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

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

4 "CHAPTER

5 PERMITTED TRANSFERS IN TRUST

6 § -1 Short title. This chapter shall be known and may
7 be cited as the Permitted Transfers in Trust Act.

8 § -2 Definitions. As used in this chapter:

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

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

15 "Debt" means liability on a claim.

16 "Former spouse" means a person to whom the transferor was
17 married where the marriage was dissolved before the time of the
18 permitted transfer.

19 "Permitted property" means United States currency or any
20 other legal tender capable of conversion to United States
21 currency or property capable of exchange on a governmentally
22 regulated exchange within the United States including, but not

1 limited to, American Depository Receipts (ADRs), exchange traded
2 funds, common stocks, mutual funds, and any and all other
3 securities that a fiduciary is permitted to hold pursuant to the
4 Hawaii uniform prudent investor act, chapter 554C.

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

9 "Permitted trustee" means a qualified natural person or
10 trust company that:

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

22 "Person" means a natural person.

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

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

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

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

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

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

20 (1) The delivery of permitted property by the transferor
21 to the permitted trustee and the written acceptance of
22 the permitted property by the permitted trustee;

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

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

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

20 (b) If a permitted trustee of a trust ceases to meet the
21 requirements of subsection (a) and there remains no trustee that
22 meets the requirements, the permitted trustee shall be deemed to

1 have resigned as of the time that the trustee no longer meets
2 the requirements of subsection (a). At that time, the successor
3 permitted trustee provided for in the trust instrument shall
4 become the permitted trustee of the trust. In the absence of
5 any successor permitted trustee provided for in the trust
6 instrument, a trust advisor or protector provided for in the
7 trust instrument shall appoint a successor permitted trustee.
8 In the absence of an appointed trust advisor or protector, a
9 Hawaii court of competent jurisdiction shall, upon application
10 of any interested party, appoint a successor permitted trustee.

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

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

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

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

1 upon the transferor a substantially unfettered right
2 to the receipt or use of the principal;

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

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

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

21 (c) A trust instrument may provide that the interest of a
22 beneficiary of the trust, including a beneficiary who is the

1 transferor of the trust, may not be transferred, assigned,
2 pledged, or mortgaged, whether voluntarily or involuntarily,
3 before the permitted trustee actually distributes the property
4 or income to the beneficiary. Any provision of this type
5 contained in the trust instrument shall be deemed to be a
6 restriction on the transfer of the transferor's beneficial
7 interest in the trust that is enforceable under applicable
8 nonbankruptcy law within the meaning of section 541(c)(2) of the
9 Bankruptcy Code, 11 U.S.C. section 541(c)(2), or any successor
10 provision.

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

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

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

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

1 (e) If a trustee of a trust existing prior to the
2 enactment of this chapter proposes to make a permitted transfer
3 but the trust instrument does not contain a power of appointment
4 that conforms to section -5(b)(2), the trustee may deliver an
5 irrevocable written election to have section -5(b)(2) apply
6 to the trust and the nonconforming powers of appointment shall
7 be deemed modified to the extent necessary to conform with
8 section -5(b)(2). The irrevocable written election shall
9 include a description of the original transferor's powers of
10 appointment as modified and the original transferor's written
11 consent to the modification. Consent of the original transferor
12 to a modification of powers of appointment shall not be
13 considered to be a permitted transfer.

14 (f) If, in any action brought against a trustee of a trust
15 that results from a permitted transfer, a court declines to
16 apply the law of this State in determining the validity,
17 construction, or administration of the trust, or the effect of a
18 spendthrift provision of the trust, the trustee, immediately
19 upon the court's action and without the further order of any
20 court, shall cease to be trustee of the trust and a successor
21 trustee shall thereupon succeed as trustee in accordance with
22 the terms of the trust instrument. If the trust instrument does

1 not provide for a successor trustee or does not provide for an
2 advisor or protector with powers to appoint successor trustees,
3 a Hawaii court of competent jurisdiction shall appoint a
4 successor permitted trustee upon the application of any
5 beneficiary of the trust under any terms and conditions that the
6 court determines to be consistent with the purposes of the trust
7 and with this chapter. Upon the removal of a trustee pursuant
8 to this section, the trustee who has been removed shall have no
9 power or authority other than to convey the trust property to
10 the successor trustee.

