Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop

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"The law has long been the special guardian of philanthropy."[1]

INTRODUCTION

A judge of the probate court of Hawai'i recently reorganized one of the nation's richest charitable trusts. Judge Kevin S. C. Chang[2] ordered four of the five trustees of the Kamehameha Schools Bishop Estate ("KSBE" or "Estate") removed, and accepted the resignation of the fifth, Oswald Stender, citing "extraordinary and unprecedented circumstances not anticipated."[3] The multibillion-dollar charitable trust, the largest in America,[4] was established some 114 years ago in 1884 through the will of Princess Bernice Pauahi Bishop ("Princess Bishop").[5] Princess Bishop, who was the wealthiest woman in the Kingdom of Hawai'i in 1884,[6] left over 400,000 acres of prime Hawaiian fee simple land in a charitable trust for the education of Hawaiian children.[7] As of 1998, her charitable trust, had an aggregate value of approximately six billion[8] and produced over a quarter of a billion dollars

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This Article is dedicated to the memory of Mrs. Beatrice Nipoaloha L. Seto, class of 1927, Kamehameha High School, mother of Judge Seto. "Who can find a virtuous woman? For her price is far above rubies. She stretcheth out her hand to the poor; yea, she reacheth forth her hands to the needy. Strength & honor are her clothing; and she shall rejoice in time to come. Her children arise up, and call her blessed." *Proverbs* 31:10, 20, 25, 28.

[1] F. Emerson Andrews, *Foundations and the Law–A Foreword*, 13 UCLA L. REV. 933, 933 (1966).

[2] Judge Chang is a graduate of Lewis & Clark College of Law and has been a member of the Hawai'i bar since 1978. *See* HAW. STATE BAR. ASS'N, 1998-1999 ANNUAL DIRECTORY 31.

[3] Gail Diane Cox, *Bishop Estate Gets Reorganized*, NAT'L L.J., May 24, 1999, at A5.

[4] *See* Lou Cannon, *Corruption Charges Catch Beloved Hawaii Charity in Furious Undertow*, WASH. POST, Dec. 23, 1997, at A3.

[5] *See* Cox, *supra* note 3.

[6] *See* GEORGE HUE'EU SANFORD KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY 166-67 (1986).

[7] *See* JULIE STEWART WILLIAMS, PRINCESS BERNICE PAUAHI BISHOP 79 (1992).

[8] *See* Master's Consolidated Report on the One Hundred Ninth, One Hundred Tenth, and

income per year.[9] The trustees of KSBE are charged with portfolio management of these assets, and with the responsibility of the maintenance and management of the Kamehameha Schools.[10]

Every trust is a triangle of three players: a trust settlor (or grantor), a trustee, and a trust beneficiary.[11] Beneficiaries generally enforce the trustee's duties.[12] The charitable trust, however, is one of the great exceptions to the beneficiary enforcement requirement. "As the result of a stormy history on both sides of the Atlantic, trusts for charitable purposes are enforced by the government; the typical official in an American state is the attorney general, although some states now have administrative agencies that are charged with that duty."[13] As the representative of the public at large, the state attorney general usually enforces the charitable trust, holding the trustee accountable to the beneficiaries.[14] If the trust funds benefit a particular individual, that person can also enforce the trust.[15] The recent events in Hawai'i illustrate these concepts in play. Princess Bishop was the settlor of KSBE, the trustees are court appointed by order of her will and the laws of charitable trusts, and the beneficiaries are the students of the Kamehameha Schools, their families and their future employers. A grave concern in this estate has been trustee misconduct.

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the One Hundred Eleventh Annual Accounts of the Trustees, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Aug. 7, 1998), *available at* <http://starbulletin.com/98/08/07/news/masters2/masters2.html> [hereinafter Master's Report].

[9] *See id.* at 26.

[10] *See* Gail Diane Cox, *In Hawaii: A Princess, A Legacy, A Scandal*, NAT'L L.J. Jan. 11, 1999, at A1. "Her will set up a trust to educate children of Hawaiian blood in perpetuity at the Kamehameha Schools." *Id.* The language of Princess Bishop's will states:

> 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 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 . . . .

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*.

[11] *See* GEORGE T. BOGERT, TRUSTS 1 (6th ed. 1987).

[12] *See* THOMAS L. SHAFFER & CAROL ANN MOONEY, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 102 (3d ed. 1991). The basic notion is that the trustee must owe some duty to the beneficiaries. *See* ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 9 (2d ed. 1999).

[13] SHAFFER & MOONEY, *supra* note 12, at 102.

[14] *See* ANDERSEN, *supra* note 12, at 124.

[15] *See id.* at 124 n.2 (citing Hooker v. Edes Homes, 579 A.2d 608 (D.C. 1990)).

A trustee, by any standard, ought to act in the state of mind which the settlor contemplated when she set up the trust.[16] This general principle, however, "points to a human fact about trustees and to a source of tension in the development of trust-administration law. The human fact is that a trustee is usually seen as a surrogate for the dead settlor. . . ."[17] Human error is one thing, but depraved human behavior paid for by KSBE was seen all too frequently in its management.[18] The wealth of the Estate and the compensa-

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[16] *See* SHAFFER & MOONEY, *supra* note 12, at 126 (attributing this principle to Professor Scott).

[17] *Id.*

[18] Examples of incidents of clear trustee indiscretion abound:

> The estate's "special project's director," former State Senator Milton Holt, had been partying at sex clubs from Honolulu to New Orleans with a VISA card that let him run up a $21,000 tab against the princess's legacy. . . . Professor Randall Roth, who teaches wills and trusts at the University of Hawaii William S. Richardson School of Law, says that Mr. Holt's bar bills illustrate the overall "lack of accountability" . . . . Toni Lee, the head of a group made up of Kamehameha School alumni, faculty and students, finds Mr. Holt's follies indicative of the "arrogance" of those she casts as betrayers of the trust. "How does one even think about using the princess's money in that fashion?" Ms. Lee marvels.

Cox, *supra* note 10. The *National Law Journal* also reported that "[t]he Western Association of Schools and Colleges, a national accreditation group, delivered a midsummer report slamming the trustees for an 'oppressive, intimidating and fearful professional climate' at the schools." *Id.*

Hearings for the removal of Trustee Jervis were postponed due to his illness, a result of a failed suicide attempt. *See* Rick Daysog, *Jervis Wins Delay in Hearing for Removal*, HONOLULU STAR-BULLETIN, Mar. 19, 1999, at A-3. Jervis tried to commit suicide after being caught in a hotel restroom having sex with a lawyer for the estate. *See* Rick Daysog & Christine Donnelly, *Jervis Improves After Overdose*, HONOLULU STAR-BULLETIN, Mar. 12, 1999, at A-1. Concerns over trustee Jervis existed at the outset of his appointment. *See* Jon Van Dyke, *The Kamehameha Schools/Bishop Estate and the Constitution*, 17 U. HAW. L. REV. 413, 425 (1995).

Trustee Richard "Dickie" Wong was indicted for first degree theft, perjury and criminal conspiracy. Rick Daysog, *Wong Says He'll Win in Courtroom*, HONOLULU STAR-BULLETIN, Apr. 13, 1999, at A-1. Fellow trustee Henry Peters was also indicted on a theft charge. *See* Rick Daysog, *Grand Jury Indicts Peters in Theft*, HONOLULU STAR-BULLETIN, Nov. 26, 1998, at A-1. Both indictments were dismissed. *See* Walter Wright, *Judge Throws out Wong Indictments*, HONOLULU ADVERTISER, June 17, 1999, at A1; Rick Daysog, *State Lets Bishop Trustee Wong and Wife off the Hook for Now*, HONOLULU STAR-BULLETIN, June 30, 1999, at A-3; Rick Daysog, *Judge: Peters Didn't Get a Fair Hearing*, HONOLULU STAR-BULLETIN, July 2, 1999, at A-1. Peters was indicted again on August 4, 1999. *See* Rick Daysog, *Peters, Stone Indicted Again by Grand Jury*, HONOLULU STAR-BULLETIN, Aug. 5, 1999, at A-8. This indictment also was dismissed. *See* Ken Kobayashi, *Peters' Case Dismissed*, HONOLULU ADVERTISER, Dec. 18, 1999, at A1. Wong was indicted for perjury a second time on December 9, 1999. *See* Rick Daysog, *Grand Jury Indicts Wong for Perjury*, HONOLULU STAR-BULLETIN, Dec. 10, 1999, at A-1.

