

Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the *Cy Pres* Doctrine

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By now, most readers are familiar with, and knowledgeable of, the facts surrounding the establishment and recent (mis)management of the Kamehameha Schools Bishop Estate Trust ("KSBET") which provided impetus to the publication of this symposium issue focusing on the KSBET. Rather than providing a lengthy exegesis of the facts regarding the establishment of the trust and the current controversy and issues raised by the alleged mismanagement and misfeasance by recent trustees, I provide a relatively brief summary of KSBET's history, focusing only on the facts that are salient to the issues addressed in this Article.¹ However, before doing so, I provide a very brief, almost cursory, summary of these issues to arm the reader with enough information to place the arguments made herein in the appropriate context.

I. INTRODUCTION

A. *Precis of the Article*

The KSBET presents a classic example of a trust in need of modification via the *cy pres* doctrine to conform to conditions that have changed since it was established by the will of Princess Bernice Pauahi Bishop over 114 years ago. The exemption of charitable trusts from the Rule Against Perpetuities,²

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¹ For a more detailed and thorough recitation of the history of the KSBET, see Judge Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 U. HAW. L. REV. 393 (1999). Similarly, for a detailed review and examination of the alleged mismanagement and misfeasance of the trust by the recently removed trustees, see Evelyn Brody, *A Taxing Time for the Bishop Estate: What is the I.R.S. Role in Charity Governance?*, 21 U. HAW. L. REV. 537 (1999).

² For further discussion of the Rule Against Perpetuities and its inapplicability to charitable trusts, see *infra* Parts III and IV. I capitalize the "Rule Against Perpetuities" simply to designate

coupled with the settlor's limited knowledge of societal changes that will or may occur in the future, present a myriad of situations requiring analysis of charitable trusts to ascertain if courts should deploy the *cy pres* doctrine to change the express terms or conditions of the charitable trust to reflect societal changes that have transpired. The KSBET provides a very clear example of a trust in need of modification pursuant to the *cy pres* doctrine.

This focus of this Article, however, is not simply on the traditional deployment of *cy pres* as it is currently used by the courts. Indeed, a majority of courts continue to subscribe to a traditionally narrow view of *cy pres* that requires successful supplicants to make three showings before *cy pres* will be deployed: 1) that the settlor has created a valid charitable trust; 2) that the purpose of the trust has become illegal, impossible, or impracticable to complete; and 3) that the settlor possessed a general, as opposed to a particular or specific, charitable intent that would not be defeated or thwarted by changing the terms or conditions of the trust if *cy pres* is granted and the express terms of the trust are modified. This narrow interpretation, I contend, has resulted in indeterminate outcomes, and has resulted in the suboptimal use of *cy pres* (when viewed from a societal perspective), relegating the use of charitable assets to archaic and unproductive purposes.³

The focus of this Article is on the use and misuse of the *cy pres* doctrine by the courts and, comparatively, the relatively liberal use of the related doctrine of deviation by courts reforming administrative provisions of charitable trusts.⁴ The thesis presented herein is that the distinction between administrative and substantive provisions of a trust are highly chimerical and illusory, and that courts can rather arbitrarily determine *ex ante* the outcome of a particular dispute or litigation by simply characterizing a proposed change in a trust's operation or management as administrative (calling for the liberal doctrine of deviation) or as substantive (calling for the much narrower doctrine of *cy pres*).

Instead, I contend that the deviation and *cy pres* doctrines should be combined and treated, for all intents and purposes, as the same. In other words, courts should employ the same test to determine whether to change terms and conditions of so-called administrative or substantive provisions of a charitable trust that is immune to the time restrictions established by the Rule Against Perpetuities. Moreover, instead of simply opting for the expanded use of the liberal deviation doctrine or the conservative *cy pres* doctrine, an analysis of the basis for both doctrines reveals the need for

the fact that although three words are used, in reality the "Rule Against Perpetuities" is one doctrine signified by those three words, any of which standing alone is meaningless.

³ See *infra* Part III.

⁴ For a definition of the deviation doctrine, see *infra* notes 86-92 and accompanying text.

separate and distinct doctrines in light of the charitable trust's exemption from the Rule Against Perpetuities and its resultant unlimited useful life. As a result of the perpetual nature of charitable trusts and the changed societal conditions that the settlor never considered when establishing the trust, but which inevitably occur, courts should deploy both equitable deviation and *cy pres* to allow efficient operation of such trusts.

The KSBET presents a classic example of a trust in need of modification (*cy pres*) to conform to conditions that have changed since it was established some 114 years ago. This Article uses the fact situation provided by the KSBET to examine anew the appropriate use of the *cy pres* doctrine in charitable trusts such as the KSBET. Building upon an earlier Article,⁵ I argue for the expansive use of *cy pres* to modify the terms and conditions in perpetual charitable trusts to better utilize the assets of the trusts for the charitable purposes intended by the settlor. In doing so, I counter the argument that a liberal use of *cy pres* will have a chilling effect on charitable gifts and trusts.

To make my argument, I examine the issue of "dead hand" control and its limitation in non-charitable trusts through the operation of the Rule Against Perpetuities. I contend, and intend to prove, that a settlor faced with the choice of establishing a non-charitable trust that will be terminated within lives in being plus twenty-one years, versus a charitable trust that could exist in perpetuity, will continue to opt for charitable trusts, given the advantages of its perpetual nature and notwithstanding the liberal operation of the *cy pres* doctrine. Indeed, I make the argument that during the period covered by the Rule Against Perpetuities (that is, lives in being plus twenty-one years from the settlor's death with respect to a testamentary charitable trust of the type employed in the KSBET), the courts should, as a matter of law, refrain from employing *cy pres* except in exigent circumstances that implicate public policy. Such restraint in deploying the *cy pres* doctrine treats the settlor's intent as paramount during the same time period we would legally allow or defer to the settlor's intent to control the asset's disposition (i.e., the dead hand) in a non-charitable trust. In other words, during the period covered by the Rule Against Perpetuities, the courts should employ the traditional narrow view of *cy pres* and require the party seeking to employ *cy pres* to prove that the settlor had a general purpose and that the purpose is or will be impossible, impracticable, or illegal to perform unless the terms and conditions of the trust are modified as requested.

⁵ See Alex M. Johnson, Jr., *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545 (1989).

However, after the period set by the Rule Against Perpetuities has expired, it is both efficient and beneficial for courts to employ a liberal or expansive view of *cy pres* similar to the current use of the deviation doctrine, which is used solely for "administrative" provisions. It is prudent and efficient to make the distinction between the conservative and liberal use of the *cy pres* doctrine for the same reasons that we employ the Rule Against Perpetuities to limit the duration of non-charitable trusts. That is, we recognize that for the non-charitable trust, the settlor cannot foresee and adequately internalize facts that will occur many years after her demise, and thus, the settlor cannot be given perpetual control over an asset when it is impossible to "recontract" with her to internalize changes postdating her death. Hence, non-charitable trusts are limited in duration to lives in being plus twenty-one years⁶ because it is assumed that the settlor can only internalize those facts that she can reasonably foresee and that she can only rely on those heirs and descendants (children and typically grandchildren) of which she has knowledge, and over which she has some control. That same rationale should apply to charitable trusts and lead to the conclusion that a court, acting in good faith and placing itself in the settlor's position, should adhere strictly to the settlor's intent for the period covered by the Rule Against Perpetuities, but be allowed to deviate from strict adherence to the terms of the trust after the period has expired and when it determines that doing so results in a more optimal use of trust assets for the settlor's intended purposes.

The facts of the KSBET controversy also compel the conclusion that the use of *cy pres* should be expanded beyond its traditional scope, which focuses on changed conditions that could frustrate the donor's intention. What is oft-overlooked in cases involving charitable trusts are the problems created by terms establishing the administration of a trust that also have the potential to operate in perpetuity. The facts of KSBET demonstrate that the terms of trust administration, as well as trust purposes, should likewise be governed by the dichotomous *cy pres* doctrine that is proposed herein (i.e., strict interpretation before the expiration of the Rule Against Perpetuities and liberal interpretation of the same after expiration of that period) in order to avoid the problems created by the enormous value of the KSBET corpus, a fact the settlor could not have foreseen at the time she established the trust. Hence, it is similarly appropriate to apply *cy pres* to modify the terms of a trust that govern its administration. This represents a significant and novel expansion in the *cy pres* doctrine, but it is compelled by the reality that the administrative terms of a trust may have more impact on the efficient and appropriate use of trust assets than a determination of the settlor's intent.

⁶ For further explanation of the Rule Against Perpetuities, see *infra* notes 41-50 and accompanying text.

Building upon the expansive or liberal use of *cy pres* after the expiration of Rule Against Perpetuities period, I conclude with a normative theory of charitable trusts. Under this normative theory, the settlor who establishes a charitable trust is viewed as entering into a contract with the public (represented by the attorney general of the requisite political body), pursuant to which the trust is given perpetual life in exchange for the public's right to modify the trust terms, both substantive and administrative, after the expiration of the period set by the Rule Against Perpetuities, to avoid the trust's obsolescence. Instead of chilling the creation of charitable trusts, the expansive use of *cy pres* can result in the increased creation of charitable trusts once settlors realize that the trust assets will be put to optimal use to benefit society beyond the period that the settlor can foresee, consistent with the settlor's intent.

B. Relevant Facts

Princess Bernice Pauahi Bishop died in 1884 with an estate consisting of the "ancestral lands of the Royal Kamehameha family."⁷ Today, the Bishop Estate, as it is popularly known, plays an integral role in Hawai'i's economy because it owns or controls over 300,000 acres of land (almost ten percent of the land in Hawai'i), controls in excess of \$1.2 billion in assets and funds, and manages the important Kamehameha Schools.⁸ A recent article claimed that the KSBET assets are worth more than ten billion dollars, and that it is the nation's largest charitable trust.⁹

The pertinent provision of the charitable trust directed that the corpus of the trust be used to found, maintain, and operate the Kamehameha Schools.¹⁰ Princess Bishop's will stated:

⁷ KAMEHAMEHA SCHOOLS/BERNICE PAUHI BISHOP ESTATE, THE LAND OF KAMEHAMEHA SCHOOLS/BERNICE PAUHI BISHOP ESTATE 1 (1989).

⁸ See Jon Van Dyke, *The Kamehameha Schools/Bishop Estate and the Constitution*, 17 U. HAW. L. REV. 413, 413 (1995).

⁹ KSBET's assets were described as follows:

For Hawaiians, it may be the biggest story since statehood, or even Pearl Harbor. After all, it has sex, suicide—and money. Lots and lots of money. It's the scandal over the \$10 billion Bishop Estate, the nation's largest charitable trust. The legacy of Princess Bernice Pauahi Bishop, who died in 1884 as the last heir to King Kamehameha, the estate was created to educate native Hawaiian children. It owns 8 percent of the state's land and 10 percent of Goldman, Sachs.

Andrew Murr, *Trouble in Paradise (Mismanagement of Bishop Estate)*, NEWSWEEK (May 20, 1999), at 62.

¹⁰ See Mary Leigh Caroline Case, Note, *Hawaiian Eth(n)ics: Race and Religion in Kamehameha Schools*, 1 WM. & MARY BILL RTS. J. 131, 131 (1992).

I give, devise, and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: 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.

I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings, and in furnishing the same with necessary and appropriate fixtures furniture and apparatus.

