

ACT 161

H.B. NO. 1447

A Bill for an Act Relating to the Permitted Transfers in Trust Act.

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

SECTION 1. The legislature finds that Hawaii continues to lay the foundation necessary to attract foreign-source capital and to retain local capital through proven domestic and international estate and financial planning methodologies. The legislature further finds that the original intent of the permitted transfers in trust act was to offer incentives to high net-worth individuals throughout the United States and the world to transfer a portion of their liquid net worth into this State for asset and trust management. It is the legislature's intent to achieve the original purpose of the permitted transfers in trust act and to make Hawaii a more competitive investment environment in the national and local marketplace.

The purpose of this Act is to amend the permitted transfers in trust act by allowing increased flexibility in the type and extent of assets that may be managed by Hawaii's private financial sector, thereby increasing state tax revenues and better positioning the State as a world-class financial management jurisdiction.

SECTION 2. Chapter 554G, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§554G- Advisors. (a) A transferor may appoint, through the trust instrument, one or more advisors or protectors, including:

- (1) Advisors who have authority under the terms of the trust to remove and appoint trustees, advisors, trust committee members, or protectors;
 - (2) Advisors who have authority under the terms of the trust to direct, consent to, or disapprove of distributions from the trust; and
 - (3) Advisors, including the transferor beneficiary of the trust, who serve as investment advisors to the trust.
- (b) While a trustee may appoint an advisor, the administrative and non-administrative authority over the trust shall remain with the trustee.

(c) Notwithstanding subsection (b), whenever there is a dispute, deadlock, or difference of opinion between a trustee and an advisor, the transferor may direct that the determination of the advisor shall be binding upon the

trustee; provided that the trustee shall bear no liability or accountability for any act or transaction entered into as a result of the enforcement of the advisor's determination. The trustee's administrative and non-administrative fiduciary duty to the beneficiaries shall be waived as to the specific act or executed transaction; provided that the trustee dissents in writing before the act or transaction is completed."

SECTION 3. Section 554G-2, Hawaii Revised Statutes, is amended to read as follows:

"[§554G-2] Definitions. As used in this chapter:

"Cash" means United States currency.]

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

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

"Debt" means liability on a claim.

"Former spouse" means a person to whom the transferor was married where the marriage was dissolved before the time of the permitted transfer[-], or person with whom the transferor was in a civil union where the civil union was dissolved before the time of the permitted transfer.

"Grantor trust" means a trust described in sections 671 through 679 of the Internal Revenue Code of 1986, as amended.

"Marketable securities" means securities that are:

- (1) Exchanged on a governmentally regulated exchange within the United States including, common stocks, bonds, mutual funds, or exchange traded funds; and
- (2) Permitted to be held by a fiduciary under Hawaii state law; provided that "marketable securities" does not include real estate or any interests in corporations, partnerships, and limited liability companies that are not publicly traded.

"Non grantor trust" shall refer to any trust that is not a "grantor trust" as defined in this chapter.]

"Permitted property" ~~[means cash, marketable securities, life insurance contracts, and non-private annuities.]~~ includes real property, personal property, and interests in real or personal property.

"Permitted transfer" means a transfer of permitted property by or from ~~[a transferor to]~~ one or more transferors who own an undivided interest in the property to one or more trustees, at least one of which is a permitted trustee, by means of a trust instrument, regardless of whether consideration is exchanged. In the case of a transfer to more than one trustee, a disposition that is otherwise a permitted transfer shall not be treated as other than a permitted transfer solely because not all of the trustees are qualified trustees.

"Permitted trustee" means a person, other than the transferor, who is a resident of this State[-] or a bank or trust company that is authorized to do business in this State [that], possesses and exercises trust powers [and], has its principal place of business in this State[-]; and:

- (1) Maintains or arranges for custody of some or all of the property that is the subject of the permitted transfer;
- (2) Maintains records for the trust on an exclusive or nonexclusive basis;
- (3) Prepares or arranges for the preparation of fiduciary income tax returns; or

(4) Otherwise materially participates in the administration of the trust.
 "Person" means a natural person.

