

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

Thursday, January 30, 2014 2:00 p.m.
State Capitol, Conference Room 325

COMMITTEE ON JUDICIARY

To: The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair

IN SUPPORT OF SB 1249, SD 2, PROPOSED 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 and no objections to the proposed Act were raised, 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. Proposed 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.

Proposed 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.

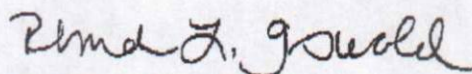
The proposed Act clarifies that the 1% inception fee is to be paid to the first non-settlor trustee and to the first new trustee of any other trust created after the settlor's death or under the terms of an administrative trust. This change will prevent payment of multiple inception fees to multiple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



Trust Division
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Testimony on HB 1249
Relating to Compensation of Trustees

Hearing on January 30, 2014
Committee on Judiciary

To: The Honorable Rep. Karl Rhoads, Chair
The Honorable Rep. Sharon E. Har, Vice Chair

RE: Testimony in Strong Support of HB 1249, Relating to Compensation of Trustees

Dear Chair Rep. Karl Rhoads, Vice Chair Rep. Sharon E. Har and Members of the Judiciary Committee;

My name is Catherine M. Fujisaki, Esq. and I am Central Pacific Bank's Vice President and Personal Trust Department Manager. Central Pacific Bank (CPB) is a Hawaii-based financial institution with \$4.7 million in assets and 35 branches statewide. It was founded in 1954.

We strongly support this bill because it is important for the law to recognize that we, as a Corporate Trustee, charge fees based on our published fee schedule. Our fee schedules must be reasonable because they are determined by the competition in the market. Under the current law, if a trust calls for "reasonable fees" to be paid to the trustee, it is not clear how this is to be determined. It is our understanding that there have been attempts, in probate court, to make a Corporate Trustee justify its fees based on the same methods that are applicable to individual trustees (e.g. the number of hours worked multiplied by a reasonable hourly rate.) Corporate Trustees are usually large businesses that aren't set up to charge fees by the hour. Corporate Trustees set their fees and publish them in a published fee schedule. It is important that the law recognize that the published fee schedules represent reasonable fees for Corporate Trustees.

We urge you to pass HB 1249. Thank you for your favorable consideration of this bill.

Sincerely,

A handwritten signature in cursive script that reads 'Cath M. J.' followed by a flourish.

Catherine M. Fujisaki, CTFA, Esq.*, CPA, CFA
Vice President and Personal Trust Department Manager

*Operating solely as a Trust Officer. No legal or CPA services provided.

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Testimony In Support of SB 1249, SD 2

Relating to the Compensation of Trustees

Thursday, January 30, 2014, 2 p.m.

State Capitol, Conference Room 325

To: The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
Members of Judiciary Committee

My name is Bonnie Fong and I am the Senior Vice President and Manager of the Personal Trust Department of Bank of Hawaii. I am submitting this testimony on behalf of the Trust department of Bank of Hawaii.

Purpose:

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 warrant the changes that are being proposed.

Background:

A Corporate Trustee is in the business of providing Trust services and differs significantly to that of an Individual Trustee. The 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. All such services are inclusive of the fees. Corporate Trustees are also highly regulated by Federal and State auditors to ensure that they adhere 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 are added expenses to the Trust.

The Corporate Trustee business is competitive and as such our fees need to be reasonable and fair in order for us to survive in this business. It is for this reason that we feel allowing a corporate trustee to charge according to its published fee schedule would be warranted. The changes proposed will also help clarify aspects of the bill which will help reduce issues that require court intervention which is an added expense to the Trust.

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

Respectfully submitted,
Bonnie Fong (694-4403)

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Testimony on SB 1249, SD2, HD1
Relating to Compensation of Trustees

Hearing on January 30, 2014
Committee on Judiciary

To: The Honorable Rep. Karl Rhoads, Chair
The Honorable Rep. Sharon E. Har, Vice Chair

RE: Testimony in Support/Opposition of HB 1249, Relating to Compensation of Trustees


Dear Chair Rep. Karl Rhoads, Vice Chair Rep. Sharon E. Har and Members of the Judiciary Committee;

I am an attorney engaged in private practice in Kailua-Kona, Hawaii, and a member of the Probate and Estate Planning Section, Tax Section and Elder Law Section of the Hawaii State Bar Association. My practice is focused on the area of trust and estate litigation.

I support this bill because, as an attorney regularly practicing in the area of estate and trust administration and advising trustees, it is difficult to properly counsel my clients as to the amount of compensation they are entitled to, and when it should be properly paid. Our current statute, which has not been amended in 20 years, is open to interpretation and ambiguous, thereby causing uncertainty and litigation. These difficulties could be avoided if our trustee compensation statute were amended to provide for a fixed schedule, and with a clear direction regarding the timing of payment.

I urge you to pass HB 1249. Thank you for your favorable consideration of this bill.

Sincerely,


Donna V. Payesko

SB1249

Submitted on: 1/29/2014

Testimony for JUD on Jan 30, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Summer G. Shelverton	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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

Thursday, January 30, 2014 2:00 p.m.
State Capitol, Conference Room 325

COMMITTEE ON JUDICIARY

To: The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair

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

My name is Neal T. Gota, Esq. and I am the Chair of the Hawaii State Bar Association Elder Law Section. I am submitting this testimony in my individual capacity as an attorney practicing in Hawaii.

As an attorney specializing in the field of trust and estates, I support this bill. We have long been faced with issues dealing with Trustee Compensation when we both advise clients setting up trusts and when we are advising trustees on trust administration issues.

SB No. 1249, SD 2, H.D.1. is a positive step forward in clarifying and providing statutory guidance relating to these trustee compensation issues.

I urge you to pass SB No. 1249, SD 2, H.D.1. and thank you for your consideration of this bill.

Sincerely,



Neal T. Gota, Esq.

WRITTEN TESTIMONY RE: SB 1249, SD 2, PROPOSED HD 1

SENATE COMMITTEE ON JUDICIARY

JANUARY 30, 2014; 2:00 p.m.

My name is Frank T. Kanemitsu, Esq. an attorney licensed to practice in the State of Hawaii. An area of my practice is trust and trust administration. I am also a member of the Standing Committee on the Uniform Probate Code and Probate Court Practices of the Judiciary of the State of Hawaii (the "Probate Committee"). The Probate Committee was organized pursuant to Resolution No. 91-25, adopted by the sixth annual Hawaii State Judicial Conference. The Probate Committee is comprised of three circuit court judges, each representing a Circuit Court of the Judiciary of the State of Hawaii and nine attorneys that practice estate planning and probate law, all of whom have been appointed by the Chief Justice of the Supreme Court of the State of Hawaii. These comments represent my views only.

I am in support of SB 1249, SD 2, HD 1.

The proposed legislation is intended to update HRS § 607-18 and clarify ambiguities which have resulted in litigation between beneficiaries and trustee on the issue of reasonable compensation. I believe SB 1249, SD 2, HD 1 creates a more definite process for calculating trustee's compensation. Under the existing statute, the issues of whether an inception fee, termination fees or accounting fee are permitted and the calculation of the fees are routinely litigated. I believe more clarity in the statute would obviously result in less litigation but more importantly the commitment of our judicial resources to more critical matters.

Respectfully submitted this 29th day of January, 2014.

By


Frank T. Kanemitsu, Esq.

SB1249

Submitted on: 1/29/2014

Testimony for JUD on Jan 30, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Derek T. Kamiya	Individual	Support	No

Comments: As a attorney who practices in the area of trusts and estates, the clarification provided by this measure can only help stave off the unnecessary and increased amount of litigation that we are seeing involving trustee compensation. Please consider these comments as strong support for this measure. Thank you for your time.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Testimony on SB 1249, SD2, HD1 Relating to Compensation of Trustees

Hearing on January 30, 2014
Committee on Judiciary

To: The Honorable Rep. Karl Rhoads, Chair
The Honorable Rep. Sharon E. Har, Vice Chair

RE: Testimony in Urging a Small Amendment to HB 1249, Relating to Compensation of Trustees

Dear Chair Rep. Karl Rhoads, Vice Chair Rep. Sharon E. Har and Members of the Judiciary Committee;

My name is Kenneth A. Martyn, and I am an attorney, who has been practicing in the trusts and estate planning field in Hawaii as a large part of my law practice over the last 27 years.

I believe there is one serious flaw in this bill, which can be corrected with a small amendment to provide at least some amount of compensation to trustees in connection with distributions of principal to or for the benefit of beneficiaries prior to the mandatory final distribution of the trust (such as 0.5% of the amount of principal distributed).

Otherwise, trustees will have a strong economic incentive to hoard principal in a trust as long as possible, rather than using their discretion to make principal distribution to beneficiaries.

A large percentage of estate planning trusts allow discretion to the trustee as to when to make distributions of principal for a beneficiary, such as the discretion to expend or distribute principal for the “education, health, support and maintenance” of the beneficiary (either for the rest of the beneficiary’s life, or until the beneficiary reaches a certain age).

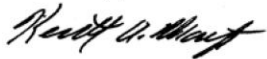
In its current form, SB 1249 would give trustees, of all the tens of thousands of existing trusts in Hawaii that provide for “reasonable compensation,” the ability to make much more money over the years by hoarding trust principal (rather than distributing it to beneficiaries), continuing to earn annual 0.5% fees every year, and then earning a termination fee of 1%.

The current statute in Hawaii provides, as a default rule, up to a 2.5% fee to a trustee for distributions of cash principal prior to the termination of the trust. That is too high in my opinion.

Amending SB 1249 to provide for at least a 0.5% trustee's fee on distributions of principal (to or for the benefit of a beneficiary) prior to trust termination, would go a long way to improving SB 1249. A 0% fee is simply too low.

I urge you to please make this amendment to SB 1249. Thank you for your favorable consideration of amending this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth A. Martyn". The signature is written in a cursive style with some flourishes.

Kenneth A. Martyn