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## WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

### *Probate: Uniform Transfer on Death Security Registration Act*

CODE SECTIONS:	O.C.G.A. §§ 53-5-60 to -71 (new)
BILL NUMBER:	SB 12
ACT NUMBER:	392
GEORGIA LAWS:	1999 Ga. Laws 805
SUMMARY:	The Act provides that owners of securities may designate a transfer-on-death (TOD) beneficiary or beneficiaries. Upon the death of the owner or of the last survivor among multiple owners, ownership of securities registered in beneficiary form passes to the beneficiaries outside of the decedent's probate estate. Registration of securities in beneficiary form has no effect until the death of the owner or owners and may be canceled or changed at any time by the owner or owners. If no beneficiary survives all of the owners, the securities pass to the estate of the owner or the last survivor of multiple owners. The Act does not require dealers in securities to offer or to accept TOD registration and indemnifies them against all claims against the securities if the dealers satisfy the requirements of the Act.
EFFECTIVE DATE:	July 1, 1999

### *History*

Under Georgia property law, if a decedent does not dispose of his or her property, it passes in the decedent's probate estate, either according to the direction of the decedent's will<sup>1</sup> or by the state's law of intestacy.<sup>2</sup> There are several ways for property to pass outside of the

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1. See 1996 Ga. Laws 504, § 10, at 544 (codified at O.C.G.A. § 53-4-1 (1997)).  
2. See *id.* at 529-30 (codified at O.C.G.A., § 53-2-1 (1997)).

probate estate, some of which courts have long recognized.<sup>3</sup> The most common of these nonprobate methods is insurance, which pays the proceeds of a policy to a named beneficiary without the need for probate.<sup>4</sup> Georgia law provides for both payable-on-death bank accounts and "Totten" trusts.<sup>5</sup> These three methods of nonprobate transfer all sound in contract.<sup>6</sup> The decedent contracts with a third party to transfer ownership to a designated beneficiary at the decedent's death, thus, the designated property never enters the decedent's probate estate.<sup>7</sup> A common method of nonprobate transfer for securities is a joint account known as joint tenancy with right of survivorship (JTWROS); under this approach, the owner of securities designates another person as a co-owner who will take the property by operation of law at the original owner's death.<sup>8</sup> Because the decedent's interest in property held in JTWROS vanishes at death, the property never enters the decedent's probate estate.<sup>9</sup> However, JTWROS creates a lifetime, present interest in persons designated as joint tenants; joint tenants have enforceable rights in the property, if a disagreement arises or if the original owner changes her mind.<sup>10</sup> An income tax problem may also arise. JTWROS property is included in a decedent's gross estate for estate tax purposes, to the extent that the decedent made contributions to the account or property.<sup>11</sup> Such property is thus eligible for stepped-up basis in the hands of the donee; however, the IRS places on the donee the burden of proving that the contributions were the decedent's and not the donee's.<sup>12</sup> The result may be that the donee ends up with the decedent's basis in the property for income tax purposes.<sup>13</sup>

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3. See PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 125 (2d ed. 1994).

4. See *id.* at 136-37.

5. See 1976 Ga. Laws 1388, § 8, at 1395 (codified at O.C.G.A. § 7-1-810 (1997)).

6. See HASKELL, *supra* note 3, at 131, 134, 141-42.

7. See *id.*

8. See *id.* at 126-27.

9. See *id.* at 127.

10. See Prefatory Note, *Uniform TOD Security Registration Act (1989)*, 8B UNIF. L. ANN. 479 (1993).

11. See I.R.C. §§ 1014, 1.1014-1(a), 2040 (West 1999).

12. See *id.*

13. See *id.*

The Act substantially mirrors the Uniform TOD Security Registration Act (UTODSRA), as published in Uniform Laws Annotated.<sup>14</sup>

Senators Mike Crotts of the 17th District, Robert Lamutt of the 21st District, and Nathan Dean of the 31st District sponsored SB 12 to provide citizens with a method of transferring registered securities at death to designated beneficiaries outside the probate estate.<sup>15</sup>

Representative Mitchell Kaye of the 37th District introduced the UTODSRA in the 1997 legislative session, where it stalled in committee.<sup>16</sup> Representative Kaye introduced it to expedite the transfer of securities after death; he was prompted by the experience of a constituent who suffered losses when the securities market shifted unfavorably during a long probate delay.<sup>17</sup> Representative Kaye believed that the bill's introduction by a House Republican may have hurt its chances for success in the 1997 session.<sup>18</sup> The Act, as passed, is the same as the version introduced in 1997.<sup>19</sup>

Senator Mike Crotts of the 17th District introduced the Act in the 1999 legislative session. He came up with the idea for introducing transfer-on-death legislation while settling the estate of his wife's grandmother.<sup>20</sup> He thought it "foolish to have to probate securities," especially at a time when family members are naturally upset by the loss of a loved one.<sup>21</sup> When he consulted legislative counsel, he discovered the UTODSRA and subsequently consulted the drafter, Professor Richard Wellman of the University of Georgia.<sup>22</sup>

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14. Compare O.C.G.A. §§ 53-5-60 to -71 (Supp. 1999), with Uniform Transfer TOD Security Registration Act (1989), 8B U.L.A. 482-95 (1993). The Act is identical to the text of the Uniform Transfer TOD Security Registration Act except for the omission of some definitions that are provided elsewhere in the Georgia Code. See 1996 Ga. Laws 504, § 10 (codified at O.C.G.A. § 53-1-2 (1997)).

