The Judiciary, State of Hawai'i

Testimony to the Thirty-Second Legislature
2023 Regular Session

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Wednesday, March 15, 2023 at 2:15 p.m.
State Capitol, Conference Room 325
VIA VIDEOCONFERENCE

by:

Chief Judge R. Mark Browning, First Circuit
Chair, Committee on the Uniform Probate Code and Probate Court Practices Committee

Bill No. and Title: Senate Bill No. 483, S.D. 1, Relating to the Uniform Probate Code.

Purpose: Updates 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. 483, S.D. 1 to enact updates to the Uniform Probate Code ("UPC") in the State of Hawai'i. To date, eighteen states have enacted the UPC, though many have enacted modified versions to incorporate practices and procedures that may be unique to their jurisdictions. Since 2018, members of the Probate Committee have reviewed the existing UPC as adopted in Hawai'i ("Hawai'i UPC"), recent revisions to the UPC by the Uniform Law Commission, the extensive commentaries to the UPC, and the changes to the UPC made by other

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

state legislatures and discussed and drafted recommended changes to the Hawai‘i UPC consistent with changes made to the UPC or that otherwise will improve upon the current Hawai‘i UPC. Senate Bill No. 483, S.D. 1 is a product of the Probate Committee's work.

Purpose of the UPC:

The UPC is a codification of the law of probate, bringing together common law principles, restatement of law concepts, and various pre-existing statutes.

Background & Discussion:

The current Hawai‘i UPC consists of six main Articles. While Article V of the UPC dealing with guardianship and conservatorships was updated in 2004, Articles I through IV remain largely unchanged since their enactment in 1996. The Uniform Law Commission regularly issues revisions to the UPC. The UPC also provides extensive commentary, which can be found at www.uniformlaws.org, regarding each section of the UPC and the rationale for each section. Senate Bill No. 483 seeks to make revisions in Articles I through IV of the Hawai‘i UPC to be consistent with revisions made by the Uniform Law Commission, make technical amendments to improve clarity in the existing Hawai‘i UPC, or to address concerns based on input from the courts and local practitioners to help improve the efficiency of the probate process. Attached to this testimony is a summary of the Probate Committee's proposed revisions to the Hawai‘i UPC, with an explanation of the reason for each change.

The substantive changes in Senate Bill No. 483, S.D. 1 include the addition of a new subpart that provides new rules defining a parent-child relationship for probate purposes and which address societal changes resulting from multiple parent families and advances in assisted reproductive technologies. Senate Bill No. 483, S.D. 1 also adopts the Uniform Estate Tax Apportionment Act, which provides fair procedures for apportioning the burden of estate taxes among beneficiaries of a decedent's estate.

The Committee has reviewed and considered the testimony submitted by Carolyn Nichol with respect to this proposed Act. The Committee respects her opinions and while not in agreement with all her suggested recommendations, do believe that a few modifications should be made to the proposed Act:

With respect to Section 3-301, the Committee recommends that the words "an original" be added to the proposed language in Paragraph (a)(2)(A) on Page 104, Line 19 to Page 105, Line 2 and said Paragraph shall read as follows:

> (A) That the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of an

> original will probated, filed, deposited or lodged in another jurisdiction accompanies the application;

The intent of the Committee was that an informal proceeding be permitted where an original will has been probated, filed or lodged in another jurisdiction, not a copy.

With respect to her comments in regards to Section 3-108, we recommend the following modifications be made to the proposed Act to address the issues raised:

1. The following new definition shall be added to Section 6, Part 1 of the proposed Act on Page 33, line 6 to line 12 as follows:

> "Probate proceeding" means an informal proceeding to probate a will, an informal proceeding to appoint a personal representative, a formal proceeding to probate a will, a formal proceeding to adjudicate intestacy, or a formal proceeding to appoint a personal representative

2. The Committee concurs that the words "or a supervised administration" on page 101, line 13 should be deleted.

The Probate Committee respectfully asks this Committee to vote in favor of Senate Bill No. 483, S.D.1. Thank you for your consideration and for the opportunity to testify on this measure.

COMMENTARY TO THE PROPOSED
CHANGES TO THE UNIFORM PROBATE CODE

SECTION 2. A new subpart 2 is being added to Section 560 to adjust for societal changes in the reproductive process. New Section 2-A contains definitions of terms that are used in Subpart 2. New Section 2-B is an umbrella section declaring that, except as otherwise provided in Section 2-E(b) through (e), if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession. Section 2-C continues the rule that, except as otherwise provided in Sections 2-F and 2-G, a parent-child relationship exists between a child and the child's genetic parents, regardless of their marital status. Regarding adopted children, Section 2- D continues the rule that adoption establishes a parent-child relationship between the adoptive parents and the adoptee for purposes of intestacy. Section 2-E addresses the extent to which an adoption severs the parent-child relationship with the adoptee's genetic parents. Sections 2-F and 2-G provide rules addressing the existence of parent-child relationships resulting from assisted reproductive technologies in forming families. Section 2-H confirms that the new subpart does not affect the doctrine of equitable adoption.

SECTION 3. Insert a title and designates existing Sections 560:2-101 to 560:2-114 as subpart A.

SECTION 4: Adds two new sections that were added to the UPC in 2008 and are based on similar provisions in the Uniform Trust Code. The sections authorize the court to reform governing instruments to correct for mistakes consistent with the transferor's intent or to modify the instrument to achieve the transferor's tax objectives.

SECTION 5. A new subpart, the Uniform Estate Tax Apportionment Act (UETAA), is added to Chapter 560. The UETAA provides that the decedent's expressed intentions govern apportionment of an estate tax. Statutory apportionment applies only to the extent there is no clear and effective decedent's tax burden direction to the contrary. Under the statutory scheme, marital and charitable beneficiaries generally are insulated from bearing any of the estate tax, and a decedent's direction that estate tax be paid from a gift to be shared by a spouse or charity with another is construed to locate the tax burden only on the taxable portion of the gift. The UETAA also provides relief for persons forced to pay estate tax on values passing to others whose interests, though contributing to the tax, are unreachable by the fiduciary.

SECTION 6. The amendment to Section 560:1-201 adds two new definitions for "record" and "sign" in the general definition section of the UPC and amends the current definitions of "beneficiary" and "issue" to adjust for changes in Hawaii laws and for further clarity.

SECTION 7. The amendment to Section 560:1-401 reduces the number of times the publication of a notice is required from three to two. With the advent of online search engine technology, the Probate Committee believes that the need to publish a notice three times is no

longer warranted and may unnecessarily increases the costs to probate an estate. The Probate Committee noted that other states have similarly reduced the number of required publications.

SECTION 8. The amendment to Section 506:1-403 restyles the section for additional clarity.

SECTION 9. The amendment to Section 506:2-102 adjusts the statutory share of a surviving spouse or reciprocal beneficiary for inflation, which was last updated when enacted in 1996.

SECTION 10. The amendment to Section 560:2-103 amends the provisions dealing with the shares of heirs other than a surviving spouse or reciprocal beneficiary, to adjust for societal changes recognizing that decedents now may have more than two parents or two sets of grandparents. Consistent with the 2008 changes to the UPC, the revised language also permits a decedent's stepchildren and their descendants to inherit in situations where there is no surviving spouse or reciprocal beneficiary, descendants, parents, grandparents or descendants of parents or grandparents.

SECTION 11. The amendment to Section 560:2-104 clarifies that the requirement of survival by 120 hours applies to heirs who are born before the intestate's death and addresses the inheritance rights of children born after the death of a decedent, through natural or assisted reproduction methods.

SECTION 12. The amendment to Section 560:2-106 includes language to adjust for societal changes as it relates to parents and grandparents similar to Section 560:2-103 (SECTION 10 above).

SECTION 13. The amendment to Section 560:2-107 removes the use of the term "half-blood" in favor of more acceptable language.

SECTION 14. The amendment to Section 560:2-108 deletes the section as the issue of afterborn heirs was addressed with the amendment to Section 560:2-104.

SECTION 15. The amendment to Section 560:2-113 was amended for clarity.

SECTION 16. Section 560:2-114 is amended to delete the language dealing with the parent-child relationship when a child is adopted and adds language to provide rules for when a parent may be barred from inheriting from a child.

SECTIONS 17. The elective share provision in Section 560:2-202 is restyled to provide that a surviving spouse or reciprocal beneficiary may elect to take an elective share equal to fifty percent of the marital-property share of the augmented estate. The determination of the marital-property share is moved to Section 560:2-203. The amendment also revises the minimum supplemental amount available to a surviving spouse or reciprocal beneficiary from $50,000 to $90,000 to adjust for inflation.

SECTION 18. Section 560:2-203 is amended to include the determination of the marital-property share formerly in Section 560:2-202 and adjust the provision dealing with gift made within two years of death for inflation.

SECTION 19. Subsection (3)(C) of Section 560:2-205 is amended to adjust the amount of gifts that are exempted from the elective share from $20,000 to $32,000 to adjust for inflation.

SECTION 20. Section 560:2-209 is restyled consistent with the changes to 560:2-202, 2-203 and 2-205.

SECTION 21. Section 560:2-212 is restyled to be consistent with the changes to 560:209.

SECTION 22. Amends Section 560:2-302 to change "the other" parent to "another" parent to address circumstances where child may have more than two parents.

SECTION 23. Amends the homestead allowance amount in Section 560:2-402 from $15,000 to $30,000 to adjust for inflation.

SECTION 24. Amends the exempt property allowance amount in Section 560:2-403 from $10,000 to $20,000 to adjust for inflation.

SECTION 25. Amends the amount of the family allowance in Section 560:2-405 that a Personal Representative may disburse without court approval from $18,000 to $36,000 to adjust for inflation.

SECTION 26. Amends the language in Section 560:2-514 for clarification in regards to will contracts.

SECTION 27. Revises definitions consistent with changes to the UPC in the anti-lapse provisions in Section 560:2-603 consistent with earlier changes and adds clarifying language.

