

ACT 260

H.B. NO. 2080

A Bill for an Act Relating to Forfeiture.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Title 37, Hawaii Revised Statutes, is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
FORFEITURE**

§ -1 **Definitions.** In this chapter, unless a different meaning plainly is required:

“Attorney general” means the attorney general or deputy attorneys general of the State of Hawaii.

“Contraband” means any property the possession of which is illegal.

“Controlled substances” means a drug, substance, or immediate precursor in schedules I through V of chapter 329, part II.

“Covered offense” means any crime set forth in section or any other offense for which forfeiture is provided by the law relating to a particular offense.

“Enterprise” includes any sole proprietorship, partnership, corporation, association, or any union or group of individuals associated for a particular purpose although not a legal entity.

“Interest-holder” means a person in whose favor there is a security interest or who is the beneficiary of a perfected encumbrance pertaining to an interest in property.

“Law enforcement officer” means any public servant, whether employed by the State or subdivisions thereof or by the United States, vested by law with a duty to maintain public order, to make arrests for offenses, or to enforce the criminal laws, whether that duty extends to all offenses or is limited to a specific class of offenses. The attorney general, deputy attorneys general, county prosecuting attorneys, and deputy prosecuting attorneys engaged in the enforcement of criminal laws are included in the definition of the term law enforcement officer.

“Owner” means a person who is not a secured party within the meaning of section 490:9-105(N) and who has an in interest property¹, whether legal or

equitable. A purported interest which is not in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value shall not be recognized as an interest against this State in an action pursuant to this chapter. An owner with power to convey property binds other owners, and a spouse binds the person's spouse, by any act or omission.

"Person" includes any individual or entity capable of holding a legal or beneficial interest in property.

"Person known to have an interest" means a person whose interest in property is reflected in the public records in which his interest is required by law to be recorded or reflected in order to perfect his interest. If a person's interest in property is not required by law to be reflected in public records in order to perfect the person's interest in the property, a person shall be known to have an interest only if such interest can be readily ascertained at the time of the commencement of the forfeiture action pursuant to this chapter.

"Proceeds" means anything of value, derived directly or indirectly from or realized through unlawful activity.

"Property" means real property, including things growing on, affixed to, and found on land; tangible and intangible personal property, including currency, instruments, vehicles, boats, aircraft or any other kind of conveyance; and all rights, privileges, interests, claims, and securities pertaining to such property.

"Prosecuting attorney" means the prosecuting attorney or deputy prosecuting attorneys of the various counties, or the attorney general or deputy attorneys general when engaged in the prosecution of a criminal offense.

"Seizing agency" means any department or agency of this state or its political subdivisions which regularly employs law enforcement officers, and which employed the law enforcement officers, and which employed the law enforcement officer who seized property for forfeiture, or such other agency as the seizing agency may designate in a particular case by its chief executive officer or designee.

"Seizure for forfeiture" means seizure of property by a law enforcement officer coupled with an assertion by the seizing agency or by a prosecuting attorney that the property is subject to forfeiture.

§ -2 Jurisdiction. The State may commence a proceeding in the circuit court if the property for which forfeiture is sought is within this State at the time of the filing of the action or if the courts of this state have in personam jurisdiction of an owner of or interest-holder in the property.

§ -3 Venue. An action brought pursuant to this chapter may be brought in the county which the property is seized or in any county where an owner or interest-holder could be complained against for the conduct alleged to give rise to the forfeiture of the property.

§ -4 Covered offenses. (1) Offense for which property is subject to forfeiture under this chapter are:

- (a) All offenses which specifically authorize forfeiture;
- (b) Murder, kidnapping, gambling, criminal property damage, robbery, bribery, extortion, theft, burglary, promoting a dangerous, harmful, or detrimental drug, or commercial promotion of marijuana, which is chargeable as a felony offense under state law; and
- (c) The manufacture, sale, or distribution of a controlled substance in violation of chapter 329, promoting detrimental drugs or intoxicating compounds, promoting pornography, promoting pornography for minors, or promoting prostitution, which is chargeable as a felony or misdemeanor offense, but not as a petty misdemeanor, under state law.

(2) The attempt, conspiracy, solicitation, coercion, or intimidation of another to commit any offense for which property is subject to forfeiture.

