SB3104

Measure Title:	RELATING TO PUBLIC LANDS.
Report Title:	Public Lands; Homestead Leases; Joint Tenancy
Description:	Requires all existing certificates of occupation or existing homestead leases, or fractional interests to be held in joint tenancy with right of survivorship.
Companion:	
Package:	None
Current Referral:	WTL/HWN, JDL
Introducer(s):	ESPERO

Sort by Date		Status Text
1/23/2014	S	Introduced.
1/27/2014	S	Passed First Reading.
1/27/2014	S	Referred to WTL/HWN, JDL.
1/29/2014	S	The committee(s) on WTL/HWN has scheduled a public hearing on 02-03-14 1:15PM in conference room 225.

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SB 3104
RELATING TO PUBLIC LANDS

Senate Committee on Water and Land
Senate Committee on Hawaiian Affairs
Joint Public Hearing – February 3, 2014
1:15 p.m., State Capitol, Conference Room 225
By
Melodie Aduja

Senator Malama Soloman
Chair Committee on Water and Land
Senator Brickwood Galuteria
Vice Chair
Senate Committee Members

Senator Maile S.L. Shimabukuro
Chair, Committee on Hawaiian Affairs
Senator Clayton Hee
Vice Chair
Senate Committee Members

Dear Chair Solomon and Chair Shimabukuro, Vice-Chair Senator Galuteria and Vice-Chair Hee and Senate Committee Members:

SB 3104 requires all existing certificates of occupation or existing homestead lease, or fractional interests to be held in joint tenancy with right of survivorship. This statement is written in ***support*** of the intent of this bill with suggested amendments. The suggested amendments are contained in draft S.B. No. 3104, attached hereto, which requires all existing certificates of occupation or existing leases, or fractional interests to be held in joint tenancy

with right of survivorship unless transferred or assigned by conveyance, devise, bequest, or intestate succession with the prior approval of the board of land and natural resources.

The issue that S.B. No. 3104 is intended to address is whether it was the legislative intent in amending §171-(e), which became law as Act 166 on June 6, 2000, to automatically transform surviving siblings from Joint Tenants with the Right of Survivorship to Tenants in Common and divest siblings of the Right of Survivorship. Unless the amendment to §171-99(e) silently and instantly destroyed the existing joint tenancy, the Lease is vested in the sole surviving joint tenant and that joint tenant is the only person with any right, title or interest in the Lease.

The effect of the amendment to §171-99(e) is principally a question of statutory interpretation. When dealing with an amendment to an existing statute, it is also useful to compare the statutory language before and after the amendment.

The old version of §171-99(e) set out a specific formula for the descent of the leasehold interest:

> In the case of the death of any occupier or lessee under an existing certificate of occupation or existing homestead lease, all the interest of the occupier or lessee, any conveyance, devise, or bequest to the contrary notwithstanding, in land held by the decedent by virtue of such certificate of occupation or homestead lease ***shall vest in the relations of the decedent as follows:***
>
> (1) In the widow, widower, or reciprocal beneficiary;
> (2) If there is no widow, widower, or reciprocal beneficiary, then in the children;
> (3) If there are no children, then in the widows, widowers, or reciprocal beneficiaries of the children;
> (4) If there are no such widows, widowers, or reciprocal beneficiaries, then in the grandchildren;
> (5) If there are no grandchildren, then in the parents or surviving parent;
> (6) If there are no parents or surviving parent, then in the sisters and brothers;
> (7) If there are no sisters and brothers, then in the widowers, widows, or reciprocal beneficiaries of the sisters and brothers
> (8) If there are such widowers, widowers, or reciprocal benefiters, then in the nieces and nephews;
> (9) If there are no nieces or nephews, then in the widowers, widows, or reciprocal beneficiaries of the nieces and nephews;
> (10) If there are no such widowers, widows, or reciprocal beneficiaries, then in the grandchildren of the sisters and brothers;

(11) If there are no grandchildren of any sister or brother, then in the State.

[I]n case two or more persons succeed together to the interest of any occupier or lessee, according the foregoing provisions they shall hold the same by joint tenancy so long as two or more shall survive, but upon the death of the last survivor, the state shall survive, but upon the death of the lase survivor, the estate shall descend as provided above.

Under this provision, the leasehold interest could only pass as specified in the statute, and co-tenant had to hold a lease as joint tenants.