SECTION 28. Adds two new paragraphs (5) and (6) to Section 560:2-606 consistent with changes to the UPC to allow a substitute gift of a replacement property where specifically devised property was sold by a decedent prior to death or a pecuniary substitute gift where it can be established that ademption of the gift would not be consistent with the decedent's testamentary plan.

SECTION 29. Amends Section 560:2-608 dealing with the exercise of power of appointments in wills with clarifying language.

SECTION 30. Adopts changes to language in Section 560:2-704 in 2014 UPC Amendments to conform it to Section 304 of the Uniform Powers of Appointment Act (not yet adopted in Hawaii).

SECTION 31. Amends Section 560:2-706 to adopt technical amendments made to the UPC in 2008 that added definitions of "descendant of a grandparent" and "descendants" as used

in subsections (b)(1) and (2) and clarified subsection (b)(4). The two new definitions resolve questions of status previously unanswered. The technical amendment of subsection (b)(4) makes that subsection easier to understand but does not change its substance.

SECTION 32. Amends Section 560:2-707 to adopt technical amendments made to the UPC in 2008 that added a definition of "descendants" as used in subsections (b)(1) and (2) and clarified subsection (b)(4). The new definition resolves questions of status previously unanswered. The technical amendment of subsection (b)(4) makes that subsection easier to understand but does not change its substance.

SECTION 33. Amends Section 560:2-804 to replace term "husband and wife" with "marriage" to reflect the adoption of same sex marriage since the section enactment in 1996 and to correct the reference to parent-child relationships due to addition of new Subpart 2.

SECTION 34. Amends Section 560:3-108 based on concerns and feedback from estate and trust practitioners to provide clarity as to the time limit within which a probate proceedings may be conducted and under what circumstances a proceeding may be brought informally.

SECTION 35. Amends paragraph (c) of Section 560:2-203 to resolve existing ambiguity as to the priority of one who is nominated to act as Personal Representative. The added language clarifies that the person who is nominated to act as Personal Representative shall have the same authority as the person who nominates him or her.

SECTION 36. Amends paragraph (a)(1) of Section 560:3-301 to clarify that an applicant in an informal proceeding may list his or her residence, business or mailing address in the application. Also amends paragraph (a)(2)(A) to require that an application for informal probate include the terms "filed, deposited or lodged" consistent with the changes made in 560:3-303 below (SECTION 34).

SECTION 37. Amends Section 560:3-303 to add a new paragraph (f) which will permit an authenticated copy of a will that has been filed, deposited or lodged in another jurisdiction to submitted for probated. The additional language provides an applicant with an additional means of filing a will where the original jurisdiction in which it was filed will not issue an authenticated copy.

SECTION 38. Amends Section 560:3-406, which applies to contested cases in which the proper execution of a will is at issue. Adopts the changes made to the UPC in 2008. Paragraph (1) provides that a will that is self-proved pursuant to Section 2-504 satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit. Paragraph (1) does not preclude evidence of undue influence, lack of testamentary capacity, revocation or any relevant evidence that the testator was unaware of the contents of the document. Paragraph (2) provides that if the will is witnessed pursuant to Section 2-502(a)(3), but not self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including

an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

SECTION 39. Section 560:3-605 is amended to adjust the interest a person or creditor must have in an estate to file a demand for bond from $1,000 to $10,000 to adjust for inflation.

SECTION 40. Amends Section 560:3-703 to add language relieving a Personal Representative of liability when distributing an estate without knowledge of the possibility of a posthumous pregnancy.

SECTION 41. Amends Section 560:3-720 to conform with its companion provision in the Uniform Trust Code.

SECTION 42. Amends Section 560:3-801 reduce the times a notice to creditor must be published from three to two. Change is consistent with the changes made to 560:1-401 above. With the advent of online search engine technology, the Probate Committee believes that the need to publish a notice three times is no longer warranted and may unnecessarily increases the costs to probate an estate. The Probate Committee noted that other states have similarly reduced the number of required publications.

SECTION 43. Amends Section 560:3-803 to change reference to sixty days after the "mailing or other delivery" of a notice of disallowance to sixty days after "service" of a notice of disallowance. Amendment is intended to address the issue raised in Ramos v. Estate of Elsenbach and clarify that the two-day extension for mailing in Probate Rule 10(d) is intended to apply to notices of disallowance.

SECTION 44. Amends Section 560:3-806 to change the language that a Personal Representative may "mail" a notice to "serve" a notice. Amendment is intended to address the issue raised in Ramos v. Estate of Elsenbach discussed above.

SECTION 45. Amends Section 560:3-915, which allows for the personal representative to distribute funds for an heir or devisee under a disability other than minority, to that person's attorney-in-fact or a spouse, reciprocal beneficiary, parent or other close relative with whom he or she resides. Amended the amount that may be distributed annually from $10,000 to $30,000 to adjust for inflation.

SECTION 46. A new subsection is added to Section 560:4-205, which deals with the powers of a domiciliary foreign personal representative, to clarify that the personal representative's power to act in this state are subject to the limitations of his or her power in the domiciliary proceeding.

SECTION 47. Section 560:3-916, which dealt with apportionment of estate taxes, is repealed. Section 560:3-916 is replaced with a new subpart discussed above.

SB-483-SD-1
Submitted on: 3/14/2023 10:52:40 AM
Testimony for JHA on 3/15/2023 2:15:00 PM

Submitted By	Organization	Testifier Position	Testify
Elizabeth Kent	Commission to Promote Uniform Laws	Support	Remotely Via Zoom

Comments:

Aloha,

Thank you for the opportunity to testify in strong support of SB 483, SD 1 regarding the Uniform Probate Code. These updates to adjust for inflation and address the changes in our society are positive steps that will provide for more clarity for the people of Hawaii.

I urge you to pass SB 483, SD 1 out of this Committee.

Respectfully,

Elizabeth Kent

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair
Wednesday, March 15, 2023
2:15 P.M.
Conference Room 325

WRITTEN TESTIMONY ONLY
by Carolyn Nicol

Bill No. & Title:
S.B. No. 483, S.D. 1, Relating to the Uniform Probate Code

Chair Tarnas, Vice Chair Takayama and Members of the Judiciary and Hawaiian Affairs Committee:

My name is Carolyn Nicol. I am a retired attorney and a current member of the Probate and Estate Planning section of the Hawaii State Bar Association, testifying in my individual capacity, to **comment** on proposed amendments to HRS §§560:3-108, 3-303, 3-720, and 3-801 in Sections 34, 37, 41, and 42 of S.B. No. 483, S.D. 1, Relating to the Uniform Probate Code, and conforming amendments in Section 36. Attachments that accompany this testimony pertain to HRS §560:3-720.

HRS §560:3-108, and conforming amendment to HRS §560:3-301.
Position: **Support intent, suggest changes.**

HRS §560:3-108, Probate, testacy and appointment proceedings; ultimate time limit, sets forth deadlines for initiating proceedings in probate court. I support the intent to revise this section, but not the proposed changes in terminology.

HRS §560:1-201 currently defines "proceeding," "informal proceedings," "formal proceedings," and "testacy proceeding." HRS §560:3-401(a) defines "formal testacy proceeding" ("litigation to determine whether a decedent left a valid will").

Section 34 of this bill appears to reflect language adopted in 1976 (1976 Haw. Sess. Laws Act 200, §1 at 372; Sec. 3-108 at 394-95) but repealed and replaced in 1996 (1996 Haw. Sess. Laws Act 288, §1 at 824; new §560:3-108 at 873-74; repeal, §6 at 920).

The 1976 version of HRS §560:1-201 (1976 Haw. Sess. Laws at 376) defined "probate proceeding"; the 1996 version of HRS §560:1-201 (1996 Haw. Sess. Laws at 828) did not. Currently, "probate proceeding" as used in context refers to a proceeding that seeks probate of a will and "appointment proceeding" seeks appointment of a personal representative. For example, HRS §560:3-301, Informal probate or appointment proceedings;

application; contents, establishes requirements for applications for informal "probate of a will" and for "appointment of a personal representative."

This bill makes changes that would restore obsolete language from 1976 including: on page 98, line 6 and line 12, changing "probate, appointment, or testacy" proceedings; on page 97, lines 17-19, changing "No informal probate or appointment proceeding or formal testacy or appointment proceeding"; and on page 101, line 20 to page 102 line 1, changing "In cases under subsection (a)(1) or (2) the date on which a testacy or appointment proceeding is properly commenced," in a cross-reference to terms used on page 98, lines 6 and 12. These changes are not recommended.

Insertion of "formal probate" on page 98 line 19 is not recommended. A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment if the contest is successful must be "formal" (there is no informal way to contest an informally probated will), but would not necessarily be a "probate" proceeding (it could request an order that the decedent died intestate).

This bill (page 97 line 19 to page 98 line 1) amends text after "other than" in the first sentence of HRS §560:3-108(a), changing "a proceeding to probate a will previously probated at the testator's domicile" to "an ancillary proceeding" and deleting "appointment proceedings relating to an estate in which there has been a prior appointment," in effect restoring "other than an ancillary proceeding" from the 1976 version. These changes should not be made. HRS §560:3-303(d) provides informal probate of a will previously probated elsewhere "may be granted at any time[.]" Depending on the date of the death, removal, resignation or incapacity of a prior personal representative, a proceeding to appoint a successor may need to be initiated more than five years after the decedent's date of death.

Proposed new §560:3-108(b) (page 101, lines 11-17) provides that if there has been "a prior probate proceeding" concerning the decedent's estate, a "formal proceeding or a supervised administration seeking an adjudication of intestacy may be commenced" under certain conditions and circumstances. This language tracks the 1976 version of §560:3-108(b), but "prior probate proceeding concerning the decedent's estate" and "prior probate proceeding" (page 101, lines 13-15) appear to rely on the obsolete 1976 definition of "probate proceeding" ("a proceeding designed to effect the settlement of the estate of a decedent by collecting his assets, paying his debts and distributing his remaining property." 1976 Haw. Sess. Laws at 376). The words "or

a supervised administration" (on page 101, line 15) appear to be remnants of the 1976 version that should be deleted.