15. See Telephone Interview with Sen. Mike Crotts, Senate District No. 17 (May 18, 1999) [hereinafter Crotts Interview].

16. See HB 642, as introduced, 1997 Ga. Gen. Assem.

17. See E-mail Interview with Rep. Mitchell Kaye, House District No. 37 (May 23, 1999) [hereinafter Kaye Interview].

18. See *id.*

19. Compare HB 642, as introduced, 1997 Ga. Gen. Assem., with SB 12, as introduced, 1999 Ga. Gen. Assem. The only difference between the two versions is the effective date. Compare HB 642, as introduced, 1997 Ga. Gen. Assem., with SB 12, as introduced, 1999 Ga. Gen. Assem.

20. See Crotts Interview, *supra* note 13.

21. *Id.*

22. See *id.*

The bill remained virtually unchanged as it passed through the committees and both chambers.<sup>23</sup> However, questions about the effect of the UTODSRA arose.<sup>24</sup> The bill was originally assigned to the Senate Committee for Finance and Public Utilities, which unanimously approved it.<sup>25</sup> At the request of its sponsor, the bill was recommitted to the Senate Judiciary Committee, where it also received a unanimous do pass.<sup>26</sup>

Professor Wellman provided information for committee members, and, ultimately, the Georgia General Assembly as a whole.<sup>27</sup> He presented arguments for the bill's passage and sought to answer questions about its purpose and effect.<sup>28</sup> His materials begin by succinctly restating the bill's purpose of allowing non-testamentary transfer of registered securities, and then go on to list the organizations that supported the bill.<sup>29</sup> The organizations included the American Bar Association, the American Association of Retired Persons, and the Securities Industry Association.<sup>30</sup> Wellman's materials also provided a list of the forty-four states that had already adopted laws similar to the Act.<sup>31</sup> The materials stress both the voluntary nature of TOD registration and the absolute control that remains in the hands of the owner because TOD registration grants no present or lifetime interest to the beneficiary.<sup>32</sup> The materials also

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23. Compare SB 12, as introduced, 1999 Ga. Gen. Assem., with SB 12 (HCS), 1999 Ga. Gen. Assem. The only alteration was that the effective date was changed from January 1, 2000 to July 1, 1999. Compare SB 12, as introduced, 1999 Ga. Gen. Assem., with SB 12 (HCS), 1999 Ga. Gen. Assem.

24. See *State of Georgia Session Archives* (audio recording of Feb. 12, 1999 Senate Proceedings) (audio recording of Mar. 17, 1999 House Proceedings) <<http://www.ganet.org/services/leg/audio/99archive/>>.

25. See *id.*

26. See *id.*

27. See *id.*; Richard Wellman, *A Few Facts About the TOD Security Registration Act*, Handout.

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.* The forty-four states that had already adopted the Act at the time of its consideration by the Georgia General Assembly include the following: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See *id.*

32. See *id.*

mention the serious problems that may attend other probate-avoidance techniques:

A person, typically elderly and worried about the impact of high probate costs on family survivors, decides to add the name of a child to her own to create a joint tenancy with right of survivorship on a security or account title. The sole purpose is probate avoidance. The elderly originator of the joint holding probably does not realize that the one named co-owner now appears to own half of the asset meaning that the investment can't be cashed out or re-registered without the consent of both owners. The bad news may come when a child's creditors or divorcing spouse lays claims to the child's half. In short, to get the benefit of probate avoidance through co-ownership and survivorship, an elderly owner has to subject money set aside for future needs to the whims and claims of others. Including possible strangers to the family [sic].<sup>33</sup>

The materials conclude by pointing out that TOD avoids the risks inherent in JTWRROS.<sup>34</sup>

Professor Wellman likens the advantages of TOD to those of other forms of nonprobate transfers, such as insurance, which sound in contract rather than property law.<sup>35</sup> He particularly sees the similarity of TOD to POD and Totten trusts, which are already available in Georgia; "[i]t's the same animal."<sup>36</sup>

In the Senate floor debate, Senator Michael S. Meyer von Bremen of the 12th District questioned the lack of safeguards attached to TOD registration and contrasted the process with the formalities of making a will.<sup>37</sup> Senator Crotts admitted that TOD registration lacked the safeguards of a will and could thus permit a greater danger that a disposition might be made under duress or with undue influence; however, he stated that the "same thing can happen under right-of-survivorship."<sup>38</sup>

Senator Michael J. Egan of the 40th District asked how the bill allowed an owner of securities to do anything that he or she could not

33. *Id.*

34. *See id.*

35. *See* Telephone Interview with Prof. Richard Wellman, University of Georgia School of Law (May 21, 1999).

36. *Id.*

37. *See State of Georgia Session Archives* (audio recording of Feb. 12, 1999 Senate Proceedings) <<http://www.ganet.org/services/leg/audio/99archive/>>.

38. *Id.*

already do by means of JTWROS.<sup>39</sup> In response, Senator Crotts pointed out that the bill allows ownership to rest clearly in the hands of the designating owner.<sup>40</sup> Senator Nathan Dean of the 31st District then called attention to the fact that the bill had passed through two Senate Committees without having a word changed.<sup>41</sup>

In the House, Representative Harold Mann of the 5th District asked House sponsor Representative Robert Reichert of the 126th District what would happen if “someone had put in their will to leave such and such stocks to someone, and then had inadvertently later put what you’re trying to do? Which would rule: what the will said or what the stock said?”<sup>42</sup> Representative Reichert answered: “What the stocks say. If you’ve already disposed of an asset, then your will would have no effect on it.”<sup>43</sup>

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39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.* (audio recording of Mar. 17, 1999 House Proceedings) <<http://www.ganet.org/services/leg/audio/99archive/>>.

43. *Id.*