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Chapter 14

BISHOP ESTATE AND BROKEN TRUST

I never wanted to be a Bishop Estate trustee. People assumed I did because my father was a trustee for the two years before his death in 1959; I was part of a lawsuit against the Hawaiʻi Supreme Court over the selection of a trustee, and I was co-signer on the 1997 essay "Broken Trust," which helped fuel badly needed changes in the way the Estate was run. But that kind of job just isn't my style. Being a federal judge is more fun. And I get a salary until I die, or at least as long as I am on "good behavior." I could have made more money during my lifetime, but you have to ask yourself, "What's money?" My mother always said, "Money's nothing."

But not everybody feels that way. Bishop Estate started being treated like a cookie jar by politicians in the 1980s when the previously land-rich, cash-poor trust came into a great deal of money. Ironically, I had something to do with that. In 1979, based on the reasoning of state Circuit Court Judge Masato Doi's opinion, I upheld a law that let the state force the owners of leased land to sell it to the individual homeowners on that land. The buyers had to pay fair value, but that didn't make this an easy case from a legal standpoint. It just seemed wrong—at first blush anyway—to force landowners to sell their land to private parties, even if the prices were high. The resulting sale of Bishop Estate holdings made the estate a bit less land-rich, and a lot less cash-poor.

Mandatory leasehold conversion—that's what people called the state law—was more than just a legal issue. It was a political issue, because it was a cornerstone of the Democratic Party's platform and opposed by the Republicans—or at least the ones that weren't leaseholders wanting to buy the land under their homes. It was also a social issue, because Bishop Estate was and still is the largest private landowner in the state, by far.

I thought mandatory conversion was well within the state's police powers. I explained in my legal opinion, "The legislature had the right to conclude that Hawaiʻi's system of landholding was injurious to the social and economic health of the community."

This was a classic case of how a person's background or understanding of the local situation can affect his decision. I had to admit it was impossible for me not to be aware of what, as I said in my ruling, was a "rather uncommon system of land holding" in Hawaii. From my perspective, living in Hawaiʻi, I could easily see how the legislature concluded that leasehold conversion was good for society here. Someone from the Mainland wouldn't necessarily see it that way. And many Hawaiians also disagreed. They felt it was improper for the state to take what they considered their land and sell it to homeowners who were mostly non-Hawaiians. They would show up in large numbers at rallies, wearing t-shirts reading, THOU SHALT NOT STEAL.

All I was doing, essentially, was deferring to the wisdom of the State Legislature. To rule the other way would overturn the thinking of the people elected to make policy for Hawaiʻi. Even so, it seems strange to some that a former Republican candidate for governor would be the one to uphold the heart of the Democrats' political agenda.

The controversy didn't actually end with my decision. The Ninth Circuit Court up on the Mainland reversed me, using phrases like "majoritarian tyranny" to describe the law that I had upheld. But then the U.S. Supreme Court reversed *them*—as it often did—upholding my decision, eight-zip. The ninth justice, Thurgood Marshall, recused himself since he was married to a Hawaiʻi girl.

I was not surprised when the Ninth Circuit reversed me, nor when the Supreme Court reversed the Ninth Circuit. I once asked a lawyer in my courtroom, "Do you remember that case we had a year ago or so?" "Yes," he replied. "Well, the Ninth Circuit just affirmed my decision," I said. And then, before he could say anything else, I added, "but I still think I'm right!"

I had tangled with Bishop Estate trustees and their political associates years earlier, when the justices appointed former City Councilman and Jack Burns' protégé Matsy Takabuki to the Estate's board in 1971. The Hawaiians were furious because Takabuki was Japanese, not Hawaiian. The bells at Kawaiahaʻo Church rang loudly and there were big marches on Bishop Estate headquarters. Revolution was in the air.

I was still in private practice at that time, and I agreed to represent Kamehameha Schools alumni, parents and students, who were questioning the justices' involvement in the trustee-selection process. They had lost at the trial level and I took the case on appeal. I wasn't so much interested in the racial angle. But I cared a great deal that the justices had done what Burns told them to do. It was bound to politicize the trust and have a corrupting effect on our Judiciary.

The justices pushed politics to the breaking point 12 years later when they appointed Chief Justice Richardson to be a Bishop Estate trustee. Imagine that! The justices looked around the room and discovered that one of them was the best, most qualified person in the state to appoint to a job that would more than quadruple his salary. They even gave him an extra two years past the normal retirement date as a trustee. It was shocking but not really a big surprise. And the political manipulation didn't stop there. Not content with just a former chief justice on the Bishop Estate board, the justices added a Senate president, a House speaker and a chairman of the Judicial Selection Commission.

The process was circular: Seven of the nine members of the Judicial Selection Commission were appointed by the chief justice, House speaker, Senate president and governor, and to become a Supreme Court justice you had to get the Judicial Selection Commission to put you on a short list of candidates. Someone once asked me if these connections were just coincidences or could be attributed to political maneuvering. I told him, "If it quacks like a duck, walks like a duck, and lays duck eggs—it's a duck!"