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

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

21 (b) The transferor shall have only the powers and rights
22 specifically conferred by the trust instrument. Except as

1 permitted by sections -4(b) and -5b, a transferor shall
2 have no rights or authority with respect to the property that is
3 the subject of a permitted transfer or to the income from
4 property that is the subject of a permitted transfer. Any
5 agreement or understanding purporting to grant or permit the
6 retention of any greater rights or authority shall be void.

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

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

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

1 (2) The creditor's claim arose concurrent with or
2 subsequent to the permitted transfer and the action is
3 brought within two years after the permitted transfer
4 is made.

5 (c) In any action described in subsection (a), the burden
6 to prove intent to defraud, hinder, or delay by clear and
7 convincing evidence shall be upon the creditor.

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

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

19 (f) No creditor or any other person shall have any claim
20 or cause of action, including but not limited to an action to
21 enforce a judgment entered by a court or other body having
22 adjudicative authority, against a trustee or an advisor

1 described in section -4(c) or against any person involved in
2 drafting, preparing, executing, or funding a trust or in
3 counseling the parties to a trust that is the subject of a
4 permitted transfer if, as of the date of the action, the action
5 would be barred under this section.

6 **§ -9 Limitations on permitted transfers.** The
7 limitations contained in section -8 on actions by creditors
8 to avoid permitted transfers shall not apply to:

- 9 (1) Any person to whom the transferor is indebted on
10 account of a family court-supervised agreement or
11 family court order for the payment of support or
12 alimony to the transferor's spouse, former spouse, or
13 children, or for a division or distribution of
14 property to the transferor's spouse or former spouse,
15 but only to the extent of the debt and not to any
16 claim for forced heirship, legitime, or elective
17 share; or
- 18 (2) Any person who suffers death, personal injury, or
19 property damage on or before the date of a permitted
20 transfer; provided that the death, personal injury, or
21 property damage is determined to have been caused in
22 whole or in part by the tortious act or omission of

1 either the transferor or another person for whom the
2 transferor is or was vicariously liable to the extent
3 of the transferor's liability or vicarious liability.

4 **§ -10 Effect of avoidance of permitted transfers. (a)**

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

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

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

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

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

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

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

1 also the transferor, the burden on the creditor shall be to
2 prove by a preponderance of the evidence that the transferor-
3 beneficiary acted with intent to defraud, hinder, or delay the
4 creditor. Mere acceptance of permitted property by a trustee
5 shall not constitute evidence of intent to defraud, hinder, or
6 delay a creditor.

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

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

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

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

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

19 § -11 **Multiple transfers.** If more than one permitted
20 transfer is made by means of the same trust instrument:

21 (1) The making of a subsequent permitted transfer shall be
22 disregarded in determining whether a creditor's claim

1 with respect to a prior permitted transfer is
2 extinguished as provided in section -8; and
3 (2) Any distribution to a beneficiary shall be deemed to
4 have been made from the latest permitted transfer.

5 § -12 **Taxation.** (a) The State shall levy a one per
6 cent tax on all permitted transfers.

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

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

14 "[+]§525-4[+] **Exclusions from statutory rule against**
15 **perpetuities.** Section 525-1 shall not apply to:

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

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

21 (3) A nonvested property interest held by a charity,
22 government, or governmental agency or subdivision, if

1 the nonvested property interest is preceded by an
2 interest held by another charity, government, or
3 governmental agency or subdivision;

4 (4) A property interest in or a power of appointment with
5 respect to a pension, profit-sharing, stock bonus,
6 health, disability, death benefit, income deferral, or
7 other current or deferred benefit plan for one or more
8 employees, independent contractors, or their
9 beneficiaries or spouses; [~~or~~]

10 (5) A property interest, power of appointment, or
11 arrangement that was not subject to the common-law
12 rule against perpetuities or is excluded by any other
13 applicable law[~~or~~]; or

14 (6) A trust described in chapter _____, permitted
15 transfers in trust act."

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

18 SECTION 5. This Act shall take effect on July 1, 2010;
19 provided that section 2 shall apply to permitted transfers made
20 after the effective date of this Act.

21

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. (SD1)

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