



**Supreme Court — THE JUDICIARY • STATE OF HAWAII**

417 SOUTH KING STREET • ALI'ĪOLANI HALE • HONOLULU, HAWAII 96813-2943 • TELEPHONE (808) 539-4700 • FAX 539-4703

**JUDICIARY COMM. NO. 17**

**Mark E. Recktenwald**  
CHIEF JUSTICE

December 19, 2019

The Honorable Ronald D. Kouchi  
President  
Hawaii State Senate  
State Capitol, Room 409  
Honolulu, HI 96813

The Honorable Scott K. Saiki  
Speaker  
House of Representatives  
State Capitol, Room 431  
Honolulu, HI 96813

Dear President Kouchi and Speaker Saiki:

Please find enclosed the *Report of the Committee on Uniform Probate Code and Probate Court Practices to the Thirtieth Legislature of the State of Hawaii*, pursuant to Act 105, Session Laws of Hawaii 2019. That report attaches proposed legislation for the Legislature's consideration.

In accordance with Section 93-16, Hawaii Revised Statutes, we are also transmitting a copy of this report to the Legislative Reference Bureau Library.

The public may view an electronic copy of this report on the Judiciary's website at the following link: [http://www.courts.state.hi.us/news\\_and\\_reports/reports/reports.html](http://www.courts.state.hi.us/news_and_reports/reports/reports.html).

Should you have any questions regarding this report, please feel free to contact Karen Takahashi of the Judiciary's Legislative Coordinating Office at 539-4896, or via e-mail at [Karen.T.Takahashi@courts.hawaii.gov](mailto:Karen.T.Takahashi@courts.hawaii.gov).

Sincerely,

Mark E. Recktenwald  
Chief Justice

Enclosure

c: Honorable R. Mark Browning, Chief Judge, First Circuit and Chair, Probate Committee  
Rodney A. Maile, Administrative Director of the Courts  
Legislative Reference Bureau Library



**Circuit Court of the First Circuit – THE JUDICIARY • STATE OF HAWAII**

CHAMBERS OF THE THIRD DIVISION • 777 PUNCHBOWL STREET • KA'AHUMANU HALE • HONOLULU, HAWAII 96813-5093

**R. MARK BROWNING**

CHIEF JUDGE OF THE FIRST CIRCUIT  
STATE OF HAWAII

December 6, 2019

The Honorable Mark Recktenwald  
Chief Justice of the State of Hawaii  
Ali'iolani Hale  
417 South King Street  
Honolulu, Hawaii 96813-2902

Dear Chief Justice Recktenwald:

Pursuant to your request, and that of the Hawaii State Legislature, the Probate Committee has finalized the proposed legislation, SB 1342.

As Probate Committee Chair, it has been a sincere honor and privilege to work with the entire committee on this important assignment. I do want to take a moment to thank each of the probate committee members for their diligent work, and utmost attention to detail with regards to the legislation that has been submitted to you.

I especially wish to recognize and thank Ms. Rhonda Griswold, Mr. Frank Kanemitsu, and Ms. Joy Miyasaki. These three committee members spent a great deal of time and energy on researching and drafting this legislation. Their collective effort and contribution has been invaluable, and is truly appreciated.

Best regards,

A handwritten signature in black ink, appearing to read "R. Mark Browning", written over a horizontal line.

Judge R. Mark Browning

cc: Probate Committee Members  
Judge Henry Nakamoto  
Judge Randal Valenciano  
Colin Goo, Esq.  
Rhonda Griswold, Esq.  
Frank Kanemitsu, Esq.  
Joy Miyasaki, Esq.  
Jeffrey Niebling, Esq.  
Raymond Okada, Esq.  
Rosemarie Sam, Esq.  
Douglas Smith, Esq.  
Carroll Taylor, Esq.  
Eric Young, Esq.

**Report Title:**

Probate Code; Donative Transfers; Restrictions.

**Description:**

Adds new sections to Article III of the Uniform Probate Code relating to restrictions on donative transfers.

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# A BILL FOR AN ACT

RELATING TO THE PROBATE CODE.