In the earlier Takabuki case, everyone knew that the justices had to disqualify themselves from deciding the case. After all, they were the ones who had made the appointment that my clients were questioning. But the replacements were selected by Chief Justice Richardson himself, though I argued that the replacement justices should be selected randomly by lot from the names of every circuit court judge. They were hardly independent. I was not surprised when they ruled in favor of the justices.

Takabuki was great with finances, but not necessarily great for a charitable institution. He pushed the Estate to invest its newfound wealth in high-flying Mainland investments. A substantial stake in Goldman Sachs worked out financially, but many others did not. More importantly, the trustees started treating Princess Pauahi's trust like their own investment company. That's how the IRS described all the wheeling and self-dealing in the 1990s, and it almost cost the Estate its tax exemption.

The money was flowing and they got carried away. But I continue to think that the things the trust stands for and the things it accomplished in the way of education and support for Hawaiians has been good. In fact, until the Board became full of people who saw it as an opportunity to line their own pockets, I think the Bishop Estate did considerable good.

By then I was convinced that two problems needed to be fixed. The first was the political nonsense of having the justices select trustees. Granted, that is what the will of Mrs. Bishop stipulated, but times were different back then. When she wrote her will, the Supreme Court handled everything, including probate, and they were loyal to her. In effect, she was saying, “My servants will name the trustees.”

By the 1980s and ‘90s, members of the Hawaiʻi Supreme Court were political appointees—they lacked jurisdiction over probate matters—and Bishop Estate had a constant parade of disputes being decided by the state courts, including the Supreme Court, which had appointed them in the first place. A classic conflict of interests.

The second obvious problem was the money. Each trustee was taking $800,000-$900,000 a year in fees, plus a bunch of extras. Trust experts said the fees were way out of line and that serious breaches of trust were apparent. The trustees were getting away with it because of the justices' too-close involvement, as well as the knee-jerk support of Hawaiian groups. The rest of the community was told, in effect, to butt out.

What's wrong with a little exciting investment and a big trustee paycheck when there's a lot of money washing around? It's easy to forget in all this drama that Bishop Estate was founded with the express purpose of aiding and educating native Hawaiian children, not of enriching itself or its trustees. What made change possible was “The March” of May 1997. After years of defending the trustees against outsiders, the Kamehameha School ‘*ohana* publicly criticized the trustees. Hawaiians had marched on behalf of the Bishop Estate before. But it was mostly in an effort to keep the larger community out of their affairs. That was the case with *Takabuki*. Many felt their kuleana was being meddled with. Over the years, when criticism of the Estate came up, their response was, in effect, “we’ll handle it ourselves.” This was different.

The marchers were particularly troubled by the antics of trustee Lokelani Lindsey, a former state education administrator from Maui who felt she knew best how to run the school and who some said was out to get rid of its beloved president, Michael Chun. So the

ʻohana gathered at the Royal Mausoleum in Nuʻuanu and marched through downtown Honolulu to Estate headquarters on King and South Streets. It was a remarkable display of courage, because the trustees were known to play rough. Photographers hired by the trustees were there, taking pictures of all the marchers so lawyers from a big downtown firm could prepare a file on each one.

The attorney for the marchers, Beadie Kanahele Dawson, later charged in court that the trustees had demoralized and gutted the educational core of the campus and its students by focusing on accumulating profits and letting Lindsay—who the other trustees had named "lead trustee" for education—impose her own warped ideas of what the school should be. Dawson wrote, "This case (also) concerns the estimated 40,000 children, many now grown to adulthood, who have been denied a Kamehameha education solely because Trustees have chosen deliberately or in inexcusable ignorance, to accumulate funds instead of furthering and expanding the Trust's benefit to more children."

I was watching this from a distance with growing concern. Then UH law professor Randy Roth, an expert on taxes and trust law, came to me with a draft of something that was highly critical of the trustees and the justices who selected those trustees. It was a long essay—it eventually became known as "Broken Trust"—and he asked if I would consider joining him. I had been a guest on his radio program, and we hit it off pretty well. After that we would occasionally meet and talk about all sorts of things, so he knew about my interest in Bishop Estate, which had nothing to do with Bishop Estate as such, but about the corruption of the judiciary.

I told Randy I was willing to be a co-author if it was okay with my wife. Randy later said he thought I was kidding about needing Annie's permission. I was absolutely 100-percent serious, but I knew she would say yes. Annie has been fully in favor of all my big decisions, except when I ran for office. I'll never do that again.

As expected, Annie's answer was, "Yes!" I relayed that to Randy and added some advice: "If it's just the two of us, it's not going to go anywhere. They're going to throw rocks. No one is going to pay attention to the issues."

After all, the haoles—newspapers and so forth—had criticized the trustees before. Nothing happened. The trustees would call up the newspaper editors and threaten all kinds of economic disaster. Then they would round up the Kamehameha *ʻohana* and have them picket the Legislature and all that kind of thing. In this case, if they hadn't already marched, the *'ohana* would have been organized by the trustees to come down and say "Impeach Judge King" and that sort of stuff.

