

WRITTEN TESTIMONY OF THE STANDING COMMITTEE
ON THE UNIFORM PROBATE CODE AND PROBATE
COURT PRACTICES OF THE JUDICIARY OF THE STATE OF
HAWAII RE: H.B.294, H.D. 1 RELATING TO PERSONAL LIABILITY
OF TRUSTEE TO THIRD PARTIES

THE SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

MARCH 23, 2009; 9:30 a.m.

This written testimony is submitted on behalf of the Standing Committee on the Uniform Probate Code and Probate Court Practices of the Judiciary of the State of Hawaii (the "Probate Committee"). The Probate Committee was organized pursuant to Resolution No. 91-25, adopted by the sixth annual Hawaii State Judicial Conference. The Probate Committee is comprised of four circuit court judges, each representing a Circuit Court of the Judiciary of the State of Hawaii and nine attorneys that practice estate planning and probate law, all of whom have been appointed by the Chief Justice of the Supreme Court of the State of Hawaii. These comments represent the views of the attorney members of the Probate Committee only.

As more fully discussed below, we strongly support H.B. 294, H.D. 1, which if adopted will make the statute governing personal liability of a trustee to third parties more consistent with a) the Uniform Probate Code, and b) current Hawaii law governing Personal Representatives of probate estates.

Haw. Rev. Stat. § 560:7-306 currently provides that a trustee is *personally* liable on contracts entered into in the trustee's fiduciary capacity unless the contract otherwise provides. In contrast, both the Uniform Probate Code § 7-306 (which governs the personal liability of trustees) and Haw. Rev. Stat. § 560:3-808 (which governs the personal liability of Personal Representatives) provide that the fiduciary is **not** personally liable on contracts unless the fiduciary fails to disclose his fiduciary status in the contract. The proposed change to Haw. Rev. Stat. § 560:7-306(a) makes the laws governing both fiduciaries – the trustee and the Personal Representative – the same. The proposed modification is particularly important for individuals who serve as trustees and who may enter into contracts without realizing that they are assuming personal liability even if they sign the contract in their fiduciary capacity.

The second proposed change to Haw. Rev. Stat. § 560:7-306 concerns the trustee's liability for obligations arising from ownership or control of the trust's property or torts committed in the course of administering the trust. The current statute provides that the trustee is personally liable even if the trustee was not personally at fault. Again, the Uniform Probate Code and Haw. Rev. Stat. § 560:3-808 only impose personal liability to third parties on the fiduciary if the fiduciary is personally at fault. The proposed change will make the laws governing trustees and Personal Representatives consistent. It is important to note that the trustee will still be liable to third parties if the trustee is personally at fault. Moreover, this statute does not affect the beneficiaries' ability to pursue claims against the trustee for breach of fiduciary duty for damages arising during the administration of the trust.

We believe that the laws governing fiduciaries – trustees and Personal Representatives – should be consistent. The role of the personal representative and the trustee *vis a vis* third parties is functionally the same. Indeed, to have different rules regulating their liability without a rational basis for the distinction is to run the risk of violating the equal protection clauses of the federal and state constitutions. See Shibuya v. Architects Hawaii Ltd., 65 Haw. 26, 35, 647 P.2d 276, 283 (1982) (“The equal protection obligation *** [must] classify the persons it affects in a manner rationally related to legitimate governmental objectives. To satisfy this ‘rational basis’ test, the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”) (citations, quotation marks and footnote omitted). Therefore, we recommend passage of H.B. 294, H.D. 1.

Thank you for the opportunity to submit testimony on this bill.

Respectfully submitted this 20th day of March, 2009.

By: Rhonda L. Griswold
Rhonda L. Griswold
Member, Probate Committee

Testimony of Robert Toyofuku
On behalf of Hawaii Association for Justice
In SUPPORT of
H.B. No. 294, H.D. 1

March 23, 2009

To: Chairman Brian Taniguchi and Members of the Senate Committee on Judiciary and Government Operations:

My name is Bob Toyofuku and I am testifying on behalf of the Hawaii Association for Justice (HAJ)(formerly known as CLH*) in Support of H.B. No. 294, H.D.1.

This measure conforms Hawaii trust law, regarding the personal liability of a trustee for matters within the scope of the representative capacity, to the Uniform Probate Code. Insofar as the H.D. 1 now clarifies that the amendment of the Hawaii law does not change the current law with regard to the liability of the trust estate for actions by the trustee, HAJ now supports this measure.

HAJ expresses its appreciation to the Standing Committee on the Uniform Probate Code and Probate Court Practices of the Judiciary of the State of Hawaii for its courtesy in considering and accommodating HAJ's concerns.

Thank you for this opportunity to testify in SUPPORT of H.B. No. 294, H.D. 1.

* CLH has changed its name to conform to the name of its national organization the American Association for Justice.