
A BILL FOR AN ACT

RELATING TO THE PERMITTED TRANSFERS IN TRUST ACT.

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

1 SECTION 1. Hawaii relies heavily on the travel industry as
2 an economic engine. Because of instabilities in that industry,
3 the state must seek out other sources of revenue to help
4 stabilize the current budget crisis and fuel future economic
5 growth. Hawaii can build on proven domestic and international
6 estate and financial planning methodologies to amend its laws
7 for the purpose of attracting foreign-source capital.

8 The intent of this Act is to offer incentives to high net-
9 worth individuals throughout the United States and throughout
10 the world to transfer a portion of their liquid net worth into
11 this state for asset and trust management. This Act is designed
12 to increase the assets under management by Hawaii's private
13 financial sector, increase state tax revenues, and position the
14 State as a world-class financial management jurisdiction.

15 SECTION 2. The Hawaii Revised Statutes is amended by
16 adding a new chapter to be appropriately designated and to read
17 as follows:

18



1 "CHAPTER

2 PERMITTED TRANSFERS IN TRUST

3 § -1 Short title. This chapter shall be known and may
4 be cited as the Permitted Transfers in Trust Act.

5 § -2 Definitions. As used in this chapter:

6 "Cash" means United States currency.

7 "Claim" means a right to payment, whether or not the right
8 is reduced to judgment, liquidated, unliquidated, fixed,
9 contingent, matured, unmatured, disputed, undisputed, legal,
10 equitable, secured, or unsecured.

11 "Creditor" means, with respect to a transferor, a person
12 who has a claim.

13 "Debt" means liability on a claim.

14 "Former spouse" means a person to whom the transferor was
15 married where the marriage was dissolved before the time of the
16 permitted transfer.

17 "Marketable securities" means securities that are:

- 18 (1) Exchanged on a governmentally regulated exchange
19 within the United States including, common stocks,
20 bonds, mutual funds, or exchange traded funds; and

- 21 (2) Permitted to be held by a fiduciary under Hawaii state
22 law;



1 providing that "marketable securities" does not include real
2 estate or any interests in corporations, partnerships, and
3 limited liability companies that are not publicly traded.

4 "Permitted property" means cash, marketable securities,
5 life insurance contracts, and non-private annuities.

6 "Permitted transfer" means a transfer of permitted property
7 by or from a transferor to a permitted trustee by means of a
8 trust instrument, regardless of whether consideration is
9 exchanged.

10 "Permitted trustee" means a person, other than the
11 transferor, who is a resident of this state, or a bank or trust
12 company authorized to do business in this state and to act as a
13 trustee subject to supervision by the department of commerce and
14 consumer affairs and pursuant to chapter 412.

15 "Person" means a natural person.

16 "Spouse" means a person to whom the transferor is married
17 at the time of the permitted transfer.

18 "Transfer" means the disposition, conveyance, or assignment
19 of permitted property to a permitted trustee or the exercise of
20 a power that causes the disposition, conveyance, or assignment
21 of permitted property to a permitted trustee.

22 "Transfer tax" means the tax described in section -12.



1 "Transferor" means an owner of permitted property; a holder
2 of a power of appointment that authorizes the holder to appoint
3 in favor of the holder, the holder's creditors, the holder's
4 estate, or the creditors of the holder's estate; or a trustee
5 who directly or indirectly makes a disposition of permitted
6 property.

7 "Trust instrument" means an irrevocable instrument
8 appointing a permitted trustee for the permitted property that
9 is the subject of a disposition.

10 **§ -3 Completed transfers.** The transfer of permitted
11 property under this chapter shall be deemed completed following
12 the completion of all of the following:

- 13 (1) The delivery of permitted property by the transferor
14 to the permitted trustee and the written acceptance of
15 the permitted property by the permitted trustee;
- 16 (2) The delivery by the transferor to the permitted
17 trustee of a signed and notarized certificate of
18 solvency that states that the amount of the transfer
19 is equal to or less than twenty-five per cent of the
20 transferor's net worth and that the transfer will not
21 result in delay, defrauding, or hindrance of a
22 creditor who is known or knowable to the transferor at



1 the time of the permitted transfer with a claim
2 against the property that is subject to the transfer;
3 and

4 (3) The filing of the appropriate form by the transferor
5 with the department of taxation and payment of the
6 attendant transfer tax.

