



The Judiciary, State of Hawai‘i

Testimony to the Thirty-first State Legislature, 2021 Regular Session

Senate Committee on Judiciary

Senator Karl Rhoads, Chair

Senator Jarrett Keohokalole, Vice Chair

Wednesday, February 10, 2021, 9:15 am

State Capitol, Via Videoconference

by

Chief Judge R. Mark Browning, First Circuit

Chair, Committee on the Uniform Probate Code and Probate Court Practices

Bill No. and Title: Senate Bill No.385, Relating to the Uniform Trust Code.

Purpose: Enacts the Uniform Trust Code (2018). Repeals the Uniform Trustees’ Powers Act, Uniform Prudent Investors Act, and article VII (trust administration) of the Uniform Probate Code.

Judiciary's Position:

The Honorable R. Mark Browning, Chair of the Committee on the Uniform Probate Code and Probate Court Practices Committee (the “Probate Committee”)¹ submits this testimony in favor of Senate Bill No. 385 to enact the Uniform Trust Code (“UTC”) in the State of Hawaii. To date, thirty-four states and the District of Columbia have enacted the UTC, though many have enacted modified versions to incorporate practices and procedures that may be unique to their jurisdictions. In 2016, the Probate Committee appointed several of its members as a

¹ The Probate Committee is chaired by the Honorable R. Mark Browning of the First Circuit Court and comprised of judges from each of the other circuits (the Honorable Randal Valenciano, the Honorable Rhonda Loo, and the Honorable Peter Kubota) and attorney members Colin Goo, Rhonda Griswold, Frank Kanemitsu, Joy Miyasaki, Jeffrey Niebling, Raymond Okada, Rosemarie Sam, Douglas Smith, Carroll Taylor, and Eric Young.



subcommittee (the “Hawaii Committee”) who together with other estate planning attorneys¹, reviewed the UTC, the extensive commentaries to the UTC, the changes to the UTC made by other state legislatures, and then presented to the Probate Committee a proposed draft UTC with recommended modifications to comply with or otherwise improve current Hawaii law. Senate Bill No. 385 is a product of the Hawaii Committee’s work, as approved by the Probate Committee.

PURPOSE:

The UTC is a codification of the law of trusts, bringing together common law principles, restatement of law concepts, and various pre-existing statutes governing trusts under one statutory umbrella. The UTC is primarily a default statute, which means that the terms of the trust document will continue to control the administration of the trust. While there are certain duties and powers that cannot be changed by the trust document (such as the trustee’s duty of good faith and the trustee’s duty to account), the meaning and distribution of the trust is governed by the trust instrument. However, where the trust is silent or fails to address an issue sufficiently, the UTC can provide guidance and procedures as to how the trust is to be administered.

BACKGROUND & DISCUSSION:

The UTC has 10 main Articles and extensive commentary. The UTC commentary, which can be found at www.uniformlaws.org, provides extensive discussion regarding each section of the UTC and the rationale for each section. Although the Hawaii Committee generally agreed with the UTC and its commentary, it modified certain provisions. Attached to this testimony is a summary of the proposed modifications that the Hawaii Committee made to the UTC, with an explanation of the reason for each change. Some of the changes are minor; other changes are substantive and either reflect changes to be consistent with existing Hawaii law or changes that other states made to their version of the UTC that the Hawaii Committee thought made sense.

The following is a brief summary and highlights of the proposed UTC.

Article 1 of the UTC contains definitions, notice provisions, and rules governing the trust’s principal place of administration. Notably, Section 111 also codifies nonjudicial settlement agreements so long as the agreement does not violate a material purpose of the trust and would otherwise be properly approvable by a court.

¹ The Hawaii Committee was comprised of Colin Goo, Rhonda Griswold, Raymond Okada, Rosemarie Sam, Carroll Taylor, Eric Young, Summer Shelverton, and Stacy Takekawa.



Article 2 of the UTC sets forth rules governing court proceedings, including personal and subject matter jurisdiction.

Article 3 of the UTC deals with representation of beneficiaries, either through fiduciaries or virtually through other third parties. A trustee, for example, may represent and bind the beneficiaries of the trust so long as there is not a material conflict of interest. Similarly, a Personal Representative of an estate may bind persons with an interest in the estate, provided there is no material conflict of interest. And parents can bind their minor children, again so long as there is no material conflict of interest. As discussed in the attached commentary, the Hawaii Committee modified Section 303 to specify which parent is entitled to represent the interests of a minor child (e.g., the parent who is a descendant of the settlor has priority).

Article 4 specifies the requirements for creating, amending, and terminating trusts. Section 407 also provides that an oral trust may be created and established by clear and convincing evidence, which is consistent with current Hawaii law. Section 407 also provides a mechanism for establishing the terms of a missing trust, which is not currently addressed in any Hawaii statute or Hawaii case law. Section 411 allows an irrevocable trust to be modified or terminated if the settlor and all beneficiaries agree and also provides a mechanism for court approval of a trust termination if less than all beneficiaries agree. Although historically, the Probate Court has entertained such requests to modify or terminate irrevocable trust, there is currently no express Hawaii statute that permits such modification or termination.

Article 5 of the UTC confirms the validity of trust spendthrift provisions and exceptions to those provisions. A spendthrift provision generally prohibits a beneficiary's creditor from attaching or compelling distribution of the trust assets to satisfy the creditor's claim. Except for asset protection trusts, the spendthrift provision does not apply to the settlor of the trust so that, for example, the creditors of the settlor can reach the assets of a trust established by the settlor for his or her own benefit. With respect to the claims of a beneficiary's creditors, a spendthrift provision is not enforceable with respect to a beneficiary's child support payments and tax liabilities, but it is enforceable as to all other creditor claims.

Article 6 of the UTC addresses the required capacity to establish a revocable trust. Since a revocable trust essentially acts as a will substitute, the same capacity to make a will is required to make a trust. The trust instrument itself may then provide for a different level of capacity to amend the trust, which provision would be enforceable. The most significant aspect of Article 6 is Section 604, which establishes for the first time a statute of limitations for contesting the validity of a revocable trust -- 5 years from the date of the settlor's death or 90 days after being provided with a copy of the trust instrument, whichever occurs first. This is similar to the statute of limitations that governs will contests.



Article 7 of the UTC sets forth the process for trustees assuming the office of trustee, the duties of co-trustees, the appointment of successor trustees, and the removal of trustees. Notably, Section 703 allows a co-trustee to recuse him or herself if the co-trustee has a conflict of interest and permits the other co-trustees to act on behalf of the trust with respect to the conflicted transaction. This situation is not expressly addressed under Hawaii's current statute.

Article 8 of the UTC addresses the trustee's fundamental duties and powers, including the duty of loyalty and the duty to account to the trust beneficiaries. Section 813 makes it clear that, consistent with current Hawaii law, during the settlor's lifetime, the trustee of a revocable trust only has the duty to report to the settlor, not to the contingent remainder beneficiaries whose interests do not vest until after the settlor's death. However, there are additional parties who can receive the accounting on behalf of an incapacitated settlor for the purpose of protecting the settlor's interests.

Article 9 of the UTC incorporates those current provisions of Hawaii's Uniform Prudent Investor Act that were not repealed by other sections of the UTC.

Article 10 of the UTC provides for remedies for breaches of trust, how damages are determined, awards of attorneys' fees, and potential defenses. Under these provisions, the court is given broad discretion to determine whether and to what extent a trustee's breach of trust gives rise to damages. Section 1004 also grants the court discretion to award attorneys' fees and costs to any one or more of the parties in a trust proceeding, even if the party's position was ultimately not accepted by the court so long as the party was acting in the best interest of the trust as a whole. Counsel for a trustee or nominated trustee who brings or defends an action in good faith is also entitled to be paid reasonable fees and costs by the trust even if counsel was retained on a contingency basis and was unsuccessful in the action. This is a departure from current case law but will make it easier for beneficiaries to retain counsel in what may become protracted litigation to enforce or invalidate a trust. Section 1005 also provides statutes of limitations for claims against a trustee for breach of trust (1 year from the date a beneficiary is sent a report disclosing the facts giving rise to the potential claim or, if none, 3 years from the date the trustee is no longer acting as trustee or the date the trust or the beneficiary's interest in the trust has terminated).