I direct my trustees to invest the remainder of my estate in such manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers, the repairing of buildings and other incidental expenses; and to devote a portion of each years income to the support and education of orphans, and others in indigent circumstances, giving preference to Hawaiians of pure or part aboriginal blood¹¹

This provision of the will has been interpreted by the trustees of the KSBET to require that only children with Hawaiian ancestry be allowed to enroll and attend the Kamehameha Schools.¹² This provision serves as the focal point of this Article because its interpretation under either the related doctrines of *cy pres* or equitable deviation, which is demonstrated below,¹³ can result in courts either modifying the trust on the ground that a provision is administrative (employing equitable deviation) or rejecting a request to modify the trust on the grounds that the affected provision is substantive, calling for the use of the relatively narrow doctrine of *cy pres*.

Hence, it is important and relevant to recognize that the will also contains other provisions that may be subject to legal and other challenges. For example, the will contains a provision that requires that the trustees be selected from "persons of the Protestant religion" and that "teachers of said school shall forever be persons of the Protestant religion . . . [not] restricted

¹¹ *Will of Bernice Pauahi Bishop*, art. 13 [hereinafter *Will*]. The Will is reprinted in Appendix B to this issue of the *University of Hawai'i Law Review*.

¹² Charles Reed Bishop, one of the first trustees of the estate, wrote in a letter dated February 11, 1897:

There is nothing in the will of Ms. Bishop excluding white boys and girls from the Schools, but it is understood by the Trustees that only those having native blood are to be admitted at present, that they are to have preference so long as they avail themselves of the privileges open to them to a reasonable extent.

Case, *supra* note 10, at 132 (citing GEORGE KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY 177 (1986)).

¹³ See *infra* section II.E.

to persons of any particular sect of the Protestants.”¹⁴ These racial and religious restrictions imposed by the will have caused some, including a jurist, to question the legality of the trust provisions as applied to the Kamehameha Schools, given the public function provided by the schools and their connections to the state of Hawai‘i.

In particular, Justice Kazuhisa Abe, in a concurring opinion in *In re Estate of Bishop*,¹⁵ argued that these racial and religious restrictions violated the Equal Protection Clause of the United States Constitution because of the public nature of the schools.¹⁶ In the only litigation to date challenging the validity of these racially and religiously restrictive clauses, the United States Court of Appeals for the Ninth Circuit affirmed the Equal Employment Opportunity Commission’s (EEOC) decision that Kamehameha Schools’ policy of hiring only Protestant teachers violated Title VII of the Civil Rights Act, and reversed the district court’s decision holding that the school was exempt.¹⁷

In addition to requiring that the trustees be Protestant, the will also requires that any new trustee vacancies be filled by a majority of the justices of the Hawai‘i Supreme Court. Princess Bishop’s will provides that “the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.”¹⁸ Although this method of trustee selection has been challenged twice unsuccessfully,¹⁹ many critics

¹⁴ Will, *supra* note 11, art. 13.

¹⁵ *In re Estate of Bishop*, 53 Haw. 604, 608, 499 P.2d 670, 673 (1972).

¹⁶ Specifically, the concurrence is described as follows:

Justice Abes’s concurrence questions whether Kamehameha Schools may continue the policy of race-determined exclusion of all persons who lack Hawaiian ancestry, given that Kamehameha Schools are privately owned by the Bishop Estate and, therefore, exempt from equal protection requirements. Justice Abe concludes that Bishop did not intend to create a school system that would exclude all persons lacking Hawaiian ancestry. Further, Justice Abe reasons that the equal protection clause, applicable under the public function doctrine, is violated by the discriminatory policy.

Van Dyke, *supra* note 8, at 413; *see also* Case, *supra* note 10, at 132 (quoting and discussing *In re Estate of Bishop*, 53 Haw. at 608-16, 499 P.2d at 673-77).

¹⁷ *See* EEOC v. Kamehameha Schools/Bishop Estate 990 F.2d 458 (9th Cir. 1993); *see also* discussion in Van Dyke, *supra* note 8, at 413.

¹⁸ Will, *supra* note 11, art. 14.

¹⁹ *See* Van Dyke, *supra* note 8, at 420. Specifically, Courts have twice upheld the role of Hawaii’s Supreme Court Justices. In 1918, the U.S. Court of Appeals for the Ninth Circuit held in *In re Bishop’s Estate* that the Supreme Court Justices were acting in their individual capacities when appointing Bishop Estate trustees, because the Justice’s normal duties do not include trust administration. In the second case, *Kekoa v. Supreme Court of Hawaii* [55 Haw. 104, 516 P.2d 1239 (1973), *cert. denied*, 417 U.S. 930 (1974)], the Hawaii Supreme Court (with all five justices

contend that both the method of selecting trustees and the requirement that the trustee be Protestant are illegal and should be stricken, as should the requirement that all students be of Hawaiian ancestry.²⁰ The recent controversy, detailed below, over the actions of the recent trustees, coupled with the recent negative publicity created as a result, has apparently led four of the five justices of the Hawai'i Supreme Court to announce that they will no longer act in their individual capacity to participate in the selection of trustees.²¹

Not only is the trustee selection process controversial, but the remuneration paid to trustees (in excess of \$900,000 per annum) and their autonomy have caused many to question whether anything can be done to reduce trustee compensation so that it is commensurate with effort, and whether action consistent with the trust terms can be taken to hinder or somehow limit the trustees' collective autonomy. A brief review of the allegations of misfeasance directed at the recently removed trustees places this issue in context.

Two of KSBET's recently removed trustees have been indicted on theft charges for allegedly accepting kickbacks for handling KSBET real estate deals.²² The trustees, both former state legislators, were alleged to have sold their condominiums at inflated prices in exchange for allowing a real estate developer to engage in lucrative development deals with KSBET property and assets.²³ Another trustee, the lead trustee for the school, is alleged to have breached her fiduciary duties to the KSBET and engaged in mismanagement of the Kamehameha Schools. Two trustees petitioned for her removal as a result.²⁴ In addition, the State Attorney General who was recently ousted from her appointment by the State Senate,²⁵ petitioned a judge to remove all the

replaced by circuit court judges for this decision) held that the selection process did not violate the due process clause of the Fourteenth Amendment, noting that it was well-established that the Justices were acting in their individual capacities when appointing Bishop Estate trustees.

Id. at 420-21.

²⁰ See Case, *supra* note 10, at 141-143.

²¹ See Hazel Beh, *Why the Supreme Court Justices Should Stop Appointing Bishop Estate Trustees*, 2 HAW. B.J. 6 (Feb. 1998)(revised in this issue of the *University of Hawai'i Law Review* as Hazel Beh, *Why the Supreme Court Justices Should Stop Appointing Bishop Estate Trustees*, 21 U. HAW. L. REV. 659 (1999)).

²² See Rick Daysog, *Wong Says He'll Win in Courtroom*, HONOLULU STAR-BULLETIN, Apr. 13, 1999, at A-1; Rick Daysog, *Grand Jury Indicts Peters in Theft*, HONOLULU STAR-BULLETIN, Nov. 26, 1998, at A-1.

²³ See Tom Lowry, *Trust Scandal Haunts Goldman Sullied Bishop Estate Owns 10% of Bank*, USA TODAY, May 3, 1999, at 1B.

²⁴ See *id.*

²⁵ See Rick Daysog, *Trustees Deny Influence on Senate*, HONOLULU STAR-BULLETIN, Apr. 29, 1999, at A-1.

trustees, charging them with gross mismanagement of KSBET, including allegations that the trustees made illegal campaign contributions to political allies and used \$350 million in income for new, risky investments instead of for educational purposes.²⁶ These allegations culminated in the temporary removal of four trustees and the resignation of the fifth and last trustee of the KSBET in May of 1999.²⁷

Lost amidst the allegations of trustee mismanagement and the resulting investigations and subsequent removal of the trustees is one fundamental fact that is often overlooked when the KSBET is discussed: This is a fabulously wealthy trust, and the Kamehameha Schools, which were the primary object of the settlor's intent, consist of only three percent of the trust's assets.²⁸ In other words, the corpus of this trust, which has an estimated value somewhere between \$6 and \$10 billion depending on who and how the assets are counted, was established by the settlor to benefit two schools (later merged into one school) to benefit native Hawaiians. Today, the private Kamehameha School is open to Hawaiian and part Hawaiian students in kindergarten through twelfth grade and has a total enrollment of approximately 3,000. And, although the trustees of the KSBET have invested the trust's assets in everything from Goldman Sachs to a Bermuda insurance company, and a methane gas company in Texas,²⁹ among other things, the trust instrument itself directs the trustees

to invest the remainder of my estate in such manner as they may think best, and to expend the annual income in the maintenance of said school; meaning thereby the salaries of teachers, the repairing of buildings and other incidental expenses; and to devote a portion of each years income to the support and education of

²⁶ See *id.* There are other less serious allegations of impropriety involving the trustees. Those allegations are catalogued in a series of articles that appeared in the *Honolulu Star-Bulletin* investigating the actions of the KSBET trustees. See Samuel King, Msgr. Charles Kekumano, Walter Heen, Gladys Brandt & Randall Roth, *Broken Trust*, HONOLULU STAR-BULLETIN, Aug. 9, 1997, at B-1 [hereinafter *Broken Trust*], reprinted in Appendix C.

²⁷ See Todd Purdum, *Hawaii Breaks Cronies' Grip on Powerful School*, CHICAGO TRIB., May 16, 1999, at C18, which stated:

The judge ordered the removals and accepted the resignation of the fifth trustee after the Internal Revenue Service threatened to revoke the tax exempt status of the trust, the cherished legacy of a childless 19th Century Hawaiian princess, amid an investigation into financial mismanagement and self-dealing by trustees, each of whom was paid about \$1 million a year.

See also Peter Waldman, *Suspension of 4 Bishop Estate Trustees Clears Way for Negotiation with IRS*, WALL ST. J., May 10, 1999, at B2.

²⁸ See Isabella Aiona Abbott, Winona K.D. Beamer, Gladys A. Brandt, Roderick F. McPhee & Winona Ellis Rubin, *Schools Gross Mismanagement Must Stop Now*, HONOLULU STAR-BULLETIN, Nov. 27, 1997, at A-23 [hereinafter *Broken Trust II*].

²⁹ See *Broken Trust*, *supra* note 26; John H. Taylor, *Hawaii's Royal Legacy*, FORBES, Dec. 21, 1992, at 177.

orphans, and others in indigent circumstances, giving preference to Hawaiians of pure or aboriginal blood. . . .³⁰

Assuming a conservative payout rate of five percent on the lowest estimated value of the corpus of the trust, i.e., \$6 billion, the trust, if well-managed, should produce \$300 million annually, which is supposed to be spent primarily on the school and secondarily on the support and education of orphans and others in indigent circumstances, according to the terms of the trust. Since there is no evidence that the trustees have ever spent any of the income to support and educate orphans and others in indigent circumstances, it is assumed for the sake of argument that the \$300 million dollars should be spent solely for the benefit of the school. If so, that would provide each of the 3000 students with a pro-rata share of \$100,000 per annum for his or her educational benefit. If all the money generated by the KSBET was spent to support the Kamehameha Schools, in other words, the trustees would have to come up with creative ways to spend hundreds of millions of dollars annually to benefit a high school when such expenditures may be unnecessary, wasteful, and downright stupid.

