

BROKEN TRUST BOOK

[Comments of Samuel P. King to Bank of Hawaii's Senior Management Group on May 23, 2007]

Ladies and Gentlemen:

When Randy told me that we had been invited to address this group, my response naturally was: "That's my bank." I have enjoyed owing money in varying amounts to Bank of Hawaii over a period of some sixty years. Thank you very much.

This is our first appearance before a group other than rotary clubs, book clubs, or classes of students or teachers. We have felt from the beginning that the lessons to be learned from the Bishop Estate imbroglio are especially relevant in the worlds of finance and law. Randy has covered the main themes of this very complicated event. His list of legal issues raised by the former trustees' actions is itself a graduate course in trustee responsibility, and certainly the violations of trust law and of a trustee's obligations are matters of which a financial institution should be aware. I would like to cover certain attendant matters involved in this episode in the history of Hawai'i.

Firstly, why a book? Hawaiians as a rule do not like to "talk stink" about anyone. People should settle their differences by "ho'oponopono" and at the end achieve "closure." But from the beginning it was obvious that something new and different was taking place, and when the Kamehameha 'ohana marched from Mauna 'Ala to the Bishop Estate headquarters across from the Advertiser building, a new chapter in people power was written. The importance of the struggle may be gleaned from Dave Shapiro's Introduction. George Chaplin is quoted as saying that this was the most important event in Hawai'i since Pearl Harbor.

Gladys Brandt wrote a Foreword to the anticipated book. She died before the book was completed, but a paragraph from her offering makes it clear that she expected a book to result from all of the efforts, including in large measure her own, to reinvigorate the Kamehameha Schools. She wrote:

The media did well in covering daily news items during the controversy but were not able to place the issues and events into a historically and culturally meaningful context. During my own life, and during the life of Hawai'i in my time, there have been great changes in what it has meant to be Hawaiian. This book will show the long view.

Monsignor Kekumano also died before the book was completed. He had provided important firsthand information and also expected that there would be a written chronicle of the events in which he played a large part.

Walter Heen is constitutionally opposed to writing books about his activities, but he read the finished product before it was printed, said it was "OK", and provided a quote on a more current matter, that is, the then pending litigation in the federal courts about the policy of the trustees to limit admissions to Kamehameha to students who had at least one ancestor who was in Hawai'i before Captain Cook arrived on the scene. On Monday, May 14th, that appeal was "settled" without further action so that the en banc decision of the 9th Circuit stands as "the law."

Secondly, is the book accurate? My sister, who recently retired as the professor of the history of Hawai'i at the University of Hawai'i and through whom we passed every chapter, complained that there were no footnotes. My response was to welcome her to the 21st century. There is a web site - brokentrustbook.com - where one can find more source material than he or she may really have wanted to read. In addition, at least one of us, and especially Gladys Brandt, was present when many of the events being described took place. There were also public trials with witnesses sworn to tell the truth and quoted

in the daily press. Judge Yim's report to the trustees about the complaints from Kamehameha 'ohana is a public document. Gladys Brandt and Monsignor Kekumano were participants in the events leading up to the appointment of Trustee Jervis. Randy personally interviewed one hundred or more individuals some of whom did not mind being quoted even as others demanded anonymity. There was also Trustee Oz Stender who had tried unsuccessfully to lead his fellow trustees along the proper path for trustees of an eleemosynary institution. He was the odd man out who paid for his integrity by also being forced to resign. He had much to say from the point of view of someone on the inside.

We had the benefit of the year 2000 "duplication" of George Kanahele's 1987 manuscript for a book entitled "Kamehameha Schools' First Hundred Years" which is available "in a limited number of copies to serve as a reference and research source." For some mysterious reason, the trustees at the time, and still today, have failed to have the manuscript published as a book for general distribution and purchase.

From Bob Watada, former head of the Campaign Spending Commission, we have had the benefit of 18 boxes of documents that private investigators for Hawai'i's attorney general's office had assembled, along with more than one hundred interviews that they conducted under oath. Watada was using the materials in connection with his investigation into campaign spending because it appeared that several politicians had their fingers in the Bishop Estate cookie jar.

