

JAN 27 2010

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# A BILL FOR AN ACT

RELATING TO THE PERMITTED TRANSFERS IN TRUST ACT.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Hawaii relies heavily on the travel industry as  
2 an economic engine. Because of instabilities in that industry,  
3 the State must seek out other sources of revenue to help  
4 stabilize the current budget crisis and fuel future economic  
5 growth. Hawaii can build on proven domestic and international  
6 estate and financial planning methodologies to amend its laws  
7 for the purpose of attracting foreign-source capital.

8           The intent of this Act is to offer incentives to high net-  
9 worth individuals throughout the United States and throughout  
10 the world to transfer a portion of their liquid net worth into  
11 this State for asset and trust management. This Act is designed  
12 to increase the assets under management by Hawaii's private  
13 financial sector, increase state tax revenues, and position the  
14 State as a world-class financial management jurisdiction.

15           SECTION 2. The Hawaii Revised Statutes is amended by  
16 adding a new chapter to be appropriately designated and to read  
17 as follows:



1 "CHAPTER

2 PERMITTED TRANSFERS IN TRUST

3 § -1 Short title. This chapter shall be known and may  
4 be cited as the Permitted Transfers in Trust Act.

5 § -2 Definitions. As used in this chapter:

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

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

12 "Debt" means liability on a claim.

13 "Former spouse" means a person to whom the transferor was  
14 married where the marriage was dissolved before the time of the  
15 permitted transfer.

16 "Permitted property" means United States currency or any  
17 other legal tender capable of conversion to United States  
18 currency or property capable of exchange on a governmentally  
19 regulated exchange within the United States including, but not  
20 limited to, American Depository Receipts (ADRs), exchange traded  
21 funds, common stocks, mutual funds, and any and all other



1 securities that a fiduciary is permitted to hold pursuant to the  
2 Hawaii uniform prudent investor act, chapter 554C.

3 "Permitted transfer" means a transfer of permitted property  
4 by or from a transferor to a permitted trustee by means of a  
5 trust instrument, regardless of whether consideration is  
6 exchanged.

7 "Permitted trustee" means a qualified natural person or  
8 trust company that:

- 9 (1) Maintains or arranges for custody in this State of  
10 some or all of the permitted property that is the  
11 subject of the permitted transfer and of some or all  
12 of the investments ultimately held in trust by the  
13 permitted trustee;
- 14 (2) Maintains records for the trust on an exclusive or  
15 nonexclusive basis;
- 16 (3) Prepares or arranges for the preparation of fiduciary  
17 income tax returns for the trust; or
- 18 (4) Otherwise materially participates in the  
19 administration of the trust.

20 "Person" means a natural person.

21 "Spouse" means a person to whom the transferor is married  
22 at the time of the permitted transfer.



1 "Transfer" means the disposition, conveyance, or assignment  
2 of permitted property to a permitted trustee or the exercise of  
3 a power that causes the disposition, conveyance, or assignment  
4 of permitted property to a permitted trustee.

5 "Transfer tax" means the tax described in section -12.

6 "Transferor" means an owner of permitted property; a holder  
7 of a power of appointment that authorizes the holder to appoint  
8 in favor of the holder, the holder's creditors, the holder's  
9 estate, or the creditors of the holder's estate; or a trustee  
10 who directly or indirectly makes a disposition of permitted  
11 property.

12 "Trust instrument" means an irrevocable instrument  
13 appointing a permitted trustee for the permitted property that  
14 is the subject of a disposition.