The KSBE trustees were even at each other's throats. Attorneys for Trustees Jervis and Stender implored the court to remove Lindsey because she micro-managed the Kamehameha tion given to its trustees[19] may have been the source from which various iniquities, breaches of duty, and indiscretions flowed. It is quite unlikely Princess Bishop herself would have committed such acts, much less exonerated the trustees for engaging in them, whether they acted in their official capacity as trustees or not. Moreover, the trustees did not want to be held accountable. This is made evident in the Master's Report[20] and in the circumstances surrounding the management of the Kamehameha Schools.[21]

This Article examines two key questions: (1) whom do the trustees represent? and (2) to whom are the trustees of a charitable trust accountable?

Schools, exercised poor judgment, and intimidated students. *See* Petition for Removal of Trustee Marion Mae Lokelani Lindsey, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Dec. 29, 1997).

Judge Kevin Chang eventually ordered the temporary removal of these "Incumbent Trustees," as he called them. *See* Order Regarding Order to Show Cause Regarding Special Purpose Trustees' Report and Order to Show Cause Regarding New CEO Based Management System, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. May 7, 1999), *available at* <http://starbulletin.com/1999/05/07/news/removal.html> [hereinafter Removal Order]. Among other interesting elements of his ruling, Chang ordered the Incumbent Trustees to surrender their offices immediately, and prohibited any communication between them and estate "employees, attorneys, agents and representatives." *Id.*

> The Court further finds and concludes, with the exception of Trustee Stender, under the strict fiduciary standard applicable to the Incumbent Trustees, that the inaction and indifference of the other Incumbent Trustees to . . . the potential loss [of tax-exempt status] constitutes a breach of duty. Simply put, with the exception of Trustee Stender, the other Incumbent Trustees are not acting in the interests of the welfare, protection and preservation of the Trust Estate.

Id. Earlier, the court had appointed five Interim Trustees to represent KSBE in negotiations with the Internal Revenue Service. *See* Minute Order Regarding Trustees Oswald Stender and Gerard Jervis' Petition for Approval of Voluntary Recusal with Respect to Pending Tax Audit and for Appointment of a Panel of Special Administrators with Respect to Pending Tax Audit and Trustees' Petition for Instructions and Approval of Appointment of IRS Dispute Advisory Panel, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Feb. 4, 1999). After the temporary removal of the five Incumbent Trustees, the court appointed the Interim Trustees to take their place. *See* Removal Order, *supra.*

Lokelani Lindsey was removed as a trustee the previous day. *See* Order Granting Petition for Removal of Trustee Marion Mae Lokelani Lindsey Filed on December 29, 1997, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. May 6, 1999). Her removal was immediate and permanent, and came in the form of an order from the judge who had presided over a five-month trial. *See id.*

[19] Each trustee's salary averaged $844,600 per year. *See* Cox, *supra* note 10, at A20.

[20] *See generally* Master's Report, *supra* note 8.

[21] The ousted trustees did not want beneficiary accountability nor student involvement. For instance, the "Lead Trustee for Education," Lokelani Lindsey, was reportedly using intimidation to oppress student voices, having "usurped," "undermined," and "subverted" the powers of Kamehameha Schools' president and his staff, and leaving the school in "turmoil" and "disarray." *See* Master's Report, *supra* note 8.

These questions are answered in part with a discussion of the testator's intent in a charitable purpose.

Using KSBE as an example, we begin in Part I by reviewing the wishes of Princess Bishop in her establishment of KSBE. In Part II we discuss the role, if any, of the beneficiaries in enforcing the terms of a charitable trust. Do these persons have any opportunity to hold the trustees accountable in the discharge of their duties in administration of the trust assets? If so, how might that be accomplished? We suggest they do, and propose some innovative methodology for establishing a critical additional layer of trustee accountability. Finally in Part III, we propose some guidelines for bringing the trust settlor and the beneficiaries back into the charitable trust triangle for invaluable accountability among the trustees. In our proposal for trustee succession in charitable or dynasty trusts, we suggest a way to preserve both the charitable purpose of the trust and the role of trust beneficiaries by linking trustee accountability and successor trustee selection to the involvement of present and future beneficiaries.

Our goal is to reestablish the solid principles designed to make trusts the wonderful vehicles of charitable benefits that they are intended to be. Charitable trusts like KSBE will then truly honor the wishes of the testator, here Princess Bishop, and the benefits she wished to confer on the children of Hawai'i in perpetuity.

I. TESTATOR'S INTENT: WHOM DO THE TRUSTEES REPRESENT?

A. Charitable Purpose—The History Behind KSBE and Princess Bishop's Charitable Intent

A historical review of the background behind KSBE is illuminating because it paints the context within which Princess Bishop's intent should be interpreted. This chronicle of events and the resulting attitudes help to analyze the current state of affairs of KSBE and the Kamehameha Schools. This school is the outgrowth of the testamentary trust set out by Princess Bishop, the last of the Kamehameha line of the Hawaiian dynasty. The Princess had a charitable purpose in establishing the trust.

It is important to understand why Princess Bishop, the richest woman in the Kingdom of Hawai'i, would turn down an offer from Kamehameha V to be the first ever sovereign Queen of the Kingdom of Hawai'i,[22] and leave almost her entire estate to all Hawaiian children rather than to her relatives. This makes a closer examination of her life necessary.

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[22] After Kamehameha V died in 1872, Princess Bishop would have been crowned as Queen in 1872. *See* WILLIAMS, *supra* note 7, at 64.

Of particular importance are her formative years, her formal education, and her exposure to other more advanced kingdoms throughout the world. Most influential were her trips to the United States, England, and European nations.[23] Equally influential was her husband, Charles Bishop, who was the President of the Board of Education of the Kingdom of Hawai'i.[24]

Princess Bishop, who was the last of the royal descendants of King Kamehameha I, was born at 'Aikupika, the home of her parents, *ali'i* Abner Pākī and High Chiefess Laura Konia, in Honolulu, Hawai'i, on December 19, 1831.[25] She was indeed the *ke ali'i* Bernice Pauahi, the great-granddaughter of Kamehameha I, whose identical immense statue graces both downtown Honolulu's I'olani Palace[26] and the United States Capitol rotunda in Washington, D.C.[27]

At the time of her birth, it was common in Hawai'i to name the first born or *hiapo* a name of a favorite ancestor.[28] In this case, her name "Pauahi" came from her mother's half-sister and Princess Bishop's aunt, Princess Pauahi Kekūanaō'a.[29] Princess Pauahi Kekūanaō'a was also the mother of Princess Ruth Ke'elikolani, who would later bequeath to Princess Bishop the bulk of the royal lands which ultimately provided the foundation of Princess Bishop's future charitable trust for Hawaiian children.[30]

Princess Bishop's deep respect for education, which ultimately culminated in the genesis of the Kamehameha Schools,[31] was developed at an early age. Princess Bishop grew up under the reign of King Kamehameha III.[32] This King wanted his people to be educated because he firmly believed that the young *ali'i* needed the knowledge and special skills required when they inherited the onerous responsibility of protecting the Kingdom of Hawai'i against the onslaught of foreigners.[33] To accomplish this objective, King Kamehameha III established "The Royal School" in Honolulu to educate and

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23 *See* KANAHELE, *supra* note 6, at 127.