7 **§ -4 Permitted trustees.** (a) A permitted trustee shall
8 be a person, other than the transferor, who is a resident of
9 this state, or a bank or trust company authorized to do business
10 in this state and to act as a trustee subject to supervision by
11 the department of commerce and consumer affairs and pursuant to
12 chapter 412.

13 (b) If a permitted trustee of a trust ceases to meet the
14 requirements of subsection (a) and there remains no trustee that
15 meets the requirements, the permitted trustee shall be deemed to
16 have resigned as of the time that the trustee no longer meets
17 the requirements of subsection (a). At that time, the successor
18 permitted trustee provided for in the trust instrument shall
19 become the permitted trustee of the trust. In the absence of
20 any successor permitted trustee provided for in the trust
21 instrument, a trust advisor or protector provided for in the
22 trust instrument shall appoint a successor permitted trustee.



1 In the absence of an appointed trust advisor or protector, a
2 Hawaii court of competent jurisdiction shall, upon application
3 of any interested party, appoint a successor permitted trustee.

4 (c) A permitted trustee may appoint an investment advisor
5 to manage the assets of the trust fund; provided that
6 administrative and non-administrative fiduciary responsibility
7 shall remain vested, as against beneficiaries of the trust, with
8 the permitted trustee.

9 **§ -5 Trust instrument.** (a) A trust instrument shall be
10 irrevocable and shall expressly incorporate the laws of this
11 state governing the validity, construction, and administration
12 of the trust.

13 (b) The trustee, in its discretion, may terminate any
14 trust if and when its fair market value has declined to the
15 extent that would make it uneconomical, imprudent, or unwise to
16 continue to retain the trust, and shall pay and distribute the
17 trust to the persons entitled to mandatory or discretionary
18 income distributions as the trustee in the trustee's absolute
19 discretion shall decide.

20 (c) A trust instrument shall not be deemed revocable on
21 account of the inclusion of:



- 1 (1) A transferor's power to veto a distribution from the
2 trust;
- 3 (2) A power of appointment other than a power to appoint
4 to the transferor, the transferor's creditors, the
5 transferor's estate, or the creditors of the
6 transferor's estate that may be exercised by will or
7 other written instrument of the transferor effective
8 only upon the transferor's death;
- 9 (3) The transferor's potential or actual receipt of
10 income, including rights to income retained in the
11 trust instrument;
- 12 (4) The transferor's annual receipt of a percentage not to
13 exceed five per cent of the initial value of the trust
14 assets or its value determined from time to time
15 pursuant to the trust instrument or of a fixed amount
16 that on an annual basis does not exceed five per cent
17 of the initial value of the trust assets;
- 18 (5) The transferor's potential or actual receipt or use of
19 the trust's principal due to the discretionary action
20 of a permitted trustee or to a provision in the trust
21 instrument that governs the distribution of principal;
22 provided that any included provision shall not confer



1 upon the transferor a substantially unfettered right
2 to the receipt or use of the principal;

3 (6) The transferor's right to remove a permitted trustee
4 or advisor and to appoint a new permitted trustee or
5 advisor;

6 (7) The transferor's potential or actual receipt of income
7 or principal to pay income taxes due on income of the
8 trust if the trust instrument includes a provision
9 allowing or directing the use of trust funds to pay
10 income taxes due, or if the permitted trustee acts in
11 the trustee's discretion to allow payment of income
12 taxes due on the trust income; or

13 (8) A permitted trustee's authority pursuant to
14 discretion, direction, or the transferor's exercise of
15 a testamentary power of appointment to pay all or any
16 part of the transferor's debts outstanding at the time
17 of the transferor's death, the expenses of
18 administering the transferor's estate, or any estate
19 or inheritance tax imposed on or with respect to the
20 transferor's estate.