15 **§ -3 Perfected transfers.** The transfer of permitted  
16 property under this chapter shall be deemed perfected following  
17 the completion of all of the following:

- 18 (1) The delivery of permitted property by the transferor  
19 to the permitted trustee and the written acceptance of  
20 the permitted property by the permitted trustee;
- 21 (2) The delivery by the transferor to the permitted  
22 trustee of a signed and notarized certificate of



1            solvency that states that the amount of the transfer  
2            is equal to or less than twenty-five per cent of the  
3            transferor's net worth and that the transfer will not  
4            result in delay, defrauding, or hindrance of a  
5            creditor who is known or knowable to the transferor at  
6            the time of the permitted transfer with a claim  
7            against the property that is subject to the transfer;  
8            and

9            (3) The filing of the appropriate form with the Hawaii  
10            department of taxation and payment of the attendant  
11            transfer tax.

12            **§ -4 Permitted trustees.** (a) A permitted trustee shall  
13            be a person other than the transferor who is a resident of this  
14            State or a trust company authorized to do business in this State  
15            and to act as a trustee subject to supervision by the department  
16            of commerce and consumer affairs and the Federal Deposit  
17            Insurance Corporation.

18            (b) If a permitted trustee of a trust ceases to meet the  
19            requirements of subsection (a) and there remains no trustee that  
20            meets the requirements, the permitted trustee shall be deemed to  
21            have resigned as of the time that the trustee no longer meets  
22            the requirements of subsection (a). At that time, the successor



1 permitted trustee provided for in the trust instrument shall  
2 become the permitted trustee of the trust. In the absence of  
3 any successor permitted trustee provided for in the trust  
4 instrument, a trust advisor or protector provided for in the  
5 trust instrument shall appoint a successor permitted trustee.  
6 In the absence of an appointed trust advisor or protector, a  
7 Hawaii court of competent jurisdiction shall, upon application  
8 of any interested party, appoint a successor permitted trustee.

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

14 **§ -5 Trust instrument.** (a) A trust instrument shall be  
15 irrevocable and shall expressly incorporate the laws of this  
16 State governing the validity, construction, and administration  
17 of the trust.

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

20 (1) A transferor's power to veto a distribution from the  
21 trust;



- 1           (2) A power of appointment other than a power to appoint  
2           to the transferor, the transferor's creditors, the  
3           transferor's estate, or the creditors of the  
4           transferor's estate that may be exercised by will or  
5           other written instrument of the transferor effective  
6           only upon the transferor's death;
- 7           (3) The transferor's potential or actual receipt of  
8           income, including rights to income retained in the  
9           trust instrument;
- 10          (4) The transferor's annual receipt of a percentage not to  
11          exceed five per cent of the initial value of the trust  
12          assets or its value determined from time to time  
13          pursuant to the trust instrument or of a fixed amount  
14          that on an annual basis does not exceed five per cent  
15          of the initial value of the trust assets;
- 16          (5) The transferor's potential or actual receipt or use of  
17          the trust's principal due to the discretionary action  
18          of a permitted trustee or to a provision in the trust  
19          instrument that governs the distribution of principal;  
20          provided that any included provision shall not confer  
21          upon the transferor a substantially unfettered right  
22          to the receipt or use of the principal;



1           (6) The transferor's right to remove a permitted trustee  
2           or advisor and to appoint a new permitted trustee or  
3           advisor;

4           (7) The transferor's potential or actual receipt of income  
5           or principal to pay income taxes due on income of the  
6           trust if the trust instrument includes a provision  
7           allowing or directing the use of trust funds to pay  
8           income taxes due or if the permitted trustee acts in  
9           the trustee's discretion to allow payment of income  
10          taxes due on the trust income; or

11          (8) A permitted trustee's authority pursuant to  
12          discretion, direction, or the transferor's exercise of  
13          a testamentary power of appointment to pay all or any  
14          part of the transferor's debts outstanding at the time  
15          of the transferor's death, the expenses of  
16          administering the transferor's estate, or any estate  
17          or inheritance tax imposed on or with respect to the  
18          transferor's estate.