24 *See id.*

25 *See* JULIE STEWART WILLIAMS, KE KAMĀLI'i Waihine, Bernice Pauahi Bishop 2 (Haw. Language ed. 1995); KANAHELE, *supra* note 6, at 2, 3. "*Ali'i*" means the chief or chiefess. *See id.* at 2.

26 The unveiling of the statue of Kamehameha I in front of Ali'iolani Hale took place on February 14, 1883. *See The 1800's*, HE AHA KA MEAHOU MA, Winter 1988, at 2 [hereinafter *The 1800's*].

27 *See* KANAHELE, *supra* note 6, at x.

28 *See id.* at 11.

29 *See id.* at xi.

30 *See id.* at 11.

31 Originally two schools were established—one for boys and one for girls, and they were recently integrated into one school. *See* WILLIAMS, *supra* note 7, at 80.

32 Kauikeaouli, Kamehameha III (1814-1854). *See id.* at 19.

33 *See id.* at 18.

train the royal *ali'i* children.[34] Here, sixteen royal *ali'i* children who mainly spoke the Hawaiian language were taught to read and write English, as well as arithmetic, algebra, geometry, geography, astronomy, chemistry, literature, spelling, and history.[35] Among these 16 royal *ali'i* children, four later became kings of Hawai'i;[36] two later became queens of Hawai'i;[37] and one, Princess Bishop, later bequeathed almost her entire estate to form one of the largest charitable trusts in the world.[38]

Princess Bishop began her first day at the Royal School, also called the Chief's Children's School, on June 13, 1839.[39] Because the Royal School was a boarding school, the *ali'i* children received academic, spiritual, and discipline training both day and night.[40] During her ten years of intense education she received while boarding at the Royal School, Princess Bishop proved to be a star student, excelling in all aspects of her education.[41]

Her quest for knowledge was derived from the Hawaiian philosophy that knowledge was essentially sacred.[42] Ancient Hawaiians believed that knowledge was sacred because it made life possible; and life, according to the ancient Hawaiians, was the manifestation of *mana*, the intrinsic power of life itself that came from the gods.[43] Accordingly, "if knowledge is sacred, then the process of learning is also sacred."[44] Therefore, Princess Bishop was motivated to learn because she was the product of centuries of Hawaiian tradition and values that elevated knowledge, its acquisition and use, to the zenith of life-giving importance.[45]

Perhaps just as important to her academic education was Princess Bishop's exposure to other great empires of her day, such as the United States, England, and other European nations. In 1875, accompanied by her husband Charles Bishop, Princess Bishop sailed from Honolulu to San Francisco, then on to

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34 *See id.* at 26.

35 *See id.* at 30.

36 The four kings were Alexander Liholiho (Kamehameha IV); Lot Kapuāiwa (Kamehameha V); William Lunalilo and David Kalākaua. *See id.* at 27.

37 The two queens were Emma, as the wife of Kamehameha IV, and Lili'u, who reigned as Queen Lili'uokalani. *See id.*

38 *See id.* at 80; *see also* Cox, *supra* note 10.

39 *See* KANAHELE, *supra* note 6, at 22, 23.

40 *See id.* at 28, 29.

41 *See id.* at 21, 46, 169. She mastered a foreign language, English, as well as the theorems of Euclid and Newton, the great civilizations of Egypt, Greece, Rome and China, the geography of the earth, and the mysteries of astronomy. *See id.* at 21, 46.

42 *See id.* at 36.

43 *Mana* is the Hawaiian word for the power of life that comes from the gods. *See id.* "*Mana*" means "[s]upernatural or divine power, mana, miraculous power...." MARY KAWENA PUKUI & SAMUEL H. ELBERT, NEW POCKET HAWAIIAN DICTIONARY 102 (1972).

44 KANAHELE, *supra* note 6, at 36.

45 *See id.* at 37.

New York on the first leg of a European whirlwind odyssey.[46] Additionally, they attended numerous dinners, teas and parties with barons, dukes, princes, and princesses and other members of royalty.[47] The adventure, beauty, and enlightenment of these worldly experiences no doubt convinced her of the value of an education, and, on the other hand, the relative lack of education among the majority of her Hawaiian people. Thus, her desire to establish the Kamehameha School was derived from her deep commitment to the education of her people.

1. The debilitating plight of the ordinary Hawaiian

Relevant and important to the thesis of this Article is the fact that ordinary Hawaiians in the nineteenth century were not a formidable empire, but rather, a people in need of educational leadership to move them into the twentieth century. In 1883, one year before Princess Bishop's death, the Hawaiian people were in an appalling condition, being physically, morally and economically depressed.[48]

In the year Princess Bishop was born, the indigenous population of Hawai'i had already declined from 300,000, estimated at the time of Captain Cook's arrival in 1778, to 124,449.[49] By the time Princess Bishop was forty-one years old in 1872, the total population of the Hawaiian Kingdom had dwindled to 56,897, of which 51,531 were native Hawaiians.[50] In 1878, only 44,088 native Hawaiians remained in the Kingdom of Hawai'i.[51] Six years later, in 1884, the year Princess Bishop died, the population of the Hawaiian Kingdom had increased dramatically to 80,578 as a result of immigration caused by the sugar industry; however, the native Hawaiian population had further declined to 40,014.[52]

Indeed native Hawaiians were fast becoming a minority in their own kingdom.[53] Princess Bishop perhaps did not foresee the day in her lifetime

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[46] Their itinerary covered more than thirty cities, including London, Geneva, Munich, Venice and Paris. They visited dozens of museums and galleries from Versailles to the Uffizi in Florence, cathedrals and castles from the Dom in Cologne to Windsor, and monuments and ruins from the Arch of Triumph to the Coliseum in Rome. *See id.* at 127.

[47] *See id.*

[48] *See id.* at 170.

[49] *See* Master's Report, *supra* note 8.

[50] *See id.*

[51] *See* OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK 1996 (1996), *available at* <http://oha.org/databook/go-chap1.htm> (derived from ROBERT C. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAII: 1778-1965 (1968); ROBERT C. SCHMITT, HISTORICAL STATISTICS OF HAWAII (1977)).

[52] *See id.*; *see also* KANAHELE, *supra* note 6, at 170.

[53] *See* LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN x (1998).

when *haoles* (foreigners) would outnumber the native Hawaiians. Exacerbating the substantial loss in numbers was the fact that too many of the remaining Hawaiians were dying off rapidly, largely because they had never had the opportunity to develop an immunity to the new diseases carried by the immigrating foreigners.[54]

In addition to facing the imminent danger of these new life-threatening diseases, many native Hawaiians were also psychologically traumatized by their own educational and economic inadequacies to face the new powerful class of American sugar planters.[55] Likewise, the new Chinese and Japanese immigrant laborers, after serving their terms in the sugar plantations, were driven to become educated in order to succeed economically, and to elevate themselves in the community.[56] Thus, many native Hawaiians were psychologically paralyzed, having lost their sense of dignity, self-esteem, and identity.[57]

2. *The exacerbation of the plight of the native Hawaiians under the Great Māhele*

Further historical examination reveals a great transformation of Hawaiian society. It was not enough that the decimated native Hawaiians had to fight off the myriad foreign diseases to which they had never developed immunity —they also faced the loss of their land.[58] Native Hawaiians lost their economic and social bases by being evicted from their own feudal lands in the Great Māhele, or the adoption of a Western-style system of ownership and property rights.[59] Historian Chinen called the Great Māhele of 1848 the most

[54] Diseases such as leprosy, tuberculosis, diabetes, gonorrhea, syphilis, mumps, measles, whooping cough and smallpox threatened the lives of native Hawaiians, and public health in general. *See* KANAHELE, *supra* note 6, at 170; WARWICK ARMSTRONG, ATLAS OF HAWAI'I 107 (2d ed. 1983).

[55] *See* KANAHELE, *supra* note 6, at 170-71.