21 (d) A trust instrument may provide that the interest of a
22 beneficiary of the trust, including a beneficiary who is the



1 transferor of the trust, may not be transferred, assigned,
2 pledged, or mortgaged, whether voluntarily or involuntarily,
3 before the permitted trustee actually distributes the property
4 or income to the beneficiary. Any provision of this type
5 contained in the trust instrument shall be deemed to be a
6 restriction on the transfer of the transferor's beneficial
7 interest in the trust that is enforceable under applicable
8 nonbankruptcy law within the meaning of 11 United States Code
9 Section 541(c)(2) of the Bankruptcy Code or any successor
10 provision.

11 (e) A transferor may appoint, through the trust
12 instrument, one or more advisors or protectors, including the
13 following:

14 (1) Advisors who have authority under the terms of the
15 trust to remove and appoint permitted trustees,
16 advisors, or protectors;

17 (2) Advisors who have authority under the terms of the
18 trust to direct, consent to, or disapprove of
19 distributions from the trust; and

20 (3) Advisors, including the transferor beneficiary of the
21 trust, who serve as investment advisors to the trust.



1 (f) Whenever there shall be a dispute, deadlock, or
2 difference of opinion between a permitted trustee and an
3 advisor, the transferor may direct that the determination of the
4 advisor shall be binding upon the permitted trustee, but that
5 the permitted trustee shall bear no liability or accountability
6 for any act or transaction entered into as a result of the
7 enforcement of the advisor's privilege if the permitted trustee
8 dissents in writing.

9 (g) If a trustee of a trust existing prior to the
10 enactment of this chapter proposes to make a permitted transfer,
11 but the trust instrument does not contain a power of appointment
12 that conforms to section -5(c)(2), the trustee may deliver an
13 irrevocable written election to have section -5(c)(2) apply
14 to the trust, and the nonconforming powers of appointment shall
15 be deemed modified to the extent necessary to conform with
16 section -5(c)(2). The irrevocable written election shall
17 include a description of the original transferor's powers of
18 appointment as modified, and the original transferor's written
19 consent to the modification. Consent of the original transferor
20 to a modification of powers of appointment shall not be
21 considered to be a permitted transfer.



1 (h) If, in any action brought against a trustee of a trust
2 that results from a permitted transfer, a court declines to
3 apply the law of this state in determining the validity,
4 construction, or administration of the trust, or the effect of a
5 spendthrift provision of the trust, the trustee, immediately
6 upon the court's action and without the further order of any
7 court, shall cease to be trustee of the trust and a successor
8 trustee shall thereupon succeed as trustee in accordance with
9 the terms of the trust instrument. If the trust instrument does
10 not provide for a successor trustee or does not provide for an
11 advisor or protector with powers to appoint successor trustees,
12 a Hawaii court of competent jurisdiction shall appoint a
13 successor permitted trustee upon the application of any
14 beneficiary of the trust under any terms and conditions that the
15 court determines to be consistent with the purposes of the trust
16 and with this chapter. Upon the removal of a trustee pursuant
17 to this section, the trustee who has been removed shall have no
18 power or authority other than to convey the trust property to
19 the successor trustee.

20 § -6 **Investments.** Nothing in this chapter shall
21 prohibit a permitted trustee from diversifying trust assets;



1 provided that a permitted trustee shall be authorized to invest
2 only in permitted property, as defined in this chapter.

3 **§ -7 Retained interests of transferor.** (a) A permitted
4 transfer shall be subject to this chapter notwithstanding a
5 transferor's retention of any or all of the powers and rights
6 described in section -5(c) and notwithstanding the
7 transferor's service as investment advisor pursuant to
8 section -5(c).

9 (b) The transferor shall have only the powers and rights
10 specifically conferred by the trust instrument. Except as
11 permitted by sections -5(c) and -5(e), a transferor shall
12 have no rights or authority with respect to the property that is
13 the subject of a permitted transfer or to the income from
14 property that is the subject of a permitted transfer. Any
15 agreement or understanding purporting to grant or permit the
16 retention of any greater rights or authority shall be void.

17 **§ -8 Avoidance of permitted transfers in trust.** (a) No
18 claim, including an action to enforce a judgment entered by a
19 court or other body having adjudicative authority, by a creditor
20 against property that is subject to a permitted transfer that
21 arises after a permitted transfer and no claim by a creditor to
22 avoid a permitted transfer shall be brought at law or in equity



1 for attachment or other provisional remedy unless the permitted
2 transfer was made with actual intent to defraud, hinder, or
3 delay the creditor.