§ -5 Property subject to forfeiture; exemption. (1) The following is subject to forfeiture:

- (a) Property described in a statute authorizing forfeiture;
- (b) Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity;
- (c) Any firearm which is subject to forfeiture under any other subsection of this section or which is carried during, visible, or used in furtherance of the commission, attempt to commit, or conspiracy to commit a covered offense, or any firearm found in proximity to contraband or to instrumentalities of an offense;
- (d) Contraband, which shall be seized and summarily forfeited to the state without regard to the procedures set forth in this chapter;
- (e) Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense;
- (f) Any property derived from any proceeds which were obtained directly or indirectly from the commission of a covered offense;
- (g) Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has been established, participated in, operated, controlled, or conducted in order to commit a covered offense;
- (h) All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.

(2) Except that:

- (a) Real property, or an interest therein, may be forfeited under the provisions of this chapter only in cases in which the covered offense is chargeable as a felony offense under state law;
- (b) No property shall be forfeited under this chapter to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge and consent of that owner.
- (c) No conveyance used by any person as a common carrier in the transaction of a business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter; and
- (d) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent.
- (e) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission.

§ -6 Seizure of property. (1) Property subject to forfeiture under this chapter may be seized for forfeiture by a law enforcement officer:

- (a) On process issued pursuant to the rules of civil procedure or the provisions of this chapter including a seizure warrant;

- (b) By making a seizure for forfeiture on property seized on process issued pursuant to law; or
- (c) By making a seizure for forfeiture without court process as follows:
 - (i) The seizure for forfeiture is of property seized incident to an arrest or search;
 - (ii) The property subject to seizure for forfeiture has been the subject of a prior judgement in favor of the state or any other state or the federal government in forfeiture proceeding;
 - (iii) The law enforcement officer has probable cause to believe that the property seized for forfeiture is directly or indirectly dangerous to health or safety; or
 - (iv) The law enforcement officer has probable cause to believe that the property is subject to forfeiture.

(2) In determining probable cause for seizure, the fact that a firearm, money, or any negotiable instrument was found in proximity to contraband or to instrumentalities of an offense gives rise to an inference that the money, or instrument was the proceeds of contraband or that the firearm, money or instrument was used or intended to be used to facilitate commission of the offense.

§ -7 Powers and duties of law enforcement officers and agencies. (1)

In the event of a seizure for forfeiture under section -6, the property is not subject to replevin, conveyance, sequestration, or attachment but is deemed to be in the custody of the law enforcement agency making the seizure for forfeiture. The seizing agency or the prosecuting attorney may authorize the release of the seizure for forfeiture on the property if forfeiture or retention is unnecessary, may transfer the property to any other county, state, or federal agency or may transfer the action to another prosecuting attorney by discontinuing forfeiture proceedings in favor of forfeiture proceedings initiated by the other agency or prosecuting attorney. An action pursuant to this chapter shall be consolidated with any other action or proceeding pursuant to this chapter relating to the same property upon motion by the prosecuting attorney in either action.

(2) If property is seized for forfeiture under section -6 pending forfeiture and final disposition, the seizing agency may do any of the following:

- (a) Place the property under constructive seizure by posting notice of seizure for forfeiture on the property or by filing notice of seizure for forfeiture or notice of pending forfeiture in any appropriate public record relating to the property;
- (b) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, deposit it in an interest bearing account;
- (c) Remove the property to a place designated by the court; or
- (d) Provide for another agency to take custody of the property and remove it to an appropriate location within the jurisdiction of the court.

(3) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct an inventory and estimate the value of the property seized. Within twenty days after seizure for forfeiture the seizing agency shall make reasonable efforts to provide notice of seizure for forfeiture to all parties known to have an interest in the seized property.

(4) In the event of a seizure for forfeiture under section -6, the seizing agency shall send to a prosecuting attorney a written request for forfeiture within thirty days, which shall include a statement of facts and circumstances of the seizure, the appraised or estimated value of the property, and a summary of the facts relied on for forfeiture.

§ **-8 Notice of pending forfeiture.** Whenever notice of pending forfeiture is required under this chapter it shall be given or provided in one of the following ways:

- (a) If the owner's or interest-holder's name and current address are known:
 - (i) By personal service; or
 - (ii) If the mailing a copy of the notice to the address;
- (b) If the owner's or interest-holder's interest is required by law to be on record with a state or federal agency in order to perfect an interest in the property, but the person's current address is not known, by mailing a copy of the notice by certified mail to any address on the record; or
- (c) If the owner's or interest-holder's address is not known, and is not on record pursuant to subsection (b), or if the person's interest is not known, by publication in one issue of a newspaper of general circulation in the county in which the seizure occurs.