Revised § 171-99(e) did away with the old succession formula:

Assignment; certificate of occupation or homestead lease. No existing certificate of occupation or existing homestead lease, or fractional interest thereof, ***shall be transferable or assignable except by conveyance, devise, bequest, or intestate succession and with the prior approval of the board of land and natural resources;*** provided that transfer or assignment by conveyance, devise, or bequest shall be limited to a member or members of the occupier's or lessee's family.

HRS § 171-99(e) (emphasis added.) As its text reveals, the amendment modified the manner in which a leasehold interest is ***transferred or assigned*** by eliminating the rigid descent provision and allowing a lessee to transfer his/her interest to any member of his/her family while living or upon his/her death. Importantly, however, the amendment did not ***delimit*** the manner in which title to a lease may be held. Accordingly, all lawful forms of ownership, including joint tenancy, are not available to lessees under §171-99(e). *Davenport v. City & County*, 100 Hawai'i 297, 307, 59 P.3d 932,941 (2001) (explaining that coverage was allowed under the statute because was not expressly excluded by the statute.)

Nothing in the text of the statute suggests, however, that ***existing joint tenancies were automatically converted into tenancies in common*** or that ***existing joint tenants were compelled to surrender the benefits of their tenancy***. The revised provision simply ***allows*** one or more tenants to transfer an interest in the lease as provided in the section. It is up to the joint tenants to act on the right to assign. If none of the joint tenants assigns an interest in the Lease, the joint tenancy, along with the right of survivorship, continues until there is only one joint tenant left. At that point, the interest of a sole tenant can be passed by devise, bequest or interstate succession as provided in the statute.

This construction of revised § 171-99(e) is confirmed in the following four ways:

1. **The Legislative History to Act 166 Confirms the Plain Language of the Measure.**

According to the Twentieth Legislature, the "descent provision" contained in the former §171-99(e) was "overly restrictive," prevented the "orderly transfer of homestead

leases" and prevented lessees from securing "financing to improve the leasehold properties." Act 166 §1 (2000). In response to those problems, the legislature restructured § 171-99 (e) to [a]llow lenders to accept the leased property as security for loans by setting aside the succession provision of the lease for the duration of the loan" and to "make the leases more freely available to members of the lessee's family."

The legislative committee reports expressed the same concerns and offered the same solution. Most notable, the report from the House Committee on Water and Land Use found that "currently the law ***does not allow for the transfer or assignment*** of a homestead lease to a family member while the lessee is still alive. According to § 171-99(e) . . . only upon death of the lessee can the lease be passed on and then, only to the person(s) as defined in this succession provision. This requirement stifles lessees who desire to leave their lease to a particular family member." Stand. Com. Rep. No. 284-00 (2000) (emphasis added.) The House proposed to remedy the situation through a bill that "would allow the homestead lessee to assign the lease proper to their death which ensuring that the lease remains within the lessee's family." ***Id.*** (emphasis added.) The Senate agreed with the concerns expressed by the House and observed that the bill "removes the strict passage requirement and ***allows*** the lessee to assign the property to any specified family member." Stan. Com. Rep. No. 3309, at 1 (2000) (emphasis added.) The measure proposed by the House became law as Act 166.

As this history reveals, the focus of the legislature was on the power of the lessees to assign or transfer their rights in homestead leases. The legislature wanted to ***allow*** lessees to transfer a leasehold interest to a particular family member or family members and, in the case of joint tenants, to convert the estate to tenants in common. But ***there is nothing that suggests the legislature intended to eliminate joint tenancy as an accepted estate or to transform all existing joint tenancies into tenancies in common***. The right to assign or transfer is a permissive one. The power to end the joint tenancy is passive in nature. One or more the joint tenants have to act to transfer or assign the lese and terminate the joint tenancy. If none of the joint tenants under a lease acts, they continue to hold as joint tenants until only one of them is left.

2. The Change to § 171-99(e) Did Not Apply Retroactively

It is axiomatic that new laws do not apply retroactively unless the statute so provides or that result was "obviously intended' by y the legislature H.R.S. The rule against retrospective application has particular force where the "statute or amendment involves substantive rights, which include vested rights acquired under existing law." *Dash v. Wayne,* 700 F. Supp. 1056, 1059 (D. Haw. 1988).

