



GOV. MSG. NO. 643

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

June 28, 2010

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fifth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

This is to inform you that on June 28, 2010, the following bill was signed into law:

SB2842 SD2 HD1 CD1

A BILL FOR AN ACT
RELATING TO THE PERMITTED TRANSFERS IN
TRUST ACT.
ACT 182 (10)

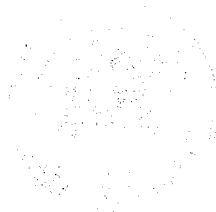
Sincerely,



LINDA LINGLE

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SENATE
OFFICE OF THE PRESIDENT

10 JUN 28 P1:43



Approved by the Governor
on JUN 28 2010

ACT 182

THE SENATE
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

S.B. NO. 2842
S.D. 2
H.D. 1
C.D. 1

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.

16 SECTION 2. The Hawaii Revised Statutes is amended by
17 adding a new chapter to be appropriately designated and to read
18 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 "Cash" means United States currency.

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

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

13 "Debt" means liability on a claim.

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

17 "Grantor trust" means a trust described in sections 671
18 through 679 of the Internal Revenue Code of 1986, as amended.

19 "Marketable securities" means securities that are:

- 20 (1) Exchanged on a governmentally regulated exchange
21 within the United States including, common stocks,
22 bonds, mutual funds, or exchange traded funds; and



1 (2) Permitted to be held by a fiduciary under Hawaii state
2 law;

3 provided that "marketable securities" does not include real
4 estate or any interests in corporations, partnerships, and
5 limited liability companies that are not publicly traded.

6 "Non-grantor trust" shall refer to any trust that is not a
7 "grantor trust" as defined in this chapter.

8 "Permitted property" means cash, marketable securities,
9 life insurance contracts, and non-private annuities.

10 "Permitted transfer" means a transfer of permitted property
11 by or from a transferor to a permitted trustee by means of a
12 trust instrument, regardless of whether consideration is
13 exchanged.

14 "Permitted trustee" means a person, other than the
15 transferor, who is a resident of this State, or a bank or trust
16 company authorized to do business in this State that possesses
17 and exercises trust powers and has its principal place of
18 business in this State.

19 "Person" means a natural person.

20 "Spouse" means a person to whom the transferor is married
21 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 **Completed transfers.** The transfer of permitted
16 property under this chapter shall be deemed completed 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 by the transferor
10 with the department of taxation and payment of the
11 attendant transfer tax.

12 § -4 **Permitted trustees.** (a) A permitted trustee means
13 a person, other than the transferor, who is a resident of this
14 State, or a bank or trust company authorized to do business in
15 this State that possesses and exercises trust powers and has its
16 principal place of business in this State.

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



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

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

13 § -5 Trust instrument. (a) A trust instrument shall be
14 irrevocable and shall expressly incorporate the laws of this
15 State governing the validity, construction, and administration
16 of the trust.

17 (b) The trustee, in its discretion, may terminate any
18 trust if and when its fair market value has declined to the
19 extent that would make it uneconomical, imprudent, or unwise to
20 continue to retain the trust, and shall pay and distribute the
21 trust to the persons entitled to mandatory or discretionary



1 income distributions as the trustee in the trustee's absolute
2 discretion shall decide.

3 (c) A trust instrument shall not be deemed revocable on
4 account of the inclusion of:

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

7 (2) A power of appointment other than a power to appoint
8 to the transferor, the transferor's creditors, the
9 transferor's estate, or the creditors of the
10 transferor's estate that may be exercised by will or
11 other written instrument of the transferor effective
12 only upon the transferor's death;

13 (3) The transferor's potential or actual receipt of
14 income, including rights to income retained in the
15 trust instrument;

16 (4) The transferor's annual receipt of a percentage not to
17 exceed five per cent of the initial value of the trust
18 assets or its value determined from time to time
19 pursuant to the trust instrument or of a fixed amount
20 that on an annual basis does not exceed five per cent
21 of the initial value of the trust assets;



- 1 (5) The transferor's potential or actual receipt or use of
2 the trust's principal due to the discretionary action
3 of a permitted trustee or to a provision in the trust
4 instrument that governs the distribution of principal;
5 provided that any included provision shall not confer
6 upon the transferor a substantially unfettered right
7 to the receipt or use of the principal;
- 8 (6) The transferor's right to remove a permitted trustee
9 or advisor and to appoint a new permitted trustee or
10 advisor;
- 11 (7) The transferor's potential or actual receipt of income
12 or principal to pay income taxes due on income of the
13 trust if the trust instrument includes a provision
14 allowing or directing the use of trust funds to pay
15 income taxes due, or if the permitted trustee acts in
16 the trustee's discretion to allow payment of income
17 taxes due on the trust income; or
- 18 (8) A permitted trustee's authority pursuant to
19 discretion, direction, or the transferor's exercise of
20 a testamentary power of appointment to pay all or any
21 part of the transferor's debts outstanding at the time
22 of the transferor's death, the expenses of



1 administering the transferor's estate, or any estate
2 or inheritance tax imposed on or with respect to the
3 transferor's estate.

4 (d) A trust instrument may provide that the interest of a
5 beneficiary of the trust, including a beneficiary who is the
6 transferor of the trust, may not be transferred, assigned,
7 pledged, or mortgaged, whether voluntarily or involuntarily,
8 before the permitted trustee actually distributes the property
9 or income to the beneficiary. Any provision of this type
10 contained in the trust instrument shall be deemed to be a
11 restriction on the transfer of the transferor's beneficial
12 interest in the trust that is enforceable under applicable
13 nonbankruptcy law within the meaning of 11 United States Code
14 Section 541(c)(2) of the Bankruptcy Code or any successor
15 provision.

16 (e) A transferor may appoint, through the trust
17 instrument, one or more advisors or protectors, including the
18 following:

19 (1) Advisors who have authority under the terms of the
20 trust to remove and appoint permitted trustees,
21 advisors, or protectors;



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

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

6 (f) Whenever there shall be a dispute, deadlock, or
7 difference of opinion between a permitted trustee and an
8 advisor, the transferor may direct that the determination of the
9 advisor shall be binding upon the permitted trustee, but that
10 the permitted trustee shall bear no liability or accountability
11 for any act or transaction entered into as a result of the
12 enforcement of the advisor's privilege if the permitted trustee
13 dissents in writing.

14 (g) If a trustee of a trust existing prior to the
15 enactment of this chapter proposes to make a permitted transfer,
16 but the trust instrument does not contain a power of appointment
17 that conforms to section -5(c)(2), the trustee may deliver an
18 irrevocable written election to have section -5(c)(2) apply
19 to the trust, and the nonconforming powers of appointment shall
20 be deemed modified to the extent necessary to conform with
21 section -5(c)(2). The irrevocable written election shall
22 include a description of the original transferor's powers of



1 appointment as modified, and the original transferor's written
2 consent to the modification. Consent of the original transferor
3 to a modification of powers of appointment shall not be
4 considered to be a permitted transfer.

5 (h) If, in any action brought against a trustee of a trust
6 that results from a permitted transfer, a court declines to
7 apply the law of this State in determining the validity,
8 construction, or administration of the trust, or the effect of a
9 spendthrift provision of the trust, the trustee, immediately
10 upon the court's action and without the further order of any
11 court, shall cease to be trustee of the trust and a successor
12 trustee shall thereupon succeed as trustee in accordance with
13 the terms of the trust instrument. If the trust instrument does
14 not provide for a successor trustee or does not provide for an
15 advisor or protector with powers to appoint successor trustees,
16 a Hawaii court of competent jurisdiction shall appoint a
17 successor permitted trustee upon the application of any
18 beneficiary of the trust under any terms and conditions that the
19 court determines to be consistent with the purposes of the trust
20 and with this chapter. Upon the removal of a trustee pursuant
21 to this section, the trustee who has been removed shall have no



1 power or authority other than to convey the trust property to
2 the successor trustee.

3 § -6 **Investments.** Nothing in this chapter shall
4 prohibit a permitted trustee from diversifying trust assets;
5 provided that a permitted trustee shall be authorized to invest
6 only in permitted property, as defined in this chapter.

7 § -7 **Retained interests of transferor.** (a) A permitted
8 transfer shall be subject to this chapter notwithstanding a
9 transferor's retention of any or all of the powers and rights
10 described in section -5(c) and notwithstanding the
11 transferor's service as investment advisor pursuant to
12 section -5(e)(3).

13 (b) The transferor shall have only the powers and rights
14 specifically conferred by the trust instrument. Except as
15 permitted by sections -5(c) and -5(e), a transferor shall
16 have no rights or authority with respect to the property that is
17 the subject of a permitted transfer or to the income from
18 property that is the subject of a permitted transfer. Any
19 agreement or understanding purporting to grant or permit the
20 retention of any greater rights or authority shall be void.

21 § -8 **Avoidance of permitted transfers in trust.** (a) No
22 claim, including an action to enforce a judgment entered by a



1 court or other body having adjudicative authority, by a creditor
2 against property that is subject to a permitted transfer that
3 arises after a permitted transfer and no claim by a creditor to
4 avoid a permitted transfer shall be brought at law or in equity
5 for attachment or other provisional remedy unless the permitted
6 transfer was made with actual intent to defraud, hinder, or
7 delay the creditor.

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

10 (1) The creditor's claim arose before the permitted
11 transfer was made and the action is brought on the
12 latter of the date of the permitted transfer or the
13 date of the enactment of this section; or

14 (2) The creditor's claim arose concurrent with or
15 subsequent to the permitted transfer, and the action
16 is brought within two years after the permitted
17 transfer is made.

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

21 (d) For purposes of this section, a permitted transfer
22 that is made by a transferor who is a trustee shall be deemed to



1 have been made as of the date that the property that is the
2 subject of the permitted transfer was originally transferred via
3 a trust instrument that meets the requirements of this chapter
4 to the transferor or the transferor's predecessor in interest.

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

10 (f) No creditor or any other person shall have any claim
11 or cause of action, including an action to enforce a judgment
12 entered by a court or other body having adjudicative authority,
13 against a trustee or advisor described in section -4(c) or
14 against any person involved in drafting, preparing, executing,
15 or funding a trust or in counseling the parties to a trust that
16 is the subject of a permitted transfer if, as of the date of the
17 action, the action would be barred under this section.

18 § -9 Limitations on permitted transfers. The
19 limitations contained in section -8 on actions by creditors
20 to avoid permitted transfers shall not apply to:

21 (1) Any person to whom the transferor is indebted on
22 account of a family court-supervised agreement or



1 family court order for the payment of support or
2 alimony to the transferor's spouse, former spouse, or
3 children, or for a division or distribution of
4 property to the transferor's spouse or former spouse,
5 but only to the extent of the debt and not to any
6 claim for forced heirship, legitime, or elective
7 share;

8 (2) Any person who suffers death, personal injury, or
9 property damage on or before the date of a permitted
10 transfer; provided that the death, personal injury, or
11 property damage is determined to have been caused in
12 whole or in part by the tortious act or omission of
13 either the transferor or another person for whom the
14 transferor is or was vicariously liable to the extent
15 of the transferor's liability or vicarious liability;

16 (3) Any lender who extends a secured or collateralized
17 loan to the transferor based on the transferor's or
18 the transferor's agent's express or implied
19 representation that the assets of a trust established
20 under this chapter would be available as security
21 against the loan in the event of the transferor's
22 default thereon; or



1 (4) The State of Hawaii to the extent that a transfer
2 results in the transferor being unable to meet the
3 transferor's tax liabilities, but only to the extent
4 necessary to extinguish the outstanding tax
5 liabilities.

6 § -10 Effect of avoidance of permitted transfers. (a)

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

12 (b) In an action pursuant to subsection (a) to avoid a
13 permitted transfer:

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

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



1 action or proceedings to avoid the permitted
2 transfer; and

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

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

20 (c) A creditor who brings an action pursuant to
21 section -8 to avoid a permitted trust shall have the burden
22 of proving by clear and convincing evidence that a trustee or



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

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

- 14 (1) Estate or inheritance taxes imposed upon or due to the
 15 beneficiary's estate;
 - 16 (2) Debts of the beneficiary's estate; or
 - 17 (3) Expenses of administering the beneficiary's estate
- 18 unless the beneficiary actually directs the payment of taxes,
 19 debts, or expenses and then only to the extent of that
 20 direction.

21 § -11 **Multiple transfers.** If more than one permitted
 22 transfer is made by means of the same trust instrument:



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

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

7 § -12 Taxation. (a) The State shall levy a one-time
8 one per cent excise tax on the fair market value of all
9 permitted transfers. This one-time excise tax shall be
10 administered by the department of taxation with all of its
11 authorities under title 14, including all rights relating to the
12 assessment, collection, and enforcement of the tax laws. The
13 department of taxation shall be authorized to implement the tax
14 under this section, including the timing, collection, and appeal
15 rights of persons affected, by rule, including temporary rule.

16 (b) A non-grantor trust established under this chapter
17 shall be subject to income tax in Hawaii; provided that to the
18 extent that the beneficial interest in the non-grantor trust
19 shall be held by a beneficiary or beneficiaries residing outside
20 this State, any income or capital gains accumulated for the
21 benefit of the non-resident beneficiary or beneficiaries shall
22 be excluded from Hawaii income tax for that year.



1 (c) A trustee of a non-grantor trust established under
2 this chapter shall not be required to track accumulated income
3 or gains attributable to a nonresident beneficiary.

4 (d) Notwithstanding any discretionary distribution
5 provisions to the contrary, where the percentage interests of
6 the beneficiaries are indeterminable based on the provisions of
7 the trust, the trustee shall allocate accumulated income and
8 gains equally among all beneficiaries then entitled to
9 distributions of income.

10 (e) Hawaii resident taxpayers who receive actual or
11 constructive distributions of income or principal from trusts
12 shall be subject to all applicable taxes on that income."

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

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

- 17 (1) A fiduciary's power to sell, lease, or mortgage
18 property, and the power of a fiduciary to determine
19 principal and income;
- 20 (2) A discretionary power of a trustee to distribute
21 principal before termination of a trust;



1 (3) A nonvested property interest held by a charity,
2 government, or governmental agency or subdivision, if
3 the nonvested property interest is preceded by an
4 interest held by another charity, government, or
5 governmental agency or subdivision;

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

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

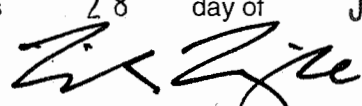
16 (6) A trust described in chapter _____."

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

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

22

APPROVED this 28 day of JUN, 2010



GOVERNOR OF THE STATE OF HAWAII