

ESTATE PLANNING

Hawaii Real Property Issues and Techniques

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ESTATE PLANNING

- I. 2013 LEGISLATION: AMERICAN TAXPAYER RELIEF ACT OF 2012
- A. Passed 1/1/2013, signed by President Obama on 1/2/2013.
 - B. Capital Gains Tax: Top rate of 20% (up from 15%) if taxable income is \$400,000 or more (\$450,000 for married couples). 15% rate still applies if your taxable income is less than \$400,000.
 - C. Dividend Tax rates: Still linked to the capital gains rate so top rate of 20%, but most still taxed at 15%.
 - D. New tax alert: Unearned Income Medicare Contribution (“UIMC”) also known as the Net Investment Income Tax (“NIIT”) is 3.8% on all interest, dividends, royalties, rents, gross income from a trade or business involving passive activities, and net gain from the disposition of property. Only applies if adjusted gross income is more than \$200,000 (\$250,000 if married).
 - E. Gift and Estate Tax:
 - Lifetime
 - Exemption: \$5,340,000 for 2014, up from \$5,250,000 (indexed for inflation)
 - Annual Gift Tax
 - Exemption: \$14,000

Tax on Excess: 40%

Hawaii: Up to 16% (but no gift tax)

Portability: Yes

II. HAWAII UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT.

A. Prior to the Enactment of the Law there were three primary methods available to transfer real property on the death of the owner.

1. Probate. Probate is available for those that die intestate.

a. This may result in an undesirable distribution of the property as the method of distribution is dictated by the intestate statute.

b. Costs can be substantial.

c. Lengthy process.

2. Titling and Tenancy.

a. Ownership of the property could be changed to name the desired beneficiary as a joint tenant.

b. Property could be conveyed to the desired beneficiary and the owner could reserve a life estate.

c. Problems with these “solutions” include:

- (1) Adding a beneficiary as a joint owner restricts the transferor's ability to sell, lease or mortgage the property.
- (2) Adding a beneficiary on title, or transferring title to the beneficiary will subject the property to the transferee's creditors.
- (3) Such transfers are considered irrevocable gifts and the fair market value of the gifted property needs to be determined. This will require an appraisal as well as the preparation of a gift tax return if the value of the gift exceeds \$14,000 (the annual gift tax exclusion amount).
- (4) Even though such transfers are considered gifts, if the transferor continues to live on the property without paying fair market rent, the entire value of the property will be includible in the transferor's estate for estate tax purposes.

3. Revocable Trusts.

- a. If ownership of the property is held in a revocable trust, no gift is made until the death of the transferor. Therefore,

most of the concerns associated with the first two methods would not apply.

- b. The major (and only) downside to the revocable trust option is that there is a high initial cost to create the trust and transfer the property to the trust. However, this cost would probably be less than the cost of a probate.

B. Background of the Law.

1. Hawaii adopted the Uniform Real Property Transfers on Death Act, effective July 1, 2011 (Act 173), and was signed into law by Governor Neil Abercrombie on June 27, 2011.
2. This is the real estate equivalent of a “payable on death” bank account where a beneficiary is named in the event of the death of the account holder.
3. The intent is to allow for a testamentary transfer for property to a designated beneficiary by recording a deed called a “Transfer on Death Deed.” As the name implies, the transfer does not become effective until the transferor dies. Until death, the transferor has all the rights and responsibilities of ownership, including the exclusive right to possession, the right to lease and the right to revoke the testamentary transfer.

C. Transfer on Death Deeds.

1. Requirements:
 - a. Statement that transfer becomes effective at death. HRS §527-9(2).
 - b. Transfer on death deeds must also contain the essential elements and formalities of a properly recordable inter vivos deed and shall be recorded with the Bureau of Conveyances or filed in the office of the Assistant Registrar of the Land Court, as applicable, before the transferor's death. HRS §527-9(1) and (3).
 - c. The Transferor must have testamentary capacity. HRS §527-8.
 - d. A transfer on death deed shall be effective without notice or delivery to or acceptance by the designated beneficiary during the transferor's life, nor is consideration required. HRS §527-10.
 - e. The transferor may revoke a transfer on death deed, even if the deed expressly states that the transfer is irrevocable. HRS §527-11. Such revocation must be by a subsequent written, signed and notarized instrument that is recorded in the Bureau of Conveyances or filed with the Land Court

before the transferor's death. HRS §527-11. Acceptable instruments of revocation include:

- (1) Subsequently recorded transfer on death deed in which the prior beneficiary designation is expressly revoked or impliedly revoked by an inconsistent beneficiary designation (HRS §527-11(a)(1));
- (2) An instrument of revocation that expressly revokes a prior beneficiary designation in whole or in part (HRS §527-11(a)(2)); or
- (3) An inter vivos deed that expressly revokes all or part of the transfer on death deed (HRS §527-11(a)(3)).