This does not mean, of course, that that sort of money has been used solely for school purposes in the past. Indeed, it is contended that it is the amount of wealth generated by the corpus of the trust that has led to the mismanagement of the trust because not all, or not even a large portion, of the income generated by the trust is or was required to satisfy the settlor's main intent: the funding and operation of the Kamehameha Schools for Hawaiians of native ancestry.

This leads one to ask: when should the settlor's intent be modified to take into account societal changes that occur subsequent to the trust unforeseen by the settlor at the time she established the trust?

Should the trustees who are appointed to replace the recently removed trustees require that the entire income generated by the trust's investments be used solely to support the Kamehameha Schools, or do these trustees have a duty to disregard what the will says and apply only so much income as they believe is prudent to the operation and management of the schools? If the latter, what should be done with the remaining income? Should it be reinvested, or should it be used to help educate orphans and support other indigents? Who determines which indigents are preferred and entitled to receive the benefit of the trust's income?

It is clear that the current practice is not to follow the literal terms of the trust, and both judges and trustees, without express judicial or other authority, have deviated from the express terms of the trust when it has been deemed expedient or good practice:

³⁰ *Will*, *supra* note 11, art. 13.

More than one hundred years have passed since Mrs. Bishop's death, and if she were here today, she unquestionably would decide some things differently. For example, the princess named five men, who happened to be haoles, as the initial trustees of her trust. Does that mean she wanted all future trustees to be of that same make up? Of course not.

In fact, the justices and trustees have themselves occasionally ignored the language of the will—perhaps with good cause. For example, the will says schools should be primarily vocational, and only secondarily college preparatory. That's changed. The will also specifically expresses a desire that the schools benefit orphans and others in indigent circumstances, and makes no mention of admissions based on academic ability. Again, the will's instructions have been modified to deal with the demands of time.³¹

More to the point, the will expressly calls for the trustees to found and operate two schools, one for boys and one for girls, but many years ago, the two schools were combined, and the focus shifted from vocational to college preparatory.

Conversely, the Bishop Estate trustees have terminated popular outreach programs such as prenatal and early education ostensibly because of concern that such efforts are not part of a traditional school curriculum and are not being performed or conducted on the Kamehameha Schools campus, and therefore, not covered by the terms of the settlor's will.³² This raises questions regarding when a governing instrument should be read expansively. The will establishing the trust calls for "instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects."³³

Ignoring for the sake of argument any issues of mismanagement leveled at the recently removed trustees, the real issue the court should address regarding the operation of the KSBET is to what extent the governing instrument should be read creatively or expansively in light of current societal conditions that were not foreseen by Princess Bishop at the time she established the trust. In other words, as circumstances change, especially after the passage of over one hundred years, what sort of changes should courts require on the one hand, and permit on the other, and based on what principles? To what extent should the doctrine of *cypres* be employed to modify the terms of the trust, and based on what principles? If this question is not answered, this trust, although perhaps not mismanaged, will continue to be used in a suboptimal fashion and

³¹ *Broken Trust*, *supra* note 26.

³² *See Broken Trust II*, *supra* note 28.

³³ *Will*, *supra* note 11, art. 13.

contrary to the wishes of the settlor whose predominant intent was to fund educational opportunities for students of Hawaiian ancestry.

The rest of this Article is devoted to a resolution of that issue. However, before turning to a theory of *cy pres* that balances the intent of the settlor with the demands of the intended beneficiaries of the trust many years later, a brief detour must be taken to define and explore the legal principles involved in the interpretation of charitable trusts when *cy pres* or equitable deviation is sought to modify their terms.

II. THE LEGAL ISSUES

A. Charitable Trusts

It is beyond cavil that the KSBET is a charitable trust immune from both income taxation and the operation of the Rule Against Perpetuities (of which more anon³⁴). However, a brief analysis of charitable trusts and how they differ from non-charitable trusts or private trusts is warranted to highlight the salient attributes of the trust and delineate those attributes that support the expansive use of *cy pres* following the expiration of time required by the Rule Against Perpetuities.

Charitable trusts are trusts established to promote the public good in some capacity. Justice Gray summarized the definition of a valid charitable trust:

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.³⁵

What differentiates a private trust from a charitable trust is the size or number of beneficiaries and the nature of the class of beneficiaries:

Funds devoted to the use of specific persons designated as beneficiaries constitute private trusts, while those funds beneficial to the community as a whole, some part thereof, or an indefinite class, constitute charitable dispositions. The class of beneficiaries must represent a sufficient benefit to the community in order for a court to uphold a trust as charitable. Even if a trust accomplishes charitable purposes, if the class of potential beneficiaries is not sufficiently large and indefinite to make the gift of common and public benefit,

³⁴ See *infra* section II.B.

³⁵ Dominic Aiello & Tracy Craig, *Cy Pres Reformation of the Charitable Trust*, 81 MASS L. REV. 110, 111 (1996)(quoting Justice Gray in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556 (1867)).

the trust is not charitable. What matters is not the number of beneficiaries, but rather the breadth of the class, which is made up of recipients and non-recipients alike. Even if very few persons will benefit from the trust because of the size of the fund or the discretion given to the trustee, or because there is a limitation on the number of persons to be benefited, a court will consider a trust charitable if the class of potential recipients is sufficiently large and indefinite in extent. Likewise, so long as the donor designated a sufficiently indefinite class, provisions which identify members of the class to be assisted or given a preference will not deprive the bequest of charitable status.³⁶

The Restatement of the Law of Trusts provides a comprehensive definition of charitable trusts:

Charitable purposes include:

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the promotion of health;
- (e) governmental or municipal purposes; and
- (f) other purposes the accomplishment of which is beneficial to the community.³⁷

Another important attribute of a charitable trust is its exemption from application of the Rule Against Perpetuities.³⁸ Thus, charitable trusts, as compared to private trusts, can last in perpetuity. Moreover, given the estate and income tax savings generated by charitable trusts, the creation and use of these trusts in estate planning has increased exponentially in the last fifty years.³⁹ The KSBET is over 100 years old and it will continue in operation as long as assets funding the trust are not depleted or exhausted and are properly deployed to benefit the intended beneficiaries.⁴⁰

³⁶ *Id.* at 111-12 (citations omitted).

³⁷ RESTATEMENT (SECOND) OF TRUSTS § 368 (1957); *see also* Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786 (1951).

³⁸ *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 672 (1995).

³⁹ *See id.* at 675.

⁴⁰ As commentators have suggested:

The seamier aspects of the saga notwithstanding, at the heart of the dispute are charges that the trustees haven't operated the Bishop Estate in the interest of the 15,000 native children who are its beneficiaries. [Attorney General Margery] Bronster charges that they failed to spend \$350 million over the past decade—the equivalent of four years of budgets for the Kamehameha Schools—despite rules requiring all income go to them. "That's money that should have been spent on the children," Bronster asserts. The trustees say the funds were properly added to the estate's principal.

Andrew Murr, *supra* note 9, at 62.

B. The Rule Against Perpetuities

*No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.*⁴¹

Critical to the thesis of this Article is the contention that the Rule Against Perpetuities should be "applied" to charitable trusts to allow for the liberal use of *cy pres* when the period governed by the Rule has expired. Hence, some limited familiarity with the rule is a prerequisite to understanding the thesis. First, the purpose of the Rule:

The Rule has three basic purposes: (1) to limit "dead hand" control over the property, which prevents the present generation from using the property as it sees fit; (2) to keep property marketable and available for productive development in accordance with market demands; and (3) to curb trusts, which can protect wealthy beneficiaries from bankruptcies and creditors, decrease the amount of risk capital available for economic development, and, after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements.⁴²

A scholar recently analyzed the Rule Against Perpetuities solely from an economic perspective and concluded that the operation of the Rule created three beneficial effects which, to my eyes, track the three traditional reasons cited above for having the rule, but in reverse order.

So the Rule has three closely related, beneficial effects, some or all of which may obtain in any given case. First, as recognized by most authorities, the Rule makes more likely the efficient use of resources by collecting rights into bundles more easily exchanged, which facilitates market reallocation to the best use and best user. Second, the Rule increases wealth by sorting rights into packages that generate more enjoyment for the holders, irrespective of whether those packages of rights, those interests, are subsequently reallocated in the market. Third, the Rule accelerates enjoyment by redistributing rights from persons that are not yet

⁴¹ J. GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942). Although it took Gray almost 200 pages to distill the Rule Against Perpetuities into the one sentence cited, the history of the rule and its development is rather complex. A complete articulation of the historical development of the rule is beyond the scope of the Article. However, because of the deference paid to Gray's work by the courts, the Rule has sometimes been treated as if it were laid down at one time by this one man. In fact, the Rule had a long and involved evolution. The Rule against Perpetuities is judicial legislation par excellence, and the case-by-case development of the Rule by the courts took several centuries. The origins of the Rule Against Perpetuities are somewhat obscure because of the ambiguous nature of the concept *perpetuity*. The political and social evils attending on perpetual entails, permitted by the Statute de Donis (1285), led judges to become jealous of allowing any limitation tying up land in perpetuity.

⁴² DUKEMINIER & JOHANSON, *supra* note 38, at 833.

alive and cannot possibly appreciate their interest to persons that are alive and able to enjoy their rights.⁴³

However its purpose is stated, the Rule Against Perpetuities operates by voiding certain interests (typically future contingent interests and executory interests but also interests created by option agreements) in land and personality that vest in interest too remotely. For those unfamiliar with the Rule, what that means is that interests created in trusts which are not given to ascertainable persons (persons in existence at the time of the creation of the trust—in this case, at the death of Princess Bishop, which is when her testamentary charitable trust was legally established) at the time of creation of the trust are subject to the Rule Against Perpetuities.⁴⁴

The Rule against Perpetuities is a rule that strikes down contingent interests that *might* vest too remotely. The essential thing to grasp about the Rule is that *it is a rule of logical proof*. You must prove that a contingent interest will *necessarily vest or fail* within 21 years of some life in being at the creation of the interest. If you cannot prove that, the contingent interest is void from the outset. What you are looking for is a person who will enable you to prove that the contingent interest will vest within the life of, or at the death of, the person, or within 21 years after the death of the person. This person, if found, is called *the validating life*.⁴⁵

⁴³ Jeffrey Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 70, 740 (1990).

⁴⁴ For the sake of completeness, it should be noted that interests given to ascertainable persons at the time of the creation of the trust may also be subject to the Rule Against Perpetuities if there is a condition attached to that interest, i.e., Blackacre to Mary if and when the Dodgers win the World Series. Since Mary's interest is contingent upon an event that may or may not happen, that is, the Dodgers winning the World Series, it is a contingent interest and subject to the Rule Against Perpetuities. Moreover, since Mary has a contingent interest that is transmissible inter vivos or by will (that is, she can leave her interest in the property to her heirs in her will), she has a contingent interest in the subject property that can tie up the property—make it less alienable because of her contingent interest (would you buy it knowing that in any given year the Dodgers might win the World Series and cause Mary's interest to vest in Mary or her heirs if she is dead even if that event occurs 100 years from today?)—for a period beyond lives in being plus 21 years. In this hypothetical, Mary is the only relevant life in being but cannot be used as a measuring life because one cannot prove that her contingent interest will vest or fail to vest within 21 years of some event occurring during her life or at the time of her death. It is possible that Mary may die tomorrow and that the Dodgers might not win the pennant—especially the way they are currently playing—for say 30 years causing the interest to vest too remotely. As a result, the contingent interest created in Mary by this hypothetical is void. In order to create a valid interest, the settlor should make Mary a valid measuring life by using the following language: "To Mary if she is living if and when the Dodgers win the World Series." If the Dodgers win the World Series while Mary is alive, she gets the money. If not, Mary's contingent executory interest disappears when Mary disappears, i.e., dies.

