

## PACIFIC BUSINESS NEWS

# THE BUSINESS OF LAW

EXPERT LEGAL ADVICE FOR HAWAII'S SMALL BUSINESS

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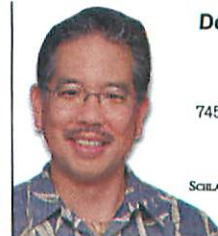
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### TOPIC

#### Retirement & Estate Planning

Though more costly than wills, the advantages of trusts make trusts the preferred estate planning solution. Trusts are lengthier than wills, so it's no surprise that some people, particularly married couples, don't know what their trust says.

Perhaps 60% of the trust's contents are mechanics that enable you to manage finances as if you, and not the trust, own the assets, and enable your family to settle your affairs outside of probate court. You can rely on your attorney to draft this language and provide guidance in times of crisis. For married couples, another 20% is incomprehensible tax language that you trust is necessary and ignore.

That leaves 20%, the part that you really should understand. Especially you married people who think that when your spouse dies, everything comes to you. Think again – or I should say, read your trust. At your spouse's death, that incomprehensible tax language will lock your spouse's assets into a now irrevocable "family" trust. Big headache for you.

These tax-motivated provisions were appropriate when the estate-tax-free limit was \$1,000,000, but now the limit is \$3,500,000. Take time to revise your plan.

### TOPIC

#### The Irony of Federal Health Insurance Reform

The House has now passed a bill intended to fix the nation's "broken" health insurance system. There's a good argument, though, that Federal law broke it in the first place.

In 1974, Hawaii enacted the Prepaid Health Care Act ("PHCA"). Everyone agrees that the PHCA has been a success and has avoided problems other States have.

But no other State has enacted a law like the PHCA. Why? Well, there's a good reason for that—Federal law has kept them from doing so.

Also enacted in 1974 was a Federal law called ERISA. ERISA is intended to protect employee welfare and retirement plans. But it preempts all State law that relates to such plans, including health insurance plans. Due to ERISA's preemption provision no other State has been able to experiment with employer health insurance mandates, because any such law would have been immediately preempted by ERISA. Hawaii's own PHCA was held to be preempted in 1977 and had to be saved in 1983 through an amendment to ERISA permitting the PHCA to stand as an exception to ERISA preemption.

Owing to ERISA, every other State has been in a time warp since 1974, powerless to do anything about seeking to cover their citizens through employer health insurance mandates because Federal law won't let them. A simpler way of fixing the nation's "broken" health insurance system might have been to allow other States to experiment in the way that Hawaii has.

### TOPIC

#### Best Practices for Handling Electronic Documents

Imagine drafting a letter and really giving the recipient a spontaneous piece of your mind. After taking a breath you tone it down significantly and send the business appropriate version.

The smoke from your original letter, however, may linger and may be accessible to an adverse party in litigation years later. Today's smoking gun is hidden in electronic documents where you never thought to look. Attorneys, however, are learning quickly that electronic documents and the metadata that goes along with it can provide litigation treasures that may help, but typically can hurt companies. Metadata can provide information including a document's authors, revisions, and the date revisions were made; and for email, the electronic path it took and all recipients.

To be prepared to respond to requests for electronic documents, companies should: (1) require employees to treat all communication as formal business communications they would be comfortable having a judge or jury review, (2) implement and follow policies on record retention and periodic destruction of unnecessary electronic files.

For copies of the electronic files you keep, companies should have the ability to index and search those records. Such abilities will help you to locate any smoking guns, and will save significant time and money if you and your attorneys are ever required to search for electronic documents.

### TOPIC

#### Real Estate

In Hawaii, title to real estate is often held by family members in co-ownership. Over time, real property owned by Papa and Tutu may become owned by Tutu's Revocable Living Trust, Uncle Bob, Auntie Lei, and cousins John and George.

Conflicts over the use and disposition of "family property" almost inevitably arise. Tutu may want to live at home rather than in a care facility. But, how will the family provide for her care? Some may want to sell or mortgage the property. Others may wish to continue residing there, without paying rent to anyone. Disagreements can linger unresolved for years, straining relationships to the breaking point. A resolution which restores family peace can be complicated by concerns such as mortgages or liens, tax consequences and a lack of funds.

Haw. Rev. Stat. Chapter 668 provides a remedy, enabling a co-owner holding certain real property interests to commence an equitable action for partition. In such a lawsuit, the court's authority includes dividing the property among the parties "according to their respective proportionate interests" and ordering a sale of part or all of the property, "where for any reason partition in kind would be impracticable in whole or in part or be greatly prejudicial to the parties interested."

Alternatively, or as the partition action proceeds, the parties should seriously consider mediation. Creative solutions are achievable in even longstanding disputes through a comprehensive understanding of all legal and equitable issues and good faith participation in the legal and dispute resolution processes.

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