Summary of recommendations as to HRS §560:3-108:

Leave as is, unamended: page 97 line 17 to page 98 line 1; page 98 lines 6, 12 and 19; and page 101 line 21. Clarify "prior probate proceeding" on page 101 line 13 and lines 14-15. Delete "or a supervised administration" on page 101 line 15.

HRS §560:3-301(a)(1)(F) in Section 36, page 104, lines 8-10 ("That the time limit for informal probate [~~or appointment~~] as provided in this article has not expired . . .") should remain as is, unamended.

HRS §560:3-303, and conforming amendment to HRS §560:3-301. Position: **Oppose.**

The proposed amendment to **HRS §560:3-303** would permit informal probate of a copy of a will filed, deposited, or lodged, but not probated, in another jurisdiction. HRS §560:3-303(d) allows the registrar to grant informal probate of a copy of a will previously probated elsewhere, but whether to admit to probate in Hawai`i a will that was filed, deposited, or lodged but not probated in another jurisdiction is a matter for a judge to determine, in a formal proceeding, after notice and hearing.

This bill, page 110, lines 1 to 6, would add new HRS §560:3-303(f):

> (f) A will that has been filed, deposited, or lodged in another jurisdiction, but not probated, may be probated in this State upon receipt by the registrar of a duly authenticated copy of the will or a copy of the will and a statement from its legal custodian that the copy filed is a full, true, and correct copy of the original.

Commentary to the Proposed Changes to the Uniform Probate Code ("Probate Committee Commentary") attached to the Judiciary's February 10, 2023 testimony before the Senate Committee on Judiciary on S.B. No. 483 (this measure as introduced) explained new paragraph (f) in Section 560:3-303 "provides an applicant with an additional means of filing a will where the original jurisdiction in which it was filed will not issue an authenticated copy." It should be noted that, to safeguard against potential fraud, Hawai`i court rules prohibit clerks from issuing certified copies of wills deposited, but not submitted for probate. (Rule 74(c) of the Hawai`i Probate Rules, Access to

Deposited Will, provides, in part, "No certified copies of deposited wills may be issued.")

A copy of a will ***probated*** elsewhere deserves recognition under comity principles, but a copy of an ***unproved*** will, whether "duly authenticated" or accompanied by a "full, true and correct" statement from its legal custodian, as proposed in this measure, does not. If an original will is not presented for probate, a question arises whether the will was revoked by destruction during the testator's lifetime. (See "revocatory act" in HRS §560:2-507.) Given lenient ("no bounce") policies about documents court clerks must accept for "filing," allowing informal probate of a copy of a will "filed" but not probated elsewhere invites abuse.

Summary of recommendations as to HRS §560:3-303:

It is respectfully recommended that the proposed addition of HRS §560:3-303(f) be rejected.

HRS §560:3-301(a)(2)(A) in Section 36, page 104 line 21 to page 105 line 2 (". . . that an authenticated copy of a will probated, filed, deposited or lodged in another jurisdiction accompanies the application;") should remain as is, unamended.

HRS §560:3-720.
Position: **Leave unamended at this time.**

HRS §560:3-720, Expenses in estate litigation, closely tracks Section 3-720 of the Uniform Law Commission's uniform probate code, as it has since 1976. Attached to this testimony are copies of Section 3-720 of the uniform act and its 1976 and 1996 Hawai`i counterparts. If amended as proposed, HRS §560:3-720 would no longer resemble the uniform act.

The Commentary to the Proposed Changes to the Uniform Probate Code ("Probate Committee Commentary") attached to the Judiciary's February 10, 2023 testimony on S.B. No. 483 before the Senate Committee on Judiciary explains its proposal as follows:

> "SECTION 41. Amends Section 560:3-720 to conform with its companion provision in the Uniform Trust Code."

A comparison of existing and proposed language follows:

Page, Line (*Issue*)	Existing HRS §560:3-720	S.B. 483, S.D. 1, Sec. 41
Pg 115, Ln 11-15 (*Heir or beneficiary*)	. . . any personal representative or person nominated as personal representative . . .	. . . any personal representative or person nominated as personal representative, ***or an heir or beneficiary if a personal representative or a person nominated as a personal representative refuses to act,*** . . .
Pg 115, Ln 15-16 (*Will contest*)	. . . defends or prosecutes any proceeding in good faith . . .	. . . defends or prosecutes any proceeding ***regarding the validity of a will*** in good faith . . .
Pg 115, Ln 17-21 (*Contingency fees*)	. . . ***that person's necessary*** expenses and disbursements including reasonable attorneys' fees ***incurred.***	. . . ***reasonable costs,*** expenses, and disbursements, including reasonable attorney's fees, ***whether or not counsel has been retained on a contingency fee basis.***

Heir or beneficiary. The Probate Committee Commentary offers no explanation for adding, on page 115, lines 13-15 ", or an heir or beneficiary if a personal representative or personal nominated as a personal representative refuses to act," aside from conformity to a companion provision, which, although not identified, appears to refer to HRS §554D-1004(b).

HRS §554D-1004 is in Part X, "Liability of Trustees and Rights of Persons Dealing with Trustee" in HRS chapter 554D. In chapter 560, HRS §560:3-720 is in Article III, Part 7, "Duties and Powers of Personal Representatives," concerning the fiduciary's duties and powers, not the "rights of persons dealing with" the fiduciary.

Will contest. The Probate Committee Commentary offers no explanation for adding, on page 115, lines 15-16 "regarding the validity of a will" aside from conformity to a companion provision.

Restricting a personal representative's litigation expenses to proceedings "regarding the validity of a will" would have an

adverse financial impact on personal representatives involved in estate litigation about matters other than the validity of a will.

Contingency Fees. In 2017, the Hawai`i Intermediate Court of Appeals ("ICA") interpreted HRS §560:3-720 in Matter of the Estate of Camacho, 140 Hawai`i 404, 400 P.3d 605 (App. 2017) ("Camacho"). The Hawai`i Supreme Court rejected certiorari in 2018. Camacho remains controlling authority. Attached to this testimony are excerpts from slip opinions for Camacho and the Vinson opinion it cites (Vinson v. Ass'n of Apartment Owners of Sands of Kahana, 130 Hawai`i 540, 312 P.3d 1247 (App. 2013)).

The Probate Committee Commentary offers no explanation for changes proposed on page 115, lines 17-21, aside from conformity to a companion provision. The Probate Committee Commentary does not mention any impact on nor concerns about case law precedent.

Attached to this testimony are copies of pages 1-5 of the Judiciary's February 10, 2021 testimony before the Senate Committee on Judiciary on S.B. No. 385, Relating to the Uniform Trust Code, and pages [1], 16, 25 and 26 of its Hawaii Committee Proposed Revisions to Uniform Trust Code attachment ("Hawaii Committee Comment"). The Judiciary presented testimony before the Senate Committee on Judiciary ("JDC") on S.B. No. 385 ; before the House Committee on Judiciary and Hawaiian Affairs ("JHA") on S.B. No. 385, S.D. 1; before the House Committee on Consumer Protection and Commerce ("CPC") on S.B. No. 385, S.D. 1, H.D. 1; and before the House Committee on Finance ("FIN") on S.B. No. 385, S.D. 1, H.D. 2 . The Judiciary's testimony before the House Committee on Judiciary and Hawaiian Affairs lacked its Hawaii Committee Comment attachment.

Also attached to this testimony are copies of Sections 709 and 1004 of the uniform act and their 2021 Hawai`i counterparts. As can be seen by comparing the Uniform Law Commission's uniform act with HRS §§554D-709 and -1004, the Hawaii emphasis on the interests of attorneys engaged on a contingency fee basis (and their clients) is a significant departure from the uniform act.

In 2021, the text of S.B. 385 did not propose any amendments to HRS §560:3-720. With its Uniform Trust Code title and scope, S.B. 385 was not a proper vehicle to amend the probate code. In testimony, however, the Hawaii Committee recommended the legislature consider amending HRS §560:3-720

> 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.

Hawaii Committee Comment at 26.

With due respect, a different reading of Camacho would suggest the fees were not denied "because counsel was engaged by a contingency fee agreement," but rather because requiring an estate to pay fees the client was not legally obligated to pay would result in an improper windfall to the client or attorney, to the detriment of the testator's intended beneficiaries.

A side-by-side comparison of language then suggested in testimony on 2021 S.B. No. 385 with language now proposed in 2023 S.B. No. 483 follows:

2021 Judiciary testimony on S.B. No. 385; S.B. 385, S.D. 1, H.D. 1; S.B. 385, S.D. 1, H.D. 2 (Re: Uniform Trust Code)	2023 text, if amended as proposed in S.B. 483, S.D. 1 Section 41 (pg 115 ln 11-21) (Re: Uniform Probate Code)
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 ***W***ill 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.	If any personal representative ***or*** person nominated as personal representative, or an heir or beneficiary if a personal representative or ***person*** nominated ***as a*** personal representative refuses to act, defends or prosecutes any proceeding regarding the validity of a ***w***ill in good faith, whether successful or not, that person is entitled to receive from the estate reasonable costs, expenses, and disbursements, including reasonable attorneys' fees, whether or not counsel has been retained on a contingency fee basis.

On page 4 of its February 10, 2021 testimony on S.B. No. 385, in its summary and highlights of Hawaii Committee modifications to the uniform act, the Judiciary alluded to a "departure from current case law" (without naming any cases) in describing contingency fee provisions that deviate from the Uniform Law Commission's version of the trust code:

> . . . Section 1004 . . . 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. . . .

The Hawaii Committee Comment attached to the Judiciary's testimony explained its differences from the uniform act, stating, at 16:

> Hawaii Committee Comment to Section 709:
>
> * * *
>
> The Hawaii Committee modified Section 709(a)(1) to include reimbursement of trustee expenses to defend and 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.

The Hawaii Committee Comment further explained its difference from the uniform act, at 25-26:

> Hawaii Committee Comment to [Section] 1004:
>
> * * *
>
> 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 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 § 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).