- f. If there are multiple transferors who executed a transfer on death deed as tenants in common the revocation by one party does not affect the interests of the other parties. However, if the property was owned jointly (tenants by the entirety or joint tenants with rights of survivorship), a revocation requires all living joint owners to execute the revocation instrument.

D. Upon the Death of the Transferor.

1. Normally, ownership of property is transferred to the beneficiary upon the death of the transferor, so long as the beneficiary can prove that the transferor has in fact died. Things are not that simple with a transfer on death deed because of the numerous exceptions listed in the statute.
 - a. Lapse issues involved with transfer on death deeds:
 - (1) If the beneficiary fails to survive the transferor, the interest of the beneficiary lapses. HRS §527-13(a)(2).
 - (2) Concurrent interests are transferred to the beneficiaries in equal and undivided shares, with no right of survivorship. HRS §527-13(a)(3).
 - (3) If there are two or more designated beneficiaries who are to receive concurrent interests, a lapsed share is to be added proportionately to the shares for the other beneficiaries. HRS §527-13(a)(4).
 - b. To avoid ambiguity or confusion, and rather than rely on statutory interpretation, it would be better that the transfer on death deed specifically name the person or persons who would take ownership if the designated beneficiary predeceases the transferor.

2. Designated beneficiaries receive the property subject to all encumbrances, mortgages, liens, assignments, contracts, conveyances and other burdens on title that existed at the time of the transferor's death. HRS §527-13(b).
 - a. If a single transferor, then encumbrances are deemed to exist upon the death of the transferor. HRS §527-13(b).
 - b. If joint transferors, then encumbrances are deemed to exist upon the death of the last of the joint transferors. HRS §527-13(c)
 - c. Transfer of property to the designated beneficiary is without covenant or warranty of title, even if the transfer on death deed purports to provide for such a covenant or warranty. HRS §527-13(d).
3. Upon the death of a transferor, the designated beneficiary may disclaim all or a portion of the interest subject to the transfer on death deed.
 - a. Disclaimer must be recorded in the Bureau of Conveyances or filed in Land Court. Failure to file or record a disclaimer does not affect the validity of the disclaimer between the disclaimant and the person to whom property is conveyed to by reason of the disclaimer and a qualified disclaimer

must be filed within nine (9) months from the date of death of the transferor or the death of the last of joint transferors.

HRS §527-14.

4. A designated beneficiary under a transfer on death deed is divested of right upon:

- a. Divorce from the transferor; or
- b. Conviction of a homicide of the transferor.

E. Why Estate Planning Attorneys Don't Like Transfer on Death Deeds.

- 1. Although deemed to be a revocable transfer, it requires such revocation to be signed, notarized and recorded in the same manner as the original transfer on death deed. This can be cumbersome, and if someone changes their mind a lot, could be expensive in the long term.
- 2. Although the statute provides that the beneficiary receives the property subject to existing encumbrances, most lending institutions will not lend on property that is subject to a transfer on death deed. This would not be an issue for existing mortgages, but would probably limit the transferor's ability to obtain a new mortgage.

3. There are limitations on how the transferor can specify what happens to the property in the event of a predeceased beneficiary. Generally terms such as “per stirpes” or descendants should be avoided in order to title issues that might require a court to remedy.
4. In the event of the transferor’s disability or incapacity, the property is in “limbo” because no one has the authority to sell the property, or obtain a reverse or traditional mortgage to pay for health care needs.
5. All recorded instruments are public record, and the designated beneficiary could become the target of a scam.
6. All of the above problems would not exist through the use of a revocable trust, and holding title in the name of the revocable trust. To change beneficiaries requires a simple amendment, does not impede the ability to get or qualify for a mortgage, you can specify an unlimited amount of beneficiaries in the event of a predeceased beneficiary or disclaimer, in the event of incapacity, the trust provides for a successor trustee and would allow the trustee to do whatever was necessary to provide for the transferor, and revocable trust terms are not a matter of public record.