[56] *See id.* at 17. The Chinese laborers arrived in 1852, while the Japanese laborers arrived in 1868. *See* ARMSTRONG, *supra* note 54, at 107. Subsequently, Portuguese, Puerto Rican, Korean, and Filipino laborers arrived in Hawai'i. *See id.*

[57] Native Hawaiians were stereotyped as lazy, having no self-initiative, thus instilling in them an overwhelming sense of inferiority. *See* KANAHELE, *supra* note 6, at 170-71.

The psychological, social, and economic devastation of the native Hawaiians was manifested by a litany of broken homes, absent fathers, crime, delinquency, and truancy throughout Hawai'i. The breakdown of the traditional family unit had its repercussions in the decline of education levels among the Hawaiians. *See id.*

[58] *See id.* at 171.

[59] Of the Great Māhele, historian Chinen explains:

> The *Mahele* itself did not convey any title to land. The high chiefs and the lesser *konohikis* who participated in *The Mahele* and who were named in the Mahele Book were required to present their claims before the Land Commission and to receive awards for

important event in the reformation of the land system in Hawai'i because it led to the end of the feudal system of lands that existed in the Kingdom of Hawai'i to that point in time.[60]

Prior to the Great Māhele, common Hawaiians had always lived and worked on the land of their particular chief, paying a commutation to him for the right to do so.[61] Accordingly, the chiefs owned great areas of land, generally called *ahupua'as*,[62] and families of common Hawaiians lived and worked areas of this land for their subsistence and for tribute to their chiefs.[63]

When the Great Māhele came to pass, new mandates were promulgated. The revolutionary idea of one person owning a small piece of land outright in fee simple arrived and was made law almost overnight.[64] Under the Great Māhele, the lands of the Kingdom of Hawai'i were basically divided into four parts: (1) The king retained all of his private lands as his own individual property; (2) one-third of the remaining lands was to go to the Hawaiian Government; (3) one-third of the remaining lands for the chiefs and *konohikis*;[65] and (4) the final one-third of the remaining lands to the commoners or tenants who had actually worked and cultivated small plots of land.[66] The result was that the Great Māhele evicted many of the common Hawaiians from their feudal lands, created innumerable legal procedures to secure fee simple land, and made it all the more difficult for native Hawaiians to become land owners.[67]

> the lands quitclaimed to them by Kamehameha III. Until an award for these lands was issued by the Land Commission, title to such lands remained with the government.

JON J. CHINEN, THE GREAT MĀHELE, HAWAII'S LAND DIVISION OF 1848 20-21 (1996). However, many native tenants did not receive title to their land either because they failed to file claims with the Land Commission, or they failed to support their claims. *See id.* at 31. Moreover, the division of land under the Great Māhele was disproportionately against the native tenants' favor. Over 1,500,000 acres of land were set aside for the chiefs, approximately 1,000,000 acres were reserved by King Kamehameha III as "Crown Lands," and 1,500,000 acres were given by the king to the "government and people." *See id.* By contrast, native tenants received less than 30,000 acres of land. *See id.*

[60] *See id.*

[61] *See* RICHARD A. WISNIEWSKI, THE RISE AND FALL OF THE HAWAIIAN KINGDOM 47 (1979).

[62] *Ahupua'as* were generally large land divisions that extended from the top of the mountains, in a pie shape, down to the bottom of the shoreline. *See* PUKUI & ELBERT, *supra* note 43, at 6.

[63] *See* CHINEN, *supra* note 59, at 6.

[64] Chinen observes: "The first *mahele*, or division of lands was signed on January 27, 1848, by Kamehameha III and Princess Victoria Kamamalu by her guardians Mataio Kekuanaoa and Ioane Ii; the last *mahele* was signed by the King and E. Enoka on March 7, 1848." *Id.* at 16.

[65] *Konohikis* worked for the chiefs, and were the headmen of an *ahupua'a*, parceling out the land and fishing rights within the *ahupua'as*. *See* PUKUI & ELBERT, *supra* note 43, at 65.

[66] *See* CHINEN, *supra* note 59, at 16.

[67] *See id.* at 20-22, 30-31.

During this decade in Hawaiian history, the 1840s, most Hawaiians lacked "the knowledge and experience to deal with the growing complexity of governmental affairs."[68] Since even Princess Bishop had to be taught to read and write English at the Royal School, it is not surprising to learn that the general common class of Hawaiians may have spoken English as a second language were unable to read or write English.[69] As a result, some native Hawaiian tenants did not file claims with the Land Commission and others, after filing claims, failed to support their claims before the Land Commission.[70]

These facts lend insight into how the Princess Bishop's intent should be read today. Furthermore, this critical historical analysis explicitly reveals her objectives in establishing the Kamehameha Schools, and highlights the need for trustee accountability in the Estate. Trustees of an estate act, in essence, as agents of the deceased settlor.[71] The KSBE trustees essentially act for, and on behalf of, Princess Bishop. Their actions must therefore stay true to Princess Bishop's charitable intent.

An agency relationship established with a deceased principal, however, appears to create little accountability. Pragmatically speaking, a trustee is accountable not so much to the settlor as to the settlor's intended beneficiaries. Under agency principles, the trustee is an agent, accountable to the beneficiaries in a third-party beneficiary relationship.[72] Thus, the benefits of a charitable trust inure to the beneficiaries of that trust.[73]

To ensure that her trustees would confer the charitable benefits she designated in her will to the beneficiaries of her trust, Princess Bishop left

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[68] WISNIEWSKI, *supra* note 61, at 45. Even the native chiefs were generally excluded from important positions in the Kingdom of Hawai'i that were being created to become equal with western civilization. *See id.*

[69] For members of an oral culture, there is a great divide between spoken and written language. *See* KANAHELE, *supra* note 6, at 38. Lack of proficiency in the English language made it almost impossible for Native Hawaiians to protect their legal property rights, particularly in view of the fact that after 1844, because of the foreign influence in Hawai'i's government, all newly enacted laws were written in English and then translated into Hawaiian. *See* WISNIEWSKI, *supra* note 61, at 45.

[70] *See* CHINEN, *supra* note 59, at 31.

[71] *See* SHAFFER & MOONEY, *supra* note 12, at 126.

[72] *See* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 17 (2d rev. ed. 1984).

[73] *See id.* Charitable purposes include the relief of poverty, the advancement of education or religion, the promotion of health, municipal or governmental purposes and other purposes, the accomplishment of which provide a benefit to the community. *See* RESTATEMENT (SECOND) OF TRUSTS § 368 (1959). In general, a charitable trust is exempt from the Rule Against Perpetuities, and may endure forever. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 672 (5th ed. 1995). KSBE is clearly a charitable trust—its purpose is to educate children of Hawaiian blood. *See Will, supra* note 10, art. 13.

specific instructions in her will regarding the disposition and management of her estate. We now take a closer look at her intent in establishing KSBE and the mechanisms by which she intended her will to be carried out.

B. Testator's Intent–The Princess's Will

During her life, Princess Bishop saw how the Great Māhele dramatically caused her native people to become alienated and disenfranchised from their *ahupua'as*.[74] She was acutely aware of the overwhelming physical and social decline of her people.[75] After anguished deliberation she reached the conclusion that, of the gifts she could give them, education was the only gift that could reverse the hopelessness of her people.[76] She believed that the power of education could "awaken the mind and spirit of the people to the world of possibilities and to their own potential."[77] She hoped education could strengthen their self-image, restore their dignity, and enable them to be gainfully employed.[78] She concluded that education would allow them to raise and support their families, increase their living standards, educate their own children, and that ultimately this would entitle all her people to stake out their rightful place in the Kingdom of Hawai'i.[79]

Accordingly, on the last day of October 1883, one year before her death, she affixed her seal to her properly witnessed and executed will.[80] It contained seventeen articles, the thirteenth of which created the Kamehameha Schools, the educational institution that now positively affects the future of thousands of native Hawaiians on a daily basis.[81] The will stated her wish

> 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 funds 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

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[74] *See* KANAHELE, *supra* note 6, at 170-72. "There was an economic antecedent to most if not all of these problems. Hawaiians had long lost control of their economy, partly through the loss or sale of their lands and through being driven out of certain traditional occupational fields like farming . . . ." *Id.* at 171.

