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**BROKEN TRUST:
GREED, MISMANAGEMENT & POLITICAL MANIPULATION
AT AMERICA'S LARGEST CHARITABLE TRUST**

SAMUEL P. KING & RANDALL W. ROTH, UNIVERSITY OF HAWAI'I PRESS, 2006

REVIEWED BY BRADLEY MYERS*

The final statement to be made by the greatest generation will be the passing of the wealth they generated to posterity. A significant portion of that wealth will find its way into the endowments of charitable institutions. One of the most significant challenges in structuring charitable gifts is ensuring that they will always be used as the donor intended. The book *Broken Trust*¹ by Samuel King, a senior federal district court judge and Randall Roth, a professor of Tax and Trust law at the University of Hawai'i School of Law, recounts the recent history of the Bishop Estate, of the trustees who failed to fully commit themselves to a trust's charitable purpose, sometimes for their own benefit, and the extraordinary actions needed to try and make things right. The book offers a cautionary tale on how even the most carefully structured gifts can be diverted to private use in full view of the public and offers valuable lessons for even the most experienced lawyers representing donors and charities.

The subject matter of *Broken Trust* is particularly interesting because of the special status of the trust and person who founded it. Princess Bernice Pauahi Bishop, a member of the Hawaiian ruling class, established the Bishop Estate under the terms of her will. When established in 1884, the Bishop Estate held 378,569 acres of Hawaiian land. Over the years, the value of the trust corpus has swelled to an estimated \$10 billion. The trust's purpose was specifically and succinctly stated, "to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls to be known as, and called the Kamehameha Schools."² The number of trustees was fixed at five with vacancies to be filled by the majority choice of the Justices of the Hawaiian Supreme Court.

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1. SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST* (Univ. of Hawai'i Press 2006).
2. *Id.* at 31.

The first chapter of *Broken Trust* lays out some of the history of the Hawaiian Islands and the *ali'i*, the royal class of which Pauahi was a member. The book's content on the developmental history of Hawai'i does not provide a comprehensive discussion of the complex history of Hawai'i's interactions and clashes with the outside world or the commercial, political, medical and religious nuances that shaped the world in which Pauahi lived. The historical background is, however, more than adequate to explain Pauahi's intentions in forming her trust and the heartfelt charitable concern she held towards the Hawaiian children that are its beneficiaries.

Broken Trust implies that the first half-century of the Bishop Estate and the early operations of the Kamehameha Schools went smoothly. Charles Bishop, Pauahi's husband and one of the original trustees, devoted himself to the cause of developing the schools "with true Victorian zeal."³ Charles even committed much of his own cash to assist the land rich, yet cash poor, trust in getting the schools up and running. While initially envisioned as "almost exclusively a trade school," the Kamehameha Schools quickly developed a reputation for high academic accomplishment.⁴ *Broken Trust* recounts some controversies from this early period, mostly related to admissions policies and trustee's fees, but one is left with the perception that the Bishop Estate spent its early years primarily focused on Pauahi's charitable mission. The bulk of *Broken Trust* explains how the estate lost focus on this simple purpose as a few elite members of Hawaiian society came to view the trust as their own personal asset fund.

Broken Trust identifies the appointment of Matsuo Takabuki to the Bishop Estate's board of directors in 1971 as a turning point in the history and administration of the trust. Although Pauahi's will entrusted the justices of the state Supreme Court with the duty to select trustees, Takabuki was a political insider and power player appointed by Hawai'i's governor. The governor had appointed all five of the justices and viewed the selection of Bishop Estate trustees as one perk of his position. The Court simply rubber stamped the governor's choice. A coalition of mostly Hawaiian organizations tried to challenge the appointment, only to have their concerns dismissed by the probate court as "a lot of garbage."⁵ Takabuki engaged in some questionable transactions, but is mostly significant for creating a governing structure in which one "lead trustee" would make all the asset management decisions with minimal input or oversight from the other

3. *Id.* at 32.

4. *Id.* at 41.

5. *Id.* at 67.

trustees.⁶ *Broken Trust* tells us that Takabuki was the first of “an almost unbroken string of political insiders who would be put on the Bishop Estate board.”⁷ These political appointees, most of whom had little or no expertise in the operations of charitable enterprises, operated the trust “more like a personal investment club” than a charitable organization, as the IRS eventually concluded.⁸ The trustees paid themselves fees in excess of \$1 million per year each, involved the trust in transactions in which the trustees had personal interests, and used trust assets for extensive political lobbying.