III. ESTATE PLANNING ISSUES FOR CLIENTS THAT MOVED FROM A COMMUNITY PROPERTY STATE.

A. Background.

1. Community property is a regime of marital property that traces its roots to civil law systems.
2. Most property acquired during marriage is owned jointly by both spouses and divided equally in the event of divorce, annulment or death, no matter what the actual title of the asset may be.
3. Community property rules generally do not apply to property acquired prior to the marriage or to property acquired by gift or inheritance during the marriage.
4. Division of community property may take place by item, by splitting all items or by value. In some jurisdictions, such as California, an equal division of community property is mandated by statute. See California Family Code Sec. 2550.
5. There are 10 community property states, mostly in the west: Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. The two most populous states, California and Texas, containing almost 20% of the U.S. population, are community property states.

B. Basic issues for clients moving from community property to common law property states.

1. When a husband and wife move from a community property state to a common law state such as Hawaii, the general rule is their community property, as well as the property they acquired with community funds (and property traceable to those funds), continues to be community property, despite the fact that the couple lives in a common law state.

a. Under Restatement (Second) of Conflicts of Laws Section 259, when a couple or spouse acquires an asset, the fact that the couple or spouse moves to another state does not affect the character of the property.

b. According to comment (a) to Section 259 “Considerations of fairness and convenience require that...the spouses’ marital property interests are not affected by a change of domicile to another state by one or both of the parties.” Comment (b) adds “If one or both spouses sell the property in their domicile and reinvest the proceeds in another asset, the new asset purchased with the proceeds retains the character of the original.”

2. The Uniform Disposition of Community Property Rights at Death Act (UDCPRDA or the “Act”) has been adopted by Hawaii. States

that have adopted the Act recognize and preserve community property brought from a community property state to a common law state for purposes of rights of disposition at death.

- a. Real property purchased in the UDCPRDA state with community property brought into the UDCPRDA state is community property.

Example: H and W move from California, a community property, non-UDCPRDA state, to Hawaii, a common law, UDCPRDA state. They retain their residence in California. Using \$800,000 of community property funds drawn from their California bank account, and \$200,000 earned by H after arriving in Hawaii, H and W also purchase a home in Hawaii. On H's death while domiciled in Hawaii, 80% of the Hawaii home is subject to the Act. The California residence is not subject to the Act.

- b. The Act only affects dispositions at death, therefore:
 - (1) Creditor rights are not affected;
 - (2) Managerial rights are not affected; and
 - (3) Division upon divorce is not affected.

- c. Rebuttable Presumptions.
- d. States that have enacted the Act operate under a rebuttable presumption that real property situated in the UDCPRDA state acquired while domiciled in a common law state, title to which was taken with rights of survivorship, is separate property.

Example: H and W, formerly domiciled in Texas, became domiciled in Hawaii and there purchased a residence, taking title in the names of “H and W as tenants by the entirety” or “H and W as joint tenants with rights of survivorship.” Regardless of the source of the funds used to purchase the residence, the Hawaii residence would be presumed to be held in joint tenancy and thus not subject to the UDCPRDA.

C. Recognition of community property in Hawaii.

- 1. HRS Chapter 510 addresses issues of community property in Hawaii.
 - a. Hawaii is not by default a community property state. However, it does recognize community property principals and will enforce them.

b. HRS Section 510-2 states that one spouse may give all of their “community right, title, interest, or estate in all or any community property, real or personal,” to the other spouse. However, each such transfer made operates to divest the property of every claim or demand as community property, and vests the same in the transferee as separate property of the transferee. Therefore, a California couple that owns property in Hawaii must make it very clear that they want community property rights to attach to the property, but since such a type of joint ownership is not automatically considered community property (as it would be in California), there is no easy means to do so.

(1) Add language in the acquisition deed that the property is to be treated as community property under the laws of the relevant state.

(2) Hold title in the property in a community property joint trust.

2. If, on the other hand, a couple from California relocates to Hawaii on a permanent basis, it is unlikely they are told by a Hawaii attorney to keep their community property joint trust.

a. Because Hawaii is separate property state, most Hawaii attorneys suggest that California couples should redraft

their estate planning documents which would effectively negate their community property joint trust because most, if not all assets, would be transferred from the joint trust to separate revocable trusts, as is the common practice in Hawaii.