Turning to the legislative history of 2021 Act 32, adopting Hawai`i's version of the Uniform Trust Code, committee reports for S.B. 385 in the 2021 Archives on the Hawai`i State Legislature website make no mention of Camacho nor of counsel retained on a contingency fee basis. A search of the "SECTION 1" in each of the five versions of 2021 S.B. No. 385 (as introduced; S.D. 1; H.D. 1; H.D. 2; and C.D. 1) and of the five committee reports (3/4/21 JDC Stand. Com. Rep. No. 698 on S.B. No. 385, S.D. 1; 3/19/21 JHA Stand. Com. Rep. No. 1015 on S.B. No. 385, S.D. 1, H.D. 1; 3/25/21 CPC Stand. Com. Rep. No. 1470 on S.B. No. 385, S.D. 1, H.D. 2; 4/8/21 FIN Stand. Com. Rep. No. 1702 on S.B. No. 385, S.D. 1, H.D. 2; and 4/22/21 Conference Committee Rep. No. 63 on S.B. No. 385, S.D. 1, H.D. 2; C.D. 1) fails to reveal any record of the legislature having entertained the notion of overriding disfavored case law. These sources mention "clarity

and certainty" in areas of trust law that are "thin" or "without precedent" in Hawaii, and amendments that "reflect Hawaii law and practice" but nothing in Section 1 of the various bills nor in the purpose and findings stated in committee reports suggests any deliberate legislative intent to disrupt or circumvent Hawaii case law.

In other contexts, the legislature creates a record of steps taken to address concerns about the impact of an appellate opinion. See, for example, findings set forth this year in Section 1 of S.B. No. 36, A Bill for An Act Relating to the Initiation of Felony Prosecutions, proposing amendments to HRS §801-1 to address concerns about the impact of State v. Obrero, 151 Hawai`i 472, 517 P.3d 755 (2022); findings in the Senate Committee on Judiciary's February 1, 2023 Stand. Com. Rep. No. 1; and findings in the report in this Committee's March 3, 2023 Stand. Com. Rep. No. 946 on that measure.

The Judiciary's testimony this year is silent as to how its proposed amendment to HRS § 560:3-720 might affect case law precedent. It is respectfully recommended that competing perspectives on the unfair windfall scenarios discussed in Camacho be brought to the fore in deliberations, and that serious consideration be given to leaving HRS §560:3-720 unamended with its Camacho case law precedent intact.

Summary of recommendations as to HRS §560:3-720:

It is respectfully recommended that HRS §560:3-720, as interpreted in Matter of the Estate of Camacho, 140 Hawai`i 404, 400 P.3d 605 (App. 2017), be left unamended at this time.

HRS §560:3-801.
Position: **Suggest addition.**

Section 42 of this bill proposes amending HRS §560:3-801(a) to reduce from "three" to "two" the number of times a notice to creditors must be published (page 116 line 7). HRS §560:3-801(f) contains similar language that should also be amended.

Summary of recommendations as to HRS §560:3-801:

Page 116, after line 15: Add amendment to subsection (f) of section 560:3-801, changing "three" to "two" (" . . . trustee or successor trustee . . . may publish a notice to creditors once a week for [~~three~~] two successive weeks . . ."). .

Thank you for considering these comments.

List of Attachments to Testimony of Carolyn Nicol

S.B. No. 483, S.D. 1, Relating to the Uniform Probate Code

Re: Probate Code

1. Pages 1 and 415 of the Uniform Law Commission's 785 page Uniform Probate Code (Section 3-720 and Comment).
2. 1976 Haw. Sess. Laws Act 200, pt of §1 at 420 (Sec. 3-720)
3. 1996 Haw. Sess. Laws Act 288, pt of §1 at 897 (HRS §560:3-720)

Re: "Camacho"

4. February 27, 2018 Hawai`i Supreme Court Order Rejecting Application for Writ of Certiorari.

5. Pages 1 and 8-19 of the 19 page July 31, 2017 Intermediate Court of Appeals ("ICA") slip opinion subsequently published as Matter of the Estate of Camacho, 140 Hawai`i 404, 400 P.3d 605 (App. 2017) ("Camacho").

6. Pages 1 and 11-16 of the 16 page October 31, 2013 ICA slip opinion subsequently published as Vinson v. Ass'n of Apartment Owners of Sands of Kahana, 130 Hawai`i 540, 312 P.3d 1247 (App. 2013) (discussed on page 10 of the Camacho slip opinion).

Re: Trust Code

7. Pages 1-5 of the Judiciary's February 10, 2021 testimony before the Senate Committee on Judiciary on S.B. No. 385, Relating to the Uniform Trust Code, and pages [1], 16, 25 and 26 of the Hawaii Committee Proposed Revisions to Uniform Trust Code ("Hawaii Committee Comment") referred to in first paragraph under "Background & Discussion" on page 2 of the testimony. (Section 709, Section 1004, and HRS §560:3-720).
8. Pages 1, 121-22, and 161 of the Uniform Law Commission's 175 page Uniform Trust Code (Sections 709 and 1004 and Comments).
9. 2021 Haw. Sess. Laws Act 32, pt of §2 at 75, 87 (HRS §[554D]-709 and HRS §[554D]-1004)

Sources:

Session laws, testimony on Hawai`i State Legislature website (https://www.capitol.hawaii.gov).

"Opinions and Orders" under tab "Legal References" on the Hawai`i State Judiciary website (https://www.courts.state.hi.us).

Uniform Probate Code and Uniform Trust Code "Final Act, with Comments" on the National Conference of Commissioners on Uniform State Laws website (https://www.uniformlaws.org).

UNIFORM PROBATE CODE (1969)

(Last Amended or Revised in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH COMMENTS

Uniform Law Commission
National Conference of Commissioners on Uniform State Laws
111 N. Wabash Ave., Suite 1010 • Chicago, IL 60602
(312) 450-6600, Fax (312) 450-6601
www.uniformlaws.org

May 17, 2018

based on the assumption that the decedent would not consider the powers of his fiduciaries to be personal, or to be suspended if one or more could not function. In regard to co-administrators in intestacy, it is based on the idea that the reason for appointing more than one ceases on the death or disability of either of them.

SECTION 3-719. COMPENSATION OF PERSONAL REPRESENTATIVE. A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

Comment

This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate, may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

SECTION 3-720. EXPENSES IN ESTATE LITIGATION. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

Comment

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the

SESSION LAWS

OF

HAWAII

PASSED BY THE

EIGHTH STATE LEGISLATURE

REGULAR SESSION

1976

Convened on Wednesday, January 21

and

Adjourned Sine Die on Tuesday, April 20

Published by Authority of the
Revisor of Statutes
Honolulu, Hawaii

60 days to cure the violation before citation for a violation is issued."

SECTION 4. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act the revisor of statutes need not include the brackets, the bracketed material or the underscoring.*

SECTION 5. This Act shall take effect upon its approval.

(Approved June 4, 1976)

ACT 200 S.B. NO. 79

A Bill for an Act Relating to the Uniform Probate Code.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The Hawaii Revised Statutes is amended by adding the Uniform Probate Code to be codified and to read as follows:

"UNIFORM PROBATE CODE
ARTICLE 1
GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Sec. 1-101 Short title. This chapter shall be known and may be cited as the Uniform Probate Code.

Sec. 1-102 Purposes; rule of construction. (a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this chapter are:

(1) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(2) To discover and make effective the intent of a decedent in distribution of his property;

(3) To promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(4) To facilitate use and enforcement of certain trusts;

(5) To make uniform the law among the various jurisdictions.

Sec. 1-103 Supplementary general principles of law applicable. Unless displaced by the particular provisions of this chapter, the principles of the common law of the State of Hawaii supplement its provisions.

Sec. 1-104 Severability. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect

*Edited accordingly.

Sec. 3-716 Powers and duties of successor personal representative. A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

Sec. 3-717 Corerepresentatives; when joint action required. If two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a corepresentative has been delegated to act for the others. Persons dealing with a corepresentative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

Sec. 3-718 Powers of surviving personal representative. Unless the terms of the will otherwise provide, every power exercisable by personal correpresentatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of two or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office.

Sec. 3-719 Compensation of personal representative. A personal representative is entitled to reasonable compensation for his services, which compensation shall be set forth in his final accounts and shall be approved by the registrar or the court as provided in sections 3-1001 or 3-1003. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of the fee may be filed with the court.

Sec. 3-720 Expenses in estate litigation. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

Sec. 3-721 Compensation of employees of estate. The propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, shall be reviewed by the court or the registrar at the time of its approval of the final account. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

SESSION LAWS

OF

HAWAII

PASSED BY THE

EIGHTEENTH STATE LEGISLATURE

REGULAR SESSION
1996

Convened on Wednesday, January 19, 1996
and
Adjourned sine die on Monday, April 29, 1996

Published by Authority of the
Revisor of Statutes
Honolulu, Hawaii

affect the validity or continuing effectiveness of any provisions of Act 218, Session Laws of Hawaii 1995, not repealed or modified by this Act.

SECTION 12. This Act shall take effect upon its approval.

(Approved June 19, 1996.)[3]

Notes

1. Item vetoed, replaced, and initialized "BJC".
2. Edited accordingly.
3. This Act was approved on June 19, 1996, which is after the approval date (June 18, 1996) of Act 288.

ACT 288 S.B. NO. 2993

A Bill for an Act Relating to Uniform Probate Code.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 560, Hawaii Revised Statutes, is amended by adding four new articles to be appropriately designated and to read as follows:

"ARTICLE I
GENERAL PROVISIONS, DEFINITIONS, AND PROBATE JURISDICTION OF COURT

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

§560:1-101 Short title. This chapter shall be known and may be cited as the Uniform Probate Code.

§560:1-102 Purposes; rule of construction. (a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this chapter are to:

(1) Simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;
(2) Discover and make effective the intent of a decedent in distribution of the decedent's property;
(3) Promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors;
(4) Facilitate use and enforcement of certain trusts; and
(5) Make uniform the law among the various jurisdictions.