§ **-9 Commencement of proceedings.** (1) The prosecuting attorney shall determine whether it is probable that the property is subject to forfeiture and, if so, may cause the initiation of administrative or judicial proceedings against the property. If, on inquiry and examination, the prosecuting attorney determines that the proceedings probably cannot be sustained or that justice does not require the institution of such proceedings, the prosecuting attorney shall notify the seizing agency, and as soon as practicable authorize the release of the seizure for forfeiture on the property or on any specified interest in it.

(2) If the property sought to be forfeited is real property, including fixtures, the prosecuting attorney shall file a lis pendens with respect to the property.

§ **-10 Administrative forfeiture.** The prosecuting attorney may initiate administrative forfeiture of property other than real property, the estimated value of which is less than \$100,000.00, or of any vehicle or other conveyance, regardless of value, in the following manner:

- (1) If the prosecuting attorney initiates administrative forfeiture, the prosecuting attorney shall provide notice of pending forfeiture by giving notice within thirty days after receiving written request for seizure for forfeiture from the seizing agency as provided in § -8 to persons known to have an interest who have not previously received notice;
- (2) Administrative forfeiture shall be initiated by filing a petition with the attorney general, who may promulgate rules and regulations to effectuate the purposes of this section;
- (3) The attorney general may forfeit property administratively as follows:
 - (a) The attorney general shall provide notice of intention to forfeit property administratively by publication in a local newspaper of general circulation;
 - (b) In addition, to the extent practicable the attorney general shall provide notice of intent to forfeit the property administratively to all persons known to have an interest in the property seized;
 - (c) Notice by publication or by mail shall include:
 - (i) A description of the property;
 - (ii) The estimated value of the property;
 - (iii) The date and place of seizure;
 - (iv) The violation of law alleged which authorizes forfeiture of the subject property;
 - (v) Instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation; and

- (vi) Notice that the property will be forfeited to the state if a petition for remission or mitigation or a claim and cost or in pauperis bond has not been timely filed.
- (4) Persons claiming an interest in the property may file either a petition for remission or mitigation of forfeiture, or a claim and cost or in pauperis bond, but not both, with the attorney general, within thirty days of the final notice by publication or receipt of written notice, whichever is earlier.
- (5) It shall be the duty of the attorney general to inquire into the facts and circumstances surrounding petitions for remission or mitigation of forfeiture. However, no petitioner is entitled to a hearing on the petition for remission or mitigation. Hearings, if any, shall be held at the discretion of the attorney general.
- (6) The attorney general shall provide the seizing agency and the petitioner a written decision on each petition for remission or mitigation within sixty days of receipt of such petition unless the circumstances of the case require additional time, in which case the attorney general shall notify the petitioner in writing and with specificity within the sixty day period that the circumstances of the case require additional time and further notify the petitioner of the expected decision date.
- (7) Any person claiming seized property may institute judicial review of the seizure and proposed forfeiture by timely filing with the attorney general a claim and bond to the State in the amount of 10 per cent of the estimated value of the property or in the sum of \$2,500, whichever is greater, with sureties to be approved by the attorney general, upon condition that in the case of the forfeiture the claimant shall pay all costs and expenses of the proceedings. In lieu of a cost bond, a claimant may file, under penalty of perjury, an in pauperis bond. The claim shall be signed under penalty of perjury and shall comply with the requirements of § -12(5). Upon receipt of the claim and bond, the attorney general shall notify the prosecuting attorney who may discretionarily continue to seek forfeiture by petitioning the circuit court for forfeiture of the property or may elect to honor the claim in which case the prosecuting attorney shall notify the seizing agency and authorize the release of the seizure for forfeiture on the property or on any specified interest in it. Any funds received by the attorney general as cost bonds shall be placed in an escrow accounting pending final disposition of the case.
- (8) If a judicial forfeiture proceeding is instituted subsequent to notice of administrative forfeiture, no duplicate or repetitive notice shall be required. The judicial proceeding, if any, shall adjudicate all timely filed claims.
- (9) In the event no claim and bond is timely filed, or if the attorney general, with sole discretion, determines that remission or mitigation is not warranted, the attorney general shall order forfeited all property seized for forfeiture. In the event the attorney general, with sole discretion, determines that remission or mitigation is warranted, the attorney general shall notify the seizing agency and the prosecuting attorney and order the release of the seizure for forfeiture on the property or on any specified interest in it. There shall be no appeal from the attorney general's decision or order of forfeiture or remission of mitigation.
- (10) Administrative proceedings and the adoption of rules under this section are exempt from the requirements of chapter 91, the Hawaii admin-

istrative procedure act, and are adjudicatory functions for the purposes of applicable sections of the Hawaii Revised Statutes.

