

A Bill for an Act Relating to a Fiduciary's Standard of Care and Performance.

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

SECTION 1. The legislature finds that other states have been aggressively enacting legislation with the goal of attracting trust business and that Hawaii residents are creating trusts in these states or moving the situs of existing trusts outside of Hawaii. The legislature finds that as a result, the State is losing business. In addition, Hawaii residents who are presently hesitant to establish directed trusts (generally, a trust where the trust administration duties and the investment management duties are separated) without the protections afforded by a statute that clearly allows them to do so, are forced to endure additional costs and inconveniences when forming such trusts elsewhere. Thirty-four states currently have laws in place that allow for directed trusts. Although Hawaii law arguably allows for directed trusts, estate planners and advisors continue to recommend that their clients establish directed trusts in, or move their existing trusts to, other states until directed trusts are clearly authorized by Hawaii law.

The purpose of this Act is to protect Hawaii's economy from attempts to lure local trust business to other states by:

- (1) Allowing the settlor of a trust to designate the investment and other responsibilities to an advisor and maintain the administrative functions with the trustee;
- (2) Limiting the trustee's liability for investments, transactions, and other functions over which the trustee does not exercise responsibility; and
- (3) Waiving a dissenting trustee's fiduciary duty for specific transactions subject to certain limitations.

SECTION 2. Section 554G-4.5, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(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 or omitted 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~~;~~ entered into or omitted as a result of the enforcement of the advisor's determination; provided that ~~the~~:

- (1) The trustee dissents in writing ~~[before]~~:
 - (A) Before the act or transaction is completed~~[-]~~;
 - (B) To a failure to act; or

- (C) In a reasonably timely manner to enter into a transaction; or
- (2) If the advisor is appointed by the transferor under the terms of the trust and section 560:7-302 applies to the trust and the advisor, the trustee is not required to dissent in writing for the waiver of the trustee's administrative and nonadministrative fiduciary duties to the beneficiaries to take effect."

SECTION 3. Section 560:7-302, Hawaii Revised Statutes, is amended to read as follows:

"§560:7-302 Trustee's standard of care and performance[-]; standards for trustee actions under an advisor's authority. (a) Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent person dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, the trustee is under a duty to use those skills.

(b) Whenever the terms of a trust direct that an advisor, rather than the trustee, shall have authority for certain fiduciary actions, the standard of care and performance for actions that are within the scope of the advisor's authority under the terms of a trust shall be as follows:

- (1) Where one or more persons are given authority by the terms of a trust, and accept this authority, to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or any other decision of the trustee, those persons shall be considered to be advisors and shall have the duties and obligations of fiduciaries when exercising the given authority, unless the trust provides otherwise;
- (2) If a trust provides that a trustee is to follow the direction of an advisor, and the trustee acts in accordance with the advisor's direction, then except in cases of wilful misconduct or gross negligence on the part of the trustee so directed, the trustee shall not be liable for any loss resulting directly or indirectly from any such act;
- (3) If a trust provides that a trustee is to make decisions with the consent of an advisor, then except in cases of wilful misconduct or gross negligence on the part of the trustee, the trustee shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of the advisor's failure to provide consent after having been requested to do so by the trustee; and
- (4) Whenever a trust provides that a trustee is to follow the direction of an advisor with respect to investment decisions, distribution decisions, or any other decision of the trustee, then except to the extent that the terms of the trust provide otherwise, the trustee shall have no duty to:
 - (A) Monitor the conduct of the advisor;
 - (B) Provide advice to the advisor or consult with the advisor; or
 - (C) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the advisor.

Absent clear and convincing evidence to the contrary, the actions of the trustee pertaining to matters within the scope of the advisor's authority, such as confirming that the advisor's directions have been carried out and recording and reporting actions taken at the advi-

sor's direction, shall be presumed to be administrative actions taken by the trustee solely to allow the trustee to perform the duties assigned to the trustee under the trust, and the administrative actions shall not be deemed to constitute an undertaking by the trustee to monitor the advisor or otherwise participate in actions within the scope of the advisor's authority.

(c) For purposes of this section:

"Advisor" includes a protector that has been granted powers and authority by the terms of a trust, including:

- (1) The power to remove and appoint trustees, advisors, trust committee members, and other protectors;
- (2) The power to modify or amend the trust to achieve favorable tax status or to facilitate the efficient administration of the trust; and
- (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the trust.

"Investment decision" means the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of or rights in any investment, or the valuation of nonpublicly traded investments."

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

SECTION 5. This Act shall take effect upon its approval.

(Approved April 30, 2014.)