

HB2623, HD1

TESTIMONY ON HB 2623 HD1
RELATING TO TRANSFER OF PROPERTY

Wednesday, March 28, 2012, 10:00 a.m.
State Capitol, Conference Room 016

COMMITTEE ON JUDICIARY AND LABOR

To: The Honorable Clayton Hee, Chair
The Honorable Maile S. L. Shimabukuro, Vice Chair
Members of the Committee on Judiciary and Labor

IN SUPPORT OF HB 2623 HD1 IN AMENDED FORM

My name is Jeffrey R. Niebling, Esq. and I am one of the attorney on the Judiciary's Committee on the Uniform Probate Code and Probate Court Practices. Although the issues presented in the proposed Act have been discussed by the Committee and no objections to the proposed Act was raised, I am submitting this testimony on behalf of individual attorney members of the Committee and not on behalf of the Committee itself.

PURPOSE:

The purpose of the proposed Act is to extend the creditor protection benefits afforded to spouses and reciprocal beneficiaries holding title as tenants by the entirety to spouses and reciprocal beneficiaries, who for tax and/or estate planning purposes, convey their property to revocable trusts.

BACKGROUND:

Generally, a debt of one spouse or reciprocal beneficiary may not be enforced against property titled as tenants by the entirety. From an estate planning standpoint, however, it is often advisable for spouses or reciprocal beneficiaries to create a joint trust or separate revocable trusts in order to achieve probate avoidance and to minimize estate taxes. Under current law, spouses or reciprocal beneficiaries are forced to choose between the creditor protections offered by holding their property as tenancy by the entirety or foregoing those protections in favor of setting up and properly funding estate planning trusts.

In recognition of this problem, other states, including but not limited to Virginia, Delaware, Maryland, and Illinois, have adopted legislation similar to this proposed Act affording spouses who convey their property out of tenancy by entirety for estate planning purposes, the continued creditor protection offered by tenancy by the entirety ownership.

AMENDMENT TO PROPOSED LANGUAGE:

HB 2623 is the companion bill to SB 2216 which was passed by this Committee. As discussed in this Committee's Stand. Com. Rep. No. 2035, I have continued to work with the representatives of the Banker Associations as well as other estate planning professionals to develop revised language aimed at addressing the concerns expressed by the Bankers Association and the Attorney General's office. As a result of our discussion, the language of the proposed Act was revised to accomplish the following:

1. Due to the difficulty in tracking and providing adequate notice of personal property would be entitled to receive the protection under this statute, we agreed that the extension of tenants by the entirety protection should be limited to real properties placed in trust;
2. To provide adequate notice to others, the conveyance document would be required to include a provision clearly noting that tenants by the entirety protection will be applicable after transfer to trust;
3. Clarifies that in the event of divorce the tenants by the entirety protection terminates and after death the same protection rules applicable to general tenants by the entirety property applies;
4. Clarifies that the property will still be governed by the trust instrument, and will be considered as tenants by the entirety property only for protection purposes, not titling purposes; and
5. Allows spouses or reciprocal beneficiaries to waive the protection in favor of specific creditors.

A copy of the revised language is attached hereto.

This Act should not have any budgetary impact on the State.

Accordingly, I urge passage of HB 2623 HD1 in the amended form attached hereto.

Jeffrey R. Niebling, Esq.

RELATING TO TRANSFER OF PROPERTY.

