

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:
S.B. NO. 2216, RELATING TO TRANSFER OF PROPERTY.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, January 27, 2012 TIME: 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Daniel A. Morris, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General provides the following **comments** on this bill.

This bill specifies that property held by spouses in tenancy by the entirety shall continue to be treated as such after transfer to a specified trust, except where specifically provided otherwise by the trust instrument. This bill also limits the remedies available to creditors against transferred property, and changes the definition of "spouse" to include partners in a civil union.

We suggest this bill be amended to address situations where spouses divorce after transfer of the property to a specified trust. An appropriate amendment to address the effect of divorce could include additional language providing that "[U]pon entry of a decree granting divorce or annulment between the spouses or the termination of the reciprocal beneficiary relationship between the reciprocal beneficiaries, trust property treated as though held in tenancy by the entirety shall instead be treated as though held in tenancy in common." This language is consistent with similar statutory provisions in other states.

In addition, the definition of "spouse" should not be changed for two reasons. Act 1, Session Laws of Hawaii, 2011, now codified as Section 572B-11, Hawaii Revised Statutes, already provides that the statutory term "spouse" includes civil unions. Second, amending the definition of "spouse" in this section could have the unintended consequence of affecting the interpretation of other statutes. The term "spouse" occurs frequently throughout the Hawaii Revised Statutes, and if this definition is amended here and not elsewhere, those other statutes may be interpreted to have intentionally excluded civil unions by the doctrine of "*expressio unius est exclusio alterius*" (meaning the inclusion of one thing implies the exclusion of another).

We respectfully ask the Committee to include the recommended amendments and refrain from changing the definition of “spouse” if the Committee chooses to pass this bill.



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Presentation of the Committees on Judiciary and Labor
Friday, January 27, 2012 at 9:30 a.m.
Testimony on SB 2216 Relating to Foreclosures

In Opposition

TO: Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Members of the Committee

I am **Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA)**, testifying in opposition to SB 2216. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

This bill specifies that property held in tenancy by the entirety (T/E) shall continue to be treated as such after transfer to a specified trust except where specifically provided otherwise by the trust instrument; limits the remedy available to creditors against transferred property.

HBA opposes the bill as drafted since its intent and how the proposed amendments would be applied are unclear. As drafted, this statute will present issues for both a creditor and a trustee.

It is not clear as to whether loans already made are subject to this transfer rule. A creditor could find a loan secured by real estate become unsecured after the loan was made and lose the real property as a secondary source of repayment in a case of loan default. An unintended consequence may be to trigger a lender's demand for payment in full due to a breach of the loan agreement.

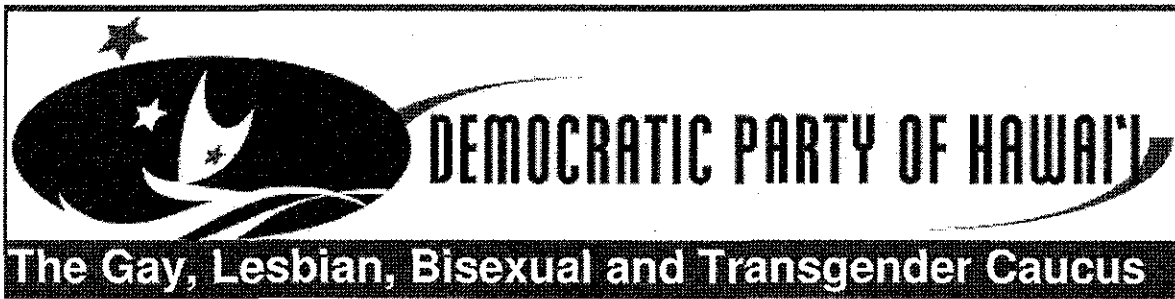
Retaining the T/E "character" raises a question regarding conveyance of the property upon the death of one spouse. Under the law T/E property would go to a surviving spouse. However, if one spouse transfers T/E property to a trust, upon their death it is unclear whether the property goes to the surviving spouse or conveyed in accordance to the terms of the trust. Thus a trustee would be faced with uncertainty regarding fulfilling its obligation as stipulated in the trust.

We request that this bill be deferred to allow time for the stakeholders to clarify the proposed language to be used for an SD1 version of the bill.