- b. There may be very important reasons to keep the community property nature of assets, even for a couple that has permanently relocated to Hawaii. See below discussion regarding estate tax considerations.

D. Estate tax considerations.

1. IRS Publication 555.

- a. In community property states, each spouse usually is considered to own half the estate (excluding separate property). When the first spouse dies, the total fair market value of the community property generally becomes the basis of the entire property. For this rule to apply, at least half the value of the community property interest must be includible in the first spouse to die's gross estate, whether or not the estate must file a return. In other words, for community property, you get a step-up in the basis of the entire asset.

Example: H and W owned community property that had a basis of \$80,000. When H died, H and W's community property had a fair market value of \$100,000. One-half of the fair market value of their community interest was includible in H's estate. The basis of W's half of the property is \$50,000 after H died (half of the \$100,000 fair market value). The basis of the other half to H's heirs is also \$50,000.

2. In non-community property, joint ownership states, the law is different.

Example: H and W are domiciled in Hawaii and own all of their assets as either joint tenants with rights of survivorship, or as tenants by the entirety. Upon H's death, only one-half of the asset's basis, the portion allocated to H, is stepped-up to the date of death value. So using the same example above, one-half of the property has a basis of \$50,000, and the W's share of the asset has a basis of \$40,000.

IV. POWERS OF TRUSTEE

- A. Power of Sale. All trusts have the Power of Sale by HRS § 554A-3(c).

- B. Many Trusts also recite the Power of Sale in the trust document or limit the power.
- C. Deeds to the trust should include a Power of Sale provision. (See Exhibit I).
- D. Failure to include a Power of Sale in the deed will require the trust to be recorded in the Bureau of Conveyances or Land Court if the trust is to sell the real property.

V. TENANTS BY THE ENTIRETY

- A. Prior to July 1, 2012, only people could own real property as tenants by the entirety.
- B. After July 1, 2012, Trusts may own property as tenants by the entirety. HRS § 509-2(b). (See Exhibit II)
 - 1. Only trusts established by persons who could own property as tenants by the entirety may hold property as tenants by the entirety:
 - a. Spouses, or
 - b. Reciprocal beneficiaries.
 - 2. Trust can be a joint trust or separate trusts.
 - a. Equal shares must be conveyed to separate trusts.
 - b. The trusts must be revocable.

3. The creditor protection of tenants by the entirety is extended to the property owned by the trust or trusts as tenants by the entirety.
 - a. The property is not subject to the creditor claims of only one of the parties. Protection extends to:
 - (1) The real property conveyed to the trust or trusts, and
 - (2) The proceeds of the property.
 - b. Upon the death of one of the parties, the interest of the deceased party in the tenants by the entirety is not subject to that party's creditors. HRS § 509-2(d).
 - c. The trust may provide for any disposition of a deceased party and does not have to pass to the surviving party.
 4. Besides creditor protection, ownership of property by tenants as tenants by the entirety avoids probate and conservatorship.
- C. The trust must contain tenants by the entirety language. (See Exhibit III)
- D. The deed to the trust must include tenants by the entirety language. (See Exhibit IV)

VI. DUE ON SALE

A. The transfer of real property subject to mortgage to a trust will usually allow the lender to call the loan under the due on sale clause in the loan documents.

B. Exceptions for residential property are created under federal law 12 U.S.C. § 1701j-3(d)(8). (See Exhibit V) In an estate planning context, exempted transfer include:

1. At death.
2. To a spouse.
3. To children.
4. To a revocable trust.

C. What is “Residential Property?”

D. Is the lender’s consent need?

VII. ISSUES RELATING TO LIMITED LIABILITY COMPANIES

A. Conversion of an entity to or from a limited liability company.

1. Change of an entity from a corporation, partnership or limited partnership to a limited liability company and vice versa.
2. No deed for any Hawaii real property is required.
3. No Hawaii conveyance tax is due.

