

A Bill for an Act Relating to Trusts and Estates.

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

SECTION 1. Section 554A-3, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

- “(c) A trustee has the power, subject to subsections (a) and (b):
- (1) To collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made;
 - (2) To receive additions to the assets of the trust;
 - (3) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;
 - (4) To invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;
 - (5) To deposit trust funds in a bank;
 - (6) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;
 - (7) To make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;
 - (8) To subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;
 - (9) To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;
 - (10) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
 - (11) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;
 - (12) To vote a security, in person or by general or limited proxy;
 - (13) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;
 - (14) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
 - (15) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;
 - (16) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

- (17) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;
- (18) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;
- (19) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;
- (20) To allocate items of income or expense to either trust income or principal, as provided by chapter 557, the Revised Uniform Principal and Income Act, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;
- (21) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;
- (22) To effect distribution of money and property (that may be made in kind on a pro rata or non-pro rata basis), in divided or undivided interests, and to adjust resulting differences in valuation;
- (23) To employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in performance of the trustee's administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;
- (24) To prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of trustee duties; [and]
- (25) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee[.]; and
- (26) To divide, sever, or separate a single trust into two or more separate trusts for administration or tax purposes, including the allocation of the generation-skipping transfer exemption; provided the terms of the new trust provide, in the aggregate, for the same succession of interests and beneficiaries as are provided in the original trust."

SECTION 2. Section 560:2-707, Hawaii Revised Statutes, is amended to read as follows:

"§560:2-707 Survivorship with respect to future interests under terms of trust; substitute takers. (a) Definitions. In this section:

"Alternative future interest" means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the

will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

“Beneficiary” means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

“Class member” includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date.

“Distribution date”, with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

“Future interest” includes an alternative future interest and a future interest in the form of a class gift.

“Future interest under the terms of a trust” means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

“Surviving beneficiary” or “surviving descendant” means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 560:2-702.

(b) Survivorship required; substitute gift. A future interest under the terms of a trust executed after January 1, 1997 is contingent on the beneficiary’s surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

- (1) Except as provided in paragraph (4), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary’s surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date;
- (2) Except as provided in paragraph (4), if the future interest is in the form of a class gift, other than a future interest to “issue”, “descendants”, “heirs of the body”, “heirs”, “next of kin”, “relatives”, or “family”, or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary’s surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph, “deceased beneficiary” means a class member who failed to survive the distribution date and left one or more surviving descendants;
- (3) For the purposes of section 560:2-701, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form;

- (4) If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(c) More than one substitute gift; which one takes. If, under subsection (b), substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

- (1) Except as provided in paragraph (2), the property passes under the primary substitute gift;
- (2) If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift;
- (3) In this subsection:

“Primary future interest” means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

“Primary substitute gift” means the substitute gift created with respect to the primary future interest.

“Younger-generation future interest” means a future interest that:

- (A) Is to a descendant of a beneficiary of the primary future interest;
- (B) Is an alternative future interest with respect to the primary future interest;
- (C) Is a future interest for which a substitute gift is created; and
- (D) Would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

“Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation future interest.

(d) If no other takers, property passes under residuary clause or to transferor’s heirs. Except as provided in subsection (e), if, after the application of subsections (b) and (c), there is no surviving taker, the property passes in the following order:

- (1) If the trust was created in a nonresiduary devise in the transferor’s will or in a codicil to the transferor’s will, the property passes under the residuary clause in the transferor’s will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust;
- (2) If no taker is produced by the application of paragraph (1), the property passes to the transferor’s heirs under section 560:2-711.

(e) If no other takers and if future interest created by exercise of power of appointment. If, after the application of subsections (b) and (c), there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

- (1) The property passes under the donor’s gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and
- (2) If no taker is produced by the application of paragraph (1), the property passes as provided in subsection (d). For purposes of subsection (d), “transferor” means the donor if the power was a nongeneral power and means the donee if the power was a general power.

(f) Notwithstanding the foregoing, if a revocable inter vivos trust terminates on the death of the settlor of the trust and all the assets are to be distributed outright, sections 560:2-603 and 560:2-604 shall determine whether a gift has lapsed and who shall receive the property.”

SECTION 3. Section 560:3-905, Hawaii Revised Statutes, is amended to read as follows:

“§560:3-905 Penalty clause for contest. A provision in a will or trust purporting to penalize any interested person for contesting the will or trust or instituting other proceedings relating to the probate or trust estate is unenforceable if probable cause exists for instituting proceedings.”

