

**TESTIMONY ON SB 1249
RELATING TO THE COMPENSATION OF TRUSTEES**

Thursday, January 31, 2013, 10:00 a.m.
State Capitol, Conference Room 016

COMMITTEE ON JUDICIARY AND LABOR

To: The Honorable Clayton Hee, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair

IN SUPPORT OF SB 1249

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.

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. 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 is. The current statute also does not include an inflation adjustment provision. We believe the tiered structure under the proposed Act is more fair to beneficiaries and the inflation adjustment is fair to the trustee.

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.

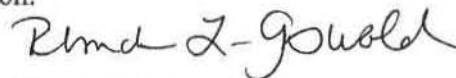
5. The Proposed Act maintains special service fees for extra services provided by the trustee but does not require court approval if all of the beneficiaries agree to the fees.

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.

PROPOSED AMENDMENTS:

We believe the effective date of the Act should be January 1, 2014, because most trusts account on a calendar year basis. Attached is a proposed Amendment that incorporates that proposed change, as well as other technical, non-substantive changes.

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 in the amended form attached hereto. Thank you for your consideration.



Rhonda L. Griswold, Esq.

Report Title:

Compensation of Trustees

Description:

Clarifies trustee compensation.

STATE OF HAWAII

A BILL FOR AN ACT

RELATING TO COMPENSATION OF TRUSTEES.

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

1 SECTION 1. The purpose of this act is to update and
2 clarify the current trustee compensation statute, which has not
3 been amended since 1993. During that time, certain ambiguities
4 in the statute have caused disputes between beneficiaries and
5 trustees, which have resulted in litigation. This act strives
6 to clarify those provisions, to provide a compensation system
7 that is fair to beneficiaries and trustees, to reduce issues
8 that require court intervention, and, thus, to minimize the
9 legal fees and costs connected with such intervention.

10 SECTION 2. Section 607-18, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "**607-18 Fees and expenses of trustees.** (a) Unless the
13 trust instrument otherwise provides, or the settlor and trustee
14 otherwise agree, or , after the settlor's death, all the
15 beneficiaries and the trustee otherwise agree, the trustee shall
16 be entitled to the compensation set forth in this statute and
17 such compensation shall be deemed to be reasonable. For good

1 cause, the court may also approve any other fee arrangement that
2 it deems reasonable.

3 (b) Banks and trust companies shall be entitled to
4 compensation as set forth in their published fee schedules as
5 such schedules may be amended from time to time.

6 (c) Except as provided in paragraph (a) above, individuals
7 serving as trustees shall be entitled to the following
8 compensation:

9 (1) Annual Compensation:

10 ~~[(a)]~~ (A) Upon all moneys and other property received
11 in the nature of revenue or income of the
12 trustestate, such as rents, interest,
13 dividends, and general profits, trustees ~~[~~
14 ~~except trustees of a charitable trust,~~]
15 shall be allowed as ~~[~~ commissions ~~]~~
16 compensation five percent payable out of the
17 income received during each year, ~~[~~ seven per ~~]~~
18 ~~cent for the first \$5,000 and five per cent~~
19 ~~for all over \$5,000]~~ the ~~[~~ commissions ~~]~~
20 compensation to be payable as and when the
21 income is received.

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~~[(b)]~~ (B) Upon the principal of the trustestate,
trustees
shall be allowed ~~[as commissions one per cent on the value at the inception of the trust payable at the inception out of the principal, one per cent on the value of all or any part of the estate upon final distribution payable at the termination out of the principal, and two and one half per cent upon all cash principal received after the inception of the trust and neither being nor representing principal upon which the two and one half per cent has previously at any time been charged, payable at the receipt out of the principal, and two and one half per cent upon the final payment of any cash principal prior to the termination of the trust, payable at the final payment out of the principal, and in addition thereto five tenths of one per cent on the value at the expiration of each year during the continuance of the trust payable~~

1 ~~annually out of the principal; provided that~~
2 ~~such five tenths of one per cent on the~~
3 ~~principal shall not apply to charitable~~
4 ~~trusts, nor to the extent the trustee has~~
5 ~~employed others to perform bookkeeping and~~
6 ~~clerical services at the expense of the~~
7 ~~estate as permitted by the trust document or~~
8 ~~as provided in section 554A-3.] the~~
9 following compensation based upon the gross
10 fair market value of the principal assets as
11 of the first business day of the trust's
12 fiscal year:

13 .50 % of the first \$5,000,000

14 .30 % of the next \$3,000,000

15 .20 % of the next \$2,000,000

16 .10 % of assets in excess of

17 \$10,000,000.

18 The annual principal fee shall be earned and
19 payable no more often than quarterly.

20 (C) Notwithstanding the foregoing, a trustee shall be
21 entitled to a minimum annual fee of \$3,000.

22 (D) All fees calculated under (B) and (C) above shall

1 be adjusted for inflation in accordance with
2 changes in the Consumer Price Index ("CPI") using
3 the year 2013 as the base. The CPI means the
4 Consumer Price Index (Annual Average) for All
5 Urban Consumers (CPI-U); for the Honolulu area -
6 All Items, (1982 - 84 = 100) reported by the
7 Bureau of Labor Statistics, United States
8 Department of Labor or its successor or, if the
9 index is discontinued, an equivalent index
10 reported by a federal authority. If no such
11 index is reported, the term means the substitute
12 index chosen by a court of competent
13 jurisdiction.

14 (2) Inception Fee:
15 1.0% inception fee based upon the gross fair market
16 value of the trust assets at the date of the trustee's
17 acceptance payable to (a) the first trustee who is not
18 the settlor of the trust, and (b) the first trustee of
19 a trust created under a revocable living trust after
20 the settlor's death or other administrative trust,
21 provided the trustee is not also the trustee of the

1 revocable living trust or administrative trust that is
2 the source of funding the newly-created trust.

3 (3) Termination Fee:

4 1.0% termination fee based upon the gross fair market
5 value of the trust assets as of the termination date
6 of the trust pursuant to the terms of the trust, which
7 fee may be paid at any time after the termination date
8 up to and including the date the trust assets are
9 finally distributed.

10 (4) Special Service Fees:

11 [~~e~~] Such further [~~allowances~~] compensation may be
12 made as the court deems just and reasonable for
13 services performed in connection with assuming the
14 trusteeship, sales or leases of real estate, contested
15 or litigated claims against the estate, the adjustment
16 and payment of extensive or complicated estate or
17 inheritance taxes, the preparation of estate and
18 income tax returns, the carrying on of the decedent's
19 business pursuant to an order of court or under the
20 provisions of any will, litigation in regard to the
21 property of the estate, and such other special
22 services as may be necessary for the trustee to

1 perform, prosecute, or defend. [~~All contracts between~~
2 ~~a trustee and a beneficiary other than the creator of~~
3 ~~the trust, for higher compensation than is allowed in~~
4 ~~this section shall be void.~~] If all of the
5 beneficiaries agree to the trustee's special service
6 fees, then court approval shall not be required.

7 (d) For purposes of any agreement between the trustee and
8 the beneficiaries regarding the trustee's compensation, such
9 agreement shall be binding upon incapacitated, minor, unborn,
10 and unascertained beneficiaries if the applicable provisions of
11 HRS §560:1-403(2)(B) and (C) are satisfied.

12 (e) The following terms or comparable language in the
13 provisions of a trust, unless otherwise limited or modified,
14 authorizes compensation to the trustee under this statute:
15 "reasonable compensation," "compensation in accordance with
16 applicable law," "compensation," "reasonable compensation
17 commensurate with the services performed," and "statutory
18 compensation."

19 [~~(d)~~](f) This section shall apply [~~as well~~] to future
20 [~~accounting~~] ~~accountings in to existing trusts-estates as well~~
21 as to new trusts-estates. This section shall not apply to
22 charitable trusts."

1 SECTION 3. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

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

6 SECTION 5. This Act shall take effect on January 1,
7 2014~~uly 1, 2013~~.

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