



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

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ON THE FOLLOWING MEASURE:  
H.B. NO. 2623, RELATING TO PROPERTY.

BEFORE THE:  
HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, January 31, 2012                      TIME: 2:00 p.m.  
LOCATION: State Capitol, Room 325  
TESTIFIER(S): David M. Louie, Attorney General, or  
Daniel A. Morris, Deputy Attorney General

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Chair Keith-Agran 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 wording 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 wording 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.

**HONOLULU PRIDE**  
**CELEBRATING 22 YEARS OF PRIDE IN PARADISE**  
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January 27, 2012

Tuesday, January 31, 2012 - 2:00 p.m.  
House Judiciary Committee  
State Capitol RM 325  
415 South Beretania Street  
Honolulu, HI 96813

RE: House Bill 2623 RELATING TO TRANSFER OF PROPERTY - SUPPORT

Aloha Chair Keith-Agaran and fellow committee members,

On behalf of the Honolulu Pride committee we ask that you support House Bill 2623.

Though we do ask that you delete the line:

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

The reason we ask for this deletion because we feel that it is unnecessary given that Act 1 the Civil Unions law already covers this inclusion as seen here:

**-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.

**-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."

The old adage "Less is more" surely applies here. We here at Honolulu Pride think that if you amend this section of the Hawaii Revised Statute to include references to the civil unions chapter, and not others it could narrow the protections, rights and responsibilities that Act 1 sought to provide those entering into a Civil Union.

Mahalo for the opportunity to testify,

Rob Hatch  
Legislative Representative

Testimony for HB2623 on 1/31/2012 2:00:00 PM

**Testimony for HB2623 on 1/31/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Monday, January 30, 2012 6:59 PM

**To:** JUDtestimony

**Cc:** stafford.kiguchi@boh.com

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Testimony for JUD 1/31/2012 2:00:00 PM HB2623

Conference room: 325

Testifier position: Oppose

Testifier will be present: Yes

Submitted by: Penny Tong

Organization: Hawaii Bankers Association

E-mail: stafford.kiguchi@boh.com

Submitted on: 1/30/2012

Comments:

Testimony for HB2623 on 1/31/2012 2:00:00 PM

## **Testimony for HB2623 on 1/31/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, January 31, 2012 2:31 AM  
**To:** JUDtestimony  
**Cc:** jadamsesq@aol.com  
**Attachments:** HB2623\_Relating to transfe~1.pdf (266 KB)

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Testimony for JUD 1/31/2012 2:00:00 PM HB2623

Conference room: 325  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Jo-Ann Adams  
Organization: GLBT Caucus of the Democratic Party of Hawaii  
E-mail: jadamsesq@aol.com  
Submitted on: 1/31/2012

**Comments:**

Please amend to delete subsection (c). The definition of spouse to include civil unions partner is unnecessary.

TESTIMONY ON HB 2623  
RELATING TO TRANSFER OF PROPERTY

Tuesday, January 31, 2:00 pm  
State Capitol, Conference Room 325

COMMITTEE ON JUDICIARY

To: Rep. Gilbert S. C. Keith-Aragan, Chair  
Rep. Karl Rhoads, Vice Chair  
Members of the Committee on Judiciary

IN SUPPORT OF HB 2623 IN AMENDED FORM

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 a early draft of the proposed Act that based on language contained in the Permitted Transfers in Trust Act that was past 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, the Attorney General's office 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 HB 2623 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 a joint trust or in equal shares to their respective separate 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 entireties 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 entireties 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 entireties property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties, unless the creditor has a secured interest in the transferred property prior to the transfer. Upon 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.

~~— [(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.