19          (c) A trust instrument may provide that the interest of a  
20          beneficiary of the trust, including a beneficiary who is the  
21          transferor of the trust, may not be transferred, assigned,  
22          pledged, or mortgaged, whether voluntarily or involuntarily,





1 before the permitted trustee actually distributes the property  
2 or income to the beneficiary. Any provision of this type  
3 contained in the trust instrument shall be deemed to be a  
4 restriction on the transfer of the transferor's beneficial  
5 interest in the trust that is enforceable under applicable  
6 nonbankruptcy law within the meaning of section 541(c)(2) of the  
7 Bankruptcy Code, 11 U.S.C. section 541(c)(2), or any successor  
8 provision.

9 (d) A transferor may appoint, through the trust  
10 instrument, one or more advisors or protectors including, but  
11 not limited to, the following:

12 (1) Advisors who have authority under the terms of the  
13 trust to remove and appoint permitted trustees,  
14 advisors, or protectors;

15 (2) Advisors who have authority under the terms of the  
16 trust to direct, consent to, or disapprove of  
17 distributions from the trust; and

18 (3) Advisors, including the transferor beneficiary of the  
19 trust, who serve as investment advisors to the trust.

20 (e) If a trustee of a trust existing prior to the  
21 enactment of this chapter proposes to make a permitted transfer  
22 but the trust instrument does not contain a power of appointment



1 that conforms to section -5(b)(2), the trustee may deliver an  
2 irrevocable written election to have section -5(b)(2) apply  
3 to the trust and the nonconforming powers of appointment shall  
4 be deemed modified to the extent necessary to conform with  
5 section -5(b)(2). The irrevocable written election shall  
6 include a description of the original transferor's powers of  
7 appointment as modified and the original transferor's written  
8 consent to the modification. Consent of the original transferor  
9 to a modification of powers of appointment shall not be  
10 considered to be a permitted transfer.

11 (f) If, in any action brought against a trustee of a trust  
12 that results from a permitted transfer, a court declines to  
13 apply the law of this State in determining the validity,  
14 construction, or administration of the trust, or the effect of a  
15 spendthrift provision of the trust, the trustee, immediately  
16 upon the court's action and without the further order of any  
17 court, shall cease to be trustee of the trust and a successor  
18 trustee shall thereupon succeed as trustee in accordance with  
19 the terms of the trust instrument. If the trust instrument does  
20 not provide for a successor trustee or does not provide for an  
21 advisor or protector with powers to appoint successor trustees,  
22 a Hawaii court of competent jurisdiction shall appoint a



1 successor permitted trustee upon the application of any  
 2 beneficiary of the trust under any terms and conditions that the  
 3 court determines to be consistent with the purposes of the trust  
 4 and with this chapter. Upon the removal of a trustee pursuant  
 5 to this section, the trustee who has been removed shall have no  
 6 power or authority other than to convey the trust property to  
 7 the successor trustee.

8       **§ -6 Investments.** Nothing in this chapter shall  
 9 prohibit a permitted trustee from diversifying permitted  
 10 property following the permitted transfer into asset classes and  
 11 investments in accordance with chapter 554C.

12       **§ -7 Retained interests of transferor.** (a) A permitted  
 13 transfer shall be subject to this chapter notwithstanding a  
 14 transferor's retention of any or all of the powers and rights  
 15 described in section -5(b) and notwithstanding the  
 16 transferor's service as investment advisor pursuant to  
 17 section -5(b).

18       (b) The transferor shall have only the powers and rights  
 19 specifically conferred by the trust instrument. Except as  
 20 permitted by sections -4(b) and -5b, a transferor shall  
 21 have no rights or authority with respect to the property that is  
 22 the subject of a permitted transfer or to the income from



1 property that is the subject of a permitted transfer. Any  
2 agreement or understanding purporting to grant or permit the  
3 retention of any greater rights or authority shall be void.

4       **§ -8 Avoidance of permitted transfers in trust.** (a) No  
5 claim, including an action to enforce a judgment entered by a  
6 court or other body having adjudicative authority, by a creditor  
7 against property that is subject to a permitted transfer that  
8 arises after a permitted transfer and no claim by a creditor to  
9 avoid a permitted transfer shall be brought at law or in equity  
10 for attachment or other provisional remedy unless the permitted  
11 transfer was made with actual intent to defraud, hinder, or  
12 delay the creditor.