In summary, the proposed UTC is a comprehensive statute that balances the interests of trust settlors, trust beneficiaries, and trustees with respect to the administration of trusts. As a fundamental rule, the Hawaii Committee believes that the intentions of the Settlor as set forth in the trust document should be honored and this statute reflects deference to the Settlor's intent. The statute also provides guidance to the trustee and mechanisms where the trustee and trust



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beneficiaries can reach agreement without requiring court intervention. But the court still plays a very important role in ensuring that trustees are fulfilling their fiduciary duties.

I respectfully ask this Committee to vote in favor of Senate Bill No. 385. Thank you for your consideration.

Thank you for the opportunity to testify on this measure.

HAWAII COMMITTEE PROPOSED REVISIONS TO
UNIFORM TRUST CODE

Hawaii Committee Comment Generally:

For purposes of all commentary herein, where the Hawaii Committee changed, deleted or added provisions to a UTC Section, it may change the corresponding commentary references. This should be taken into consideration when reviewing the UTC commentary.

Hawaii Committee Comment to Section 103:

For purposes of clarity, the Hawaii Committee added a definition for the term “court” to mean the circuit court of the State having jurisdiction over all subject matter relating to trusts.

The Hawaii Committee added a definition for the term “incapacitated” that is consistent with the legal standard necessary for the appointment of a conservator pursuant to HRS § 560:5-401(2)(A).

The Hawaii Committee added a definition for the term “spouse” to include individuals who are reciprocal beneficiaries under Hawaii law in addition to individuals who are married. The Hawaii Committee chose to include the definition of “spouse” in Section 101 rather than referencing “spouse or reciprocal beneficiary” throughout the Code.

The Hawaii Committee added a definition for the term “interested persons” based upon the Uniform Probate Code’s definition of interested persons but made applicable to trusts.

Hawaii Committee Comment to Section 105:

The Hawaii Committee deleted references to the Uniform Directed Trusts Act in subsection (b)(2) because Hawaii has not adopted the Act.

The Hawaii Committee deleted the minimum age requirement of 25 years for qualified beneficiaries to be entitled to receive information pertaining to the existence of the trust, of the identity of the trustee, and of their right to request trustee’s reports, under subsection (8).

Reason for change:

The Hawaii Committee concluded that the age of 25 was an arbitrarily advanced age and that a qualified beneficiary of any age should be entitled to receive information pertaining to such beneficiary’s interest in the trust.

Hawaii Committee Comment:

The Hawaii Committee concluded that subsections (8) and (9) should be adopted for the reasons expressed by the UTC Committee in the UTC Commentary.

Hawaii Committee Comment to Section 109:

The Hawaii Committee replaced the reference to “civil rules of procedure” to “Hawaii Probate Rules” under subsection (d).

Reason for change:

The Hawaii Committee concluded that the Hawaii Probate Rules govern the provision of notice in a judicial proceeding relating to trusts.

Hawaii Committee Comment to Section 110:

The Hawaii Committee deleted subsection (a), which requires a trustee to give notice to beneficiaries other than qualified beneficiaries who have sent the trustee a request for notice.

Reason for change:

The Hawaii Committee concluded that only qualified beneficiaries should be entitled to receive notice. Requiring a trustee to provide notice to more remote, contingent beneficiaries, unnecessarily increases the cost and expense of trust proceedings. In addition, more remote beneficiaries are currently bound when notice is given to first line remainder beneficiaries by virtual representation. See Section 304. Eliminating subsection (a) is consistent with notice requirements under current law.

Hawaii Committee Comment to Section 111:

The Hawaii Committee added the phrase “but not limited to” to subsection (d).

Reason for change:

The Hawaii Committee desired clarification that matters that may be resolved by a nonjudicial settlement agreement are not limited to the six (6) enumerated matters.

Hawaii Committee Comment to Section 113:

The Hawaii Committee deleted the UTC’s definition of insurable interest.

Reason for change:

Hawaii has its own definition of insurable interest pursuant to HRS § 431:10-202.

Hawaii Committee Comment to Section 201:

The Hawaii Committee inserted a list of examples into subsection (c) to conform this section to preexisting Hawaii law governing the Court’s jurisdiction over trust matters (Hawaii Revised Statutes § 560:7-201, which will be repealed by the enactment of this UTC). The Hawaii Committee notes that the list provided in Section 201 is demonstrative and not prohibitive.

The Hawaii Committee inserted subsection (d) to conform this section to preexisting Hawaii law governing the process for the initiation of judicial proceedings involving trust matters which will be repealed by the enactment of this UTC (Hawaii Revised Statutes § 560:7-206, which will be repealed by the enactment of this UTC).

Hawaii Committee Comment to Section 202:

The Hawaii Committee separated the original subsection (b) into subsections (b) and (c) because they reflect two separate and distinct ways that a beneficiary of a trust may become subject to the jurisdiction of the courts in this State. The Hawaii Committee added subsection (d) so that the court would have jurisdiction over agents who have accepted delegation of any duties of a trustee, similar to the court’s jurisdiction over trustees.

Hawaii Committee Comment to Section 203:

The Hawaii Committee expanded subsection (b) to incorporate preexisting Hawaii law relating to subject matter jurisdiction over trusts, Hawaii Revised Statutes § 560:7-204 (which will be repealed by the enactment of this UTC). The Hawaii Committee notes that the list provided in Section 203 is demonstrative and not prohibitive.

Hawaii Committee Comment to Section 204:

The Hawaii Committee inserted the term “judicial circuit” in place of the bracketed term “county.” The Hawaii Committee also included a fourth possible venue for a judicial proceeding of appointment of a trustee for a trust that does not have a trustee.

Reason for change:

The Hawaii Committee is enacting this Section, as expanded, to be consistent with preexisting Hawaii law which will be repealed by the enactment of this UTC (Hawaii Revised Statutes §§ 560:7-101 et seq. and 560:7-202).

Hawaii Committee Comment to Section 302:

The Hawaii Committee recognizes that the nature of the relationship between a holder of a power of appointment and the persons whose interests, as permissible appointees or takers in default, may present a conflict of interest, so the Hawaii Committee wanted to be clear that only a material conflict of interest should prevent the power holder from binding persons whose interests are subject to the power.

Furthermore, the Hawaii Committee did not want to limit this Section to general testamentary powers of appointment and therefore expanded this Section to also cover limited powers of appointment and those powers of appointment that may be exercised during the lifetime of the holder.

Hawaii Committee Comment to Section 303:

The Hawaii Committee added the second sentence to subparagraph (6) and subparagraphs (6)(a) through (6)(d), and added subparagraph (7).

Reason for change:

The Hawaii Committee recommends adoption of the language used in Montana to provide a clear mechanism for determining which parent has priority to represent and bind a minor child. The Hawaii Committee also recommends adoption of the language used in the District of Columbia allowing a qualified beneficiary to represent and bind said qualified beneficiary's successors in interest.

Hawaii Committee Comment to Section 304:

Consistent with Section 302, the Hawaii Committee wanted to be clear that only a material conflict of interest should prevent a person from binding other persons whose interests are substantially identical to theirs with respect to a particular question or dispute.

Hawaii Committee Comment to Section 305:

The Hawaii Committee changed the bracketed term “representative” to “guardian ad litem” to remain consistent with the use of the term “guardian ad litem” as used in Hawaii Revised Statutes § 560:1-403(4). The Hawaii Committee notes that the authority of the guardian ad litem is broader under this Section than under Hawaii Revised Statutes § 560:1-403(4).

Hawaii Committee Comment to Section 401:

The Hawaii Committee added subsection (4), which provides specific authority for a court to create a trust.

Reason for change:

Section 102 and the addition of subsection (4) make clear that the court can create a trust. A number of other states have adopted this addition.

Hawaii Committee Comment to Section 402:

The Hawaii Committee deleted subparagraph (a)(5).

The Hawaii Committee modified subparagraph (c) by adding the phrase “or in another person under the terms of the trust”.

The Hawaii Committee added a new subparagraph (d).

Reason for change:

The original subparagraph (a)(5) provided that a trust is not created if the same person is the sole trustee and sole beneficiary. The Hawaii Committee concluded that a settlor will often

create a revocable living trust and name the settlor as the current sole trustee and sole beneficiary, or create a trust for another individual and name that individual the sole trustee and sole beneficiary. Other jurisdictions have also deleted this provision or revised this provision to make clear an individual can be the sole trustee and sole beneficiary of a trust.