§560:1-103 Supplementary general principles of law applicable. Unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions.

§560:1-104 Severability. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

§560:1-105 Construction against implied repeal. This chapter is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

§560:3-719 Compensation of personal representative. A personal representative is entitled to reasonable compensation for the personal representative's services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce the personal representative's right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

§560:3-720 Expenses in estate litigation. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not that person is entitled to receive from the estate that person's necessary expenses and disbursements including reasonable attorneys' fees incurred.

§560:3-721 Proceedings for review of employment of agents and compensation of personal representatives and employees of estate. After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for the personal representative's own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

PART 8. CREDITORS' CLAIMS

§560:3-801 Notice to creditors. (a) Unless notice has already been given under this section, a person applying or petitioning for appointment of a personal representative or probate of a will or declaration of an intestacy may publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the judicial circuit in which the application or petition is filed announcing the person's application or petition and the name and address of the person nominated as personal representative, if any, and notifying creditors of the estate to present their claims no later than four months after the date of the first publication of the notice or be forever barred. The notice may be combined with any published notice of the pendency of the probate proceedings.

(b) After appointment the personal representative may give written notice by mail or other delivery to each known creditor, notifying the creditor to present that creditor's claim within four months after the published notice, if given as provided in subsection (a), or within sixty days after the mailing or other delivery of the notice, whichever is later, or be forever barred. Written notice must be the notice described in subsection (a) above or a similar notice.

(c) The personal representative shall undertake reasonable review of the decedent's records to ascertain the decedent's creditors.

(d) The personal representative is not liable to a creditor or to a successor of the decedent for giving or failing to give notice under this section.

(e) If a person other than the original nominee is appointed personal representative, the original nominee or any other person receiving claims shall promptly deliver all claims to the person who is appointed. Failure to deliver by the original nominee shall render the original nominee liable for any damages suffered by the claimants.

SCWC-13-0003397

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

IN THE MATTER OF
THE ESTATE OF ETHEL CAMACHO, Deceased.

IN THE MATTER OF
THE ETHEL CAMACHO LIVING TRUST DATED MARCH 3, 2008.

NEPHI DANIEL IOANE CAMACHO,
Petitioner/Petitioner-Appellee,

vs.

BEVERLY J. CALKOVSKY,
Respondent/Respondent-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0003397; PROBATE NO. 08-1-0192; TRUST NO. 08-1-0094)

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Petitioner/Petitioner-Appellee Nephi Daniel Ioane Camacho's application for writ of certiorari filed on January 8, 2018, is hereby rejected.

DATED: Honolulu, Hawai'i, February 27, 2018.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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IN THE MATTER OF
THE ESTATE OF ETHEL CAMACHO, Deceased.

IN THE MATTER OF
THE ETHEL CAMACHO LIVING TRUST DATED MARCH 3, 2008.

NEPHI DANIEL IOANE CAMACHO,
Petitioner-Appellee,
v.
BEVERLY J. CALKOVSKY,
Respondent- Appellant.

NO. CAAP-13-0003397

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(PROBATE NO. 08-1-0192, TRUST NO. 08-1-0094)

JULY 31, 2017

NAKAMURA, CHIEF JUDGE, AND REIFURTH AND GINOZA, JJ.

OPINION OF THE COURT BY NAKAMURA, CHIEF JUDGE

Prior to her death in 2008, Ethel Camacho (Ethel) executed wills in 1998, 2000, and 2004. The 1998 will left Ethel's entire estate to her two grandsons, Nephi Daniel Ioane Camacho (Nephi) and Moses Antonio Ioane Camacho (Moses), and

DISCUSSION

I.

A.

Pursuant to HRS § 560:3-720, the Circuit Court granted Nephi's request that Ethel's estate pay $345,736.78 in attorneys' fees (including general excise tax) and $42,754.09 in costs for Nephi's unsuccessful will contest. HRS § 560:3-720 provides:

> If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not that person is entitled to receive from the estate that person's necessary expenses and disbursements including reasonable attorneys' fees incurred.

On appeal, Beverly raises numerous challenges to the Circuit Court's decision to grant Nephi's request for attorneys' fees and costs.[4/] With respect to attorneys' fees, we conclude that the pivotal claim raised by Beverly is that HRS § 560:3-720 does not authorize an award of attorneys' fees to Nephi because, based on his contingency fee arrangement, Nephi was not obligated to pay attorneys' fees to his attorneys for his unsuccessful will contest. We hold that HRS § 560:3-720 does not authorize the award of attorneys' fees from the estate to a nominated personal representative who is unsuccessful in a will contest and who is

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[4/] Beverly asserts eleven points of error: (1) the Circuit Court erred by failing to state the statutory basis for its award of attorneys' fees and costs, find that Nephi acted in good faith, or address Beverly's objections to the fees and costs as unauthorized and excessive; (2) Nephi lacked good faith to initiate or persist in his will contest; (3) HRS § 560:3-720 does not apply to personal representatives who unsuccessfully attack a will for personal gain and do not benefit the estate; (4) HRS § 560:3-720 does not apply to personal representatives who unsuccessfully challenge a will and owe nothing to their lawyers under a contingency fee agreement; (5) HRS § 560:3-720 is limited to fees incurred under HRS Chapter 560:3 and does not apply to trust litigation brought under HRS Chapter 560:7; (6) assuming HRS § 560:3-720 authorized the fees requested by Nephi, he did not comply with Hawai'i Probate Rules (HPR) Rule 40-42 or Hawai'i Rules of Professional Conduct (HRPC) Rule 1.5; (7) assuming the fees requested by Nephi were authorized, he failed to provide sufficient evidence of his lawyers' reputations, training, or experience for the Circuit Court to determine their reasonable hourly rate; (8) assuming the fees requested by Nephi were authorized, the Circuit Court lacked sufficient billing information to determine whether the requested fees were reasonable; (9) the fees requested by Nephi were excessive, duplicative, and unreasonable; (10) assuming the costs requested by Nephi were authorized, the request did not comply with HRS § 607-9 or HPR Rule 40-42, or were not sufficiently documented; and (11) the request for costs included costs that were not recoverable.

not obligated to pay attorneys' fees because his or her attorneys were retained on a contingency fee basis.

With respect to costs, it appears that unlike attorneys' fees, Nephi was obligated to pay for costs incurred. We hold that under HRS § 560:3-720, Nephi was entitled to an award of his necessary costs. However, we remand the case for further proceedings regarding whether cost items requested by Nephi, and objected to by Beverly, were necessary.

B.

Our resolution of this appeal turns on the interpretation of HRS § 560:3-720. Statutory interpretation is a question of law that is subject to de novo review. Hawaii Gov't Emps. Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawai'i 197, 201-02, 239 P.3d 1, 5-6 (2010). We are guided by the following principles in construing a statute:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Id. at 202, 239 P.3d at 6 (internal block quote format and citation omitted).

C.

Assuming that the good faith requirement of HRS § 560:3-720 has been satisfied, HRS § 560:3-720 requires the estate to pay a person who is a personal representative or is nominated as a personal representative "that person's necessary expenses and disbursements including reasonable attorneys' fees incurred." Based on the language of the statute itself, we

construe HRS § 560:3-720 as only requiring the estate to pay attorneys' fees and costs that a personal representative or nominated personal representative is obligated to pay. When a personal representative or nominated personal representative is not obligated to pay attorneys' fees or costs, such fees or costs are not "necessary expenses and disbursements" and are not "fees [or costs] incurred" by the personal representative or nominated personal representative.

Our interpretation of HRS § 560:3-720 is supported by our construction of similar statutory language in Vinson v. Ass'n of Apartment Owners of Sands of Kahana, 130 Hawai'i 540, 312 P.3d 1247 (App. 2013). In Vinson, we construed HRS § 514B-157(b) (2006), which requires the award of "all reasonable and necessary expenses, costs, and attorneys' fees incurred" by a condominium owner who prevails in an action to enforce any provision of HRS Chapter 514B against a condominium association. We held that "in order for Vinson [(the condominium owner)] to have 'incurred' attorneys' fees and costs under HRS § 514B-157(b), he must have paid or be legally obligated to pay such fees and costs[.]" Vinson, 130 Hawai'i at 548-49, 312 P.3d at 1255-56.[5/] We therefore concluded that the trial court erred in awarding Vinson legal fees paid by third-parties that Vinson was not legally obligated to pay. Id. Consistent with Vinson, we conclude that for a personal representative or nominated personal representative to have "incurred" attorneys' fees or costs under HRS § 560:3-720, he or she must be legally obligated to pay such fees or costs.

[5/] In Vinson, we noted that "Black's Law Dictionary defines 'incur' to mean 'to suffer or bring on oneself (a liability or expense).'" Vinson, 130 Hawai'i at 548, 312 P.3d at 1255. We also cited case law construing a statute authorizing reasonable attorneys' fees to a prevailing party as not permitting the prevailing party to receive a windfall, but permitting the prevailing party to be awarded attorneys' fees if he could show he was "'legally obligated'" to pay his attorneys, the Legal Aid Society of Hawai'i, the fees he recovered. Id. (citing Wiginton v. Pac. Credit Corp., 2 Haw. App. 435, 446-47, 634 P.2d 111, 120 (1981)).

II.

A.

We first address the Circuit Court's award of attorneys' fees. Beverly asserts, and Nephi does not dispute, that Nephi retained his lawyers on a contingency fee basis. Although the fee agreement between Nephi and his lawyers is not part of the record, generally, a contingent fee agreement is "'a fee agreement under which the attorney will not be paid unless the client is successful.'" Lopez v. State, 133 Hawai'i 311, 327-28, 328 P.3d 320, 336-37 (2014) (Acoba, J., dissenting) (quoting Robert L. Rossi, Attorneys' Fees § 2:1); see also Black's Law Dictionary 362 (9th ed. 2009) (defining "contingent fee" as "[a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court"). A contingency fee is usually calculated as a stipulated percentage of the client's recovery in the event of a successful prosecution of the action. Rossi, Attorney's Fees § 2:1; Black's Law Dictionary 362 ("Contingent fees are [usually] calculated as a percentage of the client's net recovery[.]"). Here, Beverly asserts, and Nephi does not dispute, that because Nephi retained his lawyers on a contingency fee basis, Nephi "owed his lawyers nothing" when he did not prevail in his will contest.

