Bank of Hawaii

Testimony In Support of SB 1249, SD 2, HD1

COMMITTEE ON FINANCE
Relating to the Compensation of Trustees
Thursday, March 27, 2014, 2 p.m.
State Capitol, Conference Room 308

LATE

To: The Honorable Sylvia Luke, Chair
The Honorable Scott Nishimoto and Aaron Ling Johanson, Vice Chairs
Members of the Finance Committee

My name is Stafford Kiguchi, Executive Vice President of Bank of Hawaii. I am submitting this testimony on behalf of the Trust department of Bank of Hawaii in support of SB1249 SD2, HD1.

The purpose of the proposed Act is to update and clarify HRS 607-18, the current statute that governs trustee compensation and is applicable when the trust document either references the statute or is silent as it relates to the compensation paid to the trustees. This statute was originally enacted in 1935 with minor modifications throughout the years. Over the last 78 years, the services provided by a corporate trustee, the types of assets held within the trusts, and the increased oversight and regulations that a corporate trustee (bank or trust company) must adhere to have changed significantly and as such call for the proposed changes.

A corporate trustee is in the business of providing trust services that can differ significantly to that of an individual trustee. Services provided by a corporate trustee will include the assignment of professionals in (1) trust administration who will ensure adherence to the terms of the trust document and governing law, (2) planning, and (3) asset management for real estate and liquid assets, as well as operational staff to support the administration. Corporate trustees also provide file maintenance, document storage and recordkeeping of all trust activities. Such services are included in fees charged under the statute. Corporate trustees are highly regulated by federal and state examiners to ensure adherence to state and federal laws and current policies and procedures. An individual trustee does not have the same regulatory requirements and is not in the business of providing trust services and as such they have the ability to hire record keepers, investment advisors, other professionals and advisors to help in their ability to deliver trust services all of which can be added as expenses to the trust.

The corporate trustee business is competitive, thereby requiring that fees be reasonable and fair. It is for this reason that we feel allowing a corporate trustee to charge according to its published fee schedule would be appropriate. The changes proposed will also help clarify aspects of the bill which will help reduce issues that require court intervention which can result in added expense to the trust.

We appreciate the opportunity to testify and ask for your support of SB1249 SD2 HD1.

Respectfully submitted,

Stafford Kiguchi (694-8580)

TESTIMONY ON SB 1249, SD 2, H.D.1.
RELATING TO THE COMPENSATION OF TRUSTEES

Thursday, March 27, 2014, 2:00 p.m.
State Capitol, Conference Room 308

COMMITTEE ON FINANCE

LATE

To: The Honorable Sylvia Luke, Chair
The Honorable Scott Y. Nishimoto, Vice Chair
The Honorable Aaron Ling Johanson, Vice Chair

IN SUPPORT OF SB 1249, SD 2, H.D.1.

My name is Rhonda L. Griswold, Esq. and I am one of the attorneys on the Judiciary's Committee on the Uniform Probate Code and Probate Court Practices. Although the issues presented in the proposed Act have been discussed by the Committee, I am submitting this testimony on behalf of the individual attorney members of the Committee (Mary Jane Connell, Colin Goo, Frank Kanemitsu, Peter Ng, Jeffrey Niebling, Raymond Okada, Carroll Taylor, and Eric Young), and not on behalf of the Committee itself.

Since the introduction of SB 1249 during last year's session, I, along with the prior Chairs of Hawaii State Bar Association's Elder Law and Probate and Estate Planning Sections, have worked with Rep. Rhoads' office to fine-tune and improve the proposed legislation. I believe that SB 1249 has broad support among the estate planning community.

PURPOSE:

The purpose of the proposed Act is to update and clarify HRS § 607-18, the current statute that governs trustee compensation where the trust instrument does not specify how much the trustee should be paid. The statute and this Act only apply to private trusts, not to charitable trusts. The statute has not been amended in 20 years. During that time, certain ambiguities in the statute have caused litigation between beneficiaries and trustees, especially individuals who serve as trustee because they do not have a published fee schedule like corporate trustees. The purpose of the proposed Act is to clarify the trustee fee provisions, to create a compensation system that is fair to beneficiaries and trustees, and to reduce the need for court intervention.

BACKGROUND & DISCUSSION:

Many in Hawaii have revocable living trusts to help manage their affairs if they become incapacitated and to provide for the disposition of their assets at death. Many others are beneficiaries of irrevocable trusts established by family members (such as a revocable trust that becomes irrevocable after the settlor has died).