The Hawaii Committee concluded that a person other than a trustee could have a power to select beneficiaries.

The Hawaii Committee concluded that a trust could also be validly created by an agent under a power of attorney if the settlor specifically authorized such power and the settlor had capacity at the time the power of attorney was executed.

Hawaii Committee Comment to Section 403:

The Hawaii Committee added a sentence at the end of this Section to include trust amendments.

Reason for change:

The Hawaii Committee concluded that, unless otherwise provided in the trust instrument, if trust amendments are executed in compliance with another jurisdiction's laws as provided in this Section, such amendment would be valid in this jurisdiction.

Hawaii Committee Comment to Section 404:

The Hawaii Committee added the phrase "subject to the provisions of the trust".

Reason for change:

The Hawaii Committee modified this Section to emphasize the terms of the trust control.

Hawaii Committee Comment:

In subparagraph (b), the Hawaii Committee added the phrase "or otherwise provide for selection" and the phrase "the trustee or such other person authorized by the terms of the trust, or if none, . . .".

Reason for change:

The Hawaii Committee included this additional phrase because a charitable trust could expressly provide that the trustee or other individuals may select a charitable purpose or beneficiary, in which case such provision should control.

Hawaii Committee Comment to Section 405:

In subparagraph (c), the Hawaii Committee added the trustee, a designated beneficiary, or the Hawaii Attorney General as parties that may maintain a proceeding to enforce the trust.

Reason for change:

Members of the public, as beneficiaries of a trust, have standing to bring a matter to the attention of the court if the Hawaii Attorney General as *parens patriae* has supported the alleged breach of trust and the public would be left without protection or remedy. Kapiolani Park Preservation Soc’y v. Honolulu, 69 Haw. 569, 751 P.2d 1022 (1988).

Hawaii Committee Comment to Section 407:

The Hawaii Committee added a new subsection (b) that provides for a trust or provisions of a trust to be established if the trust instrument is missing.

Reason for change:

During the discussion on whether to adopt this section, the Hawaii Committee considered excluding this section from Hawaii’s version of the Uniform Trust Code. There was concern that codifying the creation of oral trusts would invite abuse of the judicial system and unnecessarily increase litigation on the issue of whether an oral trust is valid. The Hawaii Committee agreed that Hawaii has adequately rigid common law precedent to discourage frivolous cases. Hawaii common law already enables persons to validate orally created trusts only in limited cases and the Committee agreed that requiring a codified standard of clear and convincing evidence would sufficiently deter abuse of the judicial system. Practitioners should see Wery v. Pacific Trust Co., 33 Haw. 701 (1936), for guidance in meeting Hawaii’s standard for validating oral trusts.

Practitioners have encountered situations in which real property has been transferred to a trust or a trust is a beneficiary of an insurance policy and a copy of the trust cannot be located. The Hawaii Committee believes there should be a mechanism to allow a court to establish a missing trust by clear and convincing evidence.

Subsection (b) has been added to allow a trust or the provisions of a trust to be established if the trust document is missing. Examples of a missing trust that may be established under subsection (b) include, but are not limited to: 1) when an original or copy of a trust cannot be located; 2) a real property conveyance referencing a trust but no trust instrument can be located; 3) an agreement exists to establish a trust, such as a divorce settlement agreement, but the formal trust instrument was not created; and 4) a life insurance policy names as the owner or a death beneficiary a trust that cannot be located. As with validating oral trusts, the Hawaii Committee’s concern was that adding subsection (b) would invite abuse of the judicial system and unnecessarily increase litigation on the issue of whether a trust exists and what the terms and provisions of the missing trust are. To discourage frivolous cases, the Committee agreed upon a standard of clear and convincing evidence to establish the existence or provisions of a missing trust. In addition to requiring a rigid standard of clear and convincing evidence to avoid abuse of subsection (b) to establish the existence of a missing trust, the added subsection provides the court with latitude to validate the existence of a missing trust and its provisions using the court’s equitable powers. Practitioners may want to review Stowell v. Satorius, 413 Ill. 482 (1953) for guidance to meet the clear and convincing evidence standard.

Hawaii Committee Comment to Section 408:

The Hawaii Committee modified this section by adopting its existing statute governing pet trusts.

Reason for change:

This section has been modified to conform to existing Hawaii law governing trusts for domestic or pet animals (Hawaii Revised Statutes § 560:7-501).

Hawaii Committee Comment to Section 409:

The Hawaii Committee omitted the limitation in subsection (1) which states that a trust may not be enforced for more than 21 years.

The Hawaii Committee amended subsection (3) by adding “pursuant to the terms of the settlor’s will, or, if none,”.

Reason for change:

The Hawaii Committee concluded that a trust created for a noncharitable purpose without a definite or definitely ascertainable beneficiary should not be limited to 21 years. Other jurisdictions deleted this provision or modified the limitation to 90 years.

The Hawaii Committee concluded that that if the settlor left a will, the property should be distributed according to the settlor’s will, or if the settlor did not leave a will, to the settlor’s successors in interest.

Hawaii Committee Comment to Section 411:

In subsection (a), the Hawaii Committee adopted the first bracketed option of subsection (a), which allows a noncharitable irrevocable trust to be modified without court approval so long as the settlor and all beneficiaries consent.

Reason for change:

The Hawaii Committee adopted the first option, which is similar to the Restatement (Third) of Trusts § 65(2) and Restatement (Second) of Trusts § 338(2), to allow for greater flexibility.

Hawaii Committee Comment:

The Hawaii Committee modified subsection (c), which relates to spendthrift provisions.

Reason for change:

The modification to subsection (c) makes clear that a spendthrift provision could constitute a material purpose of the trust. As explained in Section 404, the Hawaii Committee is concerned that the settlor’s intent is preserved and protected, despite the beneficiary’s desires.

Hawaii Committee Comment to Section 413:

The Hawaii Committee revised subsection (b) to remove the reversion to the settlor and the 21-year provision exceptions.

Reason for change:

The Hawaii Committee felt that such reversion to the settlor was inconsistent with the doctrine of cy pres and that the court should apply appropriate principles to ensure the settlor's charitable intentions are fulfilled.

Hawaii Committee Comment:

The Hawaii Committee added an exception for application of cy pres in subsection (b) if the trust explicitly provides for an alternate disposition.

Reason for change:

This provision makes it clear that the court need not invoke cy pres if the terms of the trust specifically account for an alternative disposition. This section also clarifies that a general residuary disposition is not to be considered an alternative disposition. In addition, consistent with Hawaii law, the court would invoke cy pres only if all alternative dispositions failed. See In re Elizabeth J.K.L. Lucas Charitable Gift, 125 Haw. 351, 354, 261 P.3d 800, 803 (Ct. App. 2011).

Hawaii Committee Comment:

The Hawaii Committee added subsection (c) to require notice to the Hawaii Attorney General's office.

Reason for change:

Subsection (c) was added to formalize common law requirements that the Hawaii Attorney General should be notified as *parens patriae* in such proceedings.

Hawaii Committee Comment to Section 414:

The Hawaii Committee increased the small trust termination amount from \$50,000 to \$100,000. The Hawaii Committee notes that the commentary to this section specifically states that the amount was placed in brackets to signal that enacting jurisdictions may wish to place a higher or lower figure.

Hawaii Committee Comment to Section 417:

The Hawaii Committee added two sentences to Section 417 to clarify the types of situations where it is appropriate to combine two or more trusts or to divide a trust. Such clarifying language was added to ensure that the newly combined or divided trust preserves the

intent of the settlor and is consistent with the terms of the original trust and neither expands nor contracts the interests of the beneficiaries.

Hawaii Committee Comment to Section 503:

The Hawaii Committee deleted subsection (a).

Original subsection (b) (1) is amended by deleting “spouse, or former spouse”

The Hawaii Committee deleted subsection (b)(2).

Reason for change:

The Hawaii Committee concluded that original subsection (a) defining the term “child” in Article 503 was not necessary because of the amendments to subsection (b)(1) (now subsection (a)(1)).

The Hawaii Committee concluded that spendthrift protection should continue to apply to claims of spouses and former spouses, and such spouses and former spouses should not be allowed to reach beneficiaries’ interests created by third parties.

Hawaii Committee Comment to Section 504:

The Hawaii Committee deleted subsection (a).

