December 19, 2019

The Honorable Ronald D. Kouchi  The Honorable Scott K. Saiki
President Speaker
Hawai‘i State Senate House of Representatives
State Capitol, Room 409 State Capitol, Room 431
Honolulu, HI 96813 Honolulu, HI 96813

Dear President Kouchi and Speaker Saiki:


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

The public may view an electronic copy of this report on the Judiciary’s website at the following link: http://www.courts.state.hi.us/news and reports/reports/reports.html.

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

Sincerely,

Mark E. Recktenwald
Chief Justice

Enclosure

c: Honorable R. Mark Browning, Chief Judge, First Circuit and Chair, Probate Committee Rodney A. Maile, Administrative Director of the Courts Legislative Reference Bureau Library
December 6, 2019

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

Dear Chief Justice Recktenwald:

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

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

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

Best regards,

Judge R. Mark Browning

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

Description:
Adds new sections to Article III of the Uniform Probate Code relating to restrictions on donative transfers.
A BILL FOR AN ACT

RELATING TO THE PROBATE CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAI‘I:

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

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

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

(1) The person who drafted the instrument;

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

(3) A care custodian of a transferor who is an incapacitated person, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period;
(4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive;

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

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

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

(c) For the purposes of this section:

"Assistance" means services provided to an incapacitated person because of the incapacitated person’s condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.
“Affinity within the third degree” means a spouse, parent-in-law, daughter or son-in-law, grandparent-in-law, brother or sister-in-law and grandchild-in-law.

“Affinity within the fourth degree” means a spouse, parent-in-law, daughter or son-in-law, grandparent-in-law, brother or sister-in-law, grandchild-in-law, great-grandparent-in-law, aunt or uncle-in-law, first cousin-in-law, niece or nephew-in-law and great-grandchild-in-law.

“Blood within the third degree” means a child, parent, grandchild, brother or sister, grandparent, great grandchild, niece or nephew, aunt or uncle and great grandparent.

“Blood within the fourth degree” means a child, parent, grandchild, brother or sister, grandparent, great grandchild, niece or nephew, aunt or uncle, great grandparent, grand niece or nephew, first cousin, great aunt or uncle, and great great grandparent.

“Care custodian” means a person who provides a broad range of paid assistance to an incapacitated person, except that “care custodian” does not include a person who provided services without remuneration if the person had a personal relationship with the incapacitated person (1) at least 90 days before providing those services, (2) at least six months before the
incapacitated person’s death, and (3) before the incapacitated person was admitted to hospice care, if the incapacitated person was admitted to hospice care. As used in this subdivision, “remuneration” does not include the donative transfer at issue under this chapter or the reimbursement of expenses.

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

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

“Instrument” means a legal document intended to effectuate a transfer of property for less than fair market value, whether such transfer becomes effective during the life of the transferor or on or after the transferor’s death.

“Related by blood or affinity” means a spouse or domestic partner of the specified person, a relative within a specified degree of kinship to the specified person or within a specified degree of kinship to the spouse or domestic partner of the
specified person, or the spouse or domestic partner of a
relative within a specified degree of kinship to the specified
person or within a specified degree of kinship to the spouse or
domestic partner of the specified person.

“Transferee” means a legatee, a beneficiary of a trust, a
grantee or a deed, or any other person designated in a transfer
instrument to receive a nonprobate transfer.

“Transferor” means a testator, settlor, grantor of a deed,
or a decedent whose interest is transferred pursuant to a
nonprobate transfer.

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

§560:3-B Restricted donative transfers; permitted when.
(a) Section 560:3-A shall not apply to any of the
following instruments or transfers:

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

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

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

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

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

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

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

§560:3-C Donative transfers that fail under this part.
If a donative transfer fails under this part, the instrument making the donative transfer shall operate as if the beneficiary had predeceased the transferor without spouse, domestic partner, or issue.

§560:3-D Personal liability for certain property transfers. (a) A person is not liable for transferring property pursuant to an instrument that is subject to the presumption created under this part, unless the person is served with notice, prior to transferring the property, that the instrument has been contested under this part.

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

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

Unless previously barred by adjudication, consents, or limitations, any action to contest an instrument under this part is barred unless commenced within the statutory limitations period applicable to said instrument.
§560:3-F Contrary provision in instrument; application of part. This part applies notwithstanding a contrary provision in an instrument.

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

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

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

SECTION 2. New statutory material is underscored.

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