I told Randy, "Always remember that we're in this to help the *'ohana*; we're not the prime movers." The *'ohana* [Nä Pua O Keali'i Pauahi, the Kamehameha organization of parents, students and alumni] were being pushed around by big lawyers and so we were able to help them. If we weren't supporting the *'ohana*, rather than attacking the Estate, I didn't want anything to do with it. I also told him we needed to beef up our ranks. Gladys Brandt, a former Kamehameha Schools principal, immediately came to mind. She was a widely respected community leader, and tough—boy was she tough. No way would she waver when the going got rough.

I later learned that Gladys herself had a bit of an axe to grind with the justices. Several years earlier, she had been appointed by Chief Justice Ronald Moon to chair a blue-ribbon committee whose job was to make a short list of candidates for the next Bishop Estate trustee opening. Moon promised the committee that the justices would select someone from their list. He said this process would eliminate the politics. No chance. Moon and the other justices ignored the committee's list and instead named Gerard Jervis, a buddy of then-Gov. Waihee, who also just happened to chair the Judicial Selection Committee at key times. Gladys said the betrayal made her feel "used and abused," so she and the others renamed themselves the "black and blue" committee.

Randy went to Gladys's place and asked her to read the essay. She did so and then said to Randy, "You say Sam King is with you on this?" When Randy said that I was, Gladys said, "Then count me in."

Gladys understood what we were up against. To strengthen our team she suggested that we recruit Monsignor Charles Kekumano. He was head trustee of the Queen Lili'uokalani Children's Trust, and he had a habit of sticking his nose into Hawaiian affairs when there was a problem. He had also served with Gladys on the "black and blue" committee. The two of them had been working together on education issues, going up to the Kapälama campus, talking with teachers and administrators. Gladys had even taken trustee Lindsay to lunch and tried to talk some sense into her, but that was like talking to a stone wall, according to Gladys.

Then Randy suggested that we invite retired state judge Walter Heen to join us. I had long respected and thought highly of Walter, and I liked that he was a staunch Democrat. After all, we didn't want anyone thinking that our essay had anything to do with partisan politics.

The bad guys in this story were undeniably all Democrats, which would have stopped just about anyone in Walter's shoes, but it didn't stop him. Walter's got more smarts and guts than just about anyone I know. And like me, he was convinced that trustee selection was corrupting the judiciary.

I said, "That's great! We've got a Democrat, a Republican, a Kamehameha principal, a trust lawyer and a Catholic cleric." But there was something about this group that was sort of funny: In her will, Princess Pauahi required that her trustees and teachers always be "members of the Protestant religion," and some people in those days viewed that as code for "they can't be Catholics." Of the five Broken Trust authors, I think I was the only non-Catholic!

I suppose it was no accident that four of us were *kupuna*. The older you get, the less you care what other people think. In fact, the trustees later tried to discredit our work by saying we were "old and senile." When Gladys heard that, she said someone ought to explain to them that old and senile is the most dangerous kind.

I'm the first to acknowledge that few federal judges would intentionally put themselves at the center of the kind of controversy our essay unleashed. A lot of people think judges should keep their noses out of controversy, except in the courtroom. But Randy got an opinion from a professor at the law school, saying it was okay for me to be a co-author, and I got another one from a retired ethics professor.

My friend and fellow judge Martin Pence was concerned. "You shouldn't be out in public that way," he said. And he didn't say "maybe" you shouldn't do that, he said "*You shouldn't do that!*" So I said, "thank you for your advice" and went ahead. But as I said before, a judge is obligated to speak out from time to time.

I found out later that the trustees paid a big downtown law firm a lot of money to find a legal or ethical argument against my involvement. They wanted to change the conversation from whether they were ripping off the trust to whether I had done something wrong. That was predictable. They eventually decided they couldn't do it, but someone had their guns out for me.

The five of us—we called ourselves Pauahi's gang—would get together and work on the essay: polish and so forth. We worked well together and had a lot of fun. Gladys and Monsignor were always cracking jokes and kidding each other. Make no mistake, though, we were dead serious about the subject matter of our essay and the need to take action: It was common knowledge at the time that you didn't get on the Court unless you would take a suggestion as to who should be a Bishop Estate trustee. That wasn't good for the Bishop Estate, and it wasn't good for the state judiciary, either. Gladys, Monsignor, Randy and especially Walter agreed that the justices had no business selecting trustees, and that it was corrupting the judiciary and politicizing the Estate.

We knew the essay was controversial, but fortunately the *Star-Bulletin* published it in its entirety the day after we gave it to them.

One of my fondest memories from those days was attending a party the Monsignor gave for Gladys on her 91st birthday, which was shortly after the *Star-Bulletin* published our essay. Monsignor made a nice toast and then put a beautiful lei around Gladys' neck and gave her a little kiss on the cheek. To lighten the moment Gladys said, "Well, will you look at that! After 91 years I finally get a kiss from the monsignor." With a twinkle in his eye, Monsignor said, "Kind of makes you wonder what she'll get next year, doesn't it?"

In the end, the trustees were removed under pressure from the Internal Revenue Service and others, and the Supreme Court justices got out of the business of appointing trustees, which was essentially what I argued should have happened years before in the Takabuki case. I guess these things take time.