⁴⁵ JESSE DUKEMINIER & JAMES KRIER, PROPERTY 300 (3d ed. 1993)(emphasis in original)(citation omitted).

The period, lives in being plus twenty-one years, was developed judicially and, in effect, allows the settlor or donor to control the disposition of owned assets for a maximum of two generations, typically children and grandchildren if any grandchildren are in being and are minors at the time the trust becomes legally effective.⁴⁶ Thus, the Rule allows settlors of non-charitable trusts to control the disposition of assets for roughly sixty years, at which point absolute ownership of the assets must be vested in one or more existing individuals to do with what those individuals please.⁴⁷

Hawai'i, along with several other states, has enacted the Uniform Statutory Rule Against Perpetuities ("USRAP") as an attempt to reform the common law Rule Against Perpetuities. Under USRAP, an alternative perpetuities period is used to govern the duration of trusts. The statute provides two periods or rules against perpetuities: the common law perpetuities period and a statutory period of ninety years that permits the trust to endure for ninety years, which is considerably longer than the common law Rule Against Perpetuities.⁴⁸ The common law Rule Against Perpetuities typically causes trusts to terminate in sixty or so years because of the employment of the lives in being concept and the fact that those lives in being are typically exhausted within that period.⁴⁹ In Hawai'i, then, if USRAP is used to determine the relevant perpetuities period, and relatedly, the period during which *cy pres* will be strictly applied and judicial deference is given to the testator's or settlor's wishes, ninety years will be the controlling period rather than the common law lives in being plus twenty-one years. However, given the almost universal condemnation of USRAP by scholars,⁵⁰ and that this Article

⁴⁶ The history of the Rule Against Perpetuities is discussed as follows:

At the time of the formulation of the Rule against Perpetuities, heads of families—the fathers—were much concerned about securing family land . . . from incompetent sons. . . [Judges] recognized this concern as legitimate and . . . developed an appropriate period of during which the father's judgment could prevail. The father could realistically and perhaps wisely assess the capabilities of *living* members of his family, and so, with respect to them, the father's informed judgment, solemnly inscribed in an instrument, was given effect. But the head of family could know nothing of unborn persons. Hence, the father was permitted control only so long as his judgment was informed with an understanding of the capabilities and needs of persons alive when the judgment was made. Subsequently, the judges permitted the testator to extend his control beyond lives in being if any of the persons in the next generation was actually a minor. Finally, after about 150 years, the judges fixed the period as lives in being plus 21 years thereafter.

Id. at 299 (emphasis in original).

⁴⁷ See *infra* note 48 and accompanying text.

⁴⁸ For an in-depth discussion of USRAP and a criticism of its statutory 90-year wait-and-see period, see DUKEMINIER & JOHANSON, *supra* note 38, at 886-91.

⁴⁹ See *id.* at 887.

⁵⁰ See *id.* at 888.

advocates the liberal use of *cy pres* in all jurisdictions, subsequent discussion will focus on the application of the common law Rule Against Perpetuities. If this Article's thesis is adopted in a state like Hawai'i that has adopted USRAP the analysis herein may be modified simply by substituting ninety years instead of the period provided by the common law Rule Against Perpetuities.

A charitable trust creates contingent equitable interests that are subject to the Rule Against Perpetuities. Thus, the KSBET creates equitable interests in future intended beneficiaries of the trust: namely children who will attend the Kamehameha Schools and other intended beneficiaries, i.e., "orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or aboriginal blood" The interests created by the charitable trust are contingent in that the interests are created in unascertained persons, persons who are not lives in being at the creation of the interest. Those interests would be subject to the Rule Against Perpetuities if not created in a charitable trust. Moreover, since these equitable contingent interests would vest in interest and possession too remotely, i.e., not within the perpetuities period, they would violate the Rule Against Perpetuities and be rendered invalid if created in a non-charitable trust.

C. Traditional *Cy Pres* Doctrine

The doctrine of *cy pres* is recognized and employed in almost all jurisdictions, including Hawai'i.⁵¹ The doctrine was developed to modify charitable trusts whose purpose had become obsolete as a result of changed conditions not taken into account (internalized) or foreseen by the original settlor or donor.⁵² *Cy pres* developed as a necessary corollary to charitable trusts, which are exempt from the Rule Against Perpetuities and are potentially infinite in duration.⁵³ The KSBET is an illustration of a superannuated charitable trust established by a long-dead settlor—Princess

⁵¹ See 4A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 399.2 (4th ed. 1987); see also Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 n.6 (1988)(citations omitted)(noting that South Carolina is one state that recognizes no version of *cy pres*). For a Hawai'i case applying *cy pres*, see *In re Estate of Chun Quan Yee Hap*, 52 Haw. 40, 469 P.2d 183 (1970)(applying *cy pres* so that the trust would not violate the Rule Against Perpetuities).

⁵² See Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153, 154 (1967). When the settlor's intent becomes "impossible, impracticable, or illegal to perform, the court . . . will change the terms of a trust in a way which will both approximate the general intent of the testator or donor and make it possible for the trust to continue to benefit the community." *Id.*

⁵³ See *supra* note 2 and accompanying text.

Bernice Pauahi Bishop—whose intent, in light of changed circumstances, can only be guessed.⁵⁴

The doctrine of *cy pres* allows courts to exercise their equitable powers to modify a trust's substantive provisions to avoid the obsolescence of the trust, while conforming as strictly as possible to the settlor's original intent.

Where the continued enforcement of conditions in a charitable gift is no longer economically feasible, because of illegality . . . or opportunity costs . . . the court, rather than declaring the gift void and transferring the property to the residuary legatees (if any can be identified), will authorize the administrators of the charitable trust to apply the assets to a related (*cy pres*) purpose within the general scope of the donor's intent.⁵⁵

Approximately two-thirds of the states recognize and apply *cy pres* when accomplishment of the particular purpose of the trust becomes impossible, impracticable or illegal.⁵⁶ Most courts employ a three-part test to determine if *cy pres* modification is appropriate.⁵⁷ To be successful, an applicant must show: first, there is a valid charitable trust; second, the settlor's specific charitable objective is frustrated, necessitating *cy pres* modification to carry out the settlor's wishes; and third, the settlor's "general charitable intent" is not restricted to the precise purpose identified in the trust instrument.⁵⁸

⁵⁴ The changed circumstances alluded to here include, but are not limited to, the fact that the trust's wealth has grown exponentially to a sum that could support several hundred schools of the type envisaged by Princess Bishop. Similarly, the fact that Hawai'i is now a state might affect the Princess' wishes to prefer recipients with Hawaiian blood as well as the fact that the intermixture of races in Hawai'i has all but eliminated racial distinctions in the Islands.

The sixth [racial] category, utilized largely in Hawai'i, employs a highly variable classification scheme that is independent of racial traits. In Hawai'i, class status serves as an important variable, and the achievement of one's status in no way turns upon racial or ethnic identification. Although Hawai'i is part of the United States and should employ the country's "one drop of blood" rule, the state has rejected this dichotomous classification system as a result of its population mix and its cultural norms. If racial identification rather than ethnic identification is retained as a viable method of categorizing people in the United States, then the classification scheme in Hawai'i would epitomize that goal.

Alex Johnson, *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 900 (1996)(citations omitted).

⁵⁵ RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* § 18.4 (4th ed. 1992).

⁵⁶ In those states in which the *cy pres* doctrine has been rejected, courts instead apply a liberal doctrine of interpreting testator's charitable purpose, usually described as "approximation." See Stanley Johanson, *Charitable Trusts and Dispositions*, C523 A.L.I.-A.B.A. 571, 637 (1990).

⁵⁷ See Aiello & Craig, *supra* note 35, at 110.

⁵⁸ See RESTATEMENT (SECOND) OF TRUSTS § 399 (1957). For a novel criticism of the search for a general charitable intent, see DUKEMINIER & JOHANSON, *supra* note 38, at 977-78

Although a few courts have shown increased willingness to apply *cy pres* by construing these requirements liberally,⁵⁹ the majority continue to construe the doctrine narrowly.⁶⁰ Although I have been unable to discern any empirical data supporting this assumption, it is reasonable to assume that the courts worry that expanding the doctrine—i.e., using it liberally to change the terms and conditions of a settlor's trust—would thwart the testator's intent in many cases and ultimately lead to less charitable giving if future grantors/settlors are aware that courts may later change relevant terms and conditions of the trust.⁶¹

Courts, of course, apply *cy pres* only to charitable trusts—i.e., “property given in trust to be applied to a particular charitable purpose.”⁶² Because courts favor charitable dispositions of property, they typically construe the “charitable purpose” requirement liberally and have, as a result, usually found this prerequisite satisfied. Stating it differently, this requirement rarely has prevented the application of the *cy pres* doctrine.

The second element—whether changed circumstances sufficiently impede the execution of the settlor's specific charitable objective—is the requirement that creates most problems for petitioners seeking *cy pres* modification. Most courts have been unwilling to abandon the rigidly textual approach employed when analyzing the second prong of the three-pronged test for applying *cy pres*—i.e., the requirement that changed circumstances have rendered the fulfillment of the purposes of the trust illegal, impossible, or impracticable.

(arguing that the search for a general charitable intent is indeterminate because it relies on “the counterfactual”).

⁵⁹ See, e.g., *Gallaudet Univ. v. National Soc'y of Daughters of the Am. Revolution*, 699 A.2d 531 (Md. App. 1997) (employing a flexible approach based on an examination of the four corners of the donor's will to conclude that *cy pres* should be applied to allow funds designated to support a nursing home for members of the DAR to be used to support DAR members generally when the nursing home was closed).

⁶⁰ See, e.g., *In re Estate of du Pont*, 663 A.2d 470 (Del. Ch. 1994) (refusing to apply *cy pres* to allow funds donated to operate a convalescent hospital on a specific piece of property to be used to operate a similar facility in a different location when the original facility was closed due to lack of need).

⁶¹ See, e.g., *Board of Trustees of Am. Indian, Heye Found. v. Board of Trustees of Huntington Free Library & Reading Room*, 610 N.Y.S.2d 488, 501 (N.Y. App. Div. 1994) (refusing to apply *cy pres* when the trustees of the Museum of American Heye Foundation petitioned the court for a return of books it had donated to the Huntington Free Library after the Library, which was located in New York City, donated the books to the Smithsonian Institution in Washington, D.C., resulting in a lack of access to said books by intended beneficiaries of the Museum's trust). I contend, of course, that this reasoning is wrong and counterintuitive. Indeed, I argue later that applying *cy pres* liberally after the period governed by the Rule Against Perpetuities has expired will lead to the optimal use of trust assets. Further, such optimal use of trust assets several years after the settlor's death will be attractive to most settlors and increase the incentive for charitable giving. See *infra* section III.B. and Part IV.

⁶² *Fireman's Annuity & Benefit Fund v. Municipal Employee's, Officer's, & Official's Annuity & Benefit Fund*, 579 N.E.2d 1003, 1006 (Ill. App. Ct. 1991).