[75] *See id.* at 171.

[76] *See id.* at 170-72.

[77] *Id.* at 172.

[78] *See id.*

[79] *See id.*

[80] *See id.* at 174.

[81] *See Will, supra* note 10, art. 13.

> 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 . . .[82]

In paragraph fourteen of her will she named five trustees to oversee her trust. They were (1) Charles R. Bishop, her husband, who was a respected banker; (2) Samuel M. Damon, executor of Princess Bishop's estate; (3) Charles M. Hyde, a minister and renown educator; (4) Charles M. Cooke, a prominent businessman, and (5) William O. Smith, a reputable lawyer.[83] She further instructed "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, [and] the selection to be made from persons of the Protestant religion."[84]

In October 1884, the month of her death, the Princess executed two codicils to her will.[85] The first codicil was important because it specified additional actions that the trustees could undertake to increase the assets of the trust:

> I give unto the trustees named in my will the most ample power to sell and dispose of any lands or other portions of my estate, and to exchange lands and otherwise dispose of the same; and to purchase land, and to take leases of land whenever they think it expedient, and generally to make such investments as they consider best . . . .[86]

Four years later in 1887, the first of the Kamehameha Schools, the school for boys, was opened with thirty-seven students and four teachers.[87] In 1995-96, the campus enrollment at the Kapalama campus of Kamehameha Schools, from kindergarten through grade twelve, reached a peak of just over 3,000 students.[88] Additionally, the Kamehameha Schools provide preschool education throughout the state of Hawai'i to approximately 780 four-year-old Hawaiian children.[89] Moreover, KSBE now grants college scholarships to dollars over 1,800 students of Hawaiian ancestry, totaling over twelve million annually.[90]

Over the past 100 years, however, the nature of the business operations of KSBE has also evolved. KSBE's assets are no longer limited to the collection

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82 *Id.* art. 14.

83 *See id.*; *see also* KANAHELE, *supra* note 6, at 173.

84 *Will*, *supra* note 10, art. 14.

85 *See The 1800's*, *supra* note 26, at 2. Codicil 1 may be found at <http://www.ksbe.edu/estate/will/codicil1.html> [hereinafter *Codicil 1*]. Codicil 2 may be found at <http://www.ksbe.edu/estate/will/codicil2.html>. Both Codicils are reprinted in Appendix B to this Symposium issue.

86 *Codicil 1*, *supra* note 85, art. 14.

87 *See The 1800's*, *supra* note 26, at 2.

88 *See* Master's Report, *supra* note 8.

89 *See id.*

90 *See id.*

of rents from tenants on the Estate's leased properties. Rather, the infusion of substantial amounts of cash from the liquidation of residential land holdings under the threat of public condemnation has transformed KSBE into a complex business organization with wide-ranging and sophisticated domestic and international financial investments.[91] In view of the historical economic changes causing a dynamic rise of income, the challenges facing today's trustees in fulfilling the intent of Princess Bishop are extraordinarily daunting.[92]

Charles Bishop, the Princess' husband, predicted these challenges in letters he wrote to two principals of the Kamehameha Schools.[93] His apprehension regarding trustee responsibility was evident. For example, Charles Bishop wrote in 1889 to Uldrick Thompson, then principal of the Kamehameha Schools: "I have more fear of financial embarrassment [by acts of the trustees] or of undesirable reduction of the property of the estate than of being troubled with a surplus [in the trust fund]."[94] And in 1902, Mr. Bishop wrote to another principal, Charles Bartlett Dyke: "An impression has prevailed in the community that the income of the Estate was so large that there was no necessity for economy, or caution in expenditures or privileges, and that carefulness on the part of the Trustees might properly be called meanness!"[95]

Perhaps, Charles Bishop's letter of May 3, 1904, to Joseph O. Carter, a KSBE trustee from 1886 to 1909, summarized best Bishop's concern for the need of constant economic vigilance by future trustees: "The time will never come when the Trustees can safely or properly relax their grip on the finances or expenditures of the Trusts in their keeping."[96] Charles Bishop contemplated the trustee's duties with much anxiety.

Indeed, Princess Bishop's will did create a duty of accountability for her trustees by directing in her will that:

> [M]y said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some Newspaper published in said Honolulu. . . .[97]

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[91] *See id.*

[92] *See id.*

[93] *See* HAROLD W. KENT, CHARLES REED BISHOP, LETTER FILE 33 (1972)[hereinafter KENT, LETTER FILE]; *see also* HAROLD W. KENT, CHARLES REED BISHOP, MAN OF HAWAI'I 179 (1965)[hereinafter KENT, MAN OF HAWAI'I].

[94] KENT, LETTER FILE, *supra* note 93, at 33.

[95] KENT, MAN OF HAWAI'I, *supra* note 93, at 159.

[96] KENT, LETTER FILE, *supra* note 93, at 47.

[97] See *Will*, *supra* note 10, art. 13.

Whether the five recently removed trustees did indeed breach their fiduciary duty under the will and trust of Princess Bishop is up to the appropriate courts in the State of Hawai'i to determine. The Master's Report found profound breaches of the trust, the law, and numerous court orders.[98] When the Master sets forth a *prima facie* case of breach, the trustees have the burden of proving that there is no breach.[99]

The settlor's intent is the controlling factor and guiding principle in nearly all facets of trust and estate administration.[100] Trust matters are litigated in a court of chancery, where equity and court discretion determine outcome.[101] Princess Bishop selected a particular vehicle for promoting the education of Hawaiians. Despite their discretionary authority, in general, chancery courts must approve the educational plan of the settlor:

> Equity is lenient in approving as charitable trusts those encouraging the knowledge which the settlor believes would be for the best interests of mankind. It does not act as a censor and pass as charitable only those trusts which accord with the beliefs and social view of the chancellor. By and large it permits a man [or a woman] to use a charitable trust to secure converts for his notions, even though the majority of mankind would regard his views as freakish.[102]

As a general rule, the only time the settlor's wishes are disregarded is when clearly no social advantage is furthered, thus nullifying the charitable nature of the trust.[103] So long as some substantial benefit will result,[104] and persons are not deprived of their constitutional rights to the equal protection of the laws,[105] a settlor may limit the class of trust beneficiaries as he or she desires.

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98 *See* Attorney General's Response to Master's Consolidated Report on the 109th, 110th and 111th Annual Accounts, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Sept. 9, 1998), *available at* <http://starbulletin.com/98/09/10/news/bronster.html> [hereinafter Attorney General's Response]; *see also* Master's Report, *supra* note 8.

99 *See* Attorney General's Response, *supra* note 98.

100 *See, e.g.*, Heisserer v. Friedrich (*In re* Heisserer), 797 S.W.2d 864, 871 (Mo. Ct. App. 1990); Annan v. Wilmington Trust Co., 559 A.2d 1289, 1292 (Del. 1989); Estate of Taylor, 522 A.2d 641, 642 (Pa. Super. Ct. 1987).

101 *See* BOGERT & BOGERT, *supra* note 72, § 870.

102 BOGERT, *supra* note 11, at 231.

103 An example is a trust created by George Bernard Shaw to propagandize in favor of an expanded alphabet. The charitable nature of the trust was held invalid in *In Re Shaw* 1 All E.R. 745 (Ch. 1957). The court reached a compromise by permitting the use of a portion of the funds for experimentation in the subject. *See id.* Another example would be where funds had been left to publish the diary of the settlor for non-educational/charitable purposes. *See* State *ex rel.* Emmert v. Union Trust Co., 86 N.E.2d 450 (Ind. 1949).

104 *See* BOGERT, *supra* note 11, §60, at 230 n.35, where he lists three cases that demonstrate unlikely circumstances that qualified for this "substantial benefit."