4 (b) An allowable claim under subsection (a) of this
5 section shall be extinguished unless:

6 (1) The creditor's claim arose before the permitted
7 transfer was made and the action is brought on the
8 latter of the date of the permitted transfer or the
9 date of the enactment of this section; or

10 (2) The creditor's claim arose concurrent with or
11 subsequent to the permitted transfer, and the action
12 is brought within two years after the permitted
13 transfer is made.

14 (c) In any action described in subsection (a), the burden
15 to prove intent to defraud, hinder, or delay by clear and
16 convincing evidence shall be upon the creditor.

17 (d) For purposes of this section, a permitted transfer
18 that is made by a transferor who is a trustee shall be deemed to
19 have been made as of the date that the property that is the
20 subject of the permitted transfer was originally transferred via
21 a trust instrument that meets the requirements of this chapter
22 to the transferor or the transferor's predecessor in interest.



1 (e) Notwithstanding any law to the contrary, a creditor or
2 other person who purports to have a claim against property that
3 is the subject of a permitted transfer shall have only the
4 rights, with respect to a permitted transfer, as are provided in
5 this section and sections -9 and -10.

6 (f) No creditor or any other person shall have any claim
7 or cause of action, including an action to enforce a judgment
8 entered by a court or other body having adjudicative authority,
9 against a trustee or advisor described in section -4(c) or
10 against any person involved in drafting, preparing, executing,
11 or funding a trust or in counseling the parties to a trust that
12 is the subject of a permitted transfer if, as of the date of the
13 action, the action would be barred under this section.

14 **§ -9 Limitations on permitted transfers.** The
15 limitations contained in section -8 on actions by creditors
16 to avoid permitted transfers shall not apply to:

17 (1) Any person to whom the transferor is indebted on
18 account of a family court-supervised agreement or
19 family court order for the payment of support or
20 alimony to the transferor's spouse, former spouse, or
21 children, or for a division or distribution of
22 property to the transferor's spouse or former spouse,



1 but only to the extent of the debt and not to any
2 claim for forced heirship, legitime, or elective
3 share;

4 (2) Any person who suffers death, personal injury, or
5 property damage on or before the date of a permitted
6 transfer; provided that the death, personal injury, or
7 property damage is determined to have been caused in
8 whole or in part by the tortious act or omission of
9 either the transferor or another person for whom the
10 transferor is or was vicariously liable to the extent
11 of the transferor's liability or vicarious liability;
12 or

13 (3) Any lender who extends a secured or collateralized
14 loan to the transferor based on the transferor's or
15 the transferor's agent's express or implied
16 representation that the assets of a trust established
17 under this chapter would be available as security
18 against the loan in the event of the transferor's
19 default thereon.

20 **§ -10 Effect of avoidance of permitted transfers. (a)**

21 A creditor may avoid a permitted transfer pursuant to
22 section -8 only to the extent necessary to satisfy the



1 transferor's debt to the creditor at whose instance the transfer
2 has been avoided, together with costs, including attorney's
3 fees, as allowed by a court.

4 (b) In an action pursuant to subsection (a) to avoid a
5 permitted transfer:

6 (1) If a court finds that a trustee has not acted with
7 intent to defraud, hinder, or delay the creditor in
8 accepting or administering the property that is the
9 subject of the permitted transfer:

10 (A) The trustee shall have a first and paramount lien
11 against the property that is the subject of the
12 permitted transfer in an amount equal to the
13 entire cost, including attorney's fees, properly
14 incurred by the trustee in the defense of the
15 action or proceedings to avoid the permitted
16 transfer; and

17 (B) The permitted transfer shall be avoided, subject
18 to payment of proper fees, costs, preexisting
19 rights, claims, and interests of the trustee and
20 of any predecessor trustee who has not acted with
21 intent to defraud, hinder, or delay the creditor;

22 and



1 (2) If the court is satisfied that a beneficiary of the
2 trust has not acted with intent to defraud, hinder, or
3 delay the creditor, the permitted transfer shall be
4 avoided subject to the beneficiary's right to retain
5 any distribution made prior to the creditor's
6 commencement of an action to avoid the permitted
7 transfer. For purposes of this paragraph, it shall be
8 presumed that a beneficiary did not act with intent to
9 defraud, hinder, or delay the creditor merely by
10 creating the trust or by accepting a distribution made
11 in accordance with the terms of the trust.

