

JAN 24 2019

A BILL FOR AN ACT

RELATING TO THE PROBATE CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

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

4 "§560:3-A Restrictions on donative transfers. (a) Except
5 as provided by Section 560:3-B, no provision of any instrument
6 shall be valid to make any donative transfer to any of the
7 following:

8 (1) The person who drafted the instrument;

9 (2) A person who is related by blood or marriage to, is a
10 civil union partner of, is a reciprocal beneficiary
11 of, is a cohabitant with, or is an employee of, the
12 person who drafted the instrument;

13 (3) Any partner or shareholder of any law partnership or
14 law corporation in which the person described in
15 paragraph (1) has an ownership interest, and any
16 employee of that law partnership or law corporation;



1 (4) Any person who has a fiduciary relationship with the
2 transferor, including but not limited to a conservator
3 or trustee, who transcribes the instrument or causes
4 it to be transcribed;

5 (5) A person who is related by blood or marriage to, is a
6 civil union partner of, is a cohabitant with, is a
7 reciprocal beneficiary of, or is an employee of a
8 person who is described in paragraph (4);

9 (6) A care custodian of an incapacitated person who is the
10 transferor; or

11 (7) A person who is related by blood or marriage to, is a
12 civil union partner of, is a cohabitant with, is a
13 reciprocal beneficiary of, or is an employee of, a
14 person who is described in paragraph (6).

15 (b) For the purposes of this section, a person who is
16 related by blood or marriage to a person includes the following:

17 (1) The person's spouse or predeceased spouse;

18 (2) Relatives within the third degree of the person and of
19 the person's spouse; and

20 (3) The spouse of any person described in paragraph (2).

21 (c) For the purposes of this section:



1 "Care custodian" means a person who provides a broad range
2 of paid or unpaid assistance for an incapacitated person.

3 "Incapacitated person" means the same as defined in section
4 560:5-102.

5 **§560:3-B Restricted donative transfers; permitted when.**

6 (a) Section 560:3-A shall not apply when:

7 (1) The transferor is related by blood or marriage to, is
8 a cohabitant with, is the registered civil union
9 partner, or is a reciprocal beneficiary of the
10 transferee or the person who drafted the instrument;
11 provided that this paragraph shall retroactively apply
12 to an instrument that becomes irrevocable on or after
13 December 31, 2018;

14 (2) The instrument has been reviewed by an independent
15 attorney who:

16 (A) Counsels the transferor about the nature and
17 consequences of the intended transfer;

18 (B) Attempts to determine if the intended consequence
19 is the result of fraud, menace, duress, or undue
20 influence; and



1 (C) Signs and delivers to the transferor an original
 2 certificate in substantially the following form,
 3 with a copy delivered to the drafter:

4 CERTIFICATE OF INDEPENDENT REVIEW

5 I, _____ (attorney's name) _____, have reviewed
 6 _____ (name of instrument) _____ and counseled my
 7 client, _____ (name of client) _____, on the nature
 8 and consequences of the transfer, or transfers, of property to
 9 _____ (name of potentially disqualified person) _____
 10 contained in the instrument. I am so disassociated from the
 11 interest of the transferee as to be in a position to advise my
 12 client independently, impartially, and confidentially as to the
 13 consequences of the transfer. On the basis of this counsel, I
 14 conclude that the transfer, or transfers, in the instrument that
 15 otherwise might be invalid under section 560:3-A of the Probate
 16 Code are valid because the transfer, or transfers, are not the
 17 product of fraud, menace, duress, or undue influence.

18
 19
 20 _____ (Name of Attorney) _____ (Date);

21
 22 Any attorney whose written engagement signed by
 23 the client is expressly limited solely to the
 24 preparation of a certificate under this
 25 subparagraph, including the prior counseling,
 26 shall not be considered to otherwise represent
 27 the client;

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



1 (4) A court with competent jurisdiction determines, upon
2 clear and convincing evidence, but not based solely
3 upon the testimony of any person described in section
4 560:3-A(a), that the transfer was not the product of
5 fraud, menace, duress, or undue influence; provided
6 that if the court finds that the transfer was the
7 product of fraud, menace, duress, or undue influence,
8 the disqualified person shall bear all costs of the
9 proceeding, including reasonable attorneys' fees;
10 provided further that this paragraph shall only apply
11 to:

12 (A) Any instrument described by section 560:3-A(a)
13 other than one making a transfer to a person
14 described in section 560:3-A(a)(1);

15 (B) Any instrument executed on or before December 31,
16 2018, by a person who was a resident of this
17 State at the time the instrument was executed; or

18 (C) Any instrument executed by a resident of Hawaii
19 who was not a resident at the time the instrument
20 was executed;



1 (5) The transferee is a federal, state, or local public
2 entity, an entity that qualifies for an exemption from
3 taxation under Section 501(c)(3) or 501(c)(19) of the
4 Internal Revenue Code, or a trust holding an interest
5 for this entity, but only to the extent of the
6 interest of the entity, or the trustee of this trust;
7 provided that this paragraph shall retroactively apply
8 to an instrument that becomes irrevocable on or after
9 December 31, 2018;

10 (6) The transfer does not exceed the sum of twenty
11 thousand dollars; provided that this paragraph shall
12 not apply if the total value of the property in the
13 estate of the transferor does not exceed the amount
14 prescribed in Section 560:3-1205; or

15 (7) The transfer is made by an instrument executed by a
16 nonresident of Hawaii who was not a resident at the
17 time the instrument was executed, and that was not
18 signed within Hawaii.

19 (b) For the purposes of this section, a person who is
20 related by blood or marriage shall include persons within the
21 fifth degree or heirs of the transferor.



1 (c) For the purposes of this section, "cohabitant" means a
2 person living in same household as the transferor for more than
3 eighteen months."

4 SECTION 2. New statutory material is underscored.

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

6

INTRODUCED BY: ~~DC~~ DC *Ferry-Dana*



S.B. NO. 1342

Report Title:

Probate Code; Donative Transfers; Restrictions

Description:

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.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