§ -11 Judicial forfeiture proceedings; general. (1) In any judicial or administrative proceeding pursuant to this chapter, the court, on application of the state, may enter any restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, appraisers, accountants or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this chapter, including a warrant for its seizure, whether before or after the filing of a petition for forfeiture, complaint, or indictment.

(2) If property is seized for forfeiture without a seizure warrant, a prior judicial order of forfeiture, or a hearing pursuant to § -13, a court, on an application filed by an owner or interest-holder within fifteen days after notice of its seizure for forfeiture or actual knowledge of it, whichever is earlier, and complying with the requirements for claims in § -12, may issue an order to show cause to the seizing agency, with 30 days' notice to the prosecuting attorney, for a hearing on the issue of whether probable cause for forfeiture of the applicant's interest then exists, provided that, the order to show cause shall be set aside upon the filing of a petition for either administrative or judicial forfeiture prior to the hearing, in which event forfeiture proceedings shall be in accordance with this chapter.

(3) A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this chapter. For the purposes of this chapter, a conviction may result from a verdict or plea, including a no contest plea, or deferred acceptance of guilty plea, or no contest plea.

(4) In any judicial forfeiture proceeding pursuant to this chapter, if a defense is based on an exemption provided for in this chapter, the burden of proving the existence of the exemption is on the claimant or party raising the defense, and it is not necessary to negate the exemption in any petition, application, complaint, or indictment.

(5) The court shall receive and consider, at any hearing held pursuant to this chapter, except the hearing on claims pursuant to § -12, subsections (4) through (8) and § -13, section (7), evidence and information which would be admissible under the rules of penal procedure relating to preliminary hearings.

(6) All property, including all interest in such property, declared forfeited under this chapter vests in this state on the commission of the act or omission giving rise to forfeiture under this chapter together with the proceeds of the property after such time. Any such property or proceeds subsequently transferred to any person are subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing pursuant to this chapter the showings set out in § -5(2).

§ -12 Judicial in rem forfeiture proceedings. (1) If a forfeiture is authorized by law, it shall be ordered by a court on an action in rem brought by the prosecuting attorney on a verified petition for forfeiture filed in the criminal or civil division of the circuit court.

(2) A civil in rem action may be brought in addition to or in lieu of the civil and criminal in personam forfeiture procedures set forth in §§ -13 and -14 or the administrative forfeiture as set forth in § -10. Judicial in rem forfeiture proceedings are in the nature of an action in rem and are governed by the rules of civil procedure whether brought in the criminal or civil division of the circuit court, unless a different procedure is provided by law.

(3) On the filing of a civil in rem action by the state in circuit court the clerk of the court in which the action is filed shall provide, and the attorney for

the state may provide, the notice of pending forfeiture required by § -8 unless the files of the clerk of the court reflect that such notice has previously been made.

(4) An owner of or interest-holder in the property may file a claim against the property, within thirty days after the notice, for a hearing to adjudicate the validity of the claimed interest in the property. The hearings shall be held by the court without a jury.

(5) The claims shall be signed by the claimant and notarized under penalty of perjury and shall set forth all the following:

- (a) The name of the claimant;
- (b) The address at which the claimant will accept future mailings from the court or attorney for the state;
- (c) The nature and extent of the claimant's interest in the property;
- (d) The time, transferor and circumstances of the claimant's acquisition of the interest in the property;
- (e) The specific provisions of this chapter relied on in asserting that the property seized for forfeiture is not subject to forfeiture;
- (f) All facts supporting each such assertion;
- (g) Any additional facts supporting the claimant's claim; and
- (h) The precise relief sought.

Copies of the claim shall be mailed to the seizing agency and to the prosecuting attorney. No extension of time for the filing of a claim may be granted.

(6) The hearing on the claim, to the extent practicable and consistent with the interest of justice, shall be held within sixty days after the filing of the petition. The court may consolidate the hearing on the claim with a hearing on any other claim concerning the same property.