And there are, of course, numerous reliable books on the early history of Hawai'i.

Randy Roth has been the chief architect of the printed volume, and I have been his chief critic. Our wives provided valuable comments about style and substance that prevented possible gaffes. In this process we faced the practical problem of space. Our book, including everything presented, covers 336 pages. We could have easily doubled that figure and wound up with something that would not pass muster with our publisher,

the University of Hawai'i Press. So to those critics who have complained that we gave certain organizations and events short shrift, I can only advise: "Write your own book."

So far, there has been no contrary presentation. Judge Hifo complained in writing carried by the Honolulu Star-Bulletin that we had reported her actions erroneously. We respectfully disagreed with her, and Randy's response was published alongside the judge's complaint. Henry Peters has complained that if he did the things reported in the book he should be in jail, to which I can only say: "He is right." One might like to read at brokentrustbook.com the investigative report of Goodenow Associates commissioned by the attorney general. That was among the documents received from Bob Watada which had not been made available even to the deputies in the attorney general's office who had been working on Bishop Estate matters. No one else has publicly questioned anything in the book.

In this connection, I have to mention the unfortunate tendency of even public bodies to keep information secret. The report of the Internal Revenue Service which detailed the violations of the trustees' obligations, although once seen and read, is now not available even to the deputies in the attorney general's office. Also our state courts have been too quick to permit requested confidentiality of some filings concerning the Bishop Estate in what should be public proceedings. The new Bishop Estate trustees have continued the former practice of keeping their doings as secret as possible, even from the attorney general.

Thirdly, have the problems that beset the Bishop Estate been resolved so that all is now pono? The three most important areas of controversy had been trustee selection and behavior, educational reach, and student admission policy. They are still areas of controversy.

Princess Pauahi named the first five trustees, all Caucasians including her husband, and decreed that the number of trustees "shall be kept at five" and that

“vacancies shall be filled by the choice of a majority of the Supreme Court, the selection to be made from persons of the Protestant religion.”

The supreme court she was referring to was the court of three justices who had been appointed, and whose successors would presumably be appointed, by one of her relatives. During the early days of the constitutional monarchy, that supreme court was given the duties of a probate court and other initial proceedings along with the usual appellate jurisdiction. Eventually these initial proceedings were conferred on newly created circuit courts; and although the supreme court then no longer exercised the powers of a probate court the supreme court justices continued to select successor trustees of the Bishop Estate. The new selectees were then routinely sworn into office by the circuit court judge exercising probate powers.

When Hawai'i became an organized Territory of the United States, the laws of Hawai'i in this regard were carried over unchanged and the three Supreme Court justices of the territorial supreme court, who now were appointed by the President of the United States and confirmed by the United States Senate, continued to select successor Bishop Estate trustees. Eventually a circuit judge exercising probate powers ruled that the Supreme Court justices lost the power to select such trustees when they lost probate powers and that he as probate judge would name the successor trustee, which he promptly did.

Of course the matter was appealed to the challenged Supreme Court whose members held that they were acting not as a court but as individuals in their private capacity when they selected a successor trustee. Their nominee was sworn into office and the probate judge's selection was rejected. On further appeal to the 9th Circuit Court of Appeals the Hawai'i justices were supported in their rationalization. This in spite of the obvious conflict of interest when the Hawai'i Supreme Court was presented with an appeal from an action by Bishop Estate trustees who the members of the same court had selected.

When Hawai'i became a state, the now five members of the Supreme Court who had been appointed by Hawai'i's elected governor and confirmed by Hawai'i's elected Senate continued to select Bishop Estate trustees although they were far removed from the arrangement contemplated by Princess Pauahi. The conflict of interest in this arrangement became even more obvious. The practice was again challenged and again approved by five circuit judges sitting by designation by the Chief Justice as something the justices did in their private capacity and not as sitting judges. Nevertheless when one of their own number was selected he presumably did not vote on his own selection, either as a judge or in his private capacity.