"Spouse" means a person to whom the transferor is married or with whom the person is party to a civil union at the time of the permitted transfer.

"Transfer" means the disposition, conveyance, or assignment of ~~[permitted] property [to a permitted trustee]~~, including the change in the legal ownership of property occurring upon the substitution of one trustee for another or the addition of one or more new trustees, or the exercise of a power that causes the disposition, conveyance, or assignment of permitted property to a ~~[permitted] trustee[-] or trustees~~, but shall not include the release or relinquishment of an interest in property that was formerly the subject of a permitted transfer.

~~["Transfer tax" means the tax described in section 554G-12.]~~

"Transferor" means ~~[an]~~:

- (1) An owner of permitted property; ~~[a]~~
- (2) The holder of a power of appointment that authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate, or the creditors of the holder's estate; or ~~[a]~~
- (3) A trustee who directly or indirectly makes a disposition of permitted property.

"Trust instrument" means an irrevocable instrument appointing a permitted trustee or permitted trustees for the permitted property that is the subject of a disposition.

"Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court."

SECTION 4. Section 554G-4, Hawaii Revised Statutes, is amended to read as follows:

~~["§554G-4]] Permitted trustees. [(a) A permitted trustee means a person, other than the transferor, who is a resident of this State, or a bank or trust company authorized to do business in this State that possesses and exercises trust powers and has its principal place of business in this State.~~

~~(b)] If a permitted trustee of a trust ceases to meet the [requirements of subsection (a)] criteria for a permitted trustee as defined in section 554G-2, and there remains no trustee that meets the requirements, the permitted trustee shall be deemed to have resigned as of the time that the trustee [no longer meets the requirements of subsection (a)] ceases to meet the criteria. At that time, the successor permitted trustee provided for in the trust instrument shall become the permitted trustee of the trust. In the absence of any successor permitted trustee provided for in the trust instrument, a trust advisor or protector provided for in the trust instrument shall appoint a successor permitted trustee. In the absence of [an appointed] a designated trust advisor or protector[-, a Hawaii court of competent jurisdiction shall,] or in the event of the failure of the designated trust advisor or protector to appoint a successor permitted trustee, the circuit court sitting in probate, upon application of any interested party, shall appoint a successor permitted trustee.~~

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

SECTION 5. Section 554G-5, Hawaii Revised Statutes, is amended to read as follows:

“§554G-5 Trust instrument. (a) A trust instrument shall be irrevocable and shall expressly incorporate the laws of this State governing the validity, construction, and administration of the trust.

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

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

- (1) A transferor's power to veto a distribution from the trust;
- (2) A power of appointment other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate that may be exercised by will or other written instrument of the transferor effective only upon the transferor's death;
- (3) The transferor's potential or actual receipt of income, including rights to income retained in the trust instrument;
- (4) The transferor's annual receipt of a percentage not to exceed five per cent of the initial value of the trust assets or its value determined from time to time pursuant to the trust instrument or of a fixed amount that on an annual basis does not exceed five per cent of the initial value of the trust assets;
- (5) The transferor's potential or actual receipt or use of the trust's principal due to ~~the discretionary action of a permitted trustee or~~ the trustee acting:

(A) In the trustee's discretion;

(B) Pursuant to a provision in the trust instrument that governs the distribution of principal; ~~provided that any included provision shall~~ and that does not confer upon the transferor a substantially unfettered right to the receipt or use of the principal; or

(C) At the direction of an advisor described in section 554G- who is acting:

(i) In the advisor's discretion;

(ii) Pursuant to a provision in the trust instrument that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt or use of the principal; or

(iii) Pursuant to the transferor's determination under section 554G- (c) of a dispute, deadlock, or difference of opinion in favor of the advisor;

provided that for purposes of this paragraph, a trustee is presumed to have discretion with respect to the distribution of principal unless that discretion is expressly denied to the trustee by the terms of the trust instrument;