The authors of *Broken Trust* were not neutral observers to the history of the Bishop Estate. They were among a group of five that played the biggest role in bringing the problems with the Bishop Estate before the public at large. The authors, along with Walter Heen, Gladys Brandt, and Charles Kekumano, published an extensive, 6,400 word essay in the *Honolulu Star-Bulletin* on August 9, 1997. The essay recounted the extensive history of fiduciary violations and political manipulation that occurred in the Bishop Estate. While Roth was probably the original impetus for the essay, the other four, all native Hawaiians, gave the essay the political standing necessary to be taken seriously by the public and the courts. *Broken Trust* expands the original essay, adding additional historical material and recounting the events since the publication of the newspaper article. Although the publication of the *Honolulu Star-Bulletin* article could be identified by the casual observer as the time when the problems at Bishop Estate became public, some of the recounted stories had previously been published. The collection of the stories in one place created the necessary public clamor for something to be done.

Interestingly, although many investigations, court proceedings and public debates concerning the Bishop Estate occurred, the greatest single vehicle for change came from outside Hawai‘i. The IRS conducted an extensive audit of the Bishop Estate and its holdings. At the time, the only weapon the IRS had to punish inappropriately managed charities was the removal of tax-exempt status. The IRS threatened the trust with just that: consequence unless the operations of the Bishop Estate changed drastically, including the replacement of all five trustees. The findings of the IRS provided enough of a push to ensure that the probate court in Hawai‘i would require fundamental changes to the Bishop Estate.

One unfortunate aspect of the culture of modern Hawai‘i pervades *Broken Trust* and appears to have played a major role in making it hard to

6. *Id.* at 69.

7. *Id.*

8. *Id.* at 255.

deliver the message of misbehavior at the trust and clouded the public perception of the trust's actual purpose. Hawaiians suffered many historic injustices at the hands of *haoles* from the mainland. These injustices form the base for the high level of racial animosity that runs through many of the arguments and protests chronicled in the book. Some Hawaiians regularly accuse other Hawaiians of doing the bidding of non-Hawaiians trying to rob the Hawaiian people. The Bishop Estate is no longer just a simple educational endowment, but a cultural icon representing the memories, hopes and dreams of a people. This has led to conflicts between the standards of traditional trust law and the reality on the ground. For example, trust owned land in Kalama Valley, Oahu, had been leased to sixty-seven poor families. As part of a development spearheaded by shipping magnate Henry J. Kaiser, the families were driven off the land. Unquestionably, trust law mandated that the Bishop Estate develop the Kalama Valley land to maximize the income to the trust. The Kalama Valley families, supported by many native Hawaiians, felt the Bishop Estate had "greater responsibilities" than merely raising funds to run a school and that the trust was "supposed to be looking out for them."⁹ Perhaps the perception of the trust as something more than a simple school trust was inevitable given the Bishop Estate's holdings of royal land, but as a general rule trust law does not allow a trustee, however positive the reasons, to voluntarily expand the trust's mission beyond that laid out by its grantor.

Unfortunately, *Broken Trust* ends with a much less happy ending than one would hope. While the trustees, the source of the most egregious problems associated with the administration of the Bishop Estate, were removed and the organization was restructured to a more traditional approach with a single employed CEO who would be supervised by the Board. The authors leave the impression that what the political establishment learned from the entire incident was that pigs get fat, and hogs get slaughtered. The trustees were driven from power, but many of the lawyers and other advisors that assisted in the mismanagement of the trust retained their positions. The new trustees, while receiving considerably less compensation than their predecessors, are still quite handsomely rewarded. They also adopted their predecessors' habits of "stonewalling" the attorney general's office and asking the courts to seal records to protect their actions from public scrutiny.¹⁰ Leftover legal issues ended up being dispensed with quickly. The courts had jurisdiction over several cases regarding access to trust records and the recovery of damages from the former trustees and

9. *Id.* at 64.

10. *Id.* at 270.

others, but these cases were quickly dispensed with in order to achieve “closure” and to “move on.”¹¹ Although not explicitly stated in the book, the impression imparted is that the IRS may have the primary role in policing the Bishop Estate.

Ultimately, the system worked in the case of the Bishop Estate, albeit not as completely as it could have. The trustees, the courts and the attorney general all failed to fully perform their duties for a long time. Fortunately for the Bishop Estate, its financial size and very public place in Hawaiian society meant that many people were keeping an eye on it. Some of these people cared enough to brave the political backlash that followed bringing the problems to light. The future of the Bishop Estate and its commitment to Pauahi’s vision will rely on the continued diligence of not only those who have the job of policing Hawai‘i’s charities, but other concerned citizens as well. This commitment is equally required from those of us who will benefit from charities on the mainland. The best remembrance we can give to the greatest generation is making sure that their charitable gifts remain dedicated to the purposes they intended.

11. *Id.* at 275-77.