13       (b) An allowable claim under subsection (a) of this  
14 section shall be extinguished unless:

15       (1) The creditor's claim arose before the permitted  
16 transfer was made and the action is brought on the  
17 later of the date of the permitted transfer or the  
18 date of the enactment of this section; or

19       (2) The creditor's claim arose concurrent with or  
20 subsequent to the permitted transfer and the action is  
21 brought within two years after the permitted transfer  
22 is made.



1 (c) In any action described in subsection (a), the burden  
2 to prove intent to defraud, hinder, or delay by clean and  
3 convincing evidence shall be upon the creditor.

4 (d) For purposes of this section, a permitted transfer  
5 that is made by a transferor who is a trustee shall be deemed to  
6 have been made as of the date that the property that is the  
7 subject of the permitted transfer was originally transferred via  
8 a trust instrument that meets the requirements of this chapter  
9 to the transferor or the transferor's predecessor in interest.

10 (e) Notwithstanding any law to the contrary, a creditor or  
11 other person who purports to have a claim against property that  
12 is the subject of a permitted transfer shall have only the  
13 rights, with respect to a permitted transfer, as are provided in  
14 this section and sections -9 and -10.

15 (f) No creditor or any other person shall have any claim  
16 or cause of action, including but not limited to an action to  
17 enforce a judgment entered by a court or other body having  
18 adjudicative authority, against a trustee or advisor described  
19 in section -4(c) or against any person involved in drafting,  
20 preparing, executing, or funding a trust or in counseling the  
21 parties to a trust that is the subject of a permitted transfer



1 if, as of the date of the action, the action would be barred  
2 under this section.

3       **§ -9 Limitations on permitted transfers.** The  
4 limitations contained in section -8 on actions by creditors  
5 to avoid permitted transfers shall not apply to:

6       (1) Any person to whom the transferor is indebted on  
7 account of a family court-supervised agreement or  
8 family court order for the payment of support or  
9 alimony to the transferor's spouse, former spouse, or  
10 children, or for a division or distribution of  
11 property to the transferor's spouse or former spouse,  
12 but only to the extent of the debt and not to any  
13 claim for forced heirship, legitime, or elective  
14 share; or

15       (2) Any person who suffers death, personal injury, or  
16 property damage on or before the date of a permitted  
17 transfer; provided that the death, personal injury, or  
18 property damage is determined to have been caused in  
19 whole or in part by the tortious act or omission of  
20 either the transferor or another person for whom the  
21 transferor is or was vicariously liable to the extent  
22 of the transferor's liability or vicarious liability.



1           **§ -10 Effect of avoidance of permitted transfers. (a)**

2 A creditor may avoid a permitted transfer pursuant to  
3 section -8 only to the extent necessary to satisfy the  
4 transferor's debt to the creditor at whose instance the transfer  
5 has been avoided, together with costs, including attorneys'  
6 fees, as allowed by a court.

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

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

13           (A) The trustee shall have a first and paramount lien  
14 against the property that is the subject of the  
15 permitted transfer in an amount equal to the  
16 entire cost, including attorneys' fees, properly  
17 incurred by the trustee in the defense of the  
18 action or proceedings to avoid the permitted  
19 transfer; and

20           (B) The permitted transfer shall be avoided subject  
21 to payment of proper fees, costs, preexisting  
22 rights, claims, and interests of the trustee and



1 of any predecessor trustee who has not acted with  
2 intent to defraud, hinder, or delay the creditor;  
3 and

4 (2) If the court is satisfied that a beneficiary of the  
5 trust has not acted with intent to defraud, hinder, or  
6 delay the creditor, the permitted transfer shall be  
7 avoided subject to the beneficiary's right to retain  
8 any distribution made prior to the creditor's  
9 commencement of an action to avoid the permitted  
10 transfer. For purposes of this paragraph, it shall be  
11 presumed that a beneficiary did not act with intent to  
12 defraud, hinder, or delay the creditor merely by  
13 creating the trust or by accepting a distribution made  
14 in accordance with the terms of the trust.