While the settlor of a revocable trust usually serves as trustee until incapacity or death, the trust document will designate successor trustees who will then manage the assets for the settlor and his or her beneficiaries. Most trusts provide that the trustee will be entitled to "reasonable" compensation but do not specify a dollar amount or other formula. Under Hawaii law, the compensation set forth in HRS 607-18 is deemed to be reasonable, though the Court may review whether items have properly been charged to income or principal. *In re Cunha Trust,* 104 Haw. 267, 88 P.3d 202 (Haw. 2004). Most trust instruments, however, also provide that a corporate trustee (such as a bank or trust company) will be entitled to receive compensation in accordance with its published fee schedule as it may be amended from time to time.

The proposed Act has five (5) main features:

1. The Act allows settlors and trustees, or beneficiaries and trustees, to agree to the terms of compensation even if the compensation is more or less than what the statute provides,

The current statute allows the settlor and trustee to negotiate higher compensation, but does not allow the beneficiaries of an irrevocable trust to do so. Yet, there may be circumstances where higher compensation is warranted. The proposed Act would give the trustee and beneficiaries the ability to agree on such compensation without requiring approval of the court. The proposed Act also incorporates the concept of "virtual representation" so that an agreement by the adult beneficiaries would be binding upon any unborn and minor beneficiaries so long as there was no conflict of interest.

2. Corporate Trustees would be entitled to fees under their published fee schedules.

The statutory fee schedule may not be appropriate for a corporate trustee that has various departments and staff providing trust services. Because there is competition in the marketplace, the reasonableness of a corporate trustee's fees can be determined by the market (e.g. if the fees are too high, then the consumer will use another trust company). Therefore, we believe that it is reasonable to allow corporate trustees to charge for services in accordance with their published fee schedules instead of the statute. H.D.1. has added the requirement that the corporate trustee provide advance written notice of any changes in its published fee schedule, which we believe is appropriate. Of course, a corporate trustee could still agree to different charges (including the statutory fees) if it determined that it was appropriate to do so.

3. The annual income and principal fees have been fine-tuned and adjusted for inflation.

Under the proposed Act, the income fee has been simplified and clarified (5% on all income payable when it is received).

The proposed Act provides for a tiered annual principal fee, which decreases for larger estates (starting at .50% for the first $5 million, .30% of the next $3,000,000; .20% of the next $2,000,000, and .10% on assets over $10,000,000). The annual principal fee would also be adjusted for inflation.

Under the current statute, a trustee is entitled to a .50% annual principal fee on all assets no matter how large the estate. The current statute also does not include an inflation adjustment provision. We believe the tiered structure under the proposed Act is fair to beneficiaries and the inflation adjustment is fair to the trustee.

H.D.1. also specifically addresses the division of the compensation where there are two or more co-trustees. This proposed change is consistent with current Hawaii law and practice.

4. The inception and termination fee provisions have been clarified to address disputes that had arisen as to when and to whom such fees are paid.

The current statute provides for a 1% inception fee and a 1% termination fee and the proposed Act does not change those fees. However, there have been many disputes under the current statute regarding who is entitled to the fees, how and when the fees are calculated, and when the fees are to be paid.

The proposed Act clarifies that the 1% inception fee is to be paid to the first non-settlor trustee and to the first new trustee of any other trust created after the settlor's death or under the terms of an administrative trust. This change will prevent payment of multiple inception fees to multiple successor trustees.

The proposed Act also clarifies that the 1% termination fee is based upon the value of the trust assets as of the date the trust instrument states that the trust terminates, not as of the date the final trust distribution is made. Depending on the nature of the assets and the number of beneficiaries, the trust termination process can be quite lengthy and significant costs may be incurred (such as legal, accounting, and appraisal fees) between the time the trust by its terms ends and the date the final distributions are made. During this termination phase, the trustee may make partial distributions to the beneficiaries but will keep a reserve to cover the anticipated expenses. Since the purpose of the termination fee is to compensate the trustee for the extra work that is necessary to distribute the trust assets, it makes sense to base the termination fee upon the value of the trust assets on the stated termination date *before* payment of expenses and partial distributions to the beneficiaries.

5. The Proposed Act maintains special service fees for extra services provided by the trustee but does not require court approval if all of the beneficiaries agree to the fees.

The trustee is still entitled to extra fees for special services, such as preparing tax returns, buying or selling real estate, and handling litigation. The current statute requires court approval of all special service fees. The proposed Act allows the trustee and beneficiaries to agree on such fees without having to go to court for approval.

This Act should not have any budgetary impact on the State and will benefit both beneficiaries and trustees. Accordingly, we urge passage of SB No. 1249, SD 2, H.D.1. Thank you for your consideration.

Rhonda L. Griswold, Esq.