Thank you for this opportunity to testify.

A handwritten signature in black ink, appearing to read 'Gary Y. Fujitani', with a horizontal line underneath.

Gary Y. Fujitani
Executive Director



January 26, 2012

TO: COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

IN SUPPORT OF SB2216 IF AMENDED

The purpose of this bill is to allow tenancy by the entirety to survive when a property is placed into trust. We support this purpose. However, paragraph (c) adds the definition of "spouse". We urge you to delete this paragraph:

~~"Spouse" includes partner in a civil union in accordance with section 572B-11.~~

We ask for this deletion, because this paragraph is unnecessary. The civil unions bill was intentionally crafted to incorporate all references to marital rights.

§ -9 Benefits, protections, and responsibilities. Partners to a civil union lawfully entered into pursuant to this chapter shall have all the same rights, benefits, protections, and responsibilities under law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted to those who contract, obtain a license, and are solemnized pursuant to chapter 572.

§ -10 Civil unions performed in other jurisdictions. All unions entered into in other jurisdictions between two individuals not recognized under section 572-3 shall be recognized as civil unions; provided that the relationship meets the eligibility requirements of this chapter, has been entered into in accordance with the laws of that jurisdiction, and can be documented.

§ -11 References and inclusions. A party to a civil union shall be included in any definition or use of the terms "spouse", "family", "immediate family", "dependent", "next of kin", and other terms that denote the spousal relationship, as those terms are used throughout the laws of the State."

[Emphasis added.]

The language in section 572B-11 is clear that "spouse" includes "a party to a civil union". Therefore, this paragraph is unnecessary. If selected sections of the HRS are amended to include references to the civil unions chapter, it may have in inadvertent effect of narrowing the scope of the act. We want to assure that the broadest scope of the act is maintained.

Thank you for this opportunity to testify.

Jo-Ann M. Adams, Chair
Gay Lesbian Bisexual and Transgender Caucus

TESTIMONY ON SB 2216
RELATING TO TRANSFER OF PROPERTY

Friday, January 27, 2012, 9:30 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

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

PURPOSE:

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

AMENDMENT TO PROPOSED LANGUAGE:

The statutory language before the Committee for consideration is actually an adaption of an early draft of the proposed Act that based on language contained in the Permitted Transfers in Trust Act that was passed in the 2010 legislative session and amended last year. After a review of similar legislation in other states and after receiving input from the local banks, title companies and other estate planning attorneys, a revised version of the proposed Act has been drafted, a copy of which I have attached hereto and submit for your consideration. The revised language more clearly and narrowly resolves the issue intended to be addressed by the Act.

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 to create revocable trusts for spouses or reciprocal beneficiaries in order to achieve probate avoidance and minimization of estate taxes. Under current law, spouses or reciprocal beneficiaries are forced to choose between the creditor protections offered by a tenancy by the entirety arrangement or foregoing those protections in favor of setting up and properly funding estate planning trusts.

In recognition of this problem, other states such as Virginia, Delaware, Maryland and Illinois have adopted similar legislation to this proposed Act affording spouses who, in essence, convey their property out of tenants by entirety for estate planning purposes only, the continued creditor protection offered by tenancy by the entirety ownership.

Under the proposed Act as amended, if adopted, couples will no longer need to give up the protections offered by a tenancy by the entirety arrangement in order to establish and maximize the funding of revocable trusts.

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

Accordingly, I urge the passage of SB 2216 in the amended form as set forth in the attachment.

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) Where spouses or reciprocal beneficiaries make a contribution of property to one or more trusts, each of which is revocable by either or both of them, and, at the time of the transfer, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entirety and specific reference to this provision is made in the vesting language of the instrument of transfer, then notwithstanding such contribution and except where the provisions of the trust instrument may expressly provide to the contrary, that property and any accumulation thereto shall, while held in trust during the lifetime of both spouses, be treated as though it were tenancy by the entirety property to the extent that, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, the sole remedy available to the creditor with respect to trust property that is treated as though it were tenancy by the entirety property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entirety, unless the creditor has a secured interest in the transferred property prior to the transfer.

[(b)] (c) For the purposes of this chapter:

"Spouse" includes a partner in a civil union in accordance with section 572B-11.

"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.