- (6) The transferor's right to remove a ~~permitted~~ trustee or advisor and to appoint a new ~~permitted~~ trustee or advisor;
- (7) The transferor's potential or actual receipt of income or principal to pay income taxes due on income of the trust if the trust instrument includes a provision allowing or directing the use of trust funds to pay income taxes due, or if the ~~permitted~~ trustee acts in the trustee's discretion to allow payment of income taxes due on the trust income; ~~or~~

- (8) A ~~[permitted]~~ trustee's authority pursuant to discretion, direction, or the transferor's exercise of a testamentary power of appointment to pay all or any part of the transferor's debts outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate[-];
 - (9) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust, as those terms are defined in section 664 of the Internal Revenue Code and any successor provision; and the transferor's right, at any time and from time to time by written instrument delivered to the trustee, to release the transferor's retained interest in the trust, in whole or in part, in favor of one or more charitable organizations with a succeeding beneficial interest in the trust;
 - (10) The transferor's potential or actual receipt of income or principal from a grantor-retained annuity trust or grantor-retained unitrust, pursuant to Title 26 Code of Federal Regulations Section 25.2702-3 and any successor provision, or the transferor's receipt each year of a percentage specified in the governing instrument of the initial value of the trust assets or their value determined from time to time pursuant to the governing instrument; provided that the percentage received does not exceed five per cent; or
 - (11) The transferor's potential or actual use of real property held under a qualified personal residence trust, as described in Title 26 Code of Federal Regulations Section 25.2702-5(c) and any successor provision, or the transferor's possession and enjoyment of a qualified annuity interest, as described in Title 26 Code of Federal Regulations Section 25.2702-5(c)(8) and any successor provision thereto.
- (d) A trust instrument may provide that the interest of a beneficiary of the trust, including a beneficiary who is the transferor of the trust, may not be transferred, assigned, pledged, or mortgaged, whether voluntarily or involuntarily, before the ~~[permitted]~~ trustee actually distributes the property or income to the beneficiary. Any provision of this type contained in the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of Title 11 United States Code ~~[section]~~ Section 541(c)(2) of the Bankruptcy Code or any successor provision.
- ~~[(e) A transferor may appoint, through the trust instrument, one or more advisors or protectors, including the following:~~
- ~~(1) Advisors who have authority under the terms of the trust to remove and appoint permitted trustees, advisors, or protectors;~~
 - ~~(2) Advisors who have authority under the terms of the trust to direct, consent to, or disapprove of distributions from the trust; and~~
 - ~~(3) Advisors, including the transferor beneficiary of the trust, who serve as investment advisors to the trust.~~
- ~~(f) Whenever there shall be a dispute, deadlock, or difference of opinion between a permitted trustee and an advisor, the transferor may direct that the determination of the advisor shall be binding upon the permitted trustee, but that the permitted trustee shall bear no liability or accountability for any act or transaction entered into as a result of the enforcement of the advisor's privilege if the permitted trustee dissents in writing.~~
- ~~(g) [(e)]~~ (e) If a trustee of a trust existing prior to the enactment of this chapter proposes to make a permitted transfer, but the trust instrument does not contain a power of appointment that conforms to section 554G-5(c)(2), the

trustee may deliver an irrevocable written election to have section 554G-5(c)(2) apply to the trust[5] and the nonconforming powers of appointment shall be deemed modified to the extent necessary to conform with section 554G-5(c)(2). The irrevocable written election shall include a description of the original transferor's powers of appointment as modified, and the original transferor's written consent to the modification. Consent of the original transferor to a modification of powers of appointment shall not be considered to be a permitted transfer.

~~[(h)]~~ (f) If, in any action brought against a trustee of a trust that results from a permitted transfer, a court declines to apply the law of this State in determining the validity, construction, or administration of the trust[5] or the effect of a spendthrift provision of the trust, the trustee, immediately upon the court's action and without the further order of any court, shall cease to be trustee of the trust and a successor trustee shall ~~[thereupon]~~ succeed as trustee in accordance with the terms of the trust instrument. If the trust instrument does not provide for a successor trustee or does not provide for an advisor or protector with powers to appoint successor trustees, a Hawaii court of competent jurisdiction shall appoint a successor permitted trustee upon the application of any beneficiary of the trust under any terms and conditions that the court determines to be consistent with the purposes of the trust and with this chapter. Upon the removal of a trustee pursuant to this section, the trustee who has been removed shall have no power or authority other than to convey the trust property to the successor trustee."