105 *See id.* at 231. Bogert again lists examples at n.36. The best illustration is *In re Girard College Trusteeship*, 138 A.2d 844 (Pa. 1958). A gift was made in trust to Philadelphia for poor

Princess Bishop desired to establish a system of education for Hawaiian children.[106] The trustees have not honored her will. An example of their breach of trust can be found in the admissions practices of the Kamehameha Schools. Selection of students is influenced by political factors, when the appropriate criteria should be need and native Hawaiian heritage.[107] In this regard, the trustees have effectively denied Princess Bishop's wishes. They have not acted as her agent at all. The Kamehameha Schools have become an institution of aristocracy rather than the wonderful charity it ought to be—one that provides the impetus for positive advancement of native Hawaiian children, and Hawaiian children in general. Identifying and preserving the

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white orphan boys. The court held that public trustees should be enjoined from discriminatory practices. These trustees were enjoined from denying admission to Negro male orphans solely on the ground they were not white. When private trustees took over, the discriminatory trust was upheld. *See id.*

[106] A brief discussion of the constitutionality of the terms of Princess Bishop's will is needed. Limiting admission into the Kamehameha Schools to children of Hawaiian descent is constitutional. Although strong national policy against racial discrimination clearly exists, preferences for native peoples are treated differently under the laws of the United States, considered as "political" rather than "racial" in nature. *See generally* Van Dyke, *supra* note 18, at 414-16. The leading case in this area is *Morton v. Mancari*, 417 U.S. 535 (1974), which upheld a hiring preference for Native Americans for positions in the Bureau of Indian Affairs. *See id.* at 415 n.11. Under this analysis, charitable trusts limited to beneficiaries of Hawaiian descent do not violate the Equal Protection Clause. Indeed, the preference for native Hawaiian children is logical because KSBE lands were originally held in trust for the Hawaiian people by the *ali'i*. *See* Van Dyke, *supra* note 18, at 423.

The issue of racial preferences for native Hawaiians surfaced recently in *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998). There, the Court of Appeals for the Ninth Circuit determined that voting restrictions on non-Hawaiians for a special election of trustees of the Office of Hawaiian Affairs ("OHA") did not violate equal protection requirements even under strict constitutional scrutiny. *See id.* at 1082. The court noted that since only native Hawaiians can be OHA trust beneficiaries, "the Equal Protection Clause does not preclude Hawaii from restricting the voting for trustees to Hawaiians and excluding all others." *Id.* at 1082. In rendering its decision, the court consulted Hawaiian history to frame the proper context of the issues, as we do in examining Princess Bishop's intent. See id. at 1076-78.

The United States Supreme Court reversed on February 23, 2000. *See* Rice v. Cayetano, 120 S. Ct. 1044 (2000). The Court also examined Hawaiian history at length, but it reached the conclusion opposite of the Ninth Circuit's decision—the Court determined that the race-based voting restriction violated the Fifteenth Amendment. *See id.* at 1047-48. Absent from the Court's holding was the determination that racial preferences for native Hawaiians violate the Equal Protection Clause of the Fourteenth Amendment.

For additional analysis of the competing issues in this case, see Stuart Miner Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996); and Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998).

[107] "By February 1998, the state had notified the courts that it was broadening its investigation into include possible 'manipulation of the student admission process.'" Cox, *supra* note 10.

role of the intended beneficiaries of this charitable trust can be of great significance in assuring that events like those involving KSBE are not repeated elsewhere.

II. THE ROLE OF THE BENEFICIARIES IN A CHARITABLE TRUST

Do trust beneficiaries have any opportunity to hold trustees accountable in the discharge of their duties as administrators of trust assets? In this case, the direct beneficiaries of KSBE, the students of Kamehameha Schools, are also members of the public. They have been selected to be educated at the Kamehameha Schools. Do the rules of charitable trusts allow these beneficiaries to maintain trustee accountability, and if so, how might this be accomplished?

Trustees of a charitable trust are fiduciaries performing trust duties.[108] Trustees have a duty to communicate with trust beneficiaries.[109] Due to the vast income and estate tax savings that can be achieved through charitable trusts, the government has two basic interests in the administration of charitable foundations.[110] The first interest is in preventing the abuse of tax privileges granted by the state, with the federal government primarily responsible for protecting this interest.[111] The Internal Revenue Code imposes substantial tax penalties on private charitable foundations[112] that do not annually distribute income in an amount equal to five percent of the value of the endowment.[113]

The second interest the government has in the administration of charitable trusts is as a representative of the public, which is the ultimate trust

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[108] *See* UNIF. PROBATE CODE § 7-302 (amended 1983), 8 U.L.A. 507 (1998)(stating that the "trustee shall observe the standards . . . that would be observed by a prudent man dealing with the property of another . . . .").

[109] *See id.* § 7-303(b) (requiring trustees to answer beneficiaries' reasonable requests for information). "Sometimes the duty may go beyond telling what has happened." ANDERSEN, *supra* note 12, at 365. Andersen cites the related obligation for a fiduciary to keep itself informed about the status of the beneficiaries, as illustrated in *National Academy of Sciences v. Cambridge Trust Co.*, 346 N.E.2d 879 (Mass. 1976), where a trustee was surcharged when it continued to make payments to the testator's widow after she had remarried and her rights to income had ended. *See* ANDERSEN, *supra* note 12, at 365 n.57.

[110] *See* DUKEMINIER & JOHANSON, *supra* note 73, at 675.

[111] *See id.*

[112] *See* I.R.C. § 4942 (1986). These penalties are not imposed on publicly supported charities.

[113] *See id.*; *see also* DUKEMINIER & JOHANSON, *supra* note 73, at 675. Some argue that charitable trust law has been greatly complicated by the enactment of the Tax Reform Act of 1969, and subsequent federal legislation. *See generally* BOGERT, *supra* note 11, at 472-91. A trust as vast as KSBE demands expertise and attention in the area of taxation.

beneficiary, in assuring proper distribution of trust funds.[114] The state governments, through their respective attorneys general, have authority to supervise charitable foundations.[115] The common law confers power on the state attorney general to enforce charitable trusts, which is largely a formal supervision.[116] Unless an audit reveals serious irregularities, however, attorneys general rarely investigate the internal workings of charitable foundations.[117]

As the ultimate beneficiaries of charitable trusts, members of the public, nonetheless, are an important aspect of the fiduciary triangle. In particular, members of the public who are actual beneficiaries, here the students of Kamehameha Schools, have significant third-party beneficiary interests. "The only person other than the attorney general who can enforce a charitable trust is a person with a special interest as a beneficiary."[118] To have such standing, "[t]he person must show that he or she is entitled to receive a benefit under the trust that is not available to the public at large or to an average beneficiary."[119] For example, might a child of Hawaiian descent seeking education or a student at the Kamehameha School be permitted to sue to enforce the terms of the KSBE trust? In recent years, courts have broadened the definition of what constitutes a special interest.

In *Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*,[120] a parishioner was able to sue to enforce a trust for the benefit of his church.[121] In *Gordon v. City of Baltimore*,[122] a taxpayer was allowed to sue to prevent the transfer of a Baltimore library held in trust from the Peabody Institute in Baltimore to the Pratt Library.[123] In *Parsons v. Walker*,[124] a citizen was allowed to sue to enjoin a deviation from the terms of administration, where a gift of land for a park was made to the University of Illinois.[125]

The question of whether students have special standing to sue trustees of a school, however, is not firmly settled. A student petitioner was denied

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[114] *See* DUKEMINIER & JOHANSON, *supra* note 73, at 675.

[115] *See* SHAFFER & MOONEY, *supra* note 12, at 102.

[116] *See id.*

[117] *See* Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 478-79 (1960). *See also* Symposium, *Foundations, Charities and the Law: The Interaction of External Controls and Internal Policies*, 13 UCLA L. REV. 933 (1966) [hereinafter *Foundation, Charities and the Law*].