This prong requires a fact-specific inquiry,⁶³ and the courts' refusal to construe this requirement liberally has caused it to become the major impediment to the application of the *cy pres* doctrine in cases in which it is asserted that trust assets can be put to more efficient or better uses consistent with the settlor's general charitable intent.⁶⁴

*In re Estate of du Pont*⁶⁵ aptly illustrates this point. The case involved a dispute concerning the expenditure of funds from an endowment fund created by Eugene du Pont's will. The testator directed that the trust funds be used to create, construct, and operate a convalescent hospital on land—Pelleport—that had been occupied as a home by his mother.⁶⁶ He provided that "patients [should] have the benefits of such hospital at a cost less than they otherwise could."⁶⁷ The convalescent hospital was built at Pelleport and was operational for almost forty years. Then, in 1992, the trustees of the fund—the Medical Center of Delaware—moved its convalescent care center facility to the nearby Wilmington Hospital and in effect closed the Pelleport hospital. The Medical Center petitioned the court for a declaration that it be allowed to use the trust funds to support the operation of rehabilitative services it was providing at the Wilmington Hospital facility instead of the recently closed Pelleport facility. The trustees invoked *cy pres* as support for its proposed alternative use of funds, which it claimed would, in the changed circumstances it was reacting to, achieve the settlor's overarching intent.⁶⁸

Because the Medical Center failed to satisfy the court that the trust established by the settlor's will had become impracticable of fulfillment, the court refused to apply *cy pres*.⁶⁹ The Medical Center presented evidence that the introduction of Medicare into the health care system since the founding of Pelleport had changed the role of convalescent hospitals. As a result of the changes caused by the introduction of Medicare, Pelleport had begun to receive more seriously ill patients in need of more intensive care.⁷⁰ Pelleport apparently had encountered difficulties in servicing this new patient population, and the Medical Center had decided that it could either renovate Pelleport to make it an adequate treatment facility at an estimated cost of eight

⁶³ See *In re Abrams*, N.Y.S.2d 651, 655 (1991)(determining that whether a trust's purpose was impossible or impracticable to perform is a question of fact that requires a fact specific inquiry).

⁶⁴ The settlor's general charitable intent, as opposed to a specific charitable intent, must be proven as the third prong in the *cy pres* doctrine. That is discussed *infra* at notes 81-85 and accompanying text.

⁶⁵ 663 A.2d 470 (Del. Ch. 1994).

⁶⁶ See *id.* at 471.

⁶⁷ *Id.* at 473.

⁶⁸ See *id.* at 477.

⁶⁹ See *id.* at 478.

⁷⁰ See *id.* at 474.

to ten million dollars, or relocate the provision of rehabilitation services to the Wilmington Hospital where space was available for that specific purpose. The Medical Center chose the latter option and claimed that spending eight to ten million dollars to renovate Pelleport was impractical.⁷¹

The Delaware Attorney General and du Pont's son argued that renovating Pelleport was not impractical and that applying trust funds to the Wilmington Hospital would not fulfill "as nearly as possible" the settlor's intent since "his primary intent was that his mother's home be the locus of a convalescent care facility, not that convalescent care be supported in general."⁷² Moreover, the Attorney General and du Pont argued that the trustees' "true motive for moving to Wilmington Hospital was simply increased profitability," and the court agreed, stating, "I cannot say from the evidence that it was impracticable for it [the Medical Center] to continue to operate Pelleport as a convalescent hospital, given the resources that Eugene du Pont's will made available and the estimated costs of improvements that would be necessary."⁷³ The court thus refused to approve a reformation of the trust that would enable the trustees to use its funds to underwrite and support the operation of rehabilitative services at Wilmington Hospital, although it acknowledged that such a reformation would produce a socially optimal result.⁷⁴

A relatively small number of courts have found these considerations less worrisome and thus have abandoned the rigidly textual approach represented by *du Pont*. In *In re Estate of Vallery*,⁷⁵ members of a fraternal organization—the Knights Templar of Denver—argued that a provision in Mrs. Vallery's will—which devised the residue of her estate to a community hospital with income from the fund to be used for hospitalization of members of the organization—created a gift in trust (and designated the hospital as trustee) for the benefit of its members rather than an outright but restricted gift to the hospital.⁷⁶ They alleged that the hospital had breached its duties as trustee and asked the court to enter an order requiring the hospital to transfer the fund to the organization.⁷⁷ The trial court rejected the organization's argument that the will provision had created a trust, but also determined *sua sponte* that changed circumstances warranted reformation of the will to permit income from the fund to be used to defray costs of health care services besides hospitalization for needy members of the Knights Templar.⁷⁸ The trial court

⁷¹ See *id.* at 477.

⁷² *Id.*

⁷³ *Id.* at 477-78.

⁷⁴ See *id.* at 479.

⁷⁵ 883 P.2d 24 (Colo. Ct. App. 1993).

⁷⁶ See *id.* at 26.

⁷⁷ See *id.*

⁷⁸ See *id.* at 28.

took judicial notice of the changes that had occurred in the methods and financing of health care since the time of testator's death, and concluded that these changes had rendered the restriction of the fund to use for "hospitalization costs" an impracticable limitation.⁷⁹ The appellate court upheld this ruling stating that the "difficulty [which renders a trust term impracticable] need only be a reasonable one and not such as to make the donor's plan a physical impossibility."⁸⁰

The third prerequisite to the application of *cy pres* is a finding that the donor displayed general charitable intent, as distinguished from an intent limited to a specific charitable purpose. Courts have always construed this requirement fairly broadly due to their desire to uphold charitable trusts.⁸¹ Nevertheless, this requirement has constituted, and continues to constitute, a barrier to the application of *cy pres* in some instances.

Questions regarding the donor's intent arise in contexts in which a testator has made some reference to a particular charity. In determining whether the testator had general charitable intent, courts focus on "whether the donor would have preferred that his bequest be applied to a similar charitable purpose should his original scheme not work, or that the unused funds be diverted to private use."⁸²

Most courts employ a "four corners approach" in making this determination. That is, they "confine [their] search for whether the testator has manifested a general charitable intent to the four corners of the will, and only consider extrinsic evidence if the language of the will is inconclusive."⁸³ Thus, many courts that claim to consider "all available, admissible evidence, both intrinsic and extrinsic"—rather than focusing solely on the individual clause that mentions the specific charity—actually refuse to admit extrinsic evidence regarding intent if the face of the will enables them to make a definitive conclusion.⁸⁴ Hence, a gift over provision, or even a provision that simply details how a named charity should use trust assets, will preclude further argument on the intent issue; the court will conclude that the testator evinced a specific intent.⁸⁵

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *See Aiello & Craig, supra* note 35, at 113.

⁸² *Id.*

⁸³ *Gallaudet Univ. v. National Soc'y of Daughters of the Am. Revolution*, 699 A.2d 531, 547 (Md. App. 1997). The court stated that only Maryland, Oklahoma and Vermont have adopted an approach "which permits a court to consider the language of the instrument along with extrinsic evidence when divining whether a testator has manifested a general charitable intent." *Id.*

⁸⁴ *In re Estate of Crenshaw*, 819 P.2d 613, 620 (Kan. 1991).

⁸⁵ *See In re Estate of Champlin*, 684 A.2d 798, 801 (Me. 1996)(rejecting argument for the application of *cy pres* because "the Champlin will provides a specific alternative gift in the event

D. Equitable Deviation

The doctrine of deviation may be utilized when "it appears to the court that compliance is impossible or illegal, *or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.*"⁸⁶ What is important, of course, is that deviation applies only to administrative provisions of the trust, in contrast to *cy pres* modification, which affects substantive provisions of the trust.⁸⁷ However, distinguishing between administrative and substantive provisions is extremely difficult, if not impossible. As one commentator has noted: "The terms 'substantive' and 'administrative' are obviously conclusionary and give rise to confused and vague court decisions, particularly when an administrative provision is of such central importance in the trust instrument as to take on a substantive nature."⁸⁸

Courts appear to apply the deviation doctrine in situations short of impossibility, particularly when "effective philanthropy" or the public interest is paramount. Courts are less solicitous toward the *cy pres* doctrine because its application "reaches the central purpose of the trust, and is therefore subject to greater restraint" than deviation, which modifies the manner in which the trust is administered.⁸⁹ Thus, when the settlor's intent appears to be specific rather than general, or where changed circumstances have rendered the administration of the trust according to its express terms difficult but not "impossible" or "impracticable," courts sometimes invoke the doctrine of deviation to "save" the trust. In doing so, courts articulate the following distinction between these two related doctrines: In applying the deviation doctrine, a court "is merely exercising its general power over the administration of trusts," whereas the application of *cy pres* "requires the exercise of a more extensive power than the ordinary power of a court of equity in ordering deviation."⁹⁰ In other words, when applying the doctrine of deviation, the court "does not touch the question of the purpose or the object of the trust, nor vary the class of beneficiaries, nor divert the fund from

the gift to the city failed."); *Vollman v. Rosenberg*, 972 S.W.2d 490, 491-92 (Mo. Ct. App. 1998)(ruling that the language, "I give . . . [certain property] to the Salvation Army to be used, in perpetuity as a Rest Home, or Children's Camp, and aforesaid property never to be sold," demonstrates that testator evinced a specific intent in creating the trust).

⁸⁶ RESTATEMENT (SECOND) OF TRUSTS § 381 (1957)(emphasis added).

⁸⁷ See *id.* § 381 cmt. a.

⁸⁸ DiClerico, *supra* note 53, at 154-55.

⁸⁹ Sisson, *supra* note 52, at 648.

⁹⁰ *Daloi v. Franciscan Health Sys.*, 679 N.E.2d 1084, 1092 (Ohio 1997)(quoting *Craft v. Shroyer*, 74 N.E.2d 589, 598 (Ohio Ct. App. 1947)).

the charitable purpose designated.”⁹¹ It simply allows “the trustees to deviate from the mechanical means of administration of the trust” in order to facilitate accomplishment of the trust’s substantive ends.⁹²

E. Traditional Doctrine Applied to the KSBET

Although the recent controversy concerning the operation of the KSBET by the recently removed trustees raises numerous issues, several legal issues transcend that tawdry state of affairs and are worth examining for their resolution under current (traditional) trust doctrine and law. For the sake of brevity, I have chosen to focus on what I perceive to be the two most salient issues arising from the existence and operation of the KSBET: 1) the selection and compensation of trustees; and 2) defining the class of beneficiaries, i.e., who can attend the Kamehameha Schools funded by the trust. These two issues will be analyzed employing the traditionally narrow view of the *cy pres* doctrine and the rather liberal or expansive deviation doctrine.

1. Selection and compensation of trustees

I have chosen this aspect of the KSBET as the first to be addressed regarding the state of current law because I believe it demonstrates the speciousness of the distinction between administrative and substantive provisions of a trust, and it illustrates how the manipulation of the doctrines of deviation and *cy pres* can create differing outcomes regarding trust administration. It is quite clear that the selection and compensation of the trustees can be regarded as either substantive, requiring *cy pres*, or administrative, calling for equitable deviation. If it can be shown that it was the settlor’s primary purpose and intent that the trustees selected to operate the KSBET be Protestants, an argument can be made that this requirement is substantive, implicating testator’s intent, and therefore modifiable only through *cy pres*.⁹³ However, the better and prevailing view is that the selection of the trustees is an administrative matter governed by the more liberal rules pertaining to equitable deviation.

