

JAN 17 2014

A BILL FOR AN ACT

RELATING TO TRUSTEES.

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

1 SECTION 1. The legislature finds that other states have
2 been aggressively legislating with the goal of attracting trust
3 business and that Hawaii residents are creating trusts in those
4 states or moving the situs of existing trusts outside Hawaii.
5 The State is losing business, and Hawaii residents who cannot
6 currently establish directed trusts (generally, a trust where
7 the trust administration duties and the investment management
8 duties are separated) without the comfort of a statute that
9 clearly allows them to do so are forced to endure additional
10 costs and inconveniences when forming trusts elsewhere. Thirty-
11 four states currently have laws in place that allow for directed
12 trusts. Although Hawaii law arguably allows for directed
13 trusts, estate planners and advisors continue to recommend that
14 their clients establish or move their trusts to other states
15 until directed trusts are clearly authorized in Hawaii.

16 This Act will:



- 1 (1) Generally waive the duty to diversify trust assets
- 2 where a trust provision directs the retention of
- 3 property;
- 4 (2) Provide that a dissenting trustee shall dissent in
- 5 writing to a failure to act or enter into a
- 6 transaction; and
- 7 (3) Allow the settlor of a trust to designate the
- 8 investment function entirely to an investment advisor
- 9 and the administrative function to an administrative
- 10 trustee.

11 The purpose of this Act is to protect Hawaii's economy from
12 attempts to lure Hawaii's trust business to other states.

13 SECTION 2. Section 554C-3, Hawaii Revised Statutes, is
14 amended to read as follows:

15 "[+]§554C-3[+] **Diversification.** (a) A trustee shall
16 diversify the investments of the trust unless the trustee
17 reasonably determines that, because of special circumstances or
18 directives of the trust, the purposes of the trust are better
19 served without diversifying.

20 (b) Notwithstanding subsection (a), a provision in a trust
21 directing the retention of any property as a trust investment
22 shall be deemed to waive any duty to diversify otherwise



1 applicable to the trustee with respect to the property and shall
2 exonerate the trustee from liability for purposes of this
3 section, except in the case of wilful misconduct.

4 For purposes of this section, "wilful misconduct" means
5 intentional wrongdoing, not mere negligence, gross negligence,
6 or recklessness; and "wrongdoing" means malicious conduct or
7 conduct designed to defraud or seek an unconscionable
8 advantage."

9 SECTION 3. Section 554G-4.5, Hawaii Revised Statutes, is
10 amended by amending subsection (c) to read as follows:

11 "(c) Notwithstanding subsection (b), whenever there is a
12 dispute, deadlock, or difference of opinion between a trustee
13 and an advisor, the transferor may direct that the determination
14 of the advisor shall be binding upon the trustee; provided that
15 the trustee shall bear no liability or accountability for any
16 act or transaction entered into or omitted as a result of the
17 enforcement of the advisor's determination. The trustee's
18 administrative and non-administrative fiduciary duty to the
19 beneficiaries shall be waived as to the specific act or
20 [executed] transaction[+] entered into or omitted as a result of
21 the enforcement of the advisor's determination; provided that
22 [the]:



- 1 (1) The trustee dissents in writing before the act or
2 transaction is completed[-], or dissents in writing to
3 a failure to act or to enter into a transaction in a
4 reasonably timely manner; or
- 5 (2) If the advisor is appointed by the transferor under
6 the terms of the trust and section 560:7-302 applies
7 to the trust and the advisor, the trustee is not
8 required to dissent in writing for the waiver of the
9 trustee's administrative and non-administrative
10 fiduciary duties to the beneficiaries to take effect."

11 SECTION 4. Section 560:7-302, Hawaii Revised Statutes, is
12 amended to read as follows:

13 "**§560:7-302 Trustee's standard of care and performance.**

14 (a) Except as otherwise provided by the terms of the trust, the
15 trustee shall observe the standards in dealing with the trust
16 assets that would be observed by a prudent person dealing with
17 the property of another, and if the trustee has special skills
18 or is named trustee on the basis of representations of special
19 skills or expertise, the trustee is under a duty to use those
20 skills.

21 (b) Advisors.



1 (1) Where one or more persons are given authority by the
2 terms of a trust to direct, consent to, or disapprove
3 a fiduciary's actual or proposed investment decisions,
4 distribution decisions, or other decision of the
5 fiduciary, the persons shall be considered to be
6 advisors and fiduciaries when exercising the authority
7 unless the trust otherwise provides;

8 (2) If a trust provides that a fiduciary is to follow the
9 direction of an advisor and the fiduciary acts in
10 accordance with such a direction, then except in cases
11 of wilful misconduct on the part of the fiduciary so
12 directed, the fiduciary shall not be liable for any
13 loss resulting directly or indirectly from any such
14 act;

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



1 (4) Whenever a trust provides that a fiduciary is to
2 follow the direction of an advisor with respect to
3 investment decisions, distribution decisions, or other
4 decisions of the fiduciary, then except to the extent
5 that the trust provides otherwise, the fiduciary shall
6 have no duty to:

7 (A) Monitor the conduct of the advisor;

8 (B) Provide advice to the advisor or consult with the
9 advisor; or

10 (C) Communicate with or warn or apprise any
11 beneficiary or third party concerning instances
12 in which the fiduciary would or might have
13 exercised the fiduciary's own discretion in a
14 manner different from the manner directed by the
15 advisor;

16 Absent clear and convincing evidence to the contrary,
17 the actions of the fiduciary pertaining to matters
18 within the scope of the advisor's authority, such as
19 confirming that the advisor's directions have been
20 carried out and recording and reporting actions taken
21 at the advisor's direction, shall be presumed to be
22 administrative actions taken by the fiduciary solely



1 to allow the fiduciary to perform those duties
2 assigned to the fiduciary under the trust and those
3 administrative actions shall not be deemed to
4 constitute an undertaking by the fiduciary to monitor
5 the advisor or otherwise participate in actions within
6 the scope of the advisor's authority.

7 (c) For purposes of this section:

8 "Advisor" includes a "protector" who shall have all of the
9 power and authority granted to the protector by the terms of the
10 trust, which may include:

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

13 (2) The power to modify or amend the trust to achieve
14 favorable tax status or to facilitate the efficient
15 administration of the trust; and

16 (3) The power to modify, expand, or restrict the terms of
17 a power of appointment granted to a beneficiary by the
18 trust.

19 "Investment advisor" means an advisor with authority with
20 respect to investment decisions.

21 "Investment decision" means, with respect to any
22 investment, the retention, purchase, sale, exchange, tender, or



1 other transaction affecting the ownership thereof or rights
2 therein and, with respect to non-publicly traded investments,
3 the valuation thereof.

4 "Wilful misconduct" means intentional wrongdoing, not mere
5 negligence, gross negligence, or recklessness.

6 "Wrongdoing" means malicious conduct or conduct designed to
7 defraud or seek an unconscionable advantage."

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

10 SECTION 6. This Act shall take effect on July 1, 2014.

11

INTRODUCED BY: 



S.B. NO. 2364

Report Title:

Trusts; Diversification; Trust Administration; Trustees;
Standards and Performance; Advisors

Description:

Waives duty to diversify trust when trust provision directs retention of property. Requires dissenting trustee to dissent in writing to a failure to act or enter into a transaction. Allows settlor of a trust to designate investment function to an investment advisor, and administrative function to an administrative trustee.

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