SECTION 6. Section 554G-6, Hawaii Revised Statutes, is amended to read as follows:

~~"[§554G-6]] Investments.~~ Nothing in this chapter shall prohibit a ~~[permitted]~~ trustee from diversifying trust assets[5; provided that a permitted trustee shall be authorized to invest only in permitted property, as defined in this chapter]."

SECTION 7. Section 554G-7, Hawaii Revised Statutes, is amended to read as follows:

~~"[§554G-7]] Retained interests of transferor.~~ (a) A permitted transfer shall be subject to this chapter notwithstanding a transferor's retention of any or all of the powers and rights described in section 554G-5(c) and notwithstanding the transferor's service as investment advisor pursuant to section ~~[554G-5(e)(3)]~~ 554G- (a)(3).

(b) The transferor shall have only the powers and rights specifically conferred by the trust instrument. Except as permitted by sections 554G-5(c) and ~~[554G-5(e)]~~ 554G- (a)(3), a transferor shall have no rights or authority with respect to the property that is the subject of a permitted transfer or to the income from property that is the subject of a permitted transfer. Any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void."

SECTION 8. Section 554G-8, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (b) to read:

~~"(b) An allowable claim under subsection (a) [of this section] shall be extinguished unless:~~

(1) The creditor's claim arose before the permitted transfer was made and the action is brought within the limitations of section 651C-9

on the latter of the date of the permitted transfer or ~~[the date of the enactment of this section;]~~ July 1, 2010; or

- (2) ~~[The]~~ Notwithstanding the provisions of section 651C-9, the creditor's claim arose concurrent with or subsequent to the permitted transfer, and the action is brought within two years after the permitted transfer is made."

2. By amending subsection (f) to read:

"(f) No creditor or any other person shall have any claim or cause of action, including an action to enforce a judgment entered by a court or other body having adjudicative authority, against a trustee or advisor described in section ~~[554G-4(e)]~~ 554G- (a) or against any person involved in drafting, preparing, executing, or funding a trust or in counseling the parties to a trust that is the subject of a permitted transfer if, as of the date ~~[ef]~~ the action~~[-the]~~ is brought, an action with respect to the permitted transfer would be barred under this section."

SECTION 9. Section 554G-9, Hawaii Revised Statutes, is amended to read as follows:

~~"[§554G-9]]~~ **Limitations on permitted transfers.** The limitations contained in section 554G-8 on actions by creditors to avoid permitted transfers shall not apply to:

- (1) Any person to whom the transferor is indebted on account of a family court-supervised agreement or family court order for the payment of support or alimony to the transferor's spouse, former spouse, or children, or for a division or distribution of property to the transferor's spouse or former spouse~~[-];~~ provided that the transferor is in default by thirty days or more of making a payment due under the agreement or order, but only to the extent of the debt and not to any claim for forced heirship, legitime, or elective share;
- (2) Any person who suffers death, personal injury, or property damage on or before the date of a permitted transfer; provided that the death, personal injury, or property damage is determined to have been caused in whole or in part by the tortious act or omission of either the transferor or another person for whom the transferor is or was vicariously liable to the extent of the transferor's liability or vicarious liability;
- (3) Any lender who extends a secured or collateralized loan to the transferor based on the transferor's or the transferor's agent's express or implied representation that the assets of a trust established under this chapter would be available as security against the loan in the event of the transferor's default thereon; ~~[or]~~
- (4) The State of Hawaii to the extent that a transfer results in the transferor being unable to meet the transferor's tax liabilities, but only to the extent necessary to extinguish the outstanding tax liabilities~~[-];~~ or
- (5) A divorce or dissolution of marriage or civil union, for purposes of considering property subject to division under section 580-47, a transferor-beneficiary's interest with respect to assets transferred to the trust instrument:
 - (A) After the transferor's marriage or entry into a civil union; or
 - (B) Within thirty days prior to the transferor's marriage or civil union unless the transferor gives written notice to the other party to the marriage or civil union of the transfer; provided that in the event of the divorce or dissolution of the marriage

or civil union of a non-transferor beneficiary of the trust, the non-transferor beneficiary's interest in the trust is not considered property subject to division under section 580-47."