Accordingly, for purposes of our analysis on appeal, we assume that Nephi had a standard contingency fee agreement with his lawyers, one that provided that Nephi was not obligated to pay his lawyers any attorneys' fees if Nephi was unsuccessful in his will contest. Based on such a contingency fee agreement, because Nephi did not prevail in his will contest, he was not legally obligated to pay his lawyers any attorneys' fees. Therefore, under HRS § 560:3-720, Nephi was not entitled to have Ethel's estate pay for attorneys' fees that he was not obligated to pay his lawyers.

We conclude that a contrary interpretation of HRS § 560:3-720 would create improper windfall situations at the expense of the estate. HRS § 560:3-720 provides for the personal

representative or nominated personal representative, and not his or her lawyers, to receive from the estate the amounts awarded for attorneys' fees and costs. Here, an award to Nephi of $345,736.78 for attorney's fees he is not obligated to pay would result in an improper windfall to him; it would produce the anomalous result of Nephi obtaining a significant portion of Ethel's estate despite the jury's determination that Ethel validly intended that he should receive none of her estate.

Even if Nephi is ordered to pay the fee amount awarded to him to his lawyers, an action HRS § 560:3-720 does not specifically authorize or require, it would result in a windfall to Nephi's lawyers. By taking the case on a contingency fee basis, Nephi's lawyers conditioned their entitlement to receive their fees on their successful prosecution of Nephi's will contest and, in doing so, presumably factored in the possibility and assumed the risk that Nephi would not prevail in setting the level of their contingency fee. Having conditioned their entitlement to fees on Nephi's prevailing in his will contest, Nephi's lawyers would receive a windfall if despite Nephi's failure to prevail, Ethel's estate was nevertheless required to pay Nephi's lawyers for their legal fees.

These windfall scenarios reinforce our view that HRS § 560:3-720 does not require an estate to pay for attorneys' fees a personal representative or nominated personal representative is not obligated to pay because he or she retained lawyers on a contingency fee basis and was not successful in prosecuting or defending a will contest.

B.

We note that HRS § 560:3-720 is a provision that comes from the model Uniform Probate Code that was largely adopted by the Hawai'i Legislature. See Conf. Comm. Rep. No. 77, in 1996 Senate Journal, at 773. We can look to other jurisdictions that have adopted statutes with the same or similar language as HRS § 560:3-720 for guidance. Unfortunately, the case law from other jurisdictions addressing the contingency fee issue presented by

this case is sparse, and the jurisdictions that have addressed this issue are split.

Our interpretation of HRS § 560:3-720 is supported by Russell v. Moeling, 526 S.W.2d 533 (Tex. 1975). Russell involved a contest between a 1965 will and a 1969 will, in which the 1969 will was eventually found to be valid and admitted to probate. Russell, 526 S.W.2d at 534. The unsuccessful executrix of the 1965 will, who had hired her attorneys on a contingency fee basis, applied for attorneys' fees and expenses pursuant to Section 243 of the Texas Probate Code, which contained language that closely matches the operative language of HRS § 560:3-720. Id. at 534-35. Section 243 stated:

> When any person designated as executor in a will, or as administrator with the will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings.

Id. at 535 (emphasis added).

The Texas Supreme Court held that because the unsuccessful executrix of the 1965 will, by virtue of her contingency fee agreement, did not owe her attorneys any legal fees, Section 243 did not authorize the recovery of the requested attorneys' fees from the estate. The court reasoned as follows:

> The import of [Section 243] is clear: the executor or administrator "shall be allowed out of the estate his necessary expenses and disbursements." The purpose then is to pay the cost of attorney's fees that are owed by the executor or administrator, and the allowance is not to the attorney, but to the administrator. We are presented here, however, with a situation where the unsuccessful executrix of the 1965 will and her attorneys had entered into a contingent fee agreement which provided that if the probate of the 1965 will was successful, the attorneys were to receive a percentage of all moneys they recovered. The [1965] will was not probated and therefore the executrix named therein was not faced with any expense for the legal work that had been done since nothing was recovered. Consequently, under the terms of Section 243, the estate could not be held liable for those attorneys' fees.

Id. (citations omitted) (emphasis added). In accordance with the Texas Supreme Court, we conclude that the import and purpose of

HRS § 560:3-720 is clear -- to require the estate to pay for attorneys' fees, but only those fees that are actually owed by the personal representative or nominated personal representative. Indeed, this import and purpose of HRS § 560:3-720 is even clearer than the Texas statute, given HRS 560:3-720's reference to "reasonable attorney's fees incurred." (Emphasis added.)

Nephi cites cases from other jurisdictions construing statutes with language close or somewhat similar to HRS § 560:3-720 which have held that unsuccessful will contestants were entitled to recover attorneys' fees even though (or regardless of whether) their attorneys were hired on a contingency fee basis. E.g. In re Estate of Robinson, 690 P.2d 1383, 1389 (Kan. 1984) ("An individual, by entering into a contingent fee contract, does not control the award of attorney fees under the statute[.]"); Fickle v. Scampmorte, 183 N.E.2d 838, 840 (Ind. 1962) ("The statute places the obligation on the estate to pay the attorney fees and expenses that are normally required in a proceeding to probate a purported will if the proceedings are in good faith. This statute is not conditional upon any outside or private agreement."); In re Estate of Whitehead, 287 So.2d 9, 10 (Fla. 1973) ("[T]he attorneys' fees herein ordered paid were payable initially on a contingent basis, but the materialization of the contingency is not a prerequisite to the ordering of payment of attorneys' fees[.]").

We note that there is a dissenting opinion in Robinson, which states that the result of the majority's decision can be to create a windfall, and a dissenting opinion in Fickle, which asserts that because the unsuccessful will contestant was not liable for attorneys' fees under his contingency fee agreement, the attorneys' fees requested were not a necessary expense. Robinson, 690 P.2d at 1390 (McFarland, J., dissenting); Fickle, 183 N.E.2d at 841-42 (Bobbitt, J., dissenting). In any event, we are not persuaded by the majority decisions in the cases cited by Nephi and believe that our interpretation of HRS § 560:3-720

conforms to the statutory language and Hawai'i precedents and reflects a more reasoned approach.

C.

Based on the foregoing, we conclude that HRS § 560:3-720 did not authorize the Circuit Court to order Ethel's estate to pay attorneys' fees that Nephi, by virtue of his contingency fee agreement, did not owe his lawyers and was not legally obligated to pay.[6/] We therefore vacate the Amended Judgment to the extent that it entered judgment in favor of Nephi and against Ethel's estate for attorneys' fees.

III.

We now turn to the question of the Circuit Court's award of costs. Nephi was not the prevailing party in the will contest, and therefore, his request for costs was also based on HRS § 560:3-720. As noted, Nephi's fee agreement with his lawyers is not part of the record, but Beverly did not challenge Nephi's request for costs on the ground that he was not legally obligated to pay for costs. In addition, Nephi asserts, without contradiction, that he "had to borrow funds to pay for the costs incurred." Thus, it appears that Nephi satisfied the requirement under HRS § 560:3-720 of having the obligation to pay for the costs for which he sought reimbursement from Ethel's estate.

A.

Beverly, however, contends that Nephi failed to satisfy other conditions which she claims were necessary for Nephi to recover under HRS § 560:3-720. In particular, Beverly contends that Nephi did not act in good faith in pursuing the will contest. She also contends that Nephi was not entitled to recovery under HRS § 560:3-720 because (1) he did not prevail in the will contest and therefore his actions did not benefit Ethel's estate and (2) he was a primary beneficiary of the 1998

[6/] In light of our analysis and resolution of the contingency fee issue, we need not address the other grounds raised by Beverly in contending that Nephi should not have been awarded attorneys' fees under HRS § 560:3-720.

Will that he sought to validate in the will contest. These contentions of Beverly are without merit.

1.

The Circuit Court found that Nephi acted in good faith in pursing the will contest. At the hearing on Nephi's request for attorneys' fees and costs, the Circuit Court stated that "the litigation was neither frivolous nor in bad faith. [Nephi's] motion [for attorneys' fees and costs] is neither frivolous nor in bad faith." Moreover, at a hearing on Beverly's motion to have Nephi pay her attorney's fees and costs on the ground that Nephi's pursuit of the will contest was frivolous, the Circuit Court found that each party was "firm in their belief of the rightness of their respective causes," and it further found that "this litigation was undertaken by both sides in good faith."[7/]

"Generally, the existence of good faith . . . is a fact question for the trial court to determine." In re Estate of Herbert, 91 Hawai'i 107, 109, 979 P.2d 1133, 1135 (1999) (internal quotation marks, citation, and brackets omitted). We find no basis to overturn the Circuit Court's determination that Nephi acted in good faith in pursuing the will contest. In this

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[7/] In its order denying Beverly's motion to have Nephi pay Beverly's attorneys' fees and costs, the Circuit Court stated:

> I have presided over pretrial motions as well as the trial of this matter. I have had the opportunity to witness the testimonies and cross examinations of the parties and to evaluate each side's respective claims, as well as each side's reaction to the other side's claims and conduct throughout the course of this period.
>
> With this wealth of background, I conclude that the behavior of each party is one of mutual suspicion and understandable but regrettable hostility. Each side believes that the other has manipulated and/or misrepresented the intent of the decedent for the purpose of achieving financial gain.
>
> Even in this atmosphere of mutual acrimony I find each party to be firm in their belief of the rightness of their respective causes, and each to possess meritorious and indeed likeable character traits.
>
> Taking all these factors into account, I find that this litigation was undertaken by both sides in good faith.