(7) At the hearing, the claimant may testify, present evidence and witnesses on the claimant's behalf, and cross-examine witnesses who appear at the hearing. The State may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing.

(8) The State has the initial burden of showing the existence of probable cause for seizure of the property. On such a showing by the state, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

(9) In accordance with its findings at the hearing, the court shall order an interest in property returned or conveyed to the claimant, if any, who has established by a preponderance of the evidence that the claimant's interest is not subject to forfeiture. The court shall order all other property, including all interests in the property, forfeited to the state and proceed pursuant to § -15 and -16.

§ -13 Judicial in personam forfeiture proceedings. (1) If a forfeiture is authorized by law, it shall be ordered by a court on a petition for forfeiture filed by the prosecuting attorney in personam civil or criminal action.

(2) In any proceeding pursuant to this section, the court, on application of the prosecuting attorney, may enter any order authorized by § -11 or take any other action to seize, secure, maintain or preserve the availability of property subject to forfeiture under this chapter, including a warrant for its seizure, whether before or after the filing of a petition for forfeiture, complaint, or indictment.

(3) A temporary restraining order under this section may be entered on petition of the state without notice or an opportunity for a hearing if the state demonstrates that:

- (a) There is probable cause to believe that the property with respect to which the order is sought would, in the event of final judgment or conviction, be subject to forfeiture; and

- (b) Provision of notice will jeopardize the availability of the property subject to forfeiture.

A temporary restraining order expires within ten days after the date on which it is entered unless the party against whom it is entered consents to an extension for a longer period or unless after commencing a hearing the court enters or is considering a preliminary injunction.

(4) Notice of the issuance of the temporary restraining order and an opportunity for a hearing shall be afforded to persons known to have an interest in the property. The hearing, however, is limited to the issues required to be demonstrated in paragraphs 3(a) and (b) of this section.

(5) A hearing requested by any owner or interest-holder concerning a temporary restraining order entered under this section shall be held at the earliest practicable time and before the expiration of a temporary order.

(6) On a determination of liability or the conviction of a person for conduct giving rise to forfeiture under this title, the court shall enter a judgment of forfeiture of the property described in the petition for forfeiture, and shall also authorize the prosecuting attorney or attorney general, their agents or any other law enforcement officer to seize all property ordered forfeited that was not previously seized or is not then under seizure. Following the entry of an order declaring the property forfeited, the court, on application of the State, may enter any order authorized by § -11 or take any other action to protect the interest of the state or a political subdivision in the property ordered forfeited. The filing of the order of forfeiture in the appropriate public records perfects the interest of the state in the property described in the order as of the date that a notice of pending forfeiture or racketeering lien was first filed in the records, which entitles the state to all rights of a secured party as to that property in addition to any other rights or remedies of the State in relation to the property. Any income accruing to, or derived from, an enterprise or any interest in an enterprise or other property interest that is forfeited under this chapter is also forfeited from the time of the conduct giving rise to forfeiture. Such income may be used pending procedures subsequent to a verdict or finding of liability to offset ordinary and necessary expenses of the enterprise or property as required by law or that are necessary to protect the interests of the state or a political subdivision.

(7) Procedures subsequent to the verdict or finding of liability and order of forfeiture shall be as follows:

- (a) Following the entry of an order of forfeiture, the clerk of the court shall give notice of pending forfeiture to owners and interest-holders who have not previously been given notice, if any, in the manner provided in § -8;
- (b) Any owner or interest-holder, other than a party or a defendant in the underlying in personam action, asserting an interest in property that has been ordered forfeited pursuant to such action, within thirty days after initial notice of pending forfeiture or after notice under paragraph (a) of this subsection, whichever is earlier, may file a claim as described in subsection -12(5), in the court for a hearing to adjudicate the validity of the person's claimed interest in the property;
- (c) The hearing on the claim, to the extent practicable and consistent with the interest of justice, shall be held within sixty days after the order of forfeiture. The court may consolidate the hearing on the claim with a hearing on any other claim filed by a person other than a party or defendant in the underlying action and concerning the same property;
- (d) The hearing shall be conducted in the manner provided for in rem judicial forfeiture actions including the provisions of § -12, subsections (7) and (8). In addition to testimony and evidence presented at

the hearing, the court shall consider the relevant portions of the record of the underlying civil or criminal action that resulted in the order of forfeiture; and

- (e) In accordance with its findings at the hearing, the court may amend the order of forfeiture if it determines that any claimant has established by a preponderance of the evidence that the claimant has a legal interest in the property, and the claimant's interest is property designated as not subject to forfeiture by § -5.