B. Transfer of a single member limited liability company owning Hawaii real property.

1. No deed required.
2. No Hawaii conveyance tax--for now.

TRUSTEE'S POWERS LANGUAGE FOR DEED TO TRUST

TO HAVE AND TO HOLD the same unto the Grantee, IN TRUST, with full power to sell, convey, transfer, or otherwise dispose of at public or private sale, grant or exercise options to purchase, exchange, encumber, abandon, manage, improve, repair, insure, partition, mortgage, pledge, lease or grant easements for any term (within or beyond the period permitted by law or the duration of said trust), in fee simple, forever, without the necessity of producing the trust agreement. No person dealing with the Grantee as said Trustee in relation to said premises, or to whom said premises or any part thereof shall be conveyed, contracted to be sold, leased or mortgaged by said Trustee shall be obliged to see to the application of any purchase money, rent, or money borrowed or advanced on said premises, or be obliged to see that the terms of said trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of said Trustee, or be obliged or privileged to inquire into any of the terms of said trust agreement; and every deed, agreement of sale, mortgage, lease or other instrument executed by said Trustee in relation to said real estate shall be conclusive evidence in favor of every person relying upon or claiming under any such conveyance, lease or other instrument that: (a) at the time of the delivery thereof the trust created by the trust agreement referred to herein was in full force and effect; (b) such conveyance or other instrument was executed in accordance with the trust, conditions and limitations contained in said trust agreement or in some amendment thereof and binding upon all beneficiaries thereunder; (c) said Trustee was duly authorized and empowered to execute and deliver every such deed, agreement of sale, lease, mortgage or other instrument; and, (d) if the conveyance is made to a successor or successors in trust, that such successor or successors in trust have been properly appointed and are fully vested with all the title, estate, rights, powers, authorities, duties and obligations of its, his or their predecessor in trust.

A BILL FOR AN ACT

RELATING TO TRANSFER OF PROPERTY.

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

1 SECTION 1. Section 509-2, Hawaii Revised Statutes, is
2 amended to read as follows:
3 "**§509-2 Creation of joint tenancy, tenancy by the**
4 **entirety, and tenancy in common.** (a) Land, or any interest
5 therein, or any other type of property or property rights or
6 interests or interest therein, may be conveyed by a person to
7 oneself and another or others as joint tenants, or by a person
8 to oneself and one's spouse or reciprocal beneficiary, or by
9 spouses to themselves, or by reciprocal beneficiaries to
10 themselves, as tenants by the entirety, or by joint tenants to
11 themselves and another or others as joint tenants, or tenants in
12 common to themselves or to themselves and another or others as
13 joint tenants, or by tenants by the entirety to themselves or
14 themselves and another or others as joint tenants or as tenants
15 in common, or by one tenant by the entirety to the tenant's
16 spouse or reciprocal beneficiary of all of the tenant's interest
17 or interests, without the necessity of conveying through a third
18 party, and each such instrument shall be construed as validly

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1 creating a joint tenancy, tenancy by the entirety, tenancy in
2 common, or single ownership, as the case may be, if the tenor of
3 the instrument manifestly indicates such intention.

4 (b) Conveyance of any real property located in the State
5 and held by spouses or reciprocal beneficiaries as tenants by
6 the entirety:

7 (1) To a joint trust as tenant in severalty for their
8 benefit and which is revocable and amendable by either
9 or both during their joint lifetime; or

10 (2) In equal shares as tenants in common to their
11 respective separate trusts, each of which is revocable
12 and amendable by the respective grantor, or any
13 accumulation of such conveyed property,

14 shall have the same immunity from the claims of their separate
15 creditors as would exist if the spouses or reciprocal
16 beneficiaries had continued to hold the real property or its
17 proceeds as tenants by the entirety.

18 (c) Subsection (b) shall apply as long as:

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

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1 (2) The real property continues to be held in the trust as
2 provided under subsection (b);

3 (3) Both spouses or reciprocal beneficiaries remain
4 beneficiaries of the trust and no waiver as provided
5 under subsection (g) has occurred;

6 (4) The first and last name of the spouse or reciprocal
7 beneficiary for their respective trusts, or the first
8 and last names of both spouses or reciprocal
9 beneficiaries for a joint trust, are included in the
10 name of the trust; and

11 (5) Notice of the intention to continue to hold the real
12 property or its proceeds as tenants by the entirety is
13 provided by a deed of conveyance by the spouses or
14 reciprocal beneficiaries and filed or recorded in land
15 court or the bureau of conveyances, or both, as
16 appropriate; provided that the notice shall
17 specifically refer to this section and state that the
18 real property to be held by the trust shall be immune
19 from the claims of their separate creditors.

20 (d) After the death of the first of the spouses or
21 reciprocal beneficiaries, all real property held in the trust
22 that was immune from the claims of their separate creditors

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1 under subsection (b) immediately prior to the individual's death
2 shall continue to have the same immunity from the claims of the
3 decedent's separate creditors as would have existed if the
4 spouses or reciprocal beneficiaries continued to hold the real
5 property conveyed in trust or its proceeds as tenants by the
6 entirety.