15 (c) A creditor who brings an action pursuant to  
16 section -8 to avoid a permitted trust shall have the burden  
17 of proving by clear and convincing evidence that a trustee or  
18 beneficiary acted with intent to defraud, hinder, or delay the  
19 creditor; provided that, in the case of a beneficiary who is  
20 also the transferor, the burden on the creditor shall be to  
21 prove by a preponderance of the evidence that the transferor-  
22 beneficiary acted with intent to defraud, hinder, or delay the





1 creditor. Mere acceptance of permitted property by a trustee  
2 shall not constitute evidence of intent to defraud, hinder, or  
3 delay a creditor.

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

9 (1) Estate or inheritance taxes imposed upon or due to the  
10 beneficiary's estate;

11 (2) Debts of the beneficiary's estate; or

12 (3) Expenses of administering the beneficiary's estate;

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

16 **§ -11 Multiple transfers.** If more than one permitted  
17 transfer is made by means of the same trust instrument:

18 (1) The making of a subsequent permitted transfer shall be  
19 disregarded in determining whether a creditor's claim  
20 with respect to a prior permitted transfer is  
21 extinguished as provided in section -8; and



1 (2) Any distribution to a beneficiary shall be deemed to  
2 have been made from the latest permitted transfer.

3 **§ -12 Taxation.** (a) The State shall levy a one per  
4 cent tax on all permitted transfers.

5 (b) The State shall not levy any other taxes against  
6 trusts subject to this chapter; provided that Hawaii resident  
7 taxpayers who receive actual or constructive distributions of  
8 income or principal from trusts shall be subject to all  
9 applicable taxes on that income."

10 SECTION 3. Section 525-4, Hawaii Revised Statutes, is  
11 amended to read as follows:

12 "[+]§525-4[+] **Exclusions from statutory rule against**  
13 **perpetuities.** Section 525-1 shall not apply to:

14 (1) A fiduciary's power to sell, lease, or mortgage  
15 property, and the power of a fiduciary to determine  
16 principal and income;

17 (2) A discretionary power of a trustee to distribute  
18 principal before termination of a trust;

19 (3) A nonvested property interest held by a charity,  
20 government, or governmental agency or subdivision, if  
21 the nonvested property interest is preceded by an



- 1 interest held by another charity, government, or  
2 governmental agency or subdivision;
- 3 (4) A property interest in or a power of appointment with  
4 respect to a pension, profit-sharing, stock bonus,  
5 health, disability, death benefit, income deferral, or  
6 other current or deferred benefit plan for one or more  
7 employees, independent contractors, or their  
8 beneficiaries or spouses; [~~or~~]
- 9 (5) A property interest, power of appointment, or  
10 arrangement that was not subject to the common-law  
11 rule against perpetuities or is excluded by any other  
12 applicable law[~~-~~]; or
- 13 (6) A trust described in chapter \_\_\_\_\_, permitted  
14 transfers in trust act."

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

17 SECTION 5. This Act shall take effect on July 1, 2010;  
18



1 provided that section 2 shall apply to permitted transfers made  
2 after the effective date of this Act.

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INTRODUCED BY:

*[Signature]*

*Randy H. Becker*

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**Report Title:**

Permitted Transfers in Trust Act; Rule Against Perpetuities

**Description:**

Creates the Permitted Transfers in Trust Act to govern transfers of currency, bonds, and securities from a transferor to a trustee by means of an irrevocable trust instrument. Specifies that the rule against perpetuities does not apply to transfers pursuant to the Permitted Transfers in Trust Act.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