SECTION 4. Section 560:3-914, Hawaii Revised Statutes, is amended to read as follows:

“§560:3-914 Disposition of unclaimed assets. [If an heir, devisee, or claimant cannot be found, the personal representative shall distribute the share of the missing person, whether realty or personalty, to that person’s guardian of the property, if any, otherwise to the State to become a part of the treasury of the State under chapters 523A and 665, as appropriate.] When any real or personal property remains in the hands of the personal representative or trustee, after payment in the order specified in section 560:3-805, and no heirs, devisees, or claimants of the decedent, or beneficiaries of a trust, entitled to the property, can be located after reasonable search and inquiry, the personal representative or trustee, at the filing of the petition for final accounts, or termination of the trust, shall report the fact to the court, which shall forthwith enter an order authorizing the transfer of the property to the state director of finance, and the personal representative or trustee shall immediately transfer the property to the director of finance for disposition as provided in chapters 523A and 665, whichever is appropriate. The state director of finance, at any time, may authorize the payment out of the general funds of any amount so forwarded to any person who establishes to the satisfaction of the director of finance that the person is legally entitled as an heir, devisee, or claimant of the decedent, or a beneficiary of a trust, and the person shall be entitled to receive the amount out of any moneys in the general revenues of the State not otherwise appropriated, upon warrant drawn by the state comptroller.”

SECTION 5. Section 560:3-916, Hawaii Revised Statutes, is amended to read as follows:

“§560:3-916 Apportionment of estate taxes. (a) For purposes of this section:

“Estate” means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this State.

“Fiduciary” means personal representative or trustee.

“Person” means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

“Person interested in the estate” means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent’s estate. It includes a personal representative, conservator, and trustee.

“State” means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

“Tax” means the federal estate tax and the additional inheritance tax imposed by Hawaii and interest and penalties imposed in addition to the tax.

(b) Except as provided in subsection [(i)] (j) and, unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent’s will directs a method of apportionment of tax different from the method described in this chapter, the method described in the will controls.

(c) The expenses reasonably incurred by any fiduciary and by other persons interested in the estate in connection with the determination of the amount and apportionment of the tax shall be apportioned as provided in subsection (b) and charged and collected as a part of the tax apportioned. If the court finds it is inequitable to apportion the expenses as provided in subsection (b), it may direct apportionment equitably.

[(c)] (d) (1) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose may determine the apportionment of the tax;

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable;

(3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge the fiduciary with the amount of the assessed penalties and interest;

(4) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this chapter the determination of the court in respect thereto shall be prima facie correct.

[(d)] (e) (1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to that person, the amount of tax attributable to that person’s interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this chapter;

(2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

[(e)] (f) (1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax;

- (2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal;
- (3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or the decedent's estate inures to the proportionate benefit of all persons liable to apportionment;
- (4) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax;
- (5) To the extent that property passing to or in trust for a surviving spouse or reciprocal beneficiary or any charitable, public or similar purpose is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (b) [hereof], and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1986, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

[(f)] (g) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

[(g)] (h) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three-month period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

[(h)] (i) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this State and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this State or who owns property in this State subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

[(i)] (j) If the liabilities of persons interested in the estate as prescribed by this chapter differ from those which result under the federal estate tax law, the

liabilities imposed by the federal law will control and the balance of this section shall apply as if the resulting liabilities had been prescribed herein.”

SECTION 6. Section 560:3-1201, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, chose in action, or other intangible personal property belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing the debt, obligation, stock, chose in action, or other intangible personal property to a person or persons claimed to be the successor or successors of the decedent or to the department of human services where the department has paid for the decedent’s burial pursuant to section 346-15, upon being presented a death certificate for the decedent and an affidavit made by or on behalf of the claimed successor or successors of the department of human services stating that:

- (1) The gross value of the decedent’s estate in this State does not exceed [\$60,000;] \$100,000; except that any motor vehicles registered in the decedent’s name may be transferred regardless of value pursuant to this section;
- (2) No application or petition for the appointment of a personal representative is pending or has been granted in this State; and
- (3) (A) The claimed successor or successors are entitled to the property and explaining the relationship of the claimed successor or successors to the decedent; or
(B) The department of human services has paid for the decedent’s burial.

The affidavit of the department of human services shall have priority over any other claim presented pursuant to this section.”

