

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

**ON S.B. No. 2799, S.D. 2,
RELATING TO UNIFORM REAL PROPERTY TRANSFER ON DEATH.**

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 16, 2010, at 2:15 p.m.
Conference Room 325, State Capitol

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

E-MAIL to JUDtestimony@Capitol.hawaii.gov

Chair Karamatsu and Members of the Committee:

Hawaii's Uniform Law Commissioners support passage of S.B. No. 2799, S.D. 2, 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 by the National Conference of Commissioners on Uniform State Laws 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 request 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 the alternate provision intended for states that have enacted a statute governing creditors' rights in nonprobate transfers, such as section 6-102 of the Uniform Probate Code. However, the cross-reference contained in the uniform act refers to a version of section 6-102 of the Uniform Probate Code that has not been adopted in Hawaii and we, therefore, believe that Section 15 in S.B. No. 2799, S.D. 2, needs to 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 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