(8) Except as provided in subsection -11(2) and paragraph (7)(b) of this section, a person claiming an interest in property subject to forfeiture under this section may not:

- (a) Intervene in a trial or an appeal of a criminal or in personam civil case involving the forfeiture of such property; or
- (b) Commence or maintain any action against the state concerning the validity of the alleged interest other than as provided in this chapter.

(9) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of filed or subsequent claims pursuant to this section the court, on application of the state, may order that the testimony of any witness relating to the property forfeited or alleged to be subject to forfeiture be taken by deposition and that any designated book, paper, document, record, recording, electronic or otherwise, or other material which is not privileged be produced at the same time and place and in the same manner as that provided for the taking of depositions under the rules of civil procedure.

§ -14 Supplemental remedies. (1) The court shall order the forfeiture of any other property of an in personam civil or criminal defendant up to the value of the subject property if any of the property subject to forfeiture:

- (a) Cannot be located;
- (b) Has been transferred or conveyed to, sold to, or deposited with a third party;
- (c) Has been placed beyond the jurisdiction of the court;
- (d) Has been substantially diminished in value by any act or omission of a defendant, or a defendant's agent or assignee; or
- (e) Has been commingled with other property which cannot be divided without difficulty.

(2) In addition to any other remedy provided for by law, if property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a racketeering lien notice or provision of notice of pending forfeiture or after the filing and notice of a civil proceeding or criminal proceeding alleging forfeiture under this chapter, whichever is earlier, the state or seizing agency, on behalf of the State, may institute an action in circuit court against the person named in the racketeering lien or notice of pending forfeiture or the defendant in the civil proceeding or criminal proceeding, and the court shall enter final judgment against the person named in the racketeering lien or notice of pending forfeiture or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with reasonable investigative expenses and attorney fees. If a civil proceeding is pending, such action shall be filed only in the court where the civil proceeding is pending.

(3) This section does not limit the right of the state to obtain any order or injunction, receivership, writ, attachment, garnishment, or other remedy authorized under this chapter or appropriate to protect the interests of the state or available under other applicable law.

§ -15 Disposition of claims by court. (1) Following the court's disposition of all claims filed under this chapter, or if no such claims are filed, following the

expiration of the period provided in this chapter for the filing of such claims, the state has clear title to property that is the subject of the in rem or in personam petition and the court shall so order. Title to the forfeited property and its proceeds is deemed to have vested in the state on the commission of the act or omission giving rise to the forfeiture.

(2) The court, on motion of the prosecuting attorney, may release or convey forfeited personal property to an interest-holder who has satisfied both the prosecuting attorney and the court that all of the following are true:

- (a) The interest-holder has an interest which was acquired in the regular course of business as a financial institution and which is not subject to forfeiture pursuant to § -5;
- (b) The amount of the interest-holder's encumbrance and the fair market value of the property are readily determinable and both amounts have been reasonable¹ established by proof made available by the attorney for the state to the court;
- (c) There are no encumbrances on the property other than encumbrances held by the interest-holder seeking possession; and
- (d) The interest-holder has satisfied the State's interest by tendering the fair market value of the property and the expenses of its sale or disposal by the interest-holder.

(3) Upon order of the court forfeiting the subject property the attorney general may transfer good and sufficient title to any subsequent purchaser or transferee, and the title shall be recognized by all courts, by this State, and by all departments and agencies of this state and any political subdivision thereof.

(4) Upon entry of judgment for a claimant or claimants in any proceeding to forfeit property under this chapter such property or interest in property shall be returned or conveyed to the claimant or claimants designated by the court. If it appears that there was reasonable cause for the seizure for forfeiture or the filing of the complaint, the court shall cause a finding to be entered, and the claimant is not, in such case, entitled to costs or damages. Nor, in such case, is the person or seizing agency, or its agents, who made the seizure, or the prosecuting attorney or the attorney general liable to suit or judgment on account of such seizure, suit, or prosecution.

(5) The court shall order any claimant who fails to establish that the claimant's entire interest is exempt from forfeiture under § -5 to pay the costs of any claimant who establishes that the entire interest is exempt from forfeiture under § -5, and the State's costs and expenses of the investigation and prosecution of the matter, including reasonable attorney fees.