7 (e) In the event that any transfer of real property held
8 in tenancy by the entirety to a trustee of a trust as provided
9 under subsection (b) is held invalid by any court of proper
10 jurisdiction, or if the trust is revoked or dissolved by a court
11 decree or operation of law, while both spouses or reciprocal
12 beneficiaries are living, then immediately upon the occurrence
13 of either event, all real property held in the trust shall
14 automatically be deemed to be held by both spouses or reciprocal
15 beneficiaries as tenants by the entirety.

16 (f) Upon entry of a decree granting divorce or annulment
17 between the spouses or the termination of the reciprocal
18 beneficiary relationship, the immunity from the claims of
19 separate creditors under subsection (b) shall immediately
20 terminate and the real property shall be treated as held in
21 tenancy in common.

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1 (g) The immunity from the claims of separate creditors
2 under subsections (b) and (d) may be waived as to any creditor
3 or any specifically described trust property by:

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

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

13 (i) After a conveyance of real property to a trust as
14 provided under subsection (b), the real property transferred
15 shall no longer be held by the spouses or reciprocal
16 beneficiaries as tenants by the entirety and the disposition of
17 the real property shall be controlled by the terms of the trust.

18 ~~[(h)]~~ (j) For the purposes of this chapter~~[+ "Reciprocal]~~
19 "reciprocal beneficiary" means an adult who is a party to a
20 registered reciprocal beneficiary relationship in accordance
21 with chapter 572C, and has a valid certificate of reciprocal
22 beneficiary relationship that has not been terminated."

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1 SECTION 2. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 3. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 4. This Act shall take effect on July 1, 2012.

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TENANCY BY THE ENTIRETY LANGUAGE FOR TRUST AGREEMENT

A. Additions of Tenancy by the Entirety Property while SETTLOR is Living. Pursuant to the provisions of this Trust and HRS § 509-2, the TRUSTEE shall hold any interest in real property located in the State of Hawaii that the SETTLOR transfers to the Trust in accordance with HRS § 509-2 in order that the real property or its proceeds ("HRS § 509-2 tenancy by the entirety property") shall have the same immunity from the claims of the separate creditors as would exist if the SETTLOR and SETTLOR's spouse had continued to hold the HRS § 509-2 tenancy by the entirety property as tenants by the entirety. Any such HRS § 509-2 tenancy by the entirety property shall be listed on Exhibit ___. Upon the TRUSTEE's receipt of HRS § 509-2 tenancy by the entirety property, such property shall no longer be held by the SETTLOR and SETTLOR's spouse as tenants by the entirety and the disposition of the HRS § 509-2 tenancy by the entirety property shall be controlled by the terms and conditions of this Trust and only considered as tenancy by entirety property for immunity from the claims of the separate creditors of the SETTLOR and SETTLOR's spouse.

B. Transfer Requirements of HRS § 509-2 Tenancy by the Entirety Property to Trust. The TRUSTEE shall be required to receive and hold the HRS § 509-2 tenancy by the entirety property as long as the SETTLOR and SETTLOR's spouse remain married, and only if all of the statutory requirements in HRS § 509-2(c) are satisfied and the SETTLOR and SETTLOR's spouse have not waived the immunity from the claims of separate creditors under HRS § 509-2(g).

C. Invalid Transfer of HRS § 509-2 Tenancy by the Entirety Property to Trust. If the transfer of any real property held in tenancy by entirety to the TRUSTEE is held invalid by any court of proper jurisdiction, or if the Trust is revoked or dissolved by a court decree or by operation of law, while both the SETTLOR and SETTLOR's spouse are living, then immediately upon the occurrence of either event, all such real property or its proceeds held in Trust shall automatically be deemed to be held by both the SETTLOR and SETTLOR's spouse as tenants by the entirety under HRS § 509-2(e). The TRUSTEE shall transfer of all right, title and interest to such real property or its proceeds to the SETTLOR and SETTLOR's spouse as tenants by the entirety.

D. If the SETTLOR's Spouse Does Not Survive the SETTLOR. Under HRS § 509-2(d), if SETTLOR's spouse does not survive the SETTLOR all HRS § 509-2 tenancy by the entirety property held by the Trust shall continue to have the same immunity from the claims of SETTLOR's spouse's separate creditors as would have existed if the SETTLOR and SETTLOR's spouse continued to hold the real property conveyed in Trust or its proceeds as tenants by the entirety.