[118] DUKEMINIER & JOHANSON, *supra* note 73, at 675-76.

[119] *Id.* at 676.

[120] 544 S.W.2d 488 (Tex. Civ. App. 1976).

[121] *See id.*

[122] 267 A.2d 98 (Md. 1970).

[123] *See id.*

[124] 328 N.E.2d 920 (Ill. App. Ct. 1975).

[125] *See id.*

standing to sue in *Miller v. Aderhold*,[126] a case in Georgia where a student wished to sue the college's trustees.[127] The standing of students to sue can be a problem.[128] However, "[r]ecent charitable trusts cases have seemingly recognized the beneficiary status of students and by implication their standing to sue."[129] Several cases involving students as direct beneficiaries of charitable trusts indicate that courts may indeed be inclined to uphold the standing of plaintiff students receiving trust benefits.[130] Of particular interest is *Montclair National Bank & Trust Co. v. Seton Hall College of Medicine & Dentistry*,[131] where a court recognized, in dicta, that students were the true beneficiaries of a gift to a medical school.[132]

A strong argument can be made that students of Kamehameha Schools are third-party beneficiaries, bringing enforcement and accountability to the KSBE trustees. Taking together the scheme of direct beneficiaries, third-party beneficiaries "and the tort concept of the student as a trust beneficiary, the conclusion seems inescapable that responsible student groups should be entitled to seek redress of trustee misconduct in equity."[133] This principle appears ripe for application to the Kamehameha Schools and KSBE.

> Moreover, the theoretical basis for the exclusive standing rule—that the attorney general is in fact more capable of watching over trustees than interested alumni, donors, or students—is repudiated by a manifest inability on the part of the attorneys general's offices to secure enough manpower, money, and statutory authority to support a vigilant supervisory program.[134]

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[126] 184 S.E.2d 172 (Ga. 1971).

[127] *See id.*

[128] *See* Charles R. Berry & Gerald J. Buchwald, *Enforcement of College Trustees' Fiduciary Duties: Students and the Problems of Standing*, 9 U.S.F. L. REV. 1 (1974)(examining the development of the law regarding trustees and its historical underpinnings, assessing its present effectiveness, and suggesting some directions for future development, especially student involvement).

[129] *Id.* at 37.

[130] *See id.* (citing Eckles v. Lounsberry, 111 N.W.2d 638 (Iowa 1961); Coffee v. Rice Univ., 387 S.W.2d 132 (Tex. Civ. App. 1965)). Compare, however, *Kolin v. Leitch*, 99 N.E. 2d 685, 688 (Ill. App. Ct. 1951), and *Miller v. Alderhold*, 184 S.E.2d 172, 177 (Ga. 1971), where students were denied standing because the courts feared "strike suits" against trustees, with the added rationale that the attorney general was the established representative for the whole class of charitable beneficiaries.

[131] 217 A.2d 897 (N.J. Super. Ct. Ch. Div. 1966) *rev'd on other grounds*, 233 A.2d 195 (N.J. Super. Ct. App. Div. 1967).

[132] *See id.* The students of a school funded by a charitable trust, as authentic beneficiaries, ought to be the focus.

[133] *Id.* at 39.

[134] *Id.* at 39-40.

The beneficiaries of a charitable trust are the keepers of the public trust, imposing on trustees the duty of accountability, and the obligation to enforce the duties they owe to the beneficiaries. "Trustees must be attuned to the changing personal needs of the beneficiaries and the changing markets which affect the management of the trust assets. Trust administration has a pro-active feel."[135] If trustees are held accountable by direct beneficiaries, the administration of that trust certainly becomes more authentic.

III. PROPOSAL FOR TRUSTEE SUCCESSION WITH CHARITABLE (OR DYNASTY) TRUSTS

There is a tendency, as seen in the management of KSBE, for trustees of charitable trusts to not only lose sight of the interests of the beneficiaries, but also to become removed and insulated from accountability to beneficiaries. The larger the estate, the greater the level of insulation. This is particularly true of dynasty trusts because of their perceived degree of imperviousness or invulnerability. Within this framework, we strive to provide a solution to these concerns.

Our proposal has foundational, yet innovative characteristics. First, we see it critical that every effort be made to reserve a role for the direct beneficiaries of a trust, here the students of the Kamehameha Schools. Second, the unidentified beneficiaries must be represented as well, and we suggest two avenues for that representation—the guardian *ad litem* device and the virtual representation doctrine. Finally, we submit that these measures will further the third purpose of our proposal, which is to preserve the charitable intent underlying a charitable trust. When these ideals are continually focused upon, the question of how to maintain trustee accountability becomes crystal clear.

So we ask these questions: *may* trust beneficiaries participate in the selection or removal of successor trustees? Might it be prudent to preserve the trustees' duty to communicate by allowing beneficiaries to participate in the selection of successor trustees? Or, possibly more appropriate: *should* trust beneficiaries participate in the selection or removal of successor trustees? Might it be prudent to preserve the trustees' duty of loyalty by *requiring* beneficiary participation in trustee succession?

A. Preserving the Role of Trust Beneficiaries

Should trust beneficiaries participate in the selection or removal of trustees? We submit that they should, and indeed, the key to holding trustees accountable, and ensuring that they make making wise choices in selecting

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[135] ANDERSEN, *supra* note 12, at 353.

successor trustees, is to preserve the role of the trust beneficiaries. As Professor Andersen observes:

> Much of the law surrounding fiduciary-beneficiary relationships can be captured in one word: respect. Fiduciaries who think of their beneficiaries first will tend to avoid self-dealing and other conflicts of interest. . . . Building relationships with those you serve not only avoids liability, it greatly lowers the chance that someone will complain if things do go wrong.[136]

Having beneficiaries select the trustees makes sense because they are the ones who ultimately stand to benefit if the trust is managed well, or to lose if it is not.[137] Beneficiaries of the Bishop Estate are indeed the students of the Kamehameha Schools, persons of Hawaiian ancestry benefiting from an education at the Kamehameha Schools. Two avenues for their representation include appointment of a guardian *ad litem* or a virtual representative, devices which we discuss later. Furthermore, the state legislature is empowered to intervene and introduce a new method of selecting trustees.[138] "It would be fairer both to the trustees and to the justices if a different process [than court appointment] were used, and ultimately the Hawaiian beneficiaries should play a central role in this process."[139]

Preserving the beneficiaries' ability to participate in successor selection is of great significance. The possibility of such participation in the face of unidentified beneficiaries, however, remains a vital concern.

B. Representing Unidentified Beneficiaries

Two possibilities of ensuring representation of the interests of unidentified beneficiaries are apparent to us. The first is the use and appointment of a guardian *ad litem*. The second is the use of the "virtual representative" doctrine. A closer examination of these two concepts is helpful.

1. Guardian ad litem

The general rule is that the beneficiaries of a private trust are the only parties that have standing to enforce the duties created by a trust.[140] They enforce the trustees' duties by enjoining any breach of trust by a trustee,

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[136] *Id.* at 366.

[137] *See* Van Dyke, *supra* note 18, at 424. Professor Van Dyke states, "[I]n a democracy, this approach seems like the only truly defensible solution." *Id.* at 425. We tend to agree.

[138] *See id.* at 424.

[139] *Id.* at 425 (discussing the suspicion and skepticism surrounding the appointment of Gerard Jervis in 1994 after he had previously served on the Judicial Selection Commission, having helped to nominate some of the judges who selected him).

[140] *See* PAUL G. HASKELL, PREFACE TO THE LAW OF TRUSTS 82 (1975).

recovering loss from any resulting breach, or replacing the trustee.[141] With regard to a charitable trust, the general rule is that the only party having standing to enforce the charitable trust is the state attorney general, or in some cases, the local district attorney.[142] "This is consistent with the theory that the community in general benefits from the charitable trust; it follows that the legal officer who represents the people's interest is the appropriate party to enforce the charitable trust."[143] There are, however, exceptions to this general rule.