12 (c) A creditor who brings an action pursuant to
13 section -8 to avoid a permitted trust shall have the burden
14 of proving by clear and convincing evidence that a trustee or
15 beneficiary acted with intent to defraud, hinder, or delay the
16 creditor; provided that in the case of a beneficiary who is also
17 the transferor, the burden on the creditor shall be to prove by
18 a preponderance of the evidence that the transferor-beneficiary
19 acted with intent to defraud, hinder, or delay the creditor.
20 Mere acceptance of permitted property by a trustee shall not
21 constitute evidence of intent to defraud, hinder, or delay a
22 creditor.



1 (d) Notwithstanding any other provision of this chapter, a
2 creditor shall have no right against the interest of a
3 beneficiary to a trust based solely on the beneficiary's right
4 to authorize or direct the trustee to use all or part of the
5 trust property to pay:

6 (1) Estate or inheritance taxes imposed upon or due to the
7 beneficiary's estate;

8 (2) Debts of the beneficiary's estate; or

9 (3). Expenses of administering the beneficiary's estate
10 unless the beneficiary actually directs the payment of taxes,
11 debts, or expenses and then only to the extent of that
12 direction.

13 **§ -11 Multiple transfers.** If more than one permitted
14 transfer is made by means of the same trust instrument:

15 (1) The making of a subsequent permitted transfer shall be
16 disregarded in determining whether a creditor's claim
17 with respect to a prior permitted transfer is
18 extinguished as provided in section -8; and

19 (2) Any distribution to a beneficiary shall be deemed to
20 have been made from the latest permitted transfer.

21 **§ -12 Taxation.** (a) The State shall levy upon the
22 transferor a per cent tax on all permitted transfers.



1 (b) A nongrantor trust established under this chapter
2 shall be subject to Hawaii income tax.

3 (c) A nongrantor trust established under this chapter
4 without a Hawaii beneficiary shall not be subject to Hawaii
5 income tax under section 235-4.5(a).

6 (d) Hawaii resident taxpayers who receive actual or
7 constructive distributions of income or principal from trusts
8 shall be subject to all applicable taxes on that income."

9 SECTION 3. Section 525-4, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "[~~f~~]**\$525-4**[~~]~~ **Exclusions from statutory rule against**
12 **perpetuities.** Section 525-1 shall not apply to:

- 13 (1) A fiduciary's power to sell, lease, or mortgage
14 property, and the power of a fiduciary to determine
15 principal and income;
- 16 (2) A discretionary power of a trustee to distribute
17 principal before termination of a trust;
- 18 (3) A nonvested property interest held by a charity,
19 government, or governmental agency or subdivision, if
20 the nonvested property interest is preceded by an
21 interest held by another charity, government, or
22 governmental agency or subdivision;



1 (4) A property interest in or a power of appointment with
2 respect to a pension, profit-sharing, stock bonus,
3 health, disability, death benefit, income deferral, or
4 other current or deferred benefit plan for one or more
5 employees, independent contractors, or their
6 beneficiaries or spouses; [~~or~~]

7 (5) A property interest, power of appointment, or
8 arrangement that was not subject to the common-law
9 rule against perpetuities or is excluded by any other
10 applicable law[-]; or

11 (6) A trust described in chapter _____."

12 SECTION 4. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 5. This Act shall take effect on July 1, 2020;
15 provided that section 2 shall apply to permitted transfers made
16 after the effective date of this Act.



Report Title:

Permitted Transfers in Trust Act; Rule Against Perpetuities

Description:

Creates the Permitted Transfers in Trust Act to govern transfers of currency, bonds, and securities from a transferor to a trustee by means of an irrevocable trust instrument. Specifies that the rule against perpetuities does not apply to transfers pursuant to the Permitted Transfers in Trust Act. Effective July 1, 2020. (SB2842 HD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