There is nothing in Act 166 or the accompanying legislative history that suggests the legislature intended a retroactive application for the revised provisions of § 171-99(e). The right of survivorship had vested in all joint tenancies that existed before June 6, 2000. *Lynch v. Frost*, 727 P.2d 698, 700 (Wash. 1986) (describing joint tenancies that existed before the right of survivorship was limited by statutes as "vested rights.") There is no evidence that the legislature intended to take away that established right upon the mere passage of the

law. Indeed, the evidence is to the contrary. The legislature specifically directed that the Act "takes effect upon approval." This directive necessarily means that the changes to §171-99(e) are "**prospective only** in operation." *Clark v. Cassidy*, 64 Haw. 74, 79 636 P.2d 1344, 1347 (1941) (quoting *Waiaka Mill co. v. Vierra*, 35 Haw. 550, 555 (1940)) (emphasis added.)

Because the amendment to §171-99(e) only applies prospectively, whoever took as joint tenants before June 6, 2000 remained joint tenants after June 6, 2000. *Lynch*, 727 P.2d at 700 (explaining that the court would not "imply retroactively" for a law abolishing the right of survivorship, "especially in light of the fact that vested rights are involved.") Treating the Act as automatically converting an existing joint tenancy into a tenancy in common would be tantamount to applying the Act retroactively because the effect would be to divest the tenants of their vested individual rights of survivorship. The vested right of survivorship was not, according to Act 166 and HRS §1-3, retroactively taken away. Instead, the power to terminate the joint tenancy and surrender the right of survivorship prospectively was given to all joint tenants. The exercise right of right required the affirmative step of a conveyance.

C. Under the Common Law of Joint Tenancy, Intestate Succession and Other Succession Provisions Do Not Affect Property Held by Joint Tenants

As the commentary explains, "[b]ecause of the doctrine of survivorship, a joint tenant ***cannot devise*** an interest in the property . . . . The interests of the deceased tenant ***cannot descend to heirs*** or pass to representatives under the laws regulating intestate succession. A surviving joint tenant holds under the conveyance or instrument by which the tenancy was created and not under the laws regulating intestate succession." 20 Am. Jr. 2d *Cotenancy & Joint Ownership § 7 (*emphasis added); 42 A.L.R. 3d 1116 § 2[a] ("An estate in joint tenancy is one held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and having as its distinguishing feature the right of survivorship, or *jus accrescendi,* by virtue of which the entire estate, upon the death of a joint tenant, goes to the survivor or, in the case of more than two joint tenants, to the survivors', and so on to the last survivor, free and exempt from all charges made by his deceased cotenant or cotenants."). Accordingly, "until the death of a joint tenant, **the entire estate goes to the survivor**, or in the case of more than two joint tenants, to the survivors, and so on to the last survivor. The estate passes free and exempt from all charges made by the deceased cotenant or cotenants." 20 Am. Jur. 2d *Cotenancy & Joint Ownership §4; accord In re Kokjohn*, 531 N.W.2d 99, 101 (Iowa 1995) (citing *In re Estate of Kiel*, 357 N.W.2d 628, 631 (Iowa 1984)) (explaining that "property held in joint tenancy is not devisable by will.")

The only things that affect property held in joint tenancy are the death of a joint tenant, in which case the estate goes to the surviving joint tenant or tenants, or a conveyance by a joint tenant, in which case the joint tenancy is destroyed as to the joint tenant. 20 Am Jur. 2d *Co tenancy & Joint Ownership* §23 (explaining that "a joint tenancy may be terminated by one party's conveyance of the interest of that joint tenant"). Thus, the mere change in the descent provision of § 171-99(e) could not, as a matter of common law, affect the rights of

joint tenants. Statutes must be construed in a manner that is consistent with the common law unless a contrary result is clearly intended by the legislature. *See Burns Int'l Sec. Servs., Inc. v. Department of Transp.,* 66 Haw. 607, 611, 671 P.2d 446, 449 (1983) (citing *State v. Taylor*, 49 Haw. 624, 628-629, 425 P.2d 1014, 1018 91967) ("Where it does not appear there was legislative purpose in superseding the common law, the common law will be followed.") There is no suggestion that the legislature intended to depart from the established common law.

D. A Vested Right of Survivorship Is a Property Right and Cannot Be Taken Away Without Compensation.

The vested right of survivorship is a property right. See, e.g. *Lynch*, 727 P.2d at 700. As a property right, the right of survivorship is one stick of the landowner's bundle. *United States v. Craft*, 535 U.S. 274, 278 (2002) (describing "property as a "bundle of sticks" – a collection of individual right"). The state cannot take away even a single stick without paying compensation to the owner for the loss. *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979) (explaining that a loss of one of the "sticks in the bundle of rights that are commonly characterized as property" requires just compensation); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 434 (1934) (explaining that governmental action which constitutes a taking of property, no matter how minimal, requires just compensation.)