(Emphasis added.)

regard, we note that Beverly failed to include the trial transcripts as part of the record on appeal. Without the trial transcripts, Beverly cannot satisfy her "burden of demonstrating error in the record" with respect to the Circuit Court's determination that Nephi acted in good faith. State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) ("[W]e will not presume error from a silent record."). Moreover, the record that was provided supports the view that Nephi had good faith reasons for challenging the 2000 Will and 2004 Will. The record contains medical records and other evidence that Ethel suffered from dementia and which raised questions about her testamentary capacity. While the jury ultimately found the 2000 Will to be valid, it agreed with Nephi that Ethel lacked the testamentary capacity to execute the 2004 Will.

2.

We reject Beverly's contentions that Nephi was not entitled to recovery of costs under HRS § 560:3-720: (1) because he did not prevail in the will contest and therefore his actions did not benefit Ethel's estate; and (2) because of his status as a primary beneficiary of the 1998 Will.

HRS § 560:3-720 entitles a nominated personal representative who pursues a will contest in good faith to recover his or her necessary costs "whether successful or not" in the will contest. Therefore, the fact that Nephi was unsuccessful in the will contest does not disqualify him from recovering costs under HRS § 560:3-720.

Beverly's claim that Nephi's status as a primary beneficiary of the 1998 Will precludes his recovery of costs is without merit. HRS § 560:3-720 does not limit recovery to personal representatives or nominated personal representatives who are not beneficiaries of the will they sought to prove was valid. We conclude that if a personal representative or nominated personal representative pursues a will contest in good

faith, his or her status as a beneficiary of the argued-for will does not render him or her ineligible from recovering under HRS § 560:3-720.

B.

Beverly challenges the reasonableness and amount of cost items awarded by the Circuit Court. Generally, unless there is a specific objection to a cost item, the court should approve the item. Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 307, 972 P.2d 295, 310 (1999). However, when objections have been filed to specific costs items requested, the burden of proving the correctness of the items shifts to the party claiming them. Id.

Here, Beverly filed extensive objections to the cost items requested by Nephi. Beverly challenged the costs requested by Nephi on the grounds that they were unnecessary, insufficiently documented, or unrecoverable. The items of cost challenged by Beverly included messenger fees, courier services, Westlaw charges, and other charges related to the filing and delivery of documents that ordinarily do not appear to be recoverable as costs. See Kikuchi v. Brown, 110 Hawai'i 204, 212-13, 130 P.3d 1069, 1077-78 (App. 2006); Bjornen v. State Farm Fire and Cas. Co., 81 Hawai'i 105, 107, 912 P.2d 602, 604 (App. 1996). Nephi did not specifically respond to Beverly's objections or provide documentation supporting items that Beverly asserted lacked sufficient documentation. The Circuit Court granted Nephi's cost request in total, without addressing Beverly's objections or otherwise explaining its decision.

Under these circumstances, we vacate the Circuit Court's cost award and remand for further proceedings. On remand, Nephi may submit additional evidence or justification with respect to the costs objected to by Beverly. We also direct the Circuit Court to explain its rulings on Beverly's cost objections in sufficient detail to permit effective appellate review.

CONCLUSION

We vacate the Amended Judgment to the extent that it entered judgment in favor of Nephi for attorneys' fees and costs to be paid by Ethel's estate, and we remand the case for further proceedings consistent with this Opinion.

On the briefs:

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Cheryl R. Ng
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& Yamauchi)
for Petitioner-Appellee.

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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WILLIAM T. VINSON, Trustee of The Vinson Family Trust,
Plaintiff-Appellee,
v.
ASSOCIATION OF APARTMENT OWNERS OF SANDS OF KAHANA,
an unincorporated Hawaii condominium association,
Defendant-Appellant,
and
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; and OTHER DOE ENTITIES 1-20,
Defendants.

NO. 30696

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 09-1-0081(1))

OCTOBER 31, 2013

FOLEY, PRESIDING JUDGE, LEONARD AND GINOZA, JJ.

OPINION OF THE COURT BY GINOZA, J.

Defendant-Appellant Association of Apartment Owners of Sands of Kahana (AOAO) appeals from a Final Judgment filed on August 17, 2010, in the Circuit Court of the Second Circuit (circuit court).[1]

[1] The Honorable Joel E. August presided.

and costs does not preserve review of the underlying merits, but we will review the fees and costs award pursuant to *Tatibouet*.

B. **Attorneys' Fees and Costs**

Pursuant to HRS § 514B-157(b), the circuit court granted Vinson attorneys' fees and costs, plus general excise tax, in the total amount of $29,589.65. HRS § 514B-157(b) provides in relevant part that "[i]f any claim by an owner is substantiated in any action against an association . . . to enforce any provision of . . . this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an owner shall be awarded to such owner[.]"

The AOAO challenges the circuit court's award of attorneys' fees and costs on two grounds. First, the AOAO asserts that Vinson's primary claim was for declaratory relief, which seeks to *establish* rights rather than *enforce* rights as required under HRS § 514B-157(b). Second, the AOAO contends that Vinson did not "incur" attorneys' fees or costs as required under HRS § 514B-157(b) because the requested fees and costs were billed to and paid, at least in part, by others who were not party to the case and Vinson made no showing that he was obligated to pay the fees and costs.

Pursuant to *Tatibouet*, we must determine if Vinson prevailed and is entitled to an award of attorneys' fees and costs given the outcome in the circuit court, without regard to whether we think the circuit court's decision on the underlying merits is correct. 123 Haw. at 510, 236 P.3d at 1246.

Additionally, "[t]he trial court's grant or denial of attorney's fees and costs is reviewed under the abuse of discretion standard." *Sierra Club v. Dep't of Transp.*, 120 Hawai'i 181, 197, 202 P.3d 1226, 1242 (2009) (citations, internal quotation marks and brackets omitted).

> The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. In other words, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of

> law or practice to the substantial detriment of a party litigant.

Maui Tomorrow v. State of Haw., Bd. of Land & Natural Res., 110 Hawai'i 234, 242, 131 P.3d 517, 525 (2006) (citations, internal quotation marks and brackets omitted).

With regard to the AOAO's first argument, it is clear to us that Vinson's action was one to enforce a provision of HRS chapter 514B, specifically HRS § 514B-153(e). The AOAO's challenge in this regard is therefore without merit. Further, considering the requirements under HRS § 514B-157(b) for the award of attorneys' fees and costs, it is undisputed that Vinson is an owner and that his claim against the AOAO was substantiated by the circuit court's rulings.

The only serious question as to Vinson's entitlement to fees and costs under HRS § 514B-157(b) is thus whether Vinson "incurred" the fees and costs awarded by the circuit court within the meaning of HRS § 514B-157(b). In this case, the firm of MacDonald Rudy Byrns O'Neill & Yamauchi (MacDonald firm) represented Vinson. However, as the circuit court determined and as the record reflects, all billing invoices by the MacDonald firm were addressed to an entity named Sullivan Properties; there are no engagement letters or agreements between Vinson, Sullivan Properties or the MacDonald firm; and Vinson has paid only $1,700 of the requested fees. These facts are unchallenged. In a declaration dated April 8, 2010, Vinson attests, in relevant part, that:

> 3. To date I have personally paid $1,700 of attorney's fees in this matter.
> 4. The balance of the attorney's fees have been paid via contributions of other whole unit owners in the Sands of Kahana.
> 5. I do not have a written agreement with any of the other whole unit owners regarding payment of the attorney's fees.
> 6. My understanding is the other whole unit owners are contributing to the fees in this matter because they share my concerns about Consolidated Resort's control of our project.
> 7. Promptly upon the receipt of any attorney's fees awarded in this matter I will distribute such award, on a pro rata basis, to all contributing whole unit owners.

The circuit court ultimately concluded that, although no formal retainer agreement exists between Vinson and the MacDonald firm, the MacDonald firm could sue Vinson in quantum meruit or quasi-contract for services rendered if the fees and costs were not paid by the third parties. The circuit court thus awarded the challenged fees and costs.

Given these circumstances, we must determine whether Vinson "incurred" the attorneys' fees and costs awarded by the circuit court, as required by HRS § 514B-157(b).

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
>
> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
>
> In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
>
> [The appellate] court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning.

Morgan v. Planning Dep't, 104 Hawai'i 173, 179-80, 86 P.3d 982, 988-89 (2004) (citation omitted).

The term "incurred" is not defined in HRS § 514B-157(b) or elsewhere in HRS chapter 514B. Vinson argues that HRS § 514B-157(b) states that fees and costs incurred "shall" be awarded and therefore an award of fees and costs is mandated. Vinson's argument, however, ignores the requirement in the statute that the fees and costs be "incurred."

Black's Law Dictionary defines "incur" to mean "to suffer or bring on oneself (a liability or expense)." Black's Law Dictionary 836 (9th ed. 2009). Yet, it is still unclear whether one can "incur" attorneys' fees and costs for purposes of

this particular statute, when a third party finances the legal representation.