Original subsection (c) (1) is amended by deleting “spouse, or former spouse”

Original subsection (c)(2) is amended by adding “or for the benefit of” following “to pay to” in the first line and “beneficiary’s” after “to pay to or for the benefit of the”, and deleting “spouse, or former spouse”.

Reason for change:

The Hawaii Committee concluded that subsection (a) defining the term “child” in Article Section 504 was not necessary because of the amendments to original subsection (c)(1) and (2).

The Hawaii Committee concluded that spendthrift protection should continue to apply to claims of spouses and former spouses, and such spouses and former spouses should not be allowed to reach beneficiaries’ interests created by third parties.

The Hawaii Committee added language to allow payments to be made to or for the benefit of the beneficiary’s child in the event the child is a minor or disabled.

Hawaii Committee Comment to Section 505:

Subsection (a)(2) is amended by adding “Except as provided in Chapter 554G”.

The Section is amended by adding subsection (c) “This section shall not apply to trusts created under Chapter 554G.”

Reason for change:

The Hawaii Committee added references to Chapter 554G of the Hawaii Revised Statutes (Permitted Transfers in Trust Act) to be consistent with existing law providing for self-settled domestic asset protection trusts.

Hawaii Committee Comment to Section 601:

The Hawaii Committee expanded Section 601 to two sentences to clarify that the capacity to create versus the capacity to amend, revoke or direct the actions of the trustee in certain instances can be different.

Reason for change:

The Hawaii Committee notes that not all states that adopted the Uniform Trust Code elected to adopt Section 601. The Hawaii Committee has elected to adopt but with modifications to address the fact that, in certain situations, a settlor may desire a higher level of capacity to amend or revoke a trust or direct the actions of a trustee, which higher level of capacity can be established in the terms of the trust. Allowing the settlor to require a higher level of capacity for himself or herself provides flexibility. Section 105(b) does not restrict the ability of a settlor to override the standard level of capacity to revoke or amend a trust or direct the actions of a trustee; accordingly, the Hawaii Committee makes clear in this section that a trust can include provisions to require a higher level of capacity for changes, revocation or to direct the actions of the trustee, which language should control.

Hawaii Committee Comments to Section 602:

Subsection (b): Added the phrase “Unless the terms of a trust expressly provide otherwise”

Reason for change:

The Hawaii Committee added the phrase for consistency with subsection (a) and to make clear that, to the extent the trust has alternative language, then such language shall control

Hawaii Committee Comment:

Subsection (c) was shortened and reference to revocation by will or codicil removed.

Reason for change:

The Hawaii Committee shortened subsection (c) for clarity. The removal of reference to revocation by will or codicil was not intended to preclude revocation by will or codicil, but rather to discourage its use, which is also consistent with the Uniform Trust Code commentary.

Hawaii Committee Comment:

The phrase “(including a higher level of capacity)” was added to subsection (c) after the phrase “The settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust.”

Reason for change:

The phrase “(including a higher level of capacity)” was added to make clear that the terms of a trust can provide for a certain level of capacity to amend or revoke a trust, in which case such level of capacity should be enforced in determining whether a subsequent amendment or revocation can be made.

Hawaii Committee Comment:

The term “and signed” was added to the written requirement to require, where the trust does not otherwise provide a method, that any amendment or revocation should be contained in both a written and signed document.

Reason for change:

The Hawaii Committee believes such requirements provide greater certainty and regulation in determining what constitutes a valid amendment or revocation. The Hawaii Committee also notes that some of the commentary expressed by the Uniform Trust Code discouraging use of joint trusts in non-community property jurisdictions may be inapplicable given changes in tax law. Indeed, use of joint trusts in separate property states may now have much broader use and applicability.

Hawaii Committee Comment:

The Hawaii Committee substituted the word “and” for “or” in subsection (e).

Reason for change:

The substitution was made to comply with Hawaii’s Uniform Power of Attorney Act and to ensure that the settlor specifically intended that an agent under a power of attorney exercise such power.

Hawaii Committee Comment:

The Hawaii Committee substituted the term “actual knowledge” for “know” in subsection (g).

Reason for change:

The substitution was to provide a brighter line standard consistent with Hawaii law as it existed prior to adoption of UTC. “Actual knowledge” applies a narrower construction of

“knowledge” than would otherwise be defined under Section 104, which includes not only “actual knowledge” but also constructive knowledge.

The Hawaii Committee also removed optional references to guardian and guardianship in this section.

Hawaii Committee Comments to Section 603:

Subsection (a) was deleted.

Reason for change:

As noted in the commentary, subsection (a) was added to the UTC in 2018 for states that have enacted the Uniform Directed Trust act. Hawaii has not adopted this act so subsection (a) is not applicable to current Hawaii law.

Hawaii Committee Comment:

Subsection (b) (now subsection (a)) was revised to clarify that duties of the trustee are owed exclusively to the settlor of a revocable trust while the settlor is alive.

Reason for change:

The Hawaii Committee revised subsection (b) to be consistent with preexisting Hawaii law, specifically HRS § 560:7-303, which provides, in relevant part:

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration; provided, however, during the life of the settlor, the trustee of a revocable inter vivos trust shall not be required to register the trust, reveal the terms to beneficiaries, or account to beneficiaries, unless otherwise directed by the settlor.

Hawaii Committee Comment:

Subsection (c) (now subsection (b)) was expanded upon for clarification.

Reason for change:

The Hawaii Committee’s changes clarify the intent of the duties owed to the holder of a power of withdrawal. The Hawaii Committee does not believe the changes substantively change the meaning of this subsection, but clarify the intent that duties of a trustee are owed exclusively to a holder of a general power of appointment regarding the assets subject to the power.

Hawaii Committee Comment to Section 604:

The Hawaii Committee revised subsection (a)(1) to be five years, and (a)(2) to be 90 days, consistent with the statute of limitations for probate of a will under HRS §560:3-108.

Hawaii Committee Comment to Section 701:

The Hawaii Committee modified Section 701(a)(2) so that actions signifying intent to accept trusteeship must be done “knowingly” within the meaning of Section 104. The Hawaii Committee concluded that there should be no trustee duty imposed on those who are unaware of the trust.

The Hawaii Committee modified Section 701(c)(1) by adding “the designated cotrustee” or “successor trustee,” to the group of persons to whom notice of non-acceptance of trusteeship must be given. The Hawaii Committee concluded that notice to the designated co-trustee or successor trustee is necessary to protect the beneficiary.

Hawaii Committee Comment to Section 702:

The Hawaii Committee modified Section 702(c) to be consistent with current Hawaii law, by using the phrase “A bank or trust company qualified under the Hawaii Revised Statutes, Chapter 412. . .” rather than the UTC phrase “a regulated financial services institution.”

Hawaii Committee Comment to Section 703:

The Hawaii Committee modified Section 703(a) by requiring the majority of trustees to consult with all other trustees before making trustee decisions. This prevents a majority from taking action without informing the minority trustees, who would be unable to protect their rights or the rights of beneficiaries.

The Hawaii Committee modified Section 703(c) so that cotrustees are relieved of liability to perform if the Settlor exercises the power to direct under Section 808, which is the Hawaii equivalent to the Uniform Directed Trust Act mentioned in the UTC. It should be noted that Section 808 applies only to revocable trusts.

The Hawaii Committee added Section 703(e) to allow, without a Court order, transactions in which a cotrustee has a conflict; provided that, notice of the conflict is given to all other trustee(s), and a majority (or the remaining trustee, if only one) of the other trustee(s) approve of the transaction. The former HRS 554A-5(b) did not address this situation, so the addition of this language makes clear that a conflicted trustee may recuse itself and allow the remaining trustees to act in such scenarios.

The Hawaii Committee modified Section 703(f) by using the phrase “settlor intended,” rather than the UTC phrase “settlor reasonably intended.” The Hawaii Committee concluded that “settlor intent” can be ascertained from the language of the trust instrument. In contrast, “settlor’s reasonable intent” requires some speculation as to which factors are relevant.

The Hawaii Committee modified Section 703(f) so that all delegations of trustee functions are revocable. The Hawaii Committee concluded that an irrevocable delegation of trustee functions is tantamount to abandonment of trusteeship.

The Hawaii Committee modified Section 703(h) so that cotrustees are relieved of responsibility for serious breaches by other cotrustees if the settlor of the revocable trust directs otherwise pursuant to Section 808.