Settlers also frequently include in the trust instrument administrative provisions, which describe how the dispositive provisions will be executed. These may include, for example, provisions regarding investments, sale or retention of property, and the identity of the trustee. A court has the power to direct or permit the trustee of a private or charitable trust to deviate from trust provisions

⁹¹ *In re Estate of Craig*, 848 P.2d 313, 321 (Ariz. Ct. App. 1992).

⁹² *Anderson v. Wolford*, 604 N.E.2d 659, 664 n.12 (Ind. Ct. App. 1992).

⁹³ See RESTATEMENT (SECOND) OF TRUSTS § 381 (1957).

relating to methods of administration "if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by [her] compliance would defeat or substantially impair the accomplishment of the purposes of the trust." This is true whether the trust is charitable or private, since administrative provisions should give way to the dispositive ones when they are in conflict.⁹⁴

Hence, I contend that the real issue regarding the selection and compensation of the trustees, as well as their qualifications to serve, is not whether the court has the power to select non-Protestant trustees or to require some level of business or financial acumen as a prerequisite to appointment as trustee of this exceedingly wealthy trust. The real problem is that until recently, no one other than the attorney general had legal authority to object to the manner in which trustees were selected and compensated.⁹⁵ In the past, since the attorney general's office was part and parcel of the political process that selected the trustees, the attorney general had no reason to examine closely or object to the method of selecting and compensating trustees.⁹⁶ It is only when the KSBET attracted prominent and national negative press that sufficient legal attention was focused on the administration and operation of the trust.⁹⁷

It is important to note at this point that the KSBET, like other charitable trusts, created a "negative societal externality" because of its characterization as a charitable trust and the method in which charitable trusts are treated by law. I characterize this phenomenon as a negative societal externality because the operation of charitable trusts generates enforcement costs that are not borne by the individuals most affected by the operation of the charitable trust, i.e., the beneficiaries.⁹⁸

Instead, the attorney general in most states is given the power to enforce charitable trusts,⁹⁹ and that entity often has little or no incentive in monitoring, at a very simplistic level, the operation of a charitable trust to determine if a doctrine like equitable deviation should be deployed to create a more efficient use of assets.¹⁰⁰ In effect, there is no effective monitoring mechanism to ascertain when charitable trusts should be modified through the doctrine of

⁹⁴ GEORGE G. BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* 546 (6th ed. 1991)(citing RESTATEMENT (SECOND) OF TRUSTS §§ 381 & 165-167 (1959)).

⁹⁵ See *Broken Trust*, *supra* note 26.

⁹⁶ See *id.*

⁹⁷ See Chronology of Events in the Kamehameha Schools Bishop Estate Controversy (1997-2000) in Appendix A.

⁹⁸ For an in-depth and exhaustive analysis of this issue, see *infra* Part IV.

⁹⁹ See Mary G. Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 40-41 (1993).

¹⁰⁰ See Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 478-79 (1960).

equitable deviation or *cy pres*. This is especially true for charitable trusts which have unlimited useful lives, meaning that these long-term trusts will need to be interpreted when the settlor and his immediate heirs are dead. Due to the charitable character of the trusts, no one beneficiary has standing to sue unless he or she has a special interest.¹⁰¹

2. Defining the class of beneficiaries—native Hawaiians

Although it may be possible to modify the selection procedures used to choose the trustees of the KSBET, as well as the appropriate amount of compensation paid to such trustees, questions regarding the intended beneficiaries of the KSBET present substantive issues that should be resolved using the doctrine of *cy pres*. Hence, issues pertaining to the matriculants at the school or schools to be established by the KSBET present substantive questions that should not be conflated with procedural requirements that are resolvable by using equitable deviation. An argument can easily be made and defended that Princess Bishop's primary purpose in establishing the KSBET, her substantive intent, was to use the trust assets to benefit native Hawaiians.

The problem, however, is with the indeterminacy between substantive and administrative provisions when coupled with the provisions of the KSBET. Nowhere in the trust provisions does the settlor state that her principle or primary purpose is the education of native Hawaiians. The exact language of the trust is as follows:

give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: 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.¹⁰²

Nowhere does the trust state that the school is established for native Hawaiians. Indeed, the only reference to Hawaiians occurs later:

I direct my trustees to invest the remainder of my estate in such manner as they may think best, and expend the annual income in the maintenance of said schools; meaning thereby the salaries of the teachers, the repairing of buildings and other incidental expenses; and to devote a portion of each years income to

¹⁰¹ See *DUKEMINIER & JOHANSON*, *supra* note 38, at 675-76. As a result, I have prepared a proposal that would eliminate part of the costs generated by this negative societal externality by giving the relevant office of the attorney general sufficient funding to adequately monitor charitable trusts. See *infra* section IV.A.

¹⁰² *Will*, *supra* note 11, art. 13.

the support and education of orphans, and others in indigent circumstances, given preferences to Hawaiians of pure or aboriginal blood¹⁰³

Hence, given the rather ambiguous meaning of and differentiation between substantive and administrative provisions, and the rather vague provisions of the KSBET pertaining to the students who are intended to benefit from the trust, there is a credible argument that the provisions determining qualification for admission to the Kamehameha Schools are administrative provisions that can be modified by the more liberal doctrine of equitable deviation rather than *cy pres*.¹⁰⁴

III. A THEORETICAL JUSTIFICATION FOR THE EXPANDED USE OF *CY PRES*

This Part is designed to accomplish three discrete, but related tasks. First, to establish that the distinction between *cy pres* and equitable deviation is specious, without merit, and unsupportable when applied to the facts of the KSBET. This leads me to conclude that the courts should no longer treat the doctrines as distinct. Courts should apply the same test, be it liberal and expansive (which I support) or conservative and restrained (the current treatment of *cy pres* by the majority of courts), irrespective of whether the administrative or substantive provisions of a charitable trusts are subject to interpretation by the court. To do otherwise, I argue, results in the supremacy of form over substance and the manipulation of definitional provisions (what is administrative, what is substantive) to determine outcomes.

The second section in Part III is devoted to explaining my thesis for what I characterize as the narrow, restrained view of *cy pres* (which includes the interpretation of administrative provisions since I have combined *cy pres* and equitable deviation) during the period covered by the Rule Against Perpetuities. This calls for a more liberal and expansive use of *cy pres*, as applied to charitable trusts, following the period covered by the Rule Against Perpetuities. I contend that, to date, the battle over whether courts should employ the narrow or expansive view of *cy pres* has resulted in indeterminate outcomes because an examination of the temporal nature of these trusts has been lacking and, as a result, has not been internalized in the rationale supporting one view or the other. Neither view is persuasive or determinative when time is factored into the decision. It would be ludicrous to apply an expansive view of *cy pres* to a charitable trust one year after it is established,

¹⁰³ *Id.*

¹⁰⁴ See DiClerico, *supra* note 53, at 154-55. "The terms 'substantive' and 'administrative' are obviously conclusionary and give rise to confused and vague court decisions, particularly when an administrative provision is of such central importance in the trust instrument as to take on a substantive nature." *Id.*

just as it is similarly ill-advised to hew strictly to the settlor's intent 200 years after the settlor's death. Time inexorably causes the interests to be benefited or represented in the trust to change.

The last section of Part III is devoted to justifying my temporal treatment of the *cy pres* doctrine. By examining the rationale for the Rule Against Perpetuities, I provide a similar rationale for my temporal analysis of the *cy pres* doctrine. I conclude that unlimited dead hand control of charitable assets through the traditional narrow view of *cy pres* employed by most courts is suboptimal from a societal perspective, and will result in the inappropriate use of charitable assets. However, to answer criticism that such an expanded view of *cy pres* will discourage settlors from funding charitable trusts, I demonstrate that the temporal approach to *cy pres* I advocate actually encourages the creation of charitable trusts by providing fidelity to the grantor's wishes for the period governed by the Rule Against Perpetuities, while allowing modification after the perpetuities period has passed.

A. *Collapsing the Distinction between Cy Pres and Equitable Deviation*

The distinction between *cy pres* and equitable deviation is specious and without merit. Applying the disparate doctrines to the two issues presented by the KSBET and the discussion below¹⁰⁵ clearly demonstrates that the doctrine of equitable deviation may be manipulated to create or result in substantive outcomes that are not allowed or warranted by narrow application of the *cy pres* doctrine. Thus, although the distinction between the two doctrines makes it seem clear and straightforward, current trends in the application of the doctrine reveal that the distinction is difficult to perceive. Furthermore, courts consider the results generated by the application of each doctrine before determining which doctrine to apply (courts tend to peek at the outcome before deciding whether to apply *cy pres* or equitable deviation). Thus, preserving the distinction between the two doctrines leads to indeterminate results.

Since courts have no principled basis for the application of the *cy pres* doctrine, courts feel compelled to make changes that maintain fidelity to the grantor's or settlor's original intent remain open to the charge that the use of *cy pres* is unwarranted and potentially deterrent to future settlors of charitable trusts. The only way to avoid this problem is to establish firm rules for the operation of *cy pres* that inform grantors of the courts' power in this area, and to assuage any concern that the courts' intent will be substituted for that of the grantor/settlor. I propose a temporal treatment of *cy pres* that does just that.

¹⁰⁵ See *supra* notes 93-104 and accompanying text.

B. A Temporal Treatment of the Cy Pres Doctrine

I start with the assumption that when the settlor of a charitable trust establishes a trust that will become effective immediately or, more likely, upon the settlor's death, the settlor is cognizant of the current state of affairs that will affect the operation and purpose of the charitable trust. Put another way, I assume that most settlors establishing charitable trusts do so based on their honest belief that there is a need for such a trust, that the assets designated for the trust are best allocated for that purpose, and that the trust's operation will have a beneficial or salutary effect on society.

Take, for example, the trust established by Princess Bishop. At the time of her death, Princess Bishop, based on her knowledge of Hawai'i's affairs, the educational state or well-being of native Hawaiians, and the needs of Hawaiians generally, must have believed that establishing a trust to erect and maintain two schools to educate native Hawaiians or Hawaiians of pure or aboriginal blood¹⁰⁶ resulted in the optimal allocation of her assets for charitable purposes. This is not to say that at the time she established the KSBET in her will, all would agree that the optimal use of those assets was to establish the Kamehameha Schools per the terms of the trust. No claim, empirical or otherwise, is made that even at the time the trust was established, the use to which the assets are put were optimal from a societal perspective. To the contrary, I contend that the charitable trust established by the settlor is optimal from the settlor's perspective based on facts and events known to the settlor at the time the trust is established and becomes operational.

Based on facts, events, feelings, etc., known only to Princess Bishop, it was her belief that assets devoted to the charitable trust could best be used to fund two schools to educate "orphans, and others in indigent circumstances, given preference to Hawaiians of pure or aboriginal blood."¹⁰⁷ That belief may have been true and based on fact, or false and based on fiction. That, however, is irrelevant. What is relevant and indisputable is that the settlor believed that, from her perspective, the assets were put to optimal use per the terms of her will.¹⁰⁸ That assumption is also premised on a belief that the testator was of

¹⁰⁶ See *Will*, *supra* note 11, art. 13.