§ -16 Disposition of property forfeited. (1) All property forfeited to the state under this chapter shall be transferred to the attorney general who:

- (a) May transfer property, other than currency, which shall be distributed in accordance with subsection (2) of this section, to any local or state government entity, municipality, or law enforcement agency within the State;
- (b) May sell forfeited property to the public by public sale;
- (c) May sell or destroy all raw materials, products, and equipment of any kind used or intended for use in manufacturing, compounding, or processing a controlled substance;
- (d) May compromise and pay valid claims against property forfeited pursuant to this chapter; or
- (e) May make any other disposition of forfeited property authorized by law.

(2) All forfeited property and the sale proceeds thereof, up to a maximum of three million dollars per year, not previously transferred pursuant to paragraph (1)(a) of this section, shall, after payment of expenses of administration and sale, be distributed as follows:

- (a) One quarter shall be distributed to the unit or units of state or local government who¹ officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture;
- (b) One quarter shall be distributed to the prosecuting attorney who instituted the action producing the forfeiture; and
- (c) One half shall be deposited into the criminal forfeiture fund established by this chapter.

(3) Property and money distributed to units of State and local government shall be used for law enforcement purposes, and shall complement but not supplant the funds regularly appropriated for such purposes.

(4) There is established in the department of the attorney general a revolving fund to be known as the criminal forfeiture fund, hereinafter referred to as the "fund" in which shall be deposited one-half of the proceeds of a forfeiture. All monies in the fund shall be expended by attorney general¹ and are hereby appropriated for the following purposes:

- (a) The payment of any expenses necessary to seize, detain, appraise, inventory, safeguard, maintain, advertise, or sell property seized, detained, or forfeited pursuant of this chapter or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property and such contract services and payments to reimburse any federal, state, or county agency for any expenditures made to perform the foregoing functions;
- (b) The payment of awards for information or assistance leading to a civil or criminal proceeding under this chapter;
- (c) The payment of supplemental sums to state and county agencies for law enforcement purposes; and
- (d) The payment of expenses arising in connection with programs for training and education of law enforcement officers.

(5) The attorney general may, without regard to the requirements of chapter 91, promulgate rules and regulations concerning the disposition of property, the use of the fund, and compromising and paying valid claims against property forfeited pursuant to this chapter.

(6) The attorney general shall annually provide to the legislature an accounting of the fund, all forfeited properties, the sale proceeds thereof, and the allocation of monies to any agency pursuant to this section during the fiscal year preceding the legislative session.

§ -17 Limitation of Actions. Notwithstanding any other provision of law, forfeiture proceedings under this chapter may be commenced at any time within the period in which a criminal proceeding may be instituted for a covered offense pursuant to §701-108.

§ -18 Victim Restitution. Nothing herein precludes a court from ordering restitution or reparation to a victim by the defendant as part of a sentence imposed for a violation of a covered offense. The state shall not be compelled to provide funds for victim restitution or reparation under this chapter.

§ -19 Construction. It is the intent of the legislature that this chapter be liberally construed so as to effect the purposes of this chapter.

§ -20 **Short title.** This chapter may be cited as the “Hawaii omnibus criminal forfeiture act.” ”

SECTION 2. Section 842-3, Hawaii Revised Statutes, is amended to read as follows:

§842-3 Penalty; forfeiture of property. Whoever violates this chapter shall be guilty of a class B felony and shall be fined not more than \$10,000, or sentenced to an indeterminate term of imprisonment of ten years without possibility of suspension of sentence or probation, and shall forfeit to the State any interest or property [he has] acquired or maintained in violation of this chapter[.] as provided in chapter.

[Upon conviction of a person under this chapter, the circuit court shall authorize the county attorney or prosecutor, or the attorney general, to seize all property or other interest declared forfeited under this chapter upon such terms and conditions as the court shall deem proper. The State shall dispose of all property or other interest seized under this chapter as soon as feasible making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the State, it shall expire, and shall not revert to the convicted person.]”

SECTION 3. Section 329-55 is amended to read as follows:

“§329-55 Forfeitures. (a) The following are subject to forfeiture:

- (1) All controlled substances which have been manufactured, cultivated, grown, distributed, dispensed, or acquired in violation of this chapter;
- (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, cultivating, growing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter;
- (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2);
- (4) All conveyances, including aircraft, vehicles, or vessels which are used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale, delivery or receipt of property described in paragraph (1) or (2), [but:
 - (A) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;
 - (B) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner’s knowledge or consent; and
 - (C) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission;] subject to the provisions of chapter;
- (5) All books, records, and research products and materials, including formulas, microfilms, tapes, and data which are used, or intended for use, in violation of this chapter;

- (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter, [except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.] subject to the provisions of chapter.