A few months after the 'ohana march from Mauna 'Ala, four of the justices announced that they would no longer select Bishop Estate trustees. They also withdrew from selecting trustees of the Lunalilo Trust. They gave as the reason for their action that their continued participation would "promote a climate of distrust and cynicism" and "undermine the trust that people must have in the judiciary." As the younger generation might say: "Hello?"

The fifth justice announced that he might exercise this power all by himself, but nobody took him seriously and he resigned from the court before his appointment had expired. Besides, Princess Pauahi's will called for "the choice of a majority of the Justices of the Supreme Court." One judge could not be a majority of the five justices.

So how are successor trustees to be selected? The initial replacement trustees were selected by the probate judge for staggered five-year terms. For the most recent selection, a procedure was adopted by the probate judge whereby a temporary search committee selected by the judge after considering the recommendation of interested parties, especially of Kamehameha 'ohana, presented a short list of three persons from among whom the probate judge selected one nominee after a period of time in which to allow for public input. The details of this process are open to change each time a new selection comes up, which would be at least once a year. Under the present procedure, incumbents could be appointed for a second five-year term, which might not require the

full process. The process was initiated to fill the vacancy resulting from the resignation of Trustee Connie Lau.

The system has worked so far. There has been general approval of the recent selection of Corbett Kalama by Judge Colleen Hirai in her capacity as the probate judge for the First Circuit Court. Trustee Kalama is a Senior Vice-President of First Hawaiian Bank and manager of branch banking on O'ahu. He is said to be a direct descendant of Keakealaniwahine who is said to be a great-great-grandmother of Kamehameha the Great. Mr. Kalama is quoted as saying that he considers a Bishop Estate trusteeship to be a great honor and that he would be more than willing to serve without compensation. There has not been any similar statement by any of his fellow trustees .

Could other and future justices of the Hawai'i Supreme Court take back the power to select Bishop Estate trustees? There have been expressions in the past that selection by Supreme Court justices gave the Bishop Estate, and especially the memory of Princess Pauahi, a certain special aura which should be retained. Much oratory has been devoted to the necessity of honoring the Princess's legacy.

Actually, the only part of her will that has been honored exactly is the number of trustees which she decreed "shall remain at five." There has also been reasonable compliance with Princess Pauahi's wish that the trustees "devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood."

Princess Pauahi decreed that there shall be "two schools, each for boarding and day scholars, one for boys and one for girls." Several years ago the two schools were combined, but the resulting combination was, and still is, referred to as the Kamehameha Schools; there are also schools on the islands of Hawai'i and Maui.

She decreed that the schools “provide first and chiefly a good education in the common English branches,” which was understood to mean “reading, writing, and ‘rithmetic,” and also “instruction in morals and in such useful knowledge as may tend to make good and industrious men and women,” and that “instruction in the higher branches” was “to be subsidiary to the foregoing objects.” The boys’ school in fact started out as a trade school.

Today the Kamehameha Schools offer a first-class college-preparatory education, as they have for many years past. They have expended considerable time, effort, and money to the preservation and, indeed, promotion of the Hawaiian language and ancient Hawaiian cultural practices. The estate helps finance a college education for Kamehameha graduates. Recently it was announced that the estate had authorized a substantial contribution to assist the homeless, among whom were many Hawaiians. While these may all be laudable uses of Princess Pauahi’s largesse, they were not mentioned in her will. On the other hand, she was establishing “schools” and only designating the subjects to be taught “first and chiefly.” Still, it is a linguistic stretch to encompass all of present day Kamehameha Schools expenditures if one is serious about being faithful to Princess Pauahi’s will.

Princess Pauahi decreed that the successor trustees and the teachers be “persons of the Protestant religion.” The latter requirement relating to teachers was declared to be in violation of applicable federal statutes, and the former relating to trustees has been increasingly inoperative. In recent years, several successor trustees underwent last-minute conversions to Protestantism shortly before taking office as trustees. The impression an outside observer received has been that this requirement has been ignored by the Supreme Court justices when selecting a replacement trustee.

