the Board of Governors of the American College of Real Estate Lawyers.

We would like to suggest one technical amendment to new Section 15, which would be added by Section 1 of S.B. No. 105. The uniform act contains two alternate provisions for Section 15. The provision included in S.B. No. 105 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.

Material to be deleted is bracketed and stricken. New 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

DATE: February 5, 2011

TESTIMONY TO: SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

HEARING DATE: Wednesday, February 9, 2011 - 8:30 a.m.

HEARING PLACE: Conference Room 229, State Capitol

SUBMITTED BY: G.A. Rock - Hilo, Hawaii (808) 961-3515

MEASURE: **SB 105**

**RELATING TO UNIFORM REAL PROPERTY TRANSFER ON DEATH**

*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. Effective July 1, 2011.*

**WHY THIS BILL SHOULD BE PASSED**

There are obvious and strong reasons for the passage of this bill in the 2011 Session:

- Simplification of the transfer of Real Property to intended heirs and beneficiaries
- Substantial benefits for all the citizens of Hawaii in saving time and costs
- Long-term cost savings to the State Judiciary by reducing need for Probate Court

**DISCUSSION**

According to legal publisher NOLO, laws that permit Transfer-on-Death Deeds for real estate have already been successfully enacted in thirteen states (Arkansas, Arizona, Colorado, Indiana, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, Ohio, Oklahoma and Wisconsin).

Website Reference: <http://www.nolo.com/legal-encyclopedia/article-29544.html>

This bill will benefit all of the people of Hawaii. Currently, any Real Property in Hawaii owned by an individual must go through the "Probate Court" proceedings upon the death of the final living owner, regardless of whether or not a "legal will" exists naming beneficiary(s) for the property. Only property co-owned with surviving individual(s) or held in a Living Trust can successfully avoid costly probate proceedings.

Those who have experienced probate proceedings in Hawaii can tell you that this can be a very lengthy process (often over a year) and can be expensive (easily 5% of the value of the property). The decedent's estate/family/survivors must face these barriers before title to real property can be legally passed to intended beneficiaries or can even be sold. As a result, tens of thousands of individuals and families have sought alternatives such as listing other family members as co-owners on their real property deeds. A more complex alternative has been to transfer their properties into a Living Trust. While these strategies can legally avoid probate, they have shortcomings and involve extra costs, especially for Living Trusts. Further, adding co-owners to a deed and creating Living Trusts introduce additional complexities that must be considered and addressed by realtors, title companies, mortgage companies, banks, realtors, county property tax offices, estate executors, and other entities involved with real estate transfers, ownership issues, and taxing in Hawaii. There can also be estate tax consequences.

SB 105 simplifies the transfer of Real Property to intended beneficiary(s) immediately and without the delays and costs of "Probate Court" or even the need for a "legal will", simply by listing name(s) of the desired beneficiary(s) on the deed. Importantly, SB 105 also provides flexibility in allowing

owners of real property in Hawaii to subsequently remove or revise this beneficiary designation at any time prior to their death.

Interestingly, Hawaii law currently allows the immediate "transfer upon death" for two other major financial asset categories, without the need for a legal will or Probate Court. These other two important asset categories are:

- Bank Accounts via PoD – Payable on Death designation
- Registered Securities via ToD - Transfer on Death registration.

Real Property is the only other major asset where this flexibility and simplicity is missing and SB 105 will finally fix this discrepancy.

In addition to cost savings to surviving families/beneficiaries of the decedents through the avoidance of Probate Court, the government of the State of Hawaii will also enjoy long term cost savings because of the reduction in the need for its Probate Court services. This then will free up court resources which can then be reassigned to other areas of need.

In last year's 2010 Legislative Session, similar measures (SB 2799 & HB 2367) were introduced. Both passed initial readings with unanimous votes and all testimony received was favorable. SB 2799 crossed over to the House where it passed First Reading but was unexpectedly deferred in the House Judiciary Committee. Fortunately this bill adopting the *Uniform Real Property Transfer on Death* Act for Real Property within the state of Hawaii was reintroduced this year. Hopefully, it will pass in this session and be signed into law.

## **CONCLUSION**

All the people of Hawaii and the State Government's Judiciary will benefit from this bill. This is extremely important in these unprecedented, fiscally constrained times!

Please pass this bill.

Thank you.

Sincerely,

G.A. Rock  
Hilo, HI 96720  
(808) 961-3515