- (7) All firearms which are visible, carried during, or used in furtherance of a violation of this chapter or chapter 712, part IV.

(b) Property subject to forfeiture under this chapter may be seized [by the department upon process issued by any circuit court having jurisdiction over the property; provided that any county may, in addition to the department, seize motor vehicles under subsection (a)(4). Seizure without process may be made if:

- (1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
- (2) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding based upon this chapter;
- (3) The department or a county has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (4) The department or a county has probable cause to believe that the property was used or is intended to be used in violation of this chapter.] in accordance with the provisions of chapter.

[(c) In the event of the seizure of property described in subsection (a)(1) to (7), pursuant to subsection (b), proceedings under subsection (d) shall be instituted promptly. When property is seized under this chapter, the department shall report the fact of the seizure within ten days thereof to the prosecuting attorney of the county where the seizure was made. Within thirty days of the notification of the seizure, the prosecuting attorney shall cause to be filed in the circuit court in the county in which the property was seized, an action in rem, petitioning the court for forfeiture of the property. Upon the filing of the action, the court shall order the department to hold the property for further order of the court, and shall order that the owner of the seized property be served with notice of action. Notice of such action shall be made promptly in person, by registered mail, or by publication in accordance with section 634-23. At the expiration of twenty days after such filing, if no claimant has appeared, the court shall order the property forfeited to the State, to be disposed of by the department in a manner consistent with subsection (e).

If a claimant¹ is made in response to the petition for forfeiture within the twenty-day period, the court shall schedule a hearing, at which time the State shall prove by preponderance of evidence that the property was used, intended to be used, furnished, or acquired in violation of this chapter. At the conclusion of such hearing, the court shall order the property forfeited to the State; provided that if any claimant proves the claimant's right to an exception under subparagraph¹ (a)(4)(A), (B), or (C) the court shall order the return of the property or such portion of the property that is proved to be encumbered, to the bona fide owner, lienholder, or mortgagee.

(d) Property, as described in subsection (a)(1) to (7), taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the seizing authority subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings. When such property is seized under this chapter, the seizing authority may:

- (1) Place such property under seal;
- (2) Remove such property to a place designated by it; or
- (3) Require the sheriff to take custody of such property and remove it to an appropriate location for disposition in accordance with law.

If a county seizes property under subsection (a)(4) it shall immediately notify the department of the seizure, and shall relinquish the seized property to the department upon its request therefor. In the event the property is forfeited and the department does not request the property seized by the county, the property shall be disposed of by the county in a manner consistent with subsection (e).

(e) When property is forfeited under this chapter the department may:

- (1) Retain the property or transfer it to the county and authorize its use in the enforcement of this chapter;
- (2) Sell that which is not required to be destroyed by law and which is not harmful to the public. The proceeds shall be used for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising¹ and court costs;
- (3) Require the sheriff to take custody of the property and remove it for disposition in accordance with law; or
- (4) Forward it to the bureau for disposition.

(f) (c) Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the State. Controlled substances listed in Schedule I, which are seized or come into the possession of the State, the owners of which are unknown, are contraband and shall be summarily forfeited to the State.

[(g)] (d) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the State.

[(h)] (e) The failure, upon demand by the department, or its authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that the person is the holder thereof, constitutes authority for the seizure and forfeiture of the plants."

SECTION 4. Section 701-119 is repealed.

SECTION 5. Severability. If any provision of this Act or the application thereof to any person or circumstance is invalid, such invalidation shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 6. Statutory material to be repealed is bracketed. New material is underscored.²

SECTION 7. This Act shall take effect upon its approval; provided that on July 1, 1990, this Act shall be repealed and sections 842-3, 329-55, and 701-119, Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the approval of this Act; provided further that the repeal of this Act shall not affect the rights and duties that matured, penalties that were incurred, property seizures that have been initiated, and properties that have been forfeited pursuant to this Act, and such rights, duties, penalties, seizures and forfeitures shall be determined and adjudicated in accordance with the provisions of this Act.

ACT 260

(Approved June 9, 1988.)

Notes

1. So in original.
2. Edited pursuant to HRS §23G-16.5.