Princess Pauahi’s will says nothing about compensation for the trustees. An early decision by the Supreme Court of the constitutional monarchy held that nevertheless the trustees were entitled to reasonable compensation. Years later under the territorial government the Hawaii legislature passed a law that set percentages of income

and principal which the legislators thought would limit the amount taken by the trustees. The trustees interpreted this law as setting the amount they could take, completely ignoring the legal principle in the United States that the amount of compensation taken by a trustee of an eleemosynary trust can never exceed the value of his or her services. As a result, the compensation taken by Bishop Estate trustees eventually hovered around one million dollars each. State law now decrees that such compensation shall be “reasonable” as a result of legislative action during the height of the controversy as detailed in the book at pages 224-227. At present the compensation set by the probate judge works out at about \$100,000 each with an extra \$25,000 for the chairman. A few years ago, the probate judge had suggested that \$200,000 each would not be unreasonable, but the new trustees accepted the lower figure.

Princess Pauahi’s will did not limit the term of service of a trustee. Until the appointment of Trustee Hung Wo Ching trustees served for life unless they resigned earlier. Trustee Ching was appointed to a term ending at his age of 70 years. Such a limitation was in fact suggested by the incumbent trustees (or some of them). The next appointment was of Chief Justice Richardson who held out successfully for age 72. For subsequent appointments, the age limitation went back to 70.

The will directs the trustees to “annually make a full and complete report of all receipts and expenditures” and to file “annually an inventory of the property in their hands and how invested, and to publish the same” in some Honolulu newspaper. Compliance with this requirement over the more than 100 years since the trust came into existence has been very skimpy. Presumably under the new management, this situation will improve.

Princess Pauahi’s testamentary trust is a 19th century document that no practicing attorney would draft today. Full ownership of the trust’s assets and full responsibility for the trust’s operations fall upon the five individual trustees. If one wishes to sue the Bishop Estate or Kamehameha Schools for any reason, the suit will be against the five trustees. If one wishes to contract with the Bishop Estate, the contract is with the five

trustees. The trustees have the final responsibility for hiring and firing and for all expenditures including the purchase of pencils. Their actions do not have to be unanimous, as the Princess decreed that “three of them at least must join in all acts.” This would have been the law anyway if she had not so decreed. Nevertheless, all of them would be named in any legal action. They may, of course, delegate various duties to others, and the new trustees have taken a step toward a more usual corporate arrangement by theoretically delegating day-to-day operational control to a CEO, but they remain ultimately responsible for everything that goes on at the several Kamehameha schools. As a result, the premiums on their liability insurance policies are what is referred to as humongous.

The question of admissions to the Kamehameha Schools has received enough publicity for all of you to be experts on the subject. Please note that the practice which is under fire is only a policy adopted by the first trustees and continued today. The will itself contains no racial restriction except as to indigent and orphan children. In early days the schools did in fact admit a few non-Hawaiians without there being any uproar. The issue will probably come up again.

So, as no one seems to be adhering to the literal provisions of Princess Pauahi’s testamentary trust, why not turn it into a not-for-profit corporation with directors elected by the Kamehameha alumni ? Bob Midkiff has recommended such a step, citing Yale, Harvard, and Punahou as current examples. The trustees at some time in the past did look into such a move but decided against it. They also looked into the possibility of moving the trust to an Indian reservation to escape the impact of federal laws and even had their lawyers draw up the papers to do so, but they did not get around to signing them. Not the least advantage of a not-for-profit corporation is that directors who serve without compensation would have relatively little personal liability, which would translate into a substantial reduction in the cost of trust-paid liability insurance.

The Bishop Estate and Kamehameha Schools will be with us far into the future. The problems that faced the Kamehameha ‘ohana seem to be under control for now,

despite a horse-and-buggy organizational structure and a penchant for secrecy. Those who are affected by the estate's policies or actions will no doubt be vigilant and vocal. Perhaps in the not too distant future a book about the then current situation will be written.

We thank you for this opportunity to discuss our book and to expand on what the fuss was all about.

Mahalo.