The Hawaii Committee modified Section 703(i) to require a dissenting trustee to give written notice of dissent to all cotrustees, at or before the time of action, to avoid liability. Written notice minimizes issues of proof of notice of dissent.

Hawaii Committee Comment to Section 704:

The Hawaii Committee expanded the situations where a vacancy in trusteeship exists under Section 704(a) by adding “cannot be located” to subsection (a)(2), and “incapacitated” to subsection (a)(4).

The Hawaii Committee modified Section 704(c)(1) by adding that a vacancy in trusteeship can be filled by “a person named in the trust who has authority to appoint a successor trustee.”

The Hawaii Committee adopted the UTC version of §704(c)(2), which requires unanimous consent of the qualified beneficiaries. This will supersede former Hawaii Revised Statutes §554-2(b) (which provided that vacancy in trusteeship can be filled by a person appointed by a majority of competent adult beneficiaries holding more than half of the value of the trust). The Hawaii Committee concluded that the default rule provided by the UTC will avoid disputes over who can vote and the weight given to each vote.

The Hawaii Committee modified Section 704(d)(1) by adding that a vacancy in trusteeship of a charitable trust can be filled by “a person named in the trust who has authority to appoint a successor trustee.” This is consistent with Section 704(c)(1).

The Hawaii Committee modified Section 704(d)(2) to make it clear that the Hawaii Attorney General must concur with the appointment of trustee by beneficiaries of a charitable trust.

Hawaii Committee Comment to Section 705:

The Hawaii Committee added Section 705(a)(1), which requires the resigning trustee to give notice of resignation to the living settlor of a revocable trust, at least 30 days prior to resignation, but if the Settlor is incapacitated, notice must be given to the settlor’s agent under a durable power of attorney, or conservator, if any. In addition, notice must be given to all cotrustees, or if none, to the designated successor trustee.

The Hawaii Committee added Section 705(a)(1) to recognize the difference between a revocable trust and an irrevocable trust. In contrast to the UTC, Hawaii does not require notice to qualified beneficiaries of a revocable trust, while the settlor is still alive. The Hawaii Committee concluded that during the life of the settlor, only the settlor has an interest in the trust, and the settlor’s fiduciaries can adequately protect the settlor during incapacity.

For irrevocable trusts, the Hawaii Committee modified Section 705(a)(2), by adding to the group of persons to whom notice of resignation of trustee must be given. The group now includes the designated successor trustee, if there are no trustees or cotrustees serving.

The Hawaii Committee concluded that the addition to Section 705(a)(2) is necessary to protect the beneficiaries. The settlor might be deceased or unable to act. Even if the settlor is alive, but incapacitated, the settlor's agent under a durable power of attorney might not have the duty (or the power) to take action to seek appointment of a successor trustee of an irrevocable trust, of which the settlor no longer has a beneficial interest.

Hawaii Committee Comment to Section 706:

The Hawaii Committee divided UTC Section 706(a) into two sections – 706(a) and 706(b) - to distinguish between an irrevocable trust and a revocable trust, and expanded the group of those who may initiate removal of a trustee. The Hawaii Committee concluded that this modification adds clarity and better protects the beneficiary.

For irrevocable trusts, Section 706(a) provides that removal of a trustee may be initiated by (a) a cotrustee, or (b) a qualified beneficiary. In the case of a charitable trust, the Hawaii Attorney General may seek removal of trustee. In either case, the Court, on its own initiative, may seek removal of trustee. The Hawaii committee concluded that giving standing to qualified beneficiaries in a noncharitable trust and the Hawaii Attorney General in a charitable trust are necessary to protect the interests of beneficiaries.

For revocable trusts, Section 706(b) provides that removal of a trustee may be initiated by (a) the settlor, (b) the settlor's conservator or guardian, (c) the settlor's agent, under a durable power of attorney, or (d) a cotrustee. The Hawaii committee specifically excluded qualified beneficiaries of a revocable trust, because the settlor always retains the power to amend or revoke the revocable trust.

Section 706(c)(3) empowers the Court, in addition to the enumerated causes, the power to remove a trustee for "any other reason" to best serve the beneficiaries. The Hawaii committee concluded that this expansion of the Court's power is necessary to protect beneficiaries when faced with unforeseen circumstances.

Section 706(c)(4) has been modified so that all enumerated factors must exist before a trustee may be removed due to change in circumstances or request of all beneficiaries. The Hawaii committee concluded that clarification is necessary to preserve stability of trust administration.

Hawaii Committee Comment to Section 707:

Hawaii modified Section 707(b) by replacing the word "expeditiously" with the phrase "within a reasonable time." The Hawaii Committee concluded that timing of delivery depends upon the facts and circumstances of each case and each asset.

Hawaii Committee Comment to Section 708:

Hawaii does not adopt the UTC version of Section 708(a), but instead refers to HRS § 607-18 (for noncharitable trusts) and HRS§ 607-20 (for charitable trusts). The Hawaii Committee believes that trustee fees are fully addressed in the recently adopted revision to the HRS § 607-18 (for noncharitable trusts) and in HRS § 607-20 for charitable trusts.

Hawaii adopted a modified Section 708(b), to give the Court authority to adjust or award trustee fees if (a) the duties are different than originally contemplated, (b) the Court determines that the trustee delegated too much of the trustee function to agents, and (c) a request is made for additional fees for special services. The Hawaii Committee concluded that this would be consistent with the current statutory scheme under HRS § 560:7-205.

Hawaii Committee Comment to Section 709:

The Hawaii Committee modified Section 709(a) by adding that “a designated trustee” (as well as the trustee) may be entitled to reimbursement. The Hawaii Committee also added a requirement that the trustee must act in good faith in order to be reimbursed. The Hawaii Committee concluded that a designated trustee who acts for the benefit of the beneficiaries, particularly to protect trust assets, should be reimbursed, whether or not such person later becomes trustee.

The Hawaii Committee modified Section 709(a)(1) to include reimbursement of trustee expenses to defend or prosecute actions to protect the trust estate, whether or not successful, unless the trustee committed a material breach of trust. The Hawaii Committee concluded that the court’s holding in Camacho should be modified by this statute, so that a trustee, particularly those who act in good faith, and with no financial stake in the outcome, would not suffer a hardship simply for zealously protecting the settlor’s intent and the trust estate. See also Section 1004 and Hawaii Committee Comment.

Hawaii Committee Comments to Section 802:

The Hawaii Committee expanded the scope of personal relationships in subsections (c)(1) and (c)(2), where a conflict of interest is presumed, to include relatives of a trustee’s spouse (e.g., the spouse’s descendants, siblings, parents, and their respective spouses) and the trustee’s ancestors.

Reason for change:

The Hawaii Committee believes that close family relationships can give rise to conflicts of interests and such conflicts should be presumed unless shown otherwise.

Hawaii Committee Comment:

In subsection (c)(4), the Hawaii Committee added the phrase “has such a substantial interest that it might affect the trustee’s best judgment;”.

Reason for change:

The Hawaii Committee believed that a conflict should be presumed only where the trustee has a substantial interest in the entity that might affect the trustee's judgment. For less substantial or nominal interests, a conflict should not be presumed.

Hawaii Committee Comment:

The Hawaii Committee revised subsection (c)(5) to read: "a corporation or other person or enterprise which has such a substantial interest in the trustee that it might affect the trustee's best judgment."

Reason for change:

To be consistent with subsection (c)(4), this change makes it clear that a conflict of interest is not presumed if the entity's interest in the trustee is not substantial (e.g., a person is a minority shareholder in a corporate fiduciary).

Hawaii Committee Comment:

The Hawaii Committee deleted original subsection (d) of the proposed UTC.

Reason for change:

Subsection (d) provides that any transaction between a trustee and a beneficiary is voidable even if the transaction did not involve trust property and even if the trustee was no longer acting in a fiduciary capacity, unless the trustee proves that the transaction was fair to the beneficiary. The Committee believed that this provision was too broad and that current Hawaii case law already provided guidance and remedies where a confidential relationship is established and abused. Other states (Alabama, Nebraska, and Ohio) omitted this subsection as well.

Hawaii Committee Comment:

Added "or its affiliate" to the compensation provisions of subsection (e).

