

WRITTEN TESTIMONY OF THE STANDING COMMITTEE
ON THE UNIFORM PROBATE CODE AND PROBATE
COURT PRACTICES OF THE JUDICIARY OF THE STATE OF
HAWAII RE: SB106 RELATING TO PERSONAL LIABILITY
OF TRUSTEE TO THIRD PARTIES

THE SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

FEBRUARY 6, 2009; 9:00 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 S.B.106, which if adopted will make the statute governing personal liability of a trustee to third parties 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 S.B. 106.

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

Respectfully submitted this 5th day of February, 2009.

By: Rhonda L. Griswold
Rhonda L. Griswold
Jeffrey R. Nielbing
Members, Probate Committee

Testimony of Robert Toyofuku
On behalf of Hawaii Association for Justice
In OPPOSITION to
S.B. No. 106

My name is Robert Toyofuku. I am testifying on behalf of the Hawaii Association for Justice (formerly known as CLH*) in Opposition to S.B. No. 106.

The Hawaii Association for Justice opposes S.B. No. 106 for technical reasons and offers non-substantive amendments to effectuate the bill's purpose and avoid unintended ambiguity.

The procedure for processing claims against a trust estate under current law requires that claims be first asserted against the trustee under section 560:7-306(c) and that the trustee then be reimbursed or indemnified by the trust estate pursuant to subsection (d) of the statute. It is a two step process that results in the trust estate paying for claims via an action against the trustee.

This measure could simplify the process by eliminating the first step of requiring that claims first be asserted against the trustee personally, then requiring the trustee to be reimbursed or indemnified by the trust estate, unless the trustee was personally responsible in some manner. The elimination of this first step however, creates an ambiguity because subsection (c) still requires that creditors and claimants asserting claims "against the trust estate" do so by "proceeding against the trustee in the trustee's fiduciary capacity." Thus the ambiguity that is created is that if the trustee (not the trust estate) must be sued, but the trustee is no longer liable under the proposed amendments, then who is responsible?

It intent of the bill appears to keep the trust estate ultimately responsible as is presently the case. To make this clear and avoid any future ambiguity or dispute, it is requested that the following sentence be added to the end of subsections (a), (b) and (c):

"The trust estate remains primarily liable to third parties, except as provided herein, and questions of liability between the trust estate and the trustee shall be determined pursuant to subsection (d)."

This amendment will accommodate the purpose of avoiding vicarious personal liability on the part of an "innocent" trustee while avoiding the potential ambiguity that arises when the trustee is absolved of liability.

In addition, this bill will have an impact on existing trust litigation if the fact that the trust estate is liable to third parties is not made explicit. In an existing litigation where the development of trust lands into a residential subdivision resulted in the wrongful death and property damage to third parties, the trust has taken the position that

the third parties can not reach the trust estate, but can only sue and collect against the trustee personally, stating:

“Second, the parties should be aware that a trust is not an entity along the lines of a corporation or a partnership. Rather, it is a relationship between a settlor who contracts with a trustee to administer property for the benefit of beneficiaries. I cannot speak for ‘the Trust;’ no such thing exists. *That is why lawsuits regarding trusts are prosecuted in the names of the trustees and why trustees are personally liable for successfully prosecuted claims, albeit with a right of reimbursement from the trust if they acted in good faith and with proper trust objectives.*”

Thus the trust in that case is arguing that third party claimants can only recover against the trustee, not the trust estate; and it is between the trustee and the trust beneficiaries to determine whether the trustee will or will not be reimbursed. In other words, should the trustee have insufficient personal assets or insurance, third party claimants are limited to those inadequate assets even if the trust estate itself has ample assets should the trust estate refuse to reimburse the trustee. Deletion of the trustee’s personal liability under that interpretation of the statute would result in no recovery to trust claimants or creditors.

We do not oppose the elimination of personal liability for innocent trustees, but merely seek to avoid any ambiguity that can be used to defeat the true purpose of this measure and inadvertently affect existing litigation, as well as future claims.

Thank you for this opportunity to testify in Opposition to S.B. No. 106.

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