

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

ON SB385, SD1**

RELATING TO UNIFORM TRUST CODE 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.

BEFORE THE HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, March 16, 2021, at 2:00p.m.

PERSON TESTIFYING: BLAKE OSHIRO
Commission to Promote Uniform Legislation

Chair Nakashima, Vice-Chair Matayoshi, Members of the Committee on Judiciary and Hawaiian Affairs:

My name is Blake Oshiro, and I am a member of the State of Hawai'i Commission to Promote Uniform Legislation. Thank you for this opportunity to submit this testimony in **support** of Senate Bill No. 385, Senate Draft 1 which enacts the Uniform Trust Code (2018). This bill is the same as House Bill 185 heard and passed by this committee on February 2, 2021.

We are pleased to see that the Judiciary has introduced this bill as part of its package of bills in this session. We defer to the Judiciary and its testimony on the particulars of this bill since there may have been internal discussion with the applicable sections of the Hawaii State Bar Association and other interested parties.

However, from the Commission to Promote Uniform Legislation's perspective, we can offer the following comments as background and further justification for the approach in this bill that has been enacted in 35 states and jurisdictions.

Before the Uniform Trust Code (UTC) was approved in 2000, most states relied on a patchwork of case law to govern trusts. Drawing from common law sources and existing statutory law, the UTC is a national codification of the law of trusts, and also contains reforms to modernize the law of trusts. The code is divided into 11 articles

containing important provisions every state should adopt, because:

- The UTC standardizes the law of trusts. In our modern, mobile society, it is more common than ever for settlors, trustees, and beneficiaries to live in different states. The UTC provides a national standard so that all parties can rely on the same governing principles.
- The UTC is flexible. Except for the few provisions listed in UTC § 105, the UTC consists of default rules that may be freely overridden in the trust document when circumstances call for a different rule. However, the UTC's comprehensive default rules apply when a trust does not address a particular subject, which will fill many gaps in trust instruments and help to prevent unnecessary litigation.
- The UTC expressly recognizes charitable trusts. The UTC recognizes that charitable trusts can be created and allows for enforcement of the trust's terms by the settlor, the state attorney general, or other interested parties.
- The UTC provides statutory duties and powers for trustees. The UTC codifies some of the basic fiduciary obligations of a trustee to a beneficiary, such as the trustee's duty of loyalty, duty of impartiality, and obligation of prudent administration. A trustee may delegate certain powers, which was generally prohibited under common law.
- The UTC includes detailed representation provisions. Under the common law, principles of representation are not well established. The UTC clarifies and codifies the law, specifying who can be represented under what circumstances. If the representative meets the statutory requirements, notice to the representative has the same legal effect as notice to the represented person, and a representative's consent is binding on the represented person.
- Trusts are more common than ever before. Trusts are a very popular tool for estate planners and their clients. Clear statutory law is needed to give all parties confidence that the trust terms are valid and enforceable. The UTC provides certainty not available under the common law.

Thank you very much for this opportunity to testify on this measure.



The Judiciary, State of Hawai‘i

Testimony to the Thirty-First Legislature, 2021 Regular Session

House Committee on Judiciary and Hawaiian Affairs

Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

Tuesday, March 16, 2021, 2:00 p.m.
State Capitol, VIA VIDEOCONFERENCE

WRITTEN TESTIMONY ONLY

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, S.D. 1, 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, S.D. 1 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 other state legislatures, and then presented to the Probate Committee a proposed draft UTC with

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.



recommended modifications to comply with or otherwise improve current Hawaii law. Senate Bill No. 385, S.D. 1 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.

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, S.D.1. Thank you for the opportunity to testify on this measure.