



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

March 14, 2019, 2:00 p.m.

State Capitol, Room 325

WRITTEN TESTIMONY ONLY

by

R. Mark Browning, Chief Judge, First Circuit, and Chair,

Hawai‘i Supreme Court Committee

on the Uniform Probate Code and Probate Court Practices

Bill No. and Title: Senate Bill No. 1342, Relating to the Probate Code.

Purpose: Establishes restrictions on donative transfers to protect transferors from coercive, exploitative, or otherwise improper transfers benefitting persons involved with drafting the transfer instrument or persons who have significant influence over the transferor.

Judiciary's Position:

The Hawai‘i Supreme Court’s Committee on the Uniform Probate Code and Probate Court Practices (“Probate Committee” or “committee”) was organized pursuant to Resolution 91-25, adopted by the sixth annual Hawai‘i State Judicial Conference. The committee is comprised of circuit judges across the state as well as attorneys that practice estate planning and probate law, all of whom have been appointed by the Chief Justice of the Hawai‘i Supreme Court.

Although the Probate Committee supports the intent of this bill, it respectfully **opposes** the bill in its current form, in particular the inclusion of “care custodian” among the classes of restricted donees and the provisions involving court review and determination of donative transfers.

Based upon the committee’s preliminary research, it appears that S.B. 1342 is modeled after seminal legislation from the state of California originating in the mid-1990s, which has since been repealed. Criticisms that led to the repeal of the California statutes included their



expansion of the presumption of undue influence beyond drafting attorneys and their relations to “care custodians,” which became subject to “virtually boundless”¹ interpretation by encompassing both professional and unpaid caregivers alike. In doing so, the California statutes advanced the harmful public policy of “penaliz[ing] Good Samaritans by making them less eligible to receive the gratitude of those they help, the kinder they have been.”² As critics of the now-repealed statutes have observed, “an inflexible rule is not a good fit for the deeply personal question of a testator’s intent. The undue influence doctrine covers the same terrain at less risk of disregarding autonomy or penalizing kindness.”³

California’s state legislature has since enacted revised laws regarding donative transfers that went into effect in 2018. Accordingly, the committee believes it may be too early to gauge whether California’s newly revised legislation, on the whole, has been successful in balancing the fine line between narrowing the scope of restricted donative transfers and addressing the concerns arising from potential exploitative donative transfer situations. Insofar as S.B. 1342 appears modeled on the now-repealed California donative transfer statutes—and therefore subject to the same criticisms that ultimately resulted in their repeal—the committee generally advises against its enactment.

In addition, the Probate Committee specifically opposes the provisions regarding court involvement as it believes this bill would create a new category of proceedings over which the court will be tasked with oversight and approval (having to review various transfer instruments falling under proposed §560:3-B(a)(3) and (4)), and which will significantly increase the court’s caseload. It will also generate more costs with respect to estate planning and judicial involvement that will undoubtedly be borne by transferors.

As a result of these concerns, the committee respectfully requests that this measure be deferred. The committee is prepared to further study the national landscape as to these issues, analyze and discuss this proposed legislation among both its members and the Probate & Estate Planning Section of the Hawai‘i State Bar Association to achieve greater consensus on this issue, and look toward proposing a more fine-tuned version for introduction during a future legislative session.

Thank you for the opportunity to testify on this measure.

¹ David Horton, *The Uneasy Case for California’s “Care Custodian” Statute*, 12 CHAP. L. REV. 47, 63 (2008), available at <http://www.chapmanlawreview.com/archives/1444>.

² *Id.* at 62.

³ *Id.* at 49.