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

SECTION 1. Section 509-2, Hawaii Revised Statutes, is amended to read as follows:

"§509-2 Creation of joint tenancy, tenancy by the entirety, and tenancy in common. (a) Land, or any interest therein, or any other type of property or property rights or interests or interest therein, may be conveyed by a person to oneself and another or others as joint tenants, or by a person to oneself and one's spouse or reciprocal beneficiary, or by spouses to themselves, or by reciprocal beneficiaries to themselves, as tenants by the entirety, or by joint tenants to themselves and another or others as joint tenants, or tenants in common to themselves or to themselves and another or others as joint tenants, or by tenants by the entirety to themselves or themselves and another or others as joint tenants or as tenants in common, or by one tenant by the entirety to the tenant's spouse or reciprocal beneficiary of all of the tenant's interest or interests, without the necessity of conveying through a third party, and each such instrument shall be construed as validly creating a joint tenancy, tenancy by the entirety, tenancy in common, or single ownership, as the case may be, if the tenor of the instrument manifestly indicates such intention.

(b) Conveyance of any real property located in the State of Hawaii and held by spouses or reciprocal beneficiaries as tenants by the entirety to either (i) a joint trust as tenant in severalty for their benefit and which is revocable and amendable by either or both during their joint lifetime, or (ii) in equal shares as tenants in common to their respective separate trusts, each of which is revocable and amendable by the respective grantor, or any accumulation of such conveyed property, shall have the same immunity from the claims of their separate creditors as would exist if the spouses or reciprocal beneficiaries had continued to hold the property or its proceeds as tenants by the entirety, as long as:

(1) The spouses remain married or reciprocal beneficiaries remain in a registered reciprocal beneficiary relationship;

(2) The property continues to be held in the trust(s) as provided above;

(3) Both spouses or reciprocal beneficiaries remain beneficiaries of the trust(s) and no waiver as provided in paragraph (f) of this section shall have occurred; and

(4) Notice of this intention is provided by a deed of conveyance by the spouses or reciprocal beneficiaries filed or recorded in the office of the assistant registrar of the land court or the bureau of conveyances, or both, as

appropriate, that specifically refers to this section and states that the property to be held by the trust or trusts shall be immune from the claims of their separate creditors.

(c) After the death of the first of the spouses or reciprocal beneficiaries to die, all real property held in the trust or trusts that was immune from the claims of their separate creditors under paragraph (b) of this section immediately prior to the individual's death shall continue to have the same immunity from the claims of the decedent's separate creditors as would have existed if the spouses or reciprocal beneficiaries had continued to hold the property conveyed in trust, or its proceeds, as tenants by the entirety.

(d) In the event that any transfer of tenancy by the entirety property to a trustee of a trust as provided above is held to be invalid by any court of proper jurisdiction, or if the trust is revoked or dissolved by a court decree or operation of law while both spouses or reciprocal beneficiaries are living, then immediately upon the occurrence of any such event, all such real property held in such trust shall automatically deemed to be held by both spouses or reciprocal beneficiaries as tenants by the entirety.

(e) Upon entry of a decree granting divorce or annulment between the spouses or the termination of the reciprocal beneficiary relationship between the reciprocal beneficiaries, the immunity from the claims of separate creditors under paragraph (b) of this section shall immediately terminate and the property shall be treated as though held in tenancy in common.

(f) The immunity from the claims of separate creditors under paragraphs (b) and (c) of this section may be waived as to any creditor or any specifically described trust property by:

- (1) The express provisions of a trust instrument;
- (2) The written consent of both spouses or reciprocal beneficiaries.

(g) Except as provided otherwise herein, in any dispute relating to the immunity of trust property from the claims of a separate creditor of a spouse or reciprocal beneficiary, the spouses or reciprocal beneficiaries shall have the burden of proving the immunity of the trust property from the creditor's claims.

(h) After a conveyance of property to a trust or trusts described in paragraph (b), the property transferred shall no longer be held by the spouses or reciprocal beneficiaries as

tenants by the entirety and the disposition of the property shall be controlled by the terms of the trust(s).

[~~(b)~~] (i) For the purposes of this chapter:
"Reciprocal beneficiary" means an adult who is a party to a registered reciprocal beneficiary relationship in accordance with chapter 572C, and has a valid certificate of reciprocal beneficiary relationship that has not been terminated."

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval and shall only apply to transfers made after its approval.