¹⁰⁷ See *id.*

¹⁰⁸ It is important to keep in mind that these are subjective determinations made by the settlor that may be viewed by others as suboptimal or irrational. Thus, for example, when a settlor leaves thousands or millions of dollars to care for a pet, many may honestly believe that the money is or would be better spent for other purposes. However, it is the settlor's wish, bounded by some constraints, that must be ascertained and followed and those wishes will no doubt be influenced by events occurring during the settlor's life that are unique to that settlor's existence. Hence, our hypothetical settlor who establishes a charitable trust to benefit abandoned pets may not have disposed of her charitable trusts in a manner that most would view as optimal, has

sound mind at the time her will (which established the KSBET) was made, and that she was not suffering from undue influence or any other incapacity that would call into question the validity of her wishes.¹⁰⁹ To be quite clear, I argue that it is only rational to believe that if the testator, in this case Princess Bishop, thought the assets used to fund the trust (hereinafter the "charitable assets") could be better used to fund a hospital to provide indigent care to native Hawaiians given the existing state of Hawaiian hospitals, she would have decided to use the charitable assets to support that endeavor.

My point, and it is an obvious one, is that when a settlor establishes a charitable trust with charitable assets, the purpose of the trust and the use to which the trust assets are dedicated are optimal from the settlor's perspective. What is just as apparent and obvious in the case of charitable trusts established by wills is the temporal horizon that the testator/settlor must internalize in establishing the charitable trust. The settlor must not only believe that the charitable assets are being put to their optimal use at the time of her death, but she must also believe that the charitable assets are being put to optimal use for the foreseeable future as well.

The key of course is the recognition that the settlor, can only foresee so much. It is reasonable to conclude that the settlor can foresee and predict societal changes and evolution for a period of time based on facts within the settlor's knowledge when the trust is established. No one would assert that a settlor can predict future events and societal changes with a degree of certainty allowing the settlor to establish a trust that could successfully adapt to changed conditions occurring centuries after the trust was established. Furthermore, I have not found a settlor who asserts that, given the choice between creating a charitable trust that could last forever and a non-charitable private trust that will terminate under the Rule Against Perpetuities in approximately sixty or seventy years, he or she will fund a charitable trust because the settlor has a better potential to see the future and to draft the terms and conditions of the trust accordingly to respond to future changes. No, one must assume that the settlors of both non-charitable and charitable trusts have

disposed of her charitable assets in a fashion that she views as optimal and that provides her with the most satisfaction.

¹⁰⁹ See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 176-77 (6th ed. 1999):

Undue influence may occur where there is a confidential relationship between the parties or where there is no such relationship. Proof may be wholly inferential and circumstantial. The influence may be that of a beneficiary or that of a third person imputed to the beneficiary.

In more recent times judges have tried to cabin this unruly concept by saying that, to establish undue influence, it must be proved that the testator was susceptible to undue influence, that the influencer had the disposition and the opportunity to exercise undue influence, and that the disposition is the result of the influence.

the same ability to foresee future events and to draft the terms and conditions of their respective trusts. The difference, of course, is that the non-charitable trust will, in all situations, terminate in approximately one hundred years,¹¹⁰ thereby limiting the effects of changed conditions on the terms and conditions of the trust, whereas the charitable trust will endure for perpetuity.

Moreover, and just as importantly, no one today can say with any degree of certainty that he or she can discern what Princess Bishop would do with the assets in the KSBET if she were alive and apprised of the current state of affairs. Given the context within which Princess Bishop lived and the current societal conditions in which an interpreter of her trust finds himself or herself, today's interpreter of Princess Bishop's wishes is, at best, making educated guesses about just how Princess Bishop would have wanted to deploy the tremendous assets in her trust. Hence, asking an interpreter who is extant in today's society whether Princess Bishop had a general or specific intent and whether that intent is thwarted by changed conditions (all of which are predicate to the deployment of *cy pres*) is largely indeterminate because no one in today's society, looking back over a century ago, can answer these questions with certainty.

Further, assuming the interpreter, typically the judge in an equity setting, presumes that changed conditions have impeded the settlor's general charitable intent and call for the use of *cy pres*, it is sheer folly to allege that the resultant changes to the terms and conditions of the trust are the same changes the settlor would have made had she been presented with the same state of affairs. No reasonably intelligent person knows what Princess Bishop would think of the current controversy surrounding the operation of her trust and the problems engendered by the very mechanisms by which she intended her trust to be established and operated.¹¹¹

Illuminating is the fact that the law of trusts inherently recognizes that no settlor can foresee an unlimited future with specificity, and it does so by insuring that non-charitable trusts terminate within a reasonable period of time (roughly consistent with the period of time that the settlor can foresee) through the operation of the Rule Against Perpetuities.¹¹² The operation of the Rule Against Perpetuities insures that, at least with respect to non-charitable trusts, the settlor's wishes will be adhered to, and to the letter, for a limited period of time. However, after that limited period of time, the assets will be delivered to an entity for disposition, and that entity will have power to dispose of the assets without any compliance or adherence to the settlor's

¹¹⁰ See *supra* section II.B.

¹¹¹ Here I am referring specifically to the selection of the trustees by the Justices of the Hawai'i Supreme Court, which has allegedly caused some of the problems in the management of the trust. See generally Beh, *supra* note 21.

¹¹² See *supra* section II.B.

wishes. Moreover, the entity to whom the trust assets are devolved is a creature of the present, not the past. The "new" owner of the assets, which were formerly locked into a form or type of use mandated by the settlor, can use the assets as they are best suited to the owner in light of changes that have occurred since the original trust was settled.

The problem with charitable trusts is not that they will last forever. That perpetualism can be, and indeed is, I contend, a good, positive outcome for society, since that quantum of assets is dedicated to use for charitable purposes, and charitable purposes are viewed as synonymous with social good. The problem, of course, is that the assets are never delivered into a new owner's hands so that the new owner can determine the best use for the assets. What is missing is a new owner who can periodically reassess the best use to which the assets can be put consistent with the settlor's original intent, as set forth in the trust, and as subsequently interpreted by the individual situated in contemporary society.

Here's the puzzle: Given the infinite duration of charitable trusts, there is recognition and acknowledgment that changed conditions will occur that affect their operation. However, even I concede there is no way for someone in today's society to step into the settlor's shoes and accurately determine the settlor's wishes in light of changed conditions that the settlor did not foresee (I also assume the changed conditions are unforeseen because if the settlor foresaw them, she would have internalized mechanisms within the trust to deal with the anticipated changed conditions if and when they occur).

The response to that conundrum is to do nothing, to refuse to alter the terms and conditions of the trust based on what, at first glance, are two perfectly acceptable reasons. First, refusing to alter the terms and conditions of the trust, there is zero risk that the court will misinterpret the settlor's intent and misapply the assets to a purpose not intended by the settlor—this I call the "backwards looking" rationale to the narrow view and use of *cy pres*. By looking backwards to the settlor's original intent and purpose as set forth in the trust, and by refusing to make any changes in the terms and conditions of the trust, the court can rest assured that it is adhering to the settlor's intent. This is the low-risk approach to interpreting the settlor's intent.

The other reason the courts slavishly adhere to the settlor's original intent and refuse to employ *cy pres* is more forward looking, and thus, is designated the "forward looking" rationale for the narrow interpretation of *cy pres*. I suggest that the courts refuse to apply the liberal use of *cy pres* because of the alleged deterrent effect that the doctrine has on future charitable settlors. Courts believe that putative or future settlors of charitable trusts will be deterred from establishing the same if they are made knowledgeable of the fact that courts have broad inherent powers to alter the terms of charitable trusts. Thus, this "forward looking" rationale is premised on the idea that to

do otherwise would deter future settlors from establishing charitable trusts for fear of court interference and alteration with the terms of such trusts.

The problem with both the backwards and future looking rationale is twofold. First, it results in the suboptimal use of charitable assets, and second, it ignores a more plausible alternative: that the settlor would prefer to have her wishes followed when those wishes have some basis in fact—that is, when those wishes are based on facts and events within the settlor's temporal horizon. However, for that period of time beyond the foreseeable future, perhaps the settlor would prefer that the assets be put to their best use, as measured by the current state of affairs.

I support this with two theories. First, people acquire assets, set up trusts, and leave money notwithstanding the fact that they can control it for only so long. Why not have the same outcome with respect to charitable trusts? Second, the settlor of a charitable trust, when establishing the charitable trust, enters into contract with society. I discuss the first theory in the next section and the second theory in Part IV.

C. A Rationale for the Temporal Treatment of Cy Pres

One thing that has always puzzled me is the relatively narrow use by courts of *cy pres* premised on an allegiance to fidelity to the intent of a settlor that is long dead. I find this puzzling because of the widespread existence and acceptance of the Rule Against Perpetuities and the alleged salutary purposes that the Rule promotes. In other words, I find it odd and counterintuitive that with respect to non-charitable trusts, trusts established by the settlor to benefit his or her family and loved ones, we limit the settlor's control to the period governed by the Rule Against Perpetuities. Yet, with respect to charitable trusts, trusts that are established to benefit others and supported by some general charitable intent, it is presumed that the settlor's intent should continue to control the disposition of assets for several hundred years (perhaps forever) after the settlor's death unless one can establish (and the burden of proof is placed on the party seeking modification), with some degree of certainty, that a court should apply *cy pres*.

Why is it that the wishes of the settlor—the settlor's dead hand control—are limited with respect to non-charitable trusts, but not so limited with respect to charitable trusts? Why should society allow the settlor dead hand control in charitable trusts? If one looks at the traditional justification for the operation of the Rule Against Perpetuities—limitation of dead hand control, to make property marketable, and to curb trusts¹¹³—it is readily apparent that the last two reasons for operation of the Rule Against Perpetuities have no

¹¹³ See *supra* note 39 and accompanying text.

applicability to charitable trusts. Charitable trusts are settled with assets that, by definition, will not be made marketable, at least not to the extent of the assets held in non-charitable trusts that are ultimately transferred at the termination of the trust to an owner who may then transfer the asset to the highest valued user.¹¹⁴ Similarly, charitable trusts by definition are designed to endure forever, and therefore, the intent to curb the existence of trusts cannot be said to be a purpose of the Rule Against Perpetuities if applied to charitable trusts.

About the only purpose that can be satisfied by applying the purposes of the Rule Against Perpetuities, through an expanded use of *cy pres*, is the limitation on dead hand control. In other words, by not applying something akin to the Rule Against Perpetuities to charitable trusts, the dead hand is allowed to control the disposition of charitable assets in perpetuity. However, there is no persuasive reason that explains why the dead hand should control charitable assets in perpetuity but be limited to lives in being plus twenty-one years with respect to non-charitable assets governed by the Rule Against Perpetuities.

IV. A NORMATIVE JUSTIFICATION FOR THE EXPANSIVE USE OF THE *CY PRES* DOCTRINE

As Geoffrey Manne recently articulated in his article, *Agency Costs and the Oversight of Charitable Organizations*,¹¹⁵ one major problem with charitable trusts is that, for largely historical reasons, the attorney general is assigned to monitor the operation of such trusts, and is also charged with seeking or opposing the use of *cy pres*, as appropriate.¹¹⁶ Because of the inefficient monitoring that allegedly occurs, Manne argues that private entities should be created to engage in the monitoring that private investors and others accomplish with respect to for-profit corporate entities.