E. If the SETTLOR Does Not Survive the SETTLOR's Spouse. If the SETTLOR does not survive SETTLOR's spouse, then under HRS § 509-2(d) and Paragraph _____ of this Trust, all HRS § 509-2 tenancy by the entirety property held by the Trust, shall continue to have the same immunity from the claims of SETTLOR's separate creditors as would have existed if the SETTLOR and SETTLOR's spouse continued to hold the real property conveyed in Trust or its proceeds as tenants by the entirety and shall be treated as part of the Trust Residue set forth in § _____.

F. Decree Granting Divorce or Annulment. Upon entry of a decree granting divorce or annulment between the SETTLOR and SETTLOR's spouse, the immunity of HRS § 509-2 tenancy by the entirety property from the claims of separate creditors shall immediately terminate and the real property shall be treated as held in tenancy in common under HRS § 509-2(f).

TENANCY BY THE ENTIRETY LANGUAGE FOR DEED

NOTICE IS HEREBY GIVEN that it is the Grantor's (who are the primary beneficiaries of such Trusts while both of the Grantors are living) and the Grantee's intention that: [i] Hawaii Revised Statutes § 509 2(b) apply to this conveyance of the real property described in Exhibit A and its proceeds (such real property and its proceeds being collectively referred to herein as "HRS § 509 2(b) Tenancy by the Entirety Property"); [ii] the Grantee shall, for purposes of Hawaii Revised Statutes § 509 2(b), hold and continue to hold such HRS § 509 2(b) Tenancy by the Entirety Property as tenants by the entirety pursuant to, in accordance with and for the purposes set forth in Hawaii Revised Statutes § 509 2(b) in order that such HRS § 509 2(b) Tenancy by the Entirety Property and the Grantor's beneficial interests as primary beneficiaries of said Trusts with regard to such HRS § 509 2(b) Tenancy by the Entirety Property shall, while such HRS § 509 2(b) Tenancy by the Entirety Property is held by the Grantee, have the same immunity from the claims of the separate creditors of each of the Grantor as would exist if the Grantor had continued to hold such HRS § 509 2(b) Tenancy by the Entirety Property as tenants by the entirety pursuant to Hawaii Revised Statutes § 509 2(a); [iii] the HRS § 509 2(b) Tenancy by the Entirety Property, while held by the Grantee, shall be immune from the claims of the separate creditors of each of the Grantor as would exist if the Grantor had continued to hold such HRS § 509 2(b) Tenancy by the Entirety Property as tenants by the entirety pursuant to Hawaii Revised Statutes § 509 2(a); [iv] the Grantor's beneficial interests as primary beneficiaries of said Trusts with regard to such HRS § 509 2(b) Tenancy by the Entirety Property shall, for purposes of Hawaii Revised Statutes § 509 2(b), have the same immunity from the claims of the separate creditors of each of the Grantor as would have existed if the Grantor had continued to hold such HRS § 509 2(b) Tenancy by the Entirety Property as tenants by the entirety pursuant to Hawaii Revised Statutes § 509 2(a); and [v] upon the death of the first to die of the Grantor, such HRS § 509 2(b) Tenancy by the Entirety Property that was immune from the claims of the separate creditors of each of the Grantor pursuant to Hawaii Revised Statutes § 509 2(b) immediately prior to such Grantor's death shall continue to have the same immunity from the claims of such deceased Grantor's separate creditors as would have existed on the death of the first to die of the Grantor if the Grantor continued to hold such HRS § 509 2(b) Tenancy by the Entirety Property as tenants by the entirety pursuant to Hawaii Revised Statutes § 509 2(a).

Exemption of specified transfers or dispositions

With respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on the stock allocated to a dwelling unit in a cooperative housing corporation, or on a residential manufactured home, a lender may not exercise its option pursuant to a due-on-sale clause upon--

- (1) the creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;
- (2) the creation of a purchase money security interest for household appliances;
- (3) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- (4) the granting of a leasehold interest of three years or less not containing an option to purchase;
- (5) a transfer to a relative resulting from the death of a borrower;
- (6) a transfer where the spouse or children of the borrower become an owner of the property;
- (7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;
- (8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or
- (9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.