Reason for change:

This change makes it clear that the trustee as well as its affiliates may be compensated out of fees charged to the trust by an investment company for non-trust services that the trustee or affiliates of the trustee may be providing to the investment company. If such compensation is received, the trustee or its affiliates must provide notice to the trust beneficiaries annually as to how such compensation is determined and paid.

Hawaii Committee Comment:

Replaced "enterprise" with "business entities."

Reason for change:

The term “business entities” more accurately encompasses entities such as corporations, partnerships, and limited liability companies.

Hawaii Committee Comment:

Although the committee did not make any changes to old subsection (h) (now subsection (g)), it should be noted that subsection (g) differs slightly from current Hawaii law. Under HRS 554A-5(b) (which will be repealed by enactment of this UTC), a transaction between a trust and another trust in which the trustee is also acting as trustee must be approved by the Probate Court. Subsection (g) permits the trustee to engage in such transactions, and other transactions in which the trustee is acting as a fiduciary or in which a beneficiary has an interest, without prior court approval so long as the transaction is fair to the beneficiaries.

Hawaii Committee Comment to Section 807:

The Hawaii Committee added the following phrase at the end of subsection (d): “even if the agency agreement provides otherwise, and the agent may be made a party to any action or proceeding if the issues relate to a decision, action, or inaction of the agent.”

Reason for change:

Because an agency agreement may include a provision limiting the situs of legal actions arising out of the agency, the Hawaii Committee wanted to make it clear in subsection (d) that an agent for a trustee irrevocably submits to the jurisdiction of the Hawaii courts notwithstanding the terms of its agency agreement. This change is based on Wyoming’s version of this UTC subsection.

Hawaii Committee Comment:

The Hawaii Committee added subsection (e), which provides a mechanism for a beneficiary to have the court review the propriety of the agency and the reasonableness of the compensation paid to the agent.

Reason for change:

This subsection is consistent with current HRS § 560:7-205 (which will be repealed by the enactment of this UTC).

Hawaii Committee Comment to Section 808:

For those states that have adopted the Uniform Directed Trust Act, Section 808 is largely superseded. Hawaii has not adopted the Uniform Directed Trust Act but has directed trustee provisions in HRS § 560:7-302. Those provisions are incorporated in this statute.

Subsection (a) confirms that a trustee of a revocable trust can follow the directions of the settlor even if those directions conflict with the actual trust terms. Because such inconsistent

directions could be construed as an amendment to the trust, the Hawaii Committee revised this subsection to require that any such directions be in writing and signed by the settlor. Such a requirement will provide additional protection to both the settlor and trustee if a trustee's actions are later questioned.

The remainder of this Section confirms the settlor's power to direct an advisor other than the trustee to make decisions on behalf of the trustee and the trustee is to follow such advisor's directions.

Hawaii Committee Comment to Section 811:

The Hawaii Committee added subsection (b) to make it clear that a trustee has the power to abandon claims as well as to enforce them. Subsection (b) also gives the trustee the power to assign claims to one or more of the trust beneficiaries.

Hawaii Committee Comment to Section 812:

The Hawaii Committee included a reference to Section 1009 in Subsection (a) to make it clear that a trustee does not have a duty to pursue claims against a former trustee or other person if the beneficiaries had already relieved the former trustee or person of liability by consent, release, or ratification. As noted in the UTC commentary, the current trustee may also seek to relieve itself from being obligated to pursue such claims by obtaining the beneficiaries' consent pursuant to the procedures set forth in Section 1009.

The Hawaii Committee also added Subsection (b) to expressly provide that a person who received an improper distribution from a trust must return the distribution to the trust.

Hawaii Committee Comment to Section 813:

The Hawaii Committee added paragraph (a) to be consistent with Section 603 and current Hawaii law, which provides that during the life of the settlor, the trustee of a revocable trust has no duty to reveal the terms of the trust or account to the remainder beneficiaries. However, recognizing that an incapacitated settlor would not be in a position to effectively monitor the actions of the successor trustee, the Hawaii Committee included a prioritized list of those who would be entitled to receive information regarding the trust administration on the settlor's behalf. The Hawaii Committee also limited the duty to account after the settlor's death to qualified beneficiaries, not to those with more remote interests. The Hawaii Committee also added paragraph (f) to make it clear that a trustee may charge reasonable fees for providing the information requested by the beneficiary.

The Hawaii Committee also added paragraphs (g) and (h) to address the need to file periodic accountings with the court where the court or the trust instrument require such accountings. These provisions are based on current HRS § 554-4, which will be repealed by the enactment of the UTC.

Hawaii Committee Comments to Section 816:

Section 816(1): Adds specific authority for trustee to retain trust property received from the settlor even if the trustee has a personal interest in such property until the trustee in its discretion determines that the assets should be sold or exchanged.

Reason for change:

Hawaii's current Uniform Trustee's Power's Act (UTPA), HRS § 554A-3(c)(1), which will be repealed by enactment of the UTC, expressly provides that a trustee may retain a trust's original assets. Because most settlors expect a trustee to maintain the settlor's assets, the Hawaii Committee recommends that such a provision be retained in the UTC. The Hawaii Committee's suggested change also makes it clear that a trustee may retain a trust property even if the trustee has a personal interest in the property (for example, where husband and wife own a 50% interest in the residence through their respective revocable trusts, or where one or more children who are serving as trustee have an interest in the family business in which the trust and the children have interests). Of course, as a fiduciary, the trustee must not cause its personal interests in the trust asset to affect its duty of loyalty and other fiduciary duties owed to the trust beneficiaries.

Hawaii Committee Comment:

Section 816(2): Adds the express power to invest and reinvest trust assets.

Reason for change:

Hawaii's current UTPA provides this express power. Though such power is implicit in the UTC, the Hawaii Committee believes that such power should be explicit.

Hawaii Committee Comment:

Section 816(4): Adds the ability of a financial institution acting as trustee to deposit funds in its own institution if adequately insured or secured.

Reason for change:

Where a bank serves as trustee, it is standard practice for such corporate trustee to deposit the trust funds with its own institution or affiliate. This recommended addition makes clear that such deposits are within the corporate trustee's power.

Hawaii Committee Comment:

Section 816(5): Makes it clear that a corporate trustee's lending department can make loans to the trust and that the trustee can advance its own funds for the protection of the trust assets.

Reason for change:

This addition makes it clear that a corporate trustee or its affiliate has the power to make loans to the trust, which is a fairly common practice. As a fiduciary, however, the corporate trustee has a duty to ensure that the terms of the loan are fair to the beneficiaries and comport with market conditions. The Hawaii Committee also recommends the additional language that makes it clear that a trustee can advance funds to protect the trust estate, a power that is expressly included in the current UTPA. There may be a period of time where a new trustee does not have access to the trust accounts (because of a delay in obtaining the settlor's death certificate, for example) or where the trust has no liquid assets. In such cases, trustees often advance their own funds to pay trust expenses and this provision would make it clear that a trustee may do so and that such advances will be repaid by the trust.

Hawaii Committee Comment:

Section 816(7)(C): Adds stock options and other rights associated with stocks.

Reason for change:

Because types of stocks and associated rights continue to evolve, the Hawaii Committee broadened the scope of this section slightly.

Hawaii Committee Comment:

Section 816(8): Adds the power to dedicate land to public use, with or without consideration.

Reason for change:

This additional language makes it clear that a trustee has the power to donate land for a charitable purpose without consideration. Notwithstanding this power, the trustee may only do so if such a donation comports with the terms of the trust or is otherwise in the best interests of the trust and its beneficiaries.

Hawaii Committee Comment:

Section 816(19): Adds the power of the trustee to pledge trust property or guarantee loans made by others to an entity in which the trust or a beneficiary has an ownership interest.

Reason for change:

The UTC grants the power to pledge trust property to guarantee loans to a beneficiary, but does not expressly allow such pledges and guarantees for loans to entities in which the trust or any of its beneficiaries have an interest. Many families and their trusts own their assets and conduct their business through corporations, limited partnerships, limited liability companies, and other closely-held entities and, thus, the loans would be made at the entity level and not to individuals. This proposed change acknowledges that a trustee can pledge trust assets to guarantee loans to such closely-held business entities.

Hawaii Committee Comment:

Section 816(20): Adds “any” as a modifier to the powers that a trustee can delegate to a trustee appointed in another jurisdiction.

Reason for change:

This addition makes it clear that a trustee is not obligated to confer all powers and fiduciary duties to a trustee appointed in another jurisdiction. The appointing trustee can tailor the scope of the delegated powers and duties depending upon the circumstances.

Hawaii Committee Comment:

Section 816(21): Adds subsection (E) to allow the trustee to fund Section 529 savings plans for minor beneficiaries.

Reason for change:

529 plans are a tax-efficient way to save and pay for educational expenses. This provision allows a trustee in its discretion to invest in such plans for the benefit of minor or otherwise incapacitated beneficiaries instead of making an outright distribution to the beneficiary for such purposes.

Hawaii Committee Comment:

Section 816(24): Adds the power of the trustee to petition the court for approval of the trustee’s accounts and an order releasing the trustee from any liability arising out of its administration of the trust.

Reason for change:

At common law, trustees have had the right to have their accounts approved by the court. This addition makes it clear that they continue to have that right under the UTC.

Hawaii Committee Comment:

Section 816(27): Adds provisions that allow a single trust to be divided or multiple trusts merged where the terms of the beneficiaries and succession of interests are substantially the same.

Reason for change:

Hawaii’s current UTPA, HRS § 554A-3(26), expressly allows for the severance of a single trust into separate trusts, a power that is often used to minimize generation-skipping taxes. The proposed addition retains this power in the UTC and expands it to also include the merger of two or more separate trusts (with the same beneficiaries and successions of interest) into a single trust, a power that is often included in trust instruments and can be used to help minimize administrative expenses.

Hawaii Committee Comment:

Section 816(28): Adds the power to employ attorneys, investment advisors, and other agents to assist the trustee in the performance of its duties, even if such persons are affiliated with the trustee.

Reason for change:

This provision is from Hawaii's current UTPA, HRS § 554A-3(23), and makes it clear that a trustee can employ others to act on its behalf.

Hawaii Committee Comment to Section 817:

Section 817(a): Changes 30 days to 60 days.

Reason for change:

The Hawaii Committee believed that 60 days was a more reasonable time frame to allow a beneficiary to object to a proposed distribution plan, particularly if the notice is sent by regular mail.

Hawaii Committee Comment:

Section 817(c)(2): Provides that a release is not effective if the trustee failed to disclose material facts that would enable a beneficiary to determine whether there had been a breach of fiduciary duty.

Reason for change:

This change is consistent with current Hawaii law. Matter of Estate of Dwight, 67 Haw. 139, 681 P.2d 563 (1984).

Hawaii Committee Comment:

Section 817(d): Provides that a person who receives a trust distribution must return that distribution to the trust if the person was not entitled to it.

Reason for change:

This type of provision is routinely included in standard release forms and, thus, the Hawaii Committee recommends that it be added to the UTC.

Hawaii Committee Comment to Article 9:

The Hawaii State Legislature had previously enacted the Uniform Prudent Investor Act in 1997. The Uniform Prudent Investor Act was codified as Chapter 554C of the Hawaii Revised Statutes and will be repealed by the enactment of this UTC. The Hawaii Committee has followed the recommendation of the Uniform Law Commission (for states that have previously

enacted the Uniform Prudent Investor Act) to reenact their version of the Uniform Prudent Investor Act as Article 9 of the UTC.

Hawaii Committee Comment to Section 1001:

Subparagraph (a) is amended by adding the second sentence, as was done in Oregon.

Subparagraph (b)(10) is added.

Subparagraph (b)(11) is amended by adding a reference to punitive damages.

Subparagraph (c) is added similar to the North Carolina statute.

Reason for change:

The addition to subsection (a) makes clear that the common law rule that a trustee's failure to act can be a breach of trust continues to be operative. See e.g., Allard v. Pacific Nat. Bank, 99 Wash.2d 394, 404-5, 663 P.2d 104 (1983) (trustee's failure to inform beneficiaries of the sale of the principal asset of the trust was a breach of duty).

The addition of subparagraph (b)(10) is to make clear the Court's ability to assess attorneys' fees against a breaching trustee.

The reference to punitive damages is to make clear that they are awardable in the appropriate case. Historically actions by a beneficiary against a trustee were tried in equity. See Matter of Herbert M. Dowsett Trust, 7 Haw.App. 640, 650, 791 P.2d 398, 405 (1990). Punitive damages were traditionally not awardable in equitable actions. See 22 Am.Jur.2d Damages, §738 (1988). Law and equity have merged in Hawaii, See Rules 1 and 2, HRCPP, and Hawai'i permits the award of punitive damages in cases that would historically have been heard in equity. See Lussier v. Mau-Van Development, Inc., 4 Haw.App. 359, 390-391, 667 P.2d 804 (1983). Many courts hold that defalcating trustees, like other tortfeasors, can be subjected to punitive damages. See Abrams v. DiCarlo, 76 F.3d 384 (9th Cir. 1996) (unpublished opinion) (affirming a decision from the District of Hawai'i in which \$250,000 of punitive damages had been awarded against the trustees of a retirement plan); Shoemaker v. Freeman, 967 P.2d 871 (Okla. 1998) (trustee assessed \$100,000 in punitive damages for failing to deed property to beneficiary); Gillespie v. Seymour, 255 Kan. 774, 877 P.2d 409 (1994) (Kansas Supreme Court affirmed \$2,000,000 punitive damages award against trustee).

The addition of subparagraph (c) makes clear that not every breach of trust imposes liability on the trustee; rather, the equity court continues to have discretion to not impose sanctions for breach of trust if the circumstances warrant. See e.g., Dennis v. Rhode Island Hospital Trust National Bank, 744 F.2d 893, 901 (1st Cir. 1984) (affirming the trial court's failure to sanction a trustee found guilty of "a simple breach of fiduciary duty not reflecting willfully wrong or egregious conduct.").

Hawaii Committee Comment to Section 1002:

The Hawaii Committee replaced the second sentence of subparagraph (b) and recommends adoption of the language used in Oregon.

Reason for change:

The Hawaii Committee believes that the Oregon revisions accord the court greater discretion to determine the appropriate amount of contribution based upon the evidence presented.

Hawaii Committee Comment to Section 1003:

The Hawaii Committee deleted subparagraph (a).

Reason for change:

The Hawaii Committee agrees with West Virginia and Tennessee that have deleted subparagraph (a) in order to maintain the common law rule that a breach of trust is a prerequisite for imposing liability upon a trustee. See, e.g., Restatement (Second) of Trusts § 204; Shriners Hospitals for Crippled Children v. Gardiner, 152 Ariz. 527, 530, 733 P.2d 1110, 1113 (Ariz.,1987) (“A trustee is not personally liable for losses not resulting from a breach of trust.”).

Hawaii Committee Comment to Section 1004:

Subparagraph (a) is rearranged to delete superfluous language (“as justice and equity may require”), to make clear that it applies to litigation construing the trust, and to identify “attorney’s fees” as a category separate from “costs and expenses.” Subparagraph (a) adds the phrase to any party “to the trust who has acted in the best interest of the trust as a whole.”

Subparagraph (b) is added to be consistent with the court’s power under HRS § 560:3-720 to award fees, costs and expenses to a nominated personal representative who seeks the probate of a facially valid will in good faith, except that the language added here clarifies the court’s power to make such awards regardless of the terms of the engagement agreement between the nominated fiduciary and the attorney.

The Hawaii Committee further recommends that changes to HRS § 560:3-720 be considered to be consistent with this section, with possible language as follows:

If any personal representative, person nominated as personal representative, or an heir or beneficiary if a personal representative or nominated personal representative refuses to act, defends or prosecutes any proceeding regarding the validity of a Will in good faith, whether successful or not, that person is entitled to receive from the estate that person’s reasonable costs, expenses and disbursements, including reasonable attorneys’ fees, whether or not counsel has been retained on a contingency fee basis.

Reason for change:

The changes to subparagraph (a) are housekeeping. The Hawaii Committee added the phrase to any party “to the trust who has acted in the best interest of the trust as a whole” to make clear that officious intermeddlers are not paid from the trust. See, e.g., In re Campbell's Estate, 46 Haw. 475, 522, 382 P.2d 920, 953 (1963) (“[W]hen litigation is in advancement of, and not in opposition to, the interests of all the beneficiaries of a trust, counsel fees may be allowed to litigants out of the estate.”). This does not limit the Court’s discretion to award fees to a party who is found to lack standing if the party’s pleadings have assisted the Court. See, e.g., In re Estate of Damon, 109 Hawai`i 502, 513, 128 P.3d 815, 826 (2006), as amended (Feb. 28, 2006). The addition of subparagraph (b) is to accord trustees or nominated trustees who are defending the validity of the trust in good faith (or beneficiaries if the trustee is unwilling) the ability to retain counsel on the same basis accorded personal representatives defending a will in good faith under HRS § 560:3-720. Where the trustee refuses to act, a beneficiary acting in good faith may defend the trust. At the same time, the Hawaii Committee recommends that HRS § 560:3-720 be amended to reverse the decision on attorneys’ fees rendered by the Court in Estate of Camacho, 140 Haw. 404 (App. 2017), which denied an award of fees to a nominated personal representative acting in good faith to probate a will because counsel was engaged by a contingency fee agreement.

The Camacho decision is inconsistent with the underlying objective of HRS § 560:3-720, which is “to allow the personal representative, as a fiduciary acting on behalf of persons interested in an estate, to in good faith pursue appropriate legal proceedings without unfairly compelling the representative to risk personal financial loss by underwriting the expenses of those proceedings.” Matter of Estate of Flaherty, 484 N.W.2d 515, 518 (N.D. 1992).

Hawaii Committee Comment to Section 1005:

A reference to Article 3 is added to subparagraph (a).

“Has reason to know” is added to subparagraph (b).

The subparagraph (c) five-year statute of limitations on claims against trustees is reduced to three years.

Subparagraph (d) is added.

Reason for change:

Since “representative of a beneficiary” used in subparagraph (a) is a term of art in the UTC but is not otherwise a commonly used term, the addition of the reference to Article 3 is intended to guide readers back to the relevant definition.

The addition of “or has reason to know” to subparagraph (b) is intended to avoid incentivizing beneficiaries or their representatives to remain ignorant of material facts relating to the trust.

There is presently no fixed statute of limitations for actions against trustees. Five years seems too long a time to keep the trustee in suspense and to potentially keep assets in trust so that the trustee has trust funds available to potentially defend him or herself against claims. A number of other states have elected three years, e.g., the District of Columbia, New Hampshire, South Carolina, Tennessee, and Wyoming.

Subparagraph (d) is added to make clear that claims against a deceased trustee are limited by the creditor's claims period in the Uniform Probate Code, HRS Chapter 560.

With regards to the appropriate methodology to serve notice and deemed receipt of such service, the Hawaii Committee defers to both the methods of serving notice in Rule 7 of the Hawaii Probate Rules and deemed receipt of such notice as contained in HRE 303(c)(10).

Hawaii Committee Comment to Section 1007:

“Attainment of a specific age, birth or any other event” is added to the litany of events that might affect the administration of a trust.

Reason for change:

Since the language of trusts frequently have age and birth as triggering events for a change in trust administration (e.g., “this trust terminates when my youngest child from time to time surviving attains the age of 25”), the committee thought that they should be specifically identified.

Hawaii Committee Comment to Section 1008:

Original subparagraph (b) is deleted.

Reason for change:

Many states enacting the UTC made changes to this section. The Hawaii Committee felt that the provisions of subparagraph (a) that operate to negate trust language that would exculpate a trustee from liability are broad enough to cover most situations that could arise under subparagraph (b).

Hawaii Committee Comment to Section 1009:

Added the reference to representative of a beneficiary as defined in Article 3.

Reason for change:

Two other states (Ohio and West Virginia) have added “representative of a beneficiary” in subparagraph (a), and the Hawaii Committee agrees with them that a representative as defined in Article 3 should have the power to consent, release or ratify. Since “representative of a beneficiary” is a term of art in the UTC but is not otherwise a commonly used term, the addition of the reference to Article 3 is intended to guide readers back to the relevant definition.

Hawaii Committee Comment to Section 1010:

Subparagraph (d) is added.

Reason for change:

The new subparagraph (d) mirrors existing HRS § 560:3-706(d) which was enacted in 2009 after much consideration and discussion. The Hawaii Committee supports the 2009 Legislature's thoughtful conclusion and believes that it should not be tampered with now.

Hawaii Committee Comment to Section 1012:

“Actual” knowledge is added to subparagraphs (a) and (d).

Commas are added to subparagraphs (a) (b) and (d).

Reason for change:

Section 1012 deals with persons who are assisting a trustee. The Hawaii Committee feels that such persons should not be imputed with knowledge that the trustee is misbehaving; rather, they should be protected so long as they did not have actual knowledge of the trustee's misdeeds. This is consistent with HRS § 554A-7.

The commas are added to make clear that the references to “good faith dealing” refer back to “a person,” not to “a beneficiary.”

Hawaii Committee Comment to Section 1013:

In subparagraph (a)(1) “the name of the trust” is added.

Subparagraphs (7) and (8) are deleted from subparagraph (a) and a new subparagraph (7) is inserted.

Reason for change:

Adding the name by which the trust is identified seems logical.

The original subparagraph (7), which references the trust's taxpayer identification number is deleted for security reasons. The original subparagraph (8) is deleted because the Hawaii Committee finds it confusing and unnecessary.

The new subparagraph (7) is added to draw attention to the possibility that the trustee may be acting through an agent and there may be trust terms that restrict such action.

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION
ON SB 385**

RELATING TO UNIFORM TRUST CODE Enacts the Uniform Trust Code (2018). Repeals the Uniform Trustees' Powers Act, Uniform Prudent Investors Act, and article VII (trust administration) of the Uniform Probate Code.

BEFORE THE SENATE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 10, 2021, at 9:15 a.m.

PERSON TESTIFYING: BLAKE OSHIRO
Commission to Promote Uniform Legislation

Chair Rhoads, Vice-Chair Keohokalole, Members of the Senate
Committee on Judiciary:

My name is Blake Oshiro, and I am a member of the State of Hawai'i
Commission to Promote Uniform Legislation. Thank you for this opportunity to
submit this testimony in **support** of Senate Bill No. 385, which enacts the
Uniform Trust Code (2018).

We are pleased to see that the Judiciary has introduced this bill as part of
its package of bills in this session. We defer to the Judiciary and its testimony on
the particulars of this bill since there may have been internal discussion with the
applicable sections of the Hawaii State Bar Association and other interested
parties.

However, from the Commission to Promote Uniform Legislation's
perspective, we can offer the following comments as background and further
justification for the approach in this bill that has been enacted in 35 states and
jurisdictions.

Before the Uniform Trust Code (UTC) was approved in 2000, most states
relied on a patchwork of case law to govern trusts. Drawing from common law

sources and existing statutory law, the UTC is a national codification of the law of trusts, and also contains reforms to modernize the law of trusts. The code is divided into 11 articles containing important provisions every state should adopt, because:

- The UTC standardizes the law of trusts. In our modern, mobile society, it is more common than ever for settlors, trustees, and beneficiaries to live in different states. The UTC provides a national standard so that all parties can rely on the same governing principles.
- The UTC is flexible. Except for the few provisions listed in UTC § 105, the UTC consists of default rules that may be freely overridden in the trust document when circumstances call for a different rule. However, the UTC's comprehensive default rules apply when a trust does not address a particular subject, which will fill many gaps in trust instruments and help to prevent unnecessary litigation.
- The UTC expressly recognizes charitable trusts. The UTC recognizes that charitable trusts can be created and allows for enforcement of the trust's terms by the settlor, the state attorney general, or other interested parties.
- The UTC provides statutory duties and powers for trustees. The UTC codifies some of the basic fiduciary obligations of a trustee to a beneficiary, such as the trustee's duty of loyalty, duty of impartiality, and obligation of prudent administration. A trustee may delegate certain powers, which was generally prohibited under common law.
- The UTC includes detailed representation provisions. Under the common law, principles of representation are not well established. The UTC clarifies and codifies the law, specifying who can be represented under what circumstances. If the representative meets the statutory requirements, notice to the representative has the same legal effect as notice to the represented person, and a representative's consent is binding on the represented person.
- Trusts are more common than ever before. Trusts are a very popular tool for estate planners and their clients. Clear statutory law is needed to give all parties confidence that the trust terms are valid and enforceable. The UTC provides certainty not available under the common law.

Thank you very much for this opportunity to testify on this measure.