



D I S T R I C T O F C O L U M B I A B A R
Estates, Trusts and Probate Law Section

D.C. BAR ESTATES, TRUSTS & PROBATE LAW SECTION STATEMENT OF CONCERN ABOUT
D.C. BILL 19-753 "Uniform Real Property Transfer on Death Act of 2012"

The views expressed herein represent only those of the Estates, Trusts & Probate Law Steering Committee of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.¹

The Estates, Trusts & Probate Law Steering Committee of the D.C. Bar ("ET&P Steering Committee") is concerned about Bill 19-753 "The Uniform Real Property Transfer on Death Act of 2012." The proposed Real Property Transfer on Death Act ("the Act") purports to make the transfer of real property on death easier, but in fact does not adequately protect surviving spouses, children, and other creditors, and may inadvertently confuse unsophisticated seniors about asset disposition on death.

For many people, their home is their most substantial asset. Currently, in order to transfer a house on death the house has to be either jointly owned with a right of survivorship, pass through the probate process, or pass under the terms of a revocable trust. The proposed Act allows an immediate transfer of a house upon death to beneficiaries without probate or the action of a trustee. The ease and speed of the transfer has both benefits and drawbacks. The ET&P Steering Committee is of the opinion that the potential drawbacks outweigh the potential benefits.

The biggest concern is that the Revocable Transfer on Death Deed ("TOD Deed") does not protect the spouse or children of the decedent, who are entitled to the first \$40,000 of the decedent's estate. The Act states that "the beneficiary of a TOD Deed is liable" to pay statutory allowances. However, the ET&P Steering Committee questions the effectiveness of any "claw-back" rights of a surviving spouse or any other creditor under the Act. The Act does not specify the procedure a surviving spouse would use to assert statutory rights, but presumably it would be difficult and expensive. It is even more unclear whether the surviving spouse could successfully collect the statutory allowances because the beneficiary of a TOD Deed could transfer or sell the property immediately after the transferor's death. No notice is provided to family members (or other creditors) so the property would be gone before a person entitled to statutory allowances, or who was wronged by the transfer, could challenge the TOD Deed, recapture the property, or collect money.

¹ The Steering Committee of the Estates Trusts and Probate Law Section voted to adopt this public statement, without dissent, by a tally of 8-0 (with 1 recusal by a government attorney).

The probate process has many safeguards built into it to ensure beneficiaries and family members are protected. For example, there is a notice requirement that once probate is initiated all heirs at law have to be notified by certified mail. The community at large is also notified of the probate through the publication requirement. This gives family members and others an opportunity to present any claims of undue influence, duress or fraud. In addition, the execution of a will requires the formality of witness signatures and a statement that the testator is of sound mind and free of undue influence. There is also a six month period during which claims can be made, wills challenged, or the appointment of a personal representative challenged and assets are typically held by the personal representative during that period. None of these protections exist under the proposed Act.

In the situation where a client is well-advised and the family members are all honest and supportive, a TOD Deed could be a great benefit. However, in the age of the Internet, making a TOD Deed form readily available could cause unsophisticated seniors to unwittingly transfer real property without a full understanding of the consequences, and the senior's true intention for the disposition of their assets may not be realized. Add the more serious problem that under the Act, vulnerable adults have no protection against predators who by fraud, coercion or duress obtain their signature on a TOD deed, allowing the predators to enrich themselves at the expense of the transferor and their natural heirs.

The ET&P Steering Committee recommends against passage of this bill and encourages the Council to ensure that, upon death, real property pass to beneficiaries with the protections that the probate process provides.

The ET&P Steering Committee Members are Kimberly K. Edley, James L. Frazier, Leroy M. Fykes, Mark G. Griffin, Lucinda L. Lea, Giannina Lynn, Catherine M. Rafferty & Katherine Wiedmann.