SECTION 10. Section 554G-10, Hawaii Revised Statutes, is amended to read as follows:

"[§554G-10] Effect of avoidance of permitted transfers. (a) A creditor may avoid a permitted transfer pursuant to section 554G-8 only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the transfer has been avoided, together with costs[;] including attorney's fees[;] as allowed by a court.

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

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

(A) The trustee shall have a first and paramount lien against the property that is the subject of the permitted transfer in an amount equal to the entire cost[;] including attorney's fees[;] properly incurred by the trustee in the defense of the action or proceedings to avoid the permitted transfer; ~~and~~

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

(C) For purposes of this paragraph, it shall be presumed that the trustee did not act with intent to defraud, hinder, or delay the creditor merely by accepting the property; and

(2) If the court is satisfied that a beneficiary of the trust has not acted with intent to defraud, hinder, or delay the creditor, the permitted transfer shall be avoided subject to the beneficiary's right to retain any distribution made prior to the creditor's commencement of an action to avoid the permitted transfer~~[-For];~~ provided that for purposes of this paragraph, it shall be presumed that a beneficiary did not act with intent to defraud, hinder, or delay the creditor merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) A creditor who brings an action pursuant to section 554G-8 to avoid a permitted trust shall have the burden of proving by clear and convincing evidence that a trustee or beneficiary acted with intent to defraud, hinder, or delay the creditor; provided that in the case of a beneficiary who is also the transferor, the burden on the creditor shall be to prove by a preponderance of the evidence that the transferor-beneficiary acted with intent to defraud, hinder, or delay the creditor. ~~[Mere acceptance of permitted property by a trustee shall not constitute evidence of intent to defraud, hinder, or delay a creditor.]~~

(d) For purposes of this chapter, attachment, garnishment, sequestration, or other legal or equitable process shall be permitted only where permitted by the express terms of this chapter.

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

- (1) Estate or inheritance taxes imposed upon or due to the beneficiary's estate;
- (2) Debts of the beneficiary's estate; or
- (3) Expenses of administering the beneficiary's estate^{[1],[2]}

unless the beneficiary actually directs the payment of taxes, debts, or expenses and then only to the extent of that direction.

(f) Where spouses make a permitted transfer of property and, immediately before the permitted transfer, the property, any part of the permitted property, or any accumulation to the permitted property was, pursuant to applicable law, owned by them as tenants by the entirety, then notwithstanding the permitted transfer and except where the provisions of the trust instrument expressly provide to the contrary, the property and any accumulation to the property, while held in trust during the lifetime of both spouses, shall be treated as though it were held in tenancy by the entirety and shall be subject to all applicable law; provided that in every other respect, the property shall be subject to the terms of the trust instrument.

In any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the permitted transfer the sole remedy available to the creditor with respect to trust property treated as though it were held in tenancy by the entirety shall be an order directing the trustee to transfer the property to both spouses as tenants by the entirety.

(g) Subject to all of the provisions of this section and except as otherwise provided in subsection (f), upon avoidance of a qualified disposition to the extent permitted under subsection (a), the sole remedy available to the creditor shall be an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor's debt to the creditor at whose instance the disposition has been avoided."

SECTION 11. Section 554G-3, Hawaii Revised Statutes, is repealed.

SECTION 12. Section 554G-12, Hawaii Revised Statutes, is repealed.

SECTION 13. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 14. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 15. This Act shall take effect on July 1, 2011.

(Approved June 23, 2011.)

Note

1. Edited pursuant to HRS §23G-16.5.