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

1           SECTION 1.       Chapter 560, Hawaii Revised Statutes,  
2 is amended by adding six new sections to article III to be  
3 appropriately designated and to read as follows:

4           "§560:3-A   Restrictions on donative transfers.

5           (a) A provision of an instrument making a donative  
6 transfer to any of the following persons is presumed to be the  
7 product of fraud or undue influence and voidable:

8           (1) The person who drafted the instrument;

9           (2) A person who transcribed the instrument or caused it  
10           to be transcribed and who was in a fiduciary  
11           relationship with the transferor when the instrument  
12           was transcribed;

13           (3) A care custodian of a transferor who is an  
14           incapacitated person, but only if the instrument was  
15           executed during the period in which the care custodian  
16           provided services to the transferor, or within 90 days  
17           before or after that period;

1       (4) A person who is related by blood or affinity, within  
2       the third degree, to any person described in  
3       paragraphs (1) to (3), inclusive;

4       (5) A cohabitant or employee of any person described in  
5       paragraphs (1) to (3), inclusive; or

6       (6) A partner, shareholder, or employee of a law firm in  
7       which a person described in paragraph (1) or (2) has  
8       an ownership interest, unless estate planning services  
9       provided by the person is a standard employee benefit  
10       of the law firm for whom the person is employed.

11       (b) The presumption created by this section is a  
12       presumption affecting the burden of proof. The presumption may  
13       be rebutted by proving, by clear and convincing evidence, that  
14       the donative transfer was not the product of fraud or undue  
15       influence.

16       (c) For the purposes of this section:

17       "Assistance" means services provided to an incapacitated  
18       person because of the incapacitated person's condition,  
19       including, but not limited to, the administration of medicine,  
20       medical testing, wound care, assistance with hygiene,  
21       companionship, housekeeping, shopping, cooking, and assistance  
22       with finances.

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1       "Affinity within the third degree" means a spouse, parent-  
2 in-law, daughter or son-in-law, grandparent-in-law, brother or  
3 sister-in-law and grandchild-in-law.

4       "Affinity within the fourth degree" means a spouse, parent-  
5 in-law, daughter or son-in-law, grandparent-in-law, brother or  
6 sister-in-law, grandchild-in-law, great-grandparent-in-law, aunt  
7 or uncle-in-law, first cousin-in-law, niece or nephew-in-law and  
8 great-grandchild-in-law.

9       "Blood within the third degree" means a child, parent,  
10 grandchild, brother or sister, grandparent, great grandchild,  
11 niece or nephew, aunt or uncle and great grandparent.

12       "Blood within the fourth degree" means a child, parent,  
13 grandchild, brother or sister, grandparent, great grandchild,  
14 niece or nephew, aunt or uncle, great grandparent, grand niece  
15 or nephew, first cousin, great aunt or uncle, and great great  
16 grandparent.

17       "Care custodian" means a person who provides a broad range  
18 of paid assistance to an incapacitated person, except that "care  
19 custodian" does not include a person who provided services  
20 without remuneration if the person had a personal relationship  
21 with the incapacitated person (1) at least 90 days before  
22 providing those services, (2) at least six months before the

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1 incapacitated person's death, and (3) before the incapacitated  
2 person was admitted to hospice care, if the incapacitated person  
3 was admitted to hospice care. As used in this subdivision,  
4 "remuneration" does not include the donative transfer at issue  
5 under this chapter or the reimbursement of expenses.

6 "Incapacitated person" means the same as defined in section  
7 560:5-102.

8 "Independent counsel" means an attorney who has no legal,  
9 business, financial, professional, or personal relationship with  
10 the transferee of a donative transfer at issue under this  
11 section, and who would not be appointed as fiduciary or receive  
12 any pecuniary benefit as a result of the operation of the  
13 instrument containing the donative transfer at issue under this  
14 section.

15 "Instrument" means a legal document intended to effectuate  
16 a transfer of property for less than fair market value, whether  
17 such transfer becomes effective during the life of the  
18 transferor or on or after the transferor's death.