Clearly, a trustee can always bring suit against a breaching trustee to correct a breach of trust,[144] and in some cases, a trustee has a duty to do so.[145] When the benefit of a charitable trust is distributed directly to specific beneficiaries, the trustees are accountable to more than each other.[146] In such cases, the beneficiary has standing to enforce the trust.[147]

These principles are applicable to KSBE. The benefits of the trust Princess Bishop created flow directly to students at the Kamehameha Schools, funding their education, and thus, making the trustees responsible to the students. The practicalities of student representation then becomes the issue. In such a case, the attorney general alone is inadequate to protect the interests of the trust. The attorney general represents the interests of the general public, but KSBE contemplates a more specific segment of the public as the direct beneficiaries.

The use and appointment of a guardian *ad litem* is significant in giving effect to Princess Bishop's intent. In one case, *Hatch v. Riggs National Bank*,[148] a guardian *ad litem* was appointed to represent the interests of unborn or unascertained beneficiaries.[149] The guardian was appointed for purposes of consent to modification or revocation of a trust.[150] The issue in *Hatch* was whether a settlor could modify a spendthrift trust when interests of yet unborn

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[141] *See id.*

[142] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 8-1.1 (McKinney 1999); GA. CODE ANN. § 108-212 (1999); 5 ME. REV. STAT. ANN. tit. 5, § 194 (West 1999); *see also, e.g.*, State v. Taylor, 362 P.2d 247 (Wash. 1961); People *ex rel.* Courtney v. Wilson, 63 N.E.2d 794 (Ill. App. Ct. 1945); *In re* Quinlan's Estate, 45 N.W.2d 807 (Minn. 1951).

[143] HASKELL, *supra* note 140, at 82.

[144] *See, e.g.*, Holt v. College of Osteopathic Physicians & Surgeons, 394 P.2d 932 (Cal. 1964)(in bank); Richards v. Midkiff, 48 Haw. 32, 396 P.2d 49 (1964).

[145] *See* HASKELL, *supra* note 140, at 82 (noting that "[t]his is . . . as true with respect to the private trust as it is with respect to the charitable trust.").

[146] *See id.*

[147] *See id.*

[148] 361 F.2d 559 (D.C. Cir. 1966).

[149] *See id.*

[150] *See id.* at 565.

heirs were involved.[151] The question of the use of a guardian *ad litem* was one of first impression for the equity court:

> Although the question has not been previously discussed by this court we think basic principles of trust law are in accord with appointment of a guardian ad litem to represent interests of unborn or unascertained beneficiaries, for purposes of consent to modification or revocation of a trust. This use of a guardian ad litem is not uncommon in other jurisdictions. In a number of states authority for such appointments is provided by statute. These statutes reflect a broad sentiment of the approaches that are consistent with the Anglo-American system of law and adopted to promote the objective of justice.[152]

The court also noted the flexibility afforded by appointment of such a representative.[153] "Given such protection, the equitable doctrine of representation embraces the flexibility, born of convenience and necessity, to act upon the interests of unborn contingent remaindermen to the same effect as if they had been *sui juris* and parties."[154]

This analysis is easily applied to charitable trusts such as KSBE. Nearly all future students of the Kamehameha Schools are unascertained, but they deserve representation of their future interest. Clearly, all current students under the age of majority ought to have been represented in the proceedings involving the KSBE trustees stemming from the attorney general's investigation. Theirs is the future that may be wasted by the actions of imprudent trustees. Furthermore, the guardian *ad litem* represents a specific beneficiary, as we have stated, whereas the attorney general represents general beneficiaries of the public at large—taxpayers in general, and employers and

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[151] *See id.* at 560.

[152] *Id.* at 565 (footnote omitted). The leading case upholding such appointments is *Gunnell v. Palmer*, 18 N.E.2d 202 (Ill. 1938), where the court held that a statute authorizing the appointment of a trustee to represent persons not in being was constitutional. *See also* Wogman v. Wells Fargo Bank & Union Trust Co., 267 P.2d 423, 429 (Cal. Dist. Ct. App. 1954); Reynolds v. Remick, 99 N.E.2d 279 (Mass. 1951). *Compare* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18, (1950)(requiring actual notice for due process standards and applying this standard to both *in personam* and *in rem* actions). For a comprehensive and historical approach to guardians *ad litem*, see Martin D. Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 WILLAMETTE L. REV. 643 (1984).

[153] *See Hatch*, 361 F.2d at 565-66 (citing Peoples Nat'l Bank v. Barlow, 112 S.E.2d 396, 398-99 (S.C. 1960)).

[154] *Id.* at 566. The court explained:

> The use of guardians *ad litem* to represent interests of unborn and/or otherwise unascertainable beneficiaries of a trust seems to us wholly appropriate. Though the persons whose interests the guardian *ad litem* represents would be unascertainable as individuals, they are identifiable as a class and their interest, as such, recognizable.

Id.

local industries in particular—that might benefit from Kamehameha School graduates in the future.

Professor Mark Begleiter of Duke University has published a comprehensive review of the guardian *ad litem* approach.[155] Concluding that a guardian *ad litem* may indeed solve many problems arising in probate proceedings, Professor Begleiter also agrees that this mechanism applies to trusts. "[I]n almost every state today the court has the power to appoint a guardian *ad litem* to represent infants, incompetents, unborns, and unknown parties in estate and trust proceedings."[156]

Of course, a court will not appoint a guardian *ad litem* if the beneficiary under disability already has a representative, such as a conservator or a guardian.[157] Professor Begleiter points out, however, that a court has equitable powers of discretion even in such instances. "[I]f the court deems the representation by the guardian or conservator inadequate, it will appoint a guardian *ad litem*."[158]

The added protection and accountability afforded by a guardian *ad litem* can be priceless assistance and representation in holding trustees to their duties,[159] particularly when several unascertained beneficiaries may exist with differing interests. The guardian *ad litem* becomes an officer of the court and may not compromise litigation.[160] The role of the attorney general as *parens patriae* does provide protection for the interests of the public. The guardian *ad litem*, however, keeps the direct beneficiary's interest first and foremost. Neither representative is in conflict, but together, they afford the most complete and competent representation to those benefited by the charitable trust.

2. *Virtual representative*

Another option is use of the virtual representative doctrine, which is considered a "major alternative to the guardian ad litem."[161] Virtual

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155 *See* Begleiter, *supra* note 152, at 643.

156 *Id.* at 652-53.

157 *See id.* at 653.

158 *Id.* at 653-54 (citing Florida Nat'l Bank & Trust Co. v. Blake, 155 So. 2d 798 (Fla. Dist. Ct. App. 1963)); *In re* Estate of Trout, 131 P.2d 640 (Kan. 1942); *In re* Armour's Trust, 153 N.Y.S.2d 90 (N.Y. App. Div. 1956); *In re* Kenna Estate, 34 A.2d 617 (Pa. 1943); Smith v. Mann, 296 S.W. 613 (Tex. Civ. App. 1927)).

159 Professor Begleiter details the qualifications for one serving as a guardian *ad litem*. *See* Begleiter, *supra* note 152, at 655-59.

160 *See id.* at 714 and accompanying citations. Begleiter explains that a guardian *ad litem* may act as an attorney for the incompetent in a particular litigation, or as an officer of the court, and offers extensive analysis of this difference. *See id.* at 715-21.

161 *Id.* at 721; *see also* ROGER ANDERSEN ET AL., FUNDAMENTALS OF TRUSTS AND ESTATES 327 (1996)).

representation permits one party to a proceeding to represent other persons or a class of persons having a future interest in the trust without making the persons represented parties or serving them with process.[162] The doctrine is premised on the logic that one person can speak for an unknown person who, if identified, would be in the same situation as the speaker.[163]

> The theory behind the doctrine is that, if the representative has the same economic interest as the persