
A BILL FOR AN ACT

RELATING TO A FIDUCIARY'S STANDARD OF CARE AND PERFORMANCE.

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

1 SECTION 1. The legislature finds that states such as
2 Alaska, Delaware, and South Dakota have been aggressively
3 pursuing legislation to encourage the establishment of trusts
4 within their jurisdictions. Hawaii residents are creating
5 trusts in these states or moving the location of existing trusts
6 outside of Hawaii. In addition to the State losing business,
7 Hawaii residents who presently are unable to establish directed
8 trusts (generally, a trust where the trust administration duties
9 and the investment management duties are separated) in the
10 absence of a Hawaii statute that clearly allows them to do so,
11 are forced to endure additional costs and inconveniences when
12 forming the trust elsewhere. Thirty-four states currently have
13 laws in place that allow for directed trusts. Although Hawaii
14 law arguably allows for directed trusts, until they are clearly
15 authorized, estate planners and advisors continue to recommend
16 that their clients establish or move their trusts to other, more
17 "progressive" states such as Alaska and South Dakota.



1 This Act authorizes the settlor of a trust to designate and
2 allocate, at the outset, the investment function of a trust
3 entirely to an investment advisor and the administrative
4 function to the administrative trustee. In addition, this Act
5 updates Hawaii law to more accurately reflect the current
6 reality of trust administration and investments, where settlors
7 prefer to divide trustee functions among two or more
8 fiduciaries. This Act also limits the liability of an
9 administrative trustee for trust investments over which the
10 trustee does not exercise responsibility. This Act will help
11 protect and grow Hawaii's trust industry and allow Hawaii
12 residents the opportunity to create cutting-edge trust
13 arrangements without having to move ownership and administration
14 of the trust property outside of the State.

15 The purpose of this Act is to promote the local economy and
16 accommodate the formation of directed trusts by specifying
17 standards of care and performance for fiduciary actions subject
18 to an advisor's authority under the terms of the trust.

19 SECTION 2. Section 560:7-302, Hawaii Revised Statutes, is
20 amended to read as follows:

21 "§560:7-302 Trustee's standard of care and performance[-];
22 standards for fiduciary actions under an advisor's authority.



1 (a) Except as otherwise provided by the terms of the trust, the
2 trustee shall observe the standards in dealing with the trust
3 assets that would be observed by a prudent person dealing with
4 the property of another, and if the trustee has special skills
5 or is named trustee on the basis of representations of special
6 skills or expertise, the trustee is under a duty to use those
7 skills.

8 (b) The standard of care and performance for fiduciary
9 actions that are within the scope of an advisor's authority
10 under the terms of a trust shall be as follows:

11 (1) Where one or more persons are given authority by the
12 terms of a trust to direct, consent to, or disapprove
13 a fiduciary's actual or proposed investment decisions,
14 distribution decisions, or any other decision of the
15 fiduciary, those persons shall be considered to be
16 advisors and fiduciaries when exercising the given
17 authority unless the trust provides otherwise;

18 (2) Whenever a trust provides that a fiduciary is to
19 follow the direction of an advisor with respect to
20 investment decisions, distribution decisions, or any
21 other decision of the fiduciary, then except to the



1 extent that the terms of the trust provides otherwise,
2 the fiduciary shall have no duty to:
3 (A) Monitor the conduct of the advisor;
4 (B) Provide advice to the advisor or consult with the
5 advisor; or
6 (C) Communicate with or warn or apprise any
7 beneficiary or third party concerning instances
8 in which the fiduciary would or might have
9 exercised the fiduciary's own discretion in a
10 manner different from the manner directed by the
11 advisor.

12 Absent clear and convincing evidence to the contrary,
13 the actions of the fiduciary pertaining to matters
14 within the scope of the advisor's authority, such as
15 confirming that the advisor's directions have been
16 carried out and recording and reporting actions taken
17 at the advisor's direction, shall be presumed to be
18 administrative actions taken by the fiduciary solely
19 to allow the fiduciary to perform the duties assigned
20 to the fiduciary under the trust, and the
21 administrative actions shall not be deemed to
22 constitute an undertaking by the fiduciary to monitor



1 the advisor or otherwise participate in actions within
2 the scope of the advisor's authority;

3 (3) If a trust provides that a fiduciary is to follow the
4 direction of an advisor, and the fiduciary acts in
5 accordance with the advisor's direction, then except
6 in cases of wilful misconduct on the part of the
7 fiduciary so directed, the fiduciary shall not be
8 liable for any loss resulting directly or indirectly
9 from any such act; and

10 (4) If a trust provides that a fiduciary is to make
11 decisions with the consent of an advisor, then except
12 in cases of wilful misconduct on the part of the
13 fiduciary, the fiduciary shall not be liable for any
14 loss resulting directly or indirectly from any act
15 taken or omitted as a result of the advisor's failure
16 to provide consent after having been requested to do
17 so by the fiduciary.

18 (c) The provisions of subsection (b) shall apply if the
19 settlor incorporates the provisions into the trust instrument by
20 specific reference. The provisions of subsection (b) shall also
21 apply if:



1 (1) The provisions are incorporated into an irrevocable
2 trust by a person who is already authorized by the
3 terms of the trust to modify the trust; or
4 (2) All interested persons agree in writing, without the
5 necessity of any court order, to modify the trust by
6 incorporating the provisions of subsection (b) into
7 the trust, but only to the extent that all interested
8 persons agree that incorporation of the provisions
9 does not violate a material purpose of the trust and
10 would otherwise be approved by the court under this
11 chapter or other applicable law; provided that any
12 interested person who is a minor, unborn, or
13 unascertainable beneficiary shall be bound by other
14 interested persons having a substantially identical
15 interest in the trust modification.

16 (d) For purposes of this section:
17 "Advisor" means a person who is given the authority by the
18 terms of a trust to direct, consent to, or disapprove of a
19 fiduciary's actual or proposed investment decisions,
20 distribution decisions, or any other decision of the fiduciary.
21 The term includes a protector that has been granted powers and
22 authority by the terms of a trust, including:



1 (1) The power to remove and appoint trustees, advisors,
2 trust committee members, and other protectors;

3 (2) The power to modify or amend the trust to achieve
4 favorable tax status or to facilitate the efficient
5 administration of the trust; and

6 (3) The power to modify, expand, or restrict the terms of
7 a power of appointment granted to a beneficiary by the
8 trust.

9 "Interested persons" means the trustee and beneficiaries
10 whose consent would be required to achieve a binding settlement,
11 were the settlement to be approved by the court, but does not
12 include contingent or more remote beneficiaries or creditors.

13 "Investment decision" means the retention, purchase, sale,
14 exchange, tender, or other transaction affecting the ownership
15 of or rights in any investment, or the valuation of non-publicly
16 traded investments.

17 "Wilful misconduct" means intentional wrongdoing and does
18 not include mere negligence, gross negligence, or recklessness."

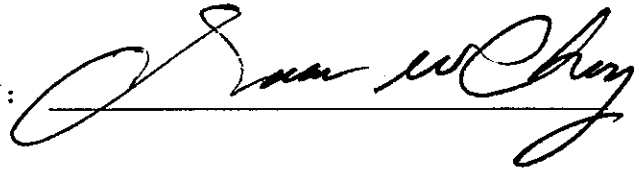
19 SECTION 3. Statutory material to be repealed is bracketed
20 and stricken. New statutory material is underscored.



1 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY:

A handwritten signature in cursive script, appearing to read "Dan W. Chyn", is written over a horizontal line.

JAN 24 2013



H.B. NO. 1300

Report Title:

Directed Trusts; Standard of Care and Performance for Fiduciary Actions under an Advisor

Description:

Accommodates the formation of directed trusts by specifying standards of care and performance for fiduciary actions subject to an advisor's authority under the terms of the trust.

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