In this Part, I take a slightly different approach that focuses on the issues presented by the KSBET fact situation and the legal issues arising from it. Although Manne's article focuses on increasing the efficient operation of

¹¹⁴ I'll ignore for the sake of argument that non-specific assets held in a charitable trust (i.e., land or a building that is not integral or specific to the operation of the charitable trust), may be, if allowed by the trust, transferred or sold by the trustee to third parties if the asset is more valuable in the hands of the third party and the resultant proceeds become part of the trust corpus and are used for the charitable purpose established by the trust. I ignore this possibility because it assumes a point that is in contention in this Article: that charitable trust assets should be treated similar to non-charitable assets with respect to transferability, etc. unless a justification is provided for some other treatment.

¹¹⁵ Geoffrey Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227.

¹¹⁶ See *id.* at 238-39.

charitable trusts by employing capable monitors, the problem with charitable trusts and *cy pres* is that there is no one entity or person charged with determining when *cy pres* should be employed because it is optimal to do so from the perspective of the settlor, society, or both. This has caused courts to deploy the narrow view of *cy pres* because of the view that doing otherwise would deter settlors from establishing these trusts. As the temporal view of *cy pres* described above demonstrates, that possibility is minimized, if not eliminated, because *cy pres* is deployed expansively only several decades after the charitable trust is established, a time when the settlor's connection to the trust, and the benefits that flow from the establishment of the trust, are rather attenuated. I buttress my argument with the contention that by establishing a charitable trust, the settlor has entered into a contract with the state for its regulation and operation. This contract, which provides tangible and intangible benefits to the settlor and tangible benefits to society is not, however, a contingent contract. It is best viewed and characterized as a relational contract given the exemption of the charitable trust from the operation of the Rule Against Perpetuities.¹¹⁷ Viewing the contract between the state and the settlor as a relational contract provides a normative basis for the expansive regulation of charitable trusts to internalize the changed conditions that result following the establishment of the charitable trust.

I conclude this Part, and this Article, with a modest proposal that supports the use of the expanded *cy pres* doctrine after the expiration of the Rule Against Perpetuities period. My proposal, unlike Professor Manne's, does not require the creation of separate contractual entities to monitor the efficacy of charitable trusts. Instead, my proposal results in a funding mechanism that will provide the respective offices of the attorneys general with sufficient resources to monitor charitable trusts adequately, including but not limited to, bringing suits, when necessary, to use *cy pres* to change the administrative or substantive terms of a charitable trust as a result of changed or unanticipated conditions that cause the suboptimal deployment—from a societal perspective—of charitable assets.

¹¹⁷ A relational contract is defined as follows:

A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance. . . . [L]ong-term contracts are more likely than short-term agreements to fit this conceptualization, but temporal extension per se is not the defining characteristic.

Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

A. Reconstructing the Ex Ante Bargain

Professor Manne's thesis, which is quite elegant and illuminating, is informative in that it correctly adduces that one principal problem with the operation of charitable trusts is the failure to provide adequate monitors to ensure compliance with the settlor's wishes or the terms of the trust.¹¹⁸ His solution, the ex post contracting with private firms to introduce capable monitors, represents an attempt to provide those monitors. Whether the insertion of third-party monitors who expressly contract to perform as such will result in the more efficient administration of charitable trusts (assuming one can define efficiency by congruence with the donor or settlor's original purpose or intent or some other standard) is beyond the scope of this Article.¹¹⁹ The one salient critique I am willing to proffer regarding Professor Manne's thesis is that Professor Manne too easily overlooks and minimizes the one monitor who is charged with overseeing the performance of the trust: the attorney general of the governing jurisdiction where the charitable trust is located. Of course, it is hornbook law that the attorney general is charged with monitoring and enforcing the terms of charitable trusts and is frequently the only party who has standing to bring litigation to enforce relevant provisions of charitable trusts.¹²⁰ As Professor Manne correctly asserts, to date, this monitoring mechanism has been deficient because of the attorneys general's lack of interest and funds to monitor and pursue vigorously cases involving possible misfeasance of trusts. On that point I am in total agreement: To date, attorneys general collectively have failed in their obligation to effectively monitor and pursue breaches of duty owed to society arising from the creation and operation of charitable trusts.

¹¹⁸ See Manne, *supra* 115, at 227-29.

¹¹⁹ I find Professor Manne's solution intriguing but problematic for a number of reasons. Primary among my concerns would be aligning the parties' interests in a fashion that provides appropriate and correct incentives for the monitors to act in an efficacious fashion while engaging in monitoring. By that I mean that these third-party monitors have no substantive or underlying interest in the purpose to which the trust is dedicated. They are not intended beneficiaries of the trust, and they are neither benefited nor harmed by the performance or nonperformance of the trust. The monitor's primary interest is the collection of the fee for which it contracted. Thus, the monitors' interest, given the requisite facts, may diverge from that of the intended beneficiaries and, relatedly, that of the settlor. The monitor may be tempted to "look the other way" as long as its fee is paid. Professor Manne acknowledges the problem and argues that the monitor will have an incentive to do its job and internalize the wishes of the settlor and the beneficiaries because if it fails to do so, the reputational effects will be detrimental and preclude future charitable trusts from entering into contracts with the monitor. That argument makes sense in a world in which all have immediate access to perfect information concerning the performance of the monitors. In the imperfect world in which we live, however, Professor Manne's resolution of this issues seems far-fetched and naive.

¹²⁰ See Manne, *supra* note 115, at 250.

However, I attribute the failure of the attorneys general not to lack of interest or improper motive, but to the lack of funds devoted specifically to this purpose. The attorneys general, although charged with this specific and very important duty, are not given adequate resources to ensure performance of this task.¹²¹ Given that most offices of attorneys general are funded with public dollars that are raised through the general fund and other taxation sources, it stands to reason that an attorney general faced with enforcing criminal statutes, interpreting laws, assisting in drafting legislation, and providing legal opinions, would place a very low priority on monitoring and bringing suits against charitable trusts which benefit only a small segment of the public.

To some extent, when the attorney general uses the scarce resources of its office to pursue and monitor misfeasance regarding the existence and operation of a charitable trust, one can argue that a type of inappropriate or suboptimal (from a societal perspective) wealth transfer has occurred. In essence, the attorney general has devoted resources that have been provided by the general public or public fisc to benefit a select intended group of beneficiaries of the subject charitable trust. This is not necessarily a bad or illegitimate act since the beneficiaries benefit through a charitable trust, the purpose of which is often to provide services that would, in the charitable trust's absence, have to be borne and provided for by the government.

In effect, when one establishes a valid charitable trust, one is entering into an implicit contract with the attorney general, and hence the state, allowing the state, through its attorney general, to fill the void left by the absence of beneficiaries who can sue, and to monitor and enforce the provisions of the subject trust. Technically speaking, by setting up a charitable trust, the settlor is imposing duties on the state and directing that assets be spent in performance of that duty. What is lacking in this implicit contractual arrangement, of course, is the funding mechanism which insures that the duty can and will be performed adequately. The charitable trust imposes a duty with no corresponding obligation to pay for that duty when it is informed. Hence, Professor Manne's proposal.¹²²

My proposal is radically different and empirically untested. As I see it, there are two ways charitable trusts can pay for the services provided or performed by the attorney general. One method, perhaps the most direct, would be for the attorney general to bill charitable trusts for the monitoring and enforcement efforts in which it engages. This, however, is problematic in a couple of respects. First, it may be very difficult to determine what amount of effort is attributable to monitoring when no violations of the trust

¹²¹ See Blasko et al., *supra* note 99, at 39.

¹²² See *supra* notes 119-21 and accompanying text.

are alleged. In other words, the *ex post* mechanism of charging a trust for the enforcement costs it generates works best when there is litigation or some dispute that leads to settlement or judicial resolution. As to that action, costs can be accounted for and maintained. However, how do you charge a trust for standard monitoring to determine compliance? It may be done on an hourly or some other basis, but I predict an *ex post* determination would present insurmountable accounting problems and result in charitable trusts being charged only when some action is taken by the attorney general in response to some perceived or real problem with the operation or administration of the trust.

This reality leads to other problems concerning the incentive structure that would result if the attorney general received recompense only when violations or other problems are identified and subsequently rectified. I think they are rather obvious—e.g., excessive enforcement, chilling trustees from referring issues to the attorney general for resolution when they are reasonable interpretive questions that can be resolved by the attorney general—and they cause me to question the efficacy of what I am characterizing as an “*ex post*” cost model of monitoring and enforcement. Perhaps, just as importantly, given the issues that arise with respect to these trusts and their differing size, it may be inappropriate to charge trusts the same amount for the same services that are provided.¹²³ This creates similar incentives to focus on big rather than small charitable trusts in order to maximize the amount of revenue generated.

My solution to this problem is to favor a second type of funding for the attorney general's monitoring and enforcement duties that is both fair and administrable. I propose that trusts be charged an annual fee equal to some percentage of their corpus—which percentage I will leave to the accountants and other actuarially sophisticated parties, but there is a certain symmetry to have it equal the standard or statutory fee paid to the trustee for managing the trust. The fee will be remitted to the state's office of the attorney general to fund a division within the office whose sole purpose would be the monitoring and enforcement of charitable trusts. This fund would provide a stable basis for maintaining an office whose sole purpose is to act as the settlor's designate in ensuring that the charitable trust is performed according to the settlor's intent, and that there is no misfeasance on the part of the trustee or anyone connected to the trust. More importantly, the costs of this enforcement is paid for by the very people who benefit from the services provided: the settlor and the beneficiaries.

¹²³ Given the assets controlled by the KSBET, it is easy to see that an attorney general would be interested in monitoring this trust, and that to do so would be more costly than monitoring a million-dollar trust to provide funds to indigent hospital patients.

V. CONCLUSION

The inconsistent (and some would argue unprincipled) use of the *cy pres* doctrine by the courts has caused many scholars to criticize either the doctrine, or the courts, or both. The issue is almost incapable of resolution because it requires a balance between the needs of the present generation by internalizing and respecting changed conditions, and respect for the settlor's original intent in light of changed conditions that the settlor neither foresaw nor could have foreseen given her limited abilities to predict events occurring *in futuro*. The modest proposal advanced herein represents an attempt to harmonize the law of charitable and non-charitable trusts by acknowledging that in the non-charitable trust context, the law recognizes and limits temporally the amount of dead hand control the settlor can exercise over trust assets. By employing the same temporal limitations on dead hand control over charitable trusts, I propose bifurcating judicial review and modification of charitable trusts.

Thus, for the same reasons settlors are allowed to control assets after their deaths for the period governed by the Rule Against Perpetuities (i.e., striking a balance between respecting the wishes and needs of the living and those of the recently departed, deceased owner of the assets), the courts should refrain from employing *cy pres* and the related doctrine, equitable deviation, to change the substantive or administrative terms of a charitable trust during the applicable perpetuities period. Conversely, after the applicable perpetuities period has expired, courts should feel free to employ an expansive or liberal use of *cy pres* when requested to do so by the appropriate individual, i.e., the attorney general. Furthermore, the appropriate attorney general should be given adequate resources to monitor these charitable trusts through a funding mechanism that produces funds from the trusts that would benefit from the monitoring. Given the normative theory that undergirds the existence and operation of these unique charitable trusts, it is fair and reasonable to require that these trusts not only pay an annual fee to ensure their continued vitality given changing societal conditions, but also to ensure that the trust assets are put to their optimal use consonant with the settlor's wishes even though the settlor is long dead. Instead of deterring settlors from establishing charitable trusts, settlors will be encouraged to establish charitable trusts with confidence that the assets they devote to the trust will be put to their best and highest use in perpetuity.