There is no suggestion that the legislature intended to create a constitutional crises. In light of the arguments submitted herein, a suggested revision of S.B. No. 3104 is submitted for this Committees' consideration.

Thank you very much for this opportunity to comment on this bill.

If you have any questions or concerns, please feel free to contact the undersigned at (808) 258-8889 or via email at adujalaw@gmail.com.

Sincerely yours,

/s/ *Melodie Aduja*

Melodie Aduja

THE SENATE

TWENTY-SEVENTH LEGISLATURE, 2014
STATE OF HAWAII

S.B. NO. 3104

A BILL FOR AN ACT

RELATING TO PUBLIC LANDS.

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

SECTION 1. The legislature finds that existing homestead leases subject to § 171-99(e) as amended by Act 166 of the Twentieth Legislature, 1999, effective June 6, 2000, was enacted to "allow lenders to accept the leased property as security for loans by setting aside the succession provision of the lease for the duration of the loan." However, the statutory effect of revised § 171-99(e) included unintended consequences such as:

(1) Retroactive application causing involuntarily conversions of vested joint tenancy with right of survivorship interests into tenancy in common; and

(2) Causing vested rights of survivorship, which are property rights, to be taken away without just compensation.

The purpose of this Act is to avoid these unintended consequences by amending § 171-99(e) to include the applicability of the pre-Act 166 formula for the descent of the leasehold interest by joint tenancy with right of survivorship unless such interest is voluntarily transferred or assigned by the lessee by conveyance, devise, bequest, or intestate succession with the prior approval of the board of land and natural resources.

SECTION 2. Section 171-99, Hawaii Revised Statues, is amended by amending subsection (e) to read as follows:

"(e) Interest, descent, t[*T*]ransfer or assignment; certificate of occupation or homestead lease. [*No existing certificate of occupation or existing homestead lease, or fractional interest thereof, shall be transferable or assignable except*] In the case of the death of any occupier or lessee under an existing certificate of occupation or existing homestead lease, all the interest of the occupier or lessee, any conveyance, devise, or bequest to the contrary notwithstanding, in land held by the decedent by virtue of such certificate of occupation or homestead lease shall vest in the relations of the decedent as follows:

(12) In the widow, widower, or reciprocal beneficiary;

(13) If there is no widow, widower, or reciprocal beneficiary, then in the children;

(14) If there are no children, then in the widows, widowers, or reciprocal beneficiaries of the children;

(15) If there are no such widows, widowers, or reciprocal beneficiaries, then in the grandchildren;

(16) If there are no grandchildren, then in the parents or surviving parent;

(17) If there are no parents or surviving parent, then in the sisters and brothers;

(18) If there are no sisters and brothers, then in the widowers, widows, or reciprocal beneficiaries of the sisters and brothers;

(19) If there are such widowers, widowers, or reciprocal benefiters, then in the nieces and nephews;

(20) If there are no nieces or nephews, then in the widowers, widows, or reciprocal beneficiaries of the nieces and nephews;

(21) If there are no such widowers, widows, or reciprocal beneficiaries, then in the grandchildren of the sisters and brothers;

(22) If there are no grandchildren of any sister or brother, then in the State.

All the successors, except the State, shall be subject to the performance of the unperformed conditions of the certificate of occupation, or the homestead lease, in like manner as the decedent would have been subject to the performance if the decedent had continued alive; provided that if a widow or widower in whom the interest shall have vested, shall thereafter marry again and decease leaving a widower or widow and a child or children of the first marriage surviving, the interest of the deceased shall vest in such child or children; and provided further that in case two or more persons succeed together to the interest of any occupier or lessee, according the foregoing provisions they shall hold the same by joint tenancy so long as two or more shall survive, but upon the death of the last survivor, the state shall survive, but upon the death of the last survivor, the estate shall descend as provided above unless transferred or assigned by conveyance, devise, bequest, intestate succession and with the prior approval of the board of land and natural resources; provided that transfer or assignment by conveyance, devise, or bequest shall be limited to a member or members of the occupier's or lessee's family or in the case of a homestead lease, to any person of persons designated as a trustee of a land trust.

SECTION 3. Statutory material to be repealed is bracketed and italicized. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

INTRODUCED BY: _____

Report Title:
Public Lands; Homestead Leases; Joint Tenancy

Description:
Requires all existing certificates of occupation or existing homestead leases, or fractional interests to be held in joint tenancy with right of survivorship unless transferred or assigned by conveyance, devise, bequest, or intestate succession with the prior approval of the board of land and natural resources.