SECTION 7. Section 560:3-1205, Hawaii Revised Statutes, is amended to read as follows:

“**§560:3-1205 Estates of [\$60,000] \$100,000 or less; clerk of court to administer.** If a person dies leaving property in this State of a total value not exceeding [\$60,000,] \$100,000 and a personal representative of the estate has not been appointed in the State, the clerk of the court of the judicial circuit in which the decedent was residing or domiciled at the time of the decedent’s death or left property may, upon the verified petition of the clerk or of any interested person, obtain an order authorizing the clerk to administer the estate, and, as the personal representative, the clerk shall collect and receive the property and administer the same. The order may be made without notice or hearing, at the discretion of the court. Except as otherwise specifically required or authorized by law or where the clerk may be interested as an heir, or devisee, no clerk of any court shall act as personal representative of any estate where the value of the same is in excess of [\$60,000.] \$100,000. No fees shall be allowed the clerk, except as set forth in section 560:3-1211.”

SECTION 8. Section 560:3-1211, Hawaii Revised Statutes, is amended to read as follows:

“**§560:3-1211 Exemption from costs.** All proceedings under this part shall be free from all costs of court, except that the clerk may charge the actual expenses for advertising the notice specified in section 560:3-1206, the advertising, posting, or service fees required in carrying out any order of the court, including orders

relating to the sale of real or personal property, and any expenses reasonably necessary for the preservation, disposal, distribution, and administration of the estate, together with a fee of three per cent of the market value of the first [\$60,000] \$100,000 in the gross estate, the fee to be paid into the treasury of the State as a government realization from any available assets of the estate; provided that if the administration is completed by another personal representative on account of the size of the estate or for any other reason, no fee shall be charged by the clerk.”

SECTION 9. Section 560:3-1212, Hawaii Revised Statutes, is amended to read as follows:

“§560:3-1212 Estates of persons leaving no known relatives. Every coroner or medical examiner who is called to investigate the death of any person leaving no known spouse or reciprocal beneficiary, issue, parent, grandparent, or issue of grandparents over the age of majority in the State, shall take immediate charge of the decedent’s personal effects and if in the discretion of the coroner the value of such personal effects is in excess of \$2,500, forthwith deliver them to the clerk of the court of the judicial circuit in which such decedent died.

If after ten days no person appears, competent to initiate appropriate probate proceedings, the clerk shall administer the estate pursuant to the provisions of this part; provided that if the decedent’s estate is of a value exceeding [\$60,000] \$100,000, the clerk shall notify the judge of the circuit having charge of the probate calendar, and shall petition for the appointment of a personal representative of such estate other than the clerk. In the meantime the clerk may take such steps as may be appropriate to preserve and conserve the real and personal property of the decedent. All expenses in connection with the taking possession, care, and conservation of the property and with such proceedings shall be proper charges against the estate of the decedent. The corporation counsel or county attorney of each county shall advise, assist, and represent as far as necessary any of such officers in the performance of any act or the institution or prosecution of any proceeding required by this section. If the decedent’s estate is of a value not exceeding \$2,500 and the decedent has no known relatives or whose relatives have failed to indicate any means of disposition of the estate, then the coroner or medical examiner having custody of the property shall dispose of the property in an appropriate manner, which may be any one of the following or a combination thereof:

- (1) Where the estate consists only of money and is not in excess of \$2,500 and expenditures have been made in connection with such death, to reimburse the appropriate city and/or county office that made the disbursement to defray said expenses;
- (2) Where the estate consists of cash or personal belongings of monetary value, or both, not exceeding \$2,500, to liquidate the personal belongings and apply the proceeds, together with the cash, if the total does not exceed \$2,500, in accordance with paragraph (1);
- (3) Where the assets in the estate are of no monetary value (unsalable) and in the best judgment and discretion of the coroner or medical examiner can be used by some charitable institution, to donate the assets to whatever charitable institution is willing and able to pick up the assets in question;
- (4) Where the assets have no value whatsoever or are in such condition that, in the best judgment and discretion of the coroner or medical examiner, a charitable institution cannot use the properties, or will not receive the properties, to destroy the same in any manner the coroner or medical examiner sees fit; and

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- (5) If under paragraphs (1) and (2), there are assets remaining, then the coroner or medical examiner shall forthwith forward the same to the state director of finance for disposition as provided in chapter 523A.”

SECTION 10. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 11. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 12. This Act shall take effect on July 1, 2000.

(Approved April 26, 2000.)