19 "Related by blood or affinity" means a spouse or domestic  
20 partner of the specified person, a relative within a specified  
21 degree of kinship to the specified person or within a specified  
22 degree of kinship to the spouse or domestic partner of the

1 specified person, or the spouse or domestic partner of a  
2 relative within a specified degree of kinship to the specified  
3 person or within a specified degree of kinship to the spouse or  
4 domestic partner of the specified person.

5 "Transferee" means a legatee, a beneficiary of a trust, a  
6 grantee or a deed, or any other person designated in a transfer  
7 instrument to receive a nonprobate transfer.

8 "Transferor" means a testator, settlor, grantor of a deed,  
9 or a decedent whose interest is transferred pursuant to a  
10 nonprobate transfer.

11 (d) For purposes of this section, step relationships are  
12 considered to be the same as blood relationships.

13 **§560:3-B Restricted donative transfers; permitted when.**

14 (a) Section 560:3-A shall not apply to any of the  
15 following instruments or transfers:

16 (1) A donative transfer or instrument where the transferor  
17 was represented in the transfer or execution by  
18 independent counsel;

19 (2) A donative transfer to a person who is related by  
20 blood or affinity, within the fourth degree, to the  
21 transferor or is the cohabitant of the transferor;



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1       (3) An instrument that is drafted or transcribed by a  
2       person who is related by blood or affinity, within the  
3       fourth degree, to the transferor or is the cohabitant  
4       of the transferor;

5       (4) After full disclosure of the relationships of the  
6       persons involved, the instrument is approved pursuant  
7       to an order by a court with competent jurisdiction;

8       (5) A donative transfer to a federal, state, or local  
9       public entity, an entity that qualifies for an  
10       exemption from taxation under section 501(c)(3) or  
11       501(c)(9) of the Internal Revenue Code, or a trust  
12       holding the transferred property for the entity;

13       (6) A donative transfer of property valued at fifty  
14       thousand dollars (\$50,000) or less; or

15       (7) An instrument executed outside of Hawaii by a  
16       transferor who was not a resident of Hawaii when the  
17       instrument was executed.

18       (b) For the purposes of this section, "cohabitant" means a  
19 person living in the same household as the transferor for more  
20 than eighteen months.

21       §560:3-C Donative transfers that fail under this part.

1        If a donative transfer fails under this part, the  
2 instrument making the donative transfer shall operate as if the  
3 beneficiary had predeceased the transferor without spouse,  
4 domestic partner, or issue.

5        **§560:3-D Personal liability for certain property**

6 **transfers.** (a) A person is not liable for transferring  
7 property pursuant to an instrument that is subject to the  
8 presumption created under this part, unless the person is served  
9 with notice, prior to transferring the property, that the  
10 instrument has been contested under this part.

11        (b) A person who is served with notice that an instrument  
12 has been contested under this part is not liable for failing to  
13 transfer property pursuant to the instrument, unless the person  
14 is served with notice that the validity of the transfer has been  
15 conclusively determined by a court.

16        **§560:3-E Limitations on proceeding to contest instrument.**

17 Unless previously barred by adjudication, consents, or  
18 limitations, any action to contest an instrument under this part  
19 is barred unless commenced within the statutory limitations  
20 period applicable to said instrument.

1        §560:3-F Contrary provision in instrument; application of  
2 part. This part applies notwithstanding a contrary provision in  
3 an instrument.

4        §560:3-G Application of part; application of common law.

5        (a) This part shall apply to instruments that become  
6 irrevocable on or after January 2, 2021. For the purposes of  
7 this section, an instrument that is otherwise revocable or  
8 amendable shall be deemed to be irrevocable if, on or after  
9 January 1, 2021, the transferor by reason of incapacity was  
10 unable to change the disposition of the transferor's property  
11 and did not regain capacity before the date of the transferor's  
12 death.

13        (b) It is the intent of the Legislature that this part  
14 supplement the common law on fraud and undue influence, without  
15 superseding or interfering in the operation of that law. Nothing  
16 in this part precludes an action to contest a donative transfer  
17 under the common law or under any other applicable law. This  
18 subdivision is declarative of existing law."

19        SECTION 2. New statutory material is underscored.

20        SECTION 3. This Act shall take effect upon its approval.