There is nothing in the context of HRS Chapter 514B that suggests how we should interpret the term "incurred" in this case. Generally speaking, HRS § 514B-157 entitles both associations and owners to obtain reasonable attorneys' fees and costs incurred for *inter alia* substantiating claims to enforce HRS chapter 514B. Because the statute is ambiguous as to whether Vinson "incurred" the attorneys' fees and costs awarded by the circuit court, we thus consider the legislative history of HRS § 514B-157. However, the legislative history does not assist us in clarifying the definition of "incurred".[5]

We therefore turn to existing Hawai'i case law that generally considered whether attorneys' fees should be awarded where a question was raised whether such fees had been incurred. In *Wiginton v. Pac. Credit Corporation*, 2 Haw. App. 435, 634 P.2d 111 (1981), the plaintiff, represented by the Legal Aid Society of Hawai'i (LASH), brought claims for unfair and deceptive practices and asserted that he was entitled to attorneys' fees under HRS § 480-13 (1976), which allowed for reasonable attorneys' fees to a prevailing plaintiff. *Id.* at 439-40, 446, 634 P.2d at 115-16, 120. The defendant argued that because plaintiff was represented by LASH, the plaintiff had not incurred attorneys' fees and would thus be unjustly enriched. This court ruled that the plaintiff should not receive a windfall, but that if the plaintiff could show that he was "legally obligated" to

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[5] The Legislature enacted HRS § 514B-157 in 2004 as part of a comprehensive recodification of Hawaii's "Condominium Property Regime" Law (which prior to 1988 was referred to as "Horizontal Property Regimes"). *See* 2004 Haw. Sess. Laws Act 164, §§ 1 at 755, 2 at 795-96; 1988 Haw. Sess Laws Act 65, § 1 at 98. The predecessor to HRS § 514B-157 is HRS § 514A-94 (Supp. 1977), which in turn was preceded by HRS § 514-7.5 (1976). *See* 1977 Haw. Sess. Laws Act 98, §2 at 180-81; 1976 Haw. Sess. Laws Act 239, § 1 at 757-58. The statute has been amended over time, including the adoption of subsection (b) in 1983. *See* 1983 Haw. Sess. Laws Act 137, § 1 at 250. The word "incurred" has been a part of the statute since its original adoption in 1976. *See* HRS § 514-7.5. However, there is nothing in the legislative history which illuminates the question of how we should interpret "incurred" in subsection (b) given the circumstances in this case.

pay LASH the fees that were recovered, then attorneys' fees could be awarded. *Id.* at 446-47, 634 P.2d at 120; *see also* Morrison v. Comm'r, 565 F.3d 658 (9th Cir. 2009).

We therefore hold that in order for Vinson to have "incurred" attorneys' fees and costs under HRS § 514B-157(b), he must have paid or be legally obligated to pay such fees and costs to the MacDonald firm. In this case, based on the undisputed record, Vinson paid only $1,700 in fees; he has no agreement with the MacDonald firm contractually binding him to pay fees and costs; and, although Vinson attests that he would share fees awarded to him pro rata with contributing whole unit owners, he has no agreement with the third parties legally obligating him to repay them for the amounts they have paid or will pay. Moreover, the billing statements by the MacDonald firm were addressed to Sullivan Properties -- not Vinson -- and the billing entries indicate a variety of communications by the attorneys with individuals other than Vinson. We thus conclude that the circuit court based its award of attorneys' fees and costs on an erroneous view of the law when it determined that Vinson would prevail on a quantum meruit claim and thus was entitled to fees and costs. Such a conclusion is speculative on this record and Vinson, as the party requesting the award of fees and costs, failed to demonstrate his entitlement to such fees and costs beyond the $1,700 he has paid.

The circuit court thus abused its discretion to the extent it awarded Vinson attorneys' fees and costs beyond $1,700 and the general excise tax thereon.

III. Conclusion

Based on the foregoing, the following orders and judgments entered by the circuit court are hereby vacated:

1) the portions of the Final Judgment filed on August 17, 2010, pertaining to summary judgment and HRS § 514B-153;

2) the January 13, 2010 summary judgment order; and

3) the February 16, 2010 summary judgment order.

The Final Judgment as it pertains to attorneys' fees and costs and the "Order Granting Attorney's Fees and Costs to Plaintiff" filed on May 6, 2010, are affirmed to the extent that they awarded attorneys' fees to Vinson in the amount of $1,700, plus the general excise tax on that amount. The award of fees and costs beyond that amount is reversed.

The case is remanded to the circuit court with instructions to dismiss the case.

On the briefs:

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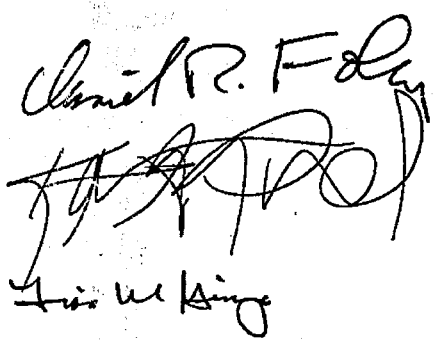

The Judiciary, State of Hawai'i

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 attorneys[1], 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.

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[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

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 subjection (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 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;".

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 Secton 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.

UNIFORM TRUST CODE

(Last Revised or Amended in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR
ST. AUGUSTINE, FLORIDA
JULY 28 – AUGUST 4, 2000

WITH PREFATORY NOTE AND COMMENTS

September 27, 2022

as long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991).

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. *See* Restatement (Third) of Trusts Section 38 cmt. e (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. *See* Section 111(d) (matters that may be the resolved by nonjudicial settlement). *See also* Restatement (Third) of Trusts Section 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul. 66-167, 1966-1 C.B. 20. *See also* Restatement (Third) of Trusts Section 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. j (1959).

Section 816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

SECTION 709. REIMBURSEMENT OF EXPENSES.

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(1) expenses that were properly incurred in the administration of the trust; and

(2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Comment

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust).

Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust. The purpose of this provision, which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959).

Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, The Law of Trusts § 245 (4th ed. 1988).

ARTICLE 8

arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

Comment

The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts § 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration. *See* Restatement (Second) of Trusts § 203 cmt. a (1959).

A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959), subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

SECTION 1004. ATTORNEY'S FEES AND COSTS. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

Comment

This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 188.4 (4th ed. 1988).

SESSION LAWS

OF

HAWAII

PASSED BY THE

THIRTY-FIRST STATE LEGISLATURE

STATE OF HAWAII

REGULAR SESSION 2021

Convened on Wednesday, January 20, 2021, and
Adjourned sine die on Thursday, April 29, 2021

SPECIAL SESSION 2021

Convened on Tuesday, July 6, 2021, and
Adjourned sine die on Thursday, July 8, 2021

Published under Authority of
Section 23G-13, Hawaii Revised Statutes
by the
Revisor of Statutes
State of Hawaii
Honolulu, Hawaii

ACT 32

S.B. NO. 385

A Bill for an Act Relating to the Uniform Trust Code.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the Uniform Trust Code is a national codification of the law of trusts, which provides for greater clarity and uniformity in trust law and interpretation. While there are currently a number of Hawaii statutes relating to trusts, the Uniform Trust Code serves to update these laws and to bring them under one comprehensive umbrella.

The legislature further finds that the Uniform Trust Code will significantly reduce the time, complexity, and expense of trust proceedings and, in certain instances, allow for nonjudicial resolution of trust issues that currently require court intervention. At the same time, the Uniform Trust Code provides ready access to a judge if either a dispute arises during the course of trust administration or the interested parties desire judicial supervision. The Uniform Trust Code also provides greater clarity and certainty in many areas of trust law that are exceedingly thin or without precedent in Hawaii.

The purpose of this Act is to enact the Uniform Trust Code (2018 version) in the State, with appropriate amendments to reflect Hawaii law and practice where relevant.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER
UNIFORM TRUST CODE

PART I. GENERAL PROVISIONS AND DEFINITIONS

§ -101 **Short title.** This chapter may be cited as the Uniform Trust Code.

§ -102 **Scope.** This chapter applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

§ -103 **Definitions.** As used in this chapter:

"Action", with respect to an act of a trustee, includes a failure to act.

"Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on the effective date of this chapter.

"Beneficiary" means a person who:

(1) Has a present or future beneficial interest in a trust, vested or contingent; or

(2) In a capacity other than that of trustee, holds a power of appointment over trust property.

"Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section -405(a).

"Conservator" means a person appointed by the court to administer the estate of a minor or adult individual.

"Court" means the circuit court in this State having jurisdiction over all subject matter relating to trusts.

received excessive compensation from a trust may be ordered to make appropriate refunds.

§ -709 **Reimbursement of expenses.** (a) A trustee or designated trustee who acts in good faith is entitled to reimbursement out of the trust property, with interest as appropriate, for:

(1) Expenses that were properly incurred in the administration of the trust, including the defense or prosecution of any action, whether successful or not, unless the trustee is determined to have wilfully or wantonly committed a material breach of trust; or

(2) To the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee or designated trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

PART VIII. DUTIES AND POWERS OF TRUSTEE

§ -801 **Duty to administer trust.** Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

§ -802 **Duty of loyalty.** (a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in section -1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) The transaction was authorized by the terms of the trust;

(2) The transaction was approved by the court;

(3) The beneficiary did not commence a judicial proceeding within the time allowed by section -1005;

(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section -1009; or

(5) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming a trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) The trustee's spouse, or the spouse's descendants, siblings, or ancestors, and their spouses;

(2) The trustee's descendants, siblings, ancestors, or their spouses;

(3) An agent or attorney of the trustee;

(4) A corporation or other person or enterprise in which the trustee has such a substantial interest that it might affect the trustee's best judgment; or

to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

§ -1003 **No damages in absence of breach.** Absent a breach of trust, a trustee shall not be liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

§ -1004 **Attorney's fees and costs.** (a) In a judicial proceeding involving the administration, interpretation, or validity of a trust, the court may award reasonable attorney's fees, costs, and expenses to any party to the trust who has acted in the best interest of the trust as a whole, to be paid by another party or from the trust that is the subject of the controversy.

(b) If a trustee, a nominated trustee, or a beneficiary, if a trustee or a nominated trustee refuses to act, defends or prosecutes any proceeding regarding the validity of a trust in good faith, whether successful or not, that person is entitled to receive from the trust reasonable costs, expenses, and disbursements, including reasonable attorney's fees, regardless of whether counsel has been retained on a contingency fee basis.

§ -1005 **Limitation of action against trustee.** (a) A beneficiary shall not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary, as described in part III, was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows or has reason to know of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust shall be commenced within three years after the first to occur of:

(1) The removal or resignation of the trustee;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(d) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a deceased trustee for breach of trust shall be commenced within the time frames set forth in section 560:3-803(a).

§ -1006 **Reliance on trust instrument.** A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument shall not be liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

§ -1007 **Event affecting administration or distribution.** If the happening of an event, including marriage, divorce, performance of educational requirements, or attainment of a specific age, birth, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event shall not be liable for a loss resulting from the trustee's lack of knowledge.

§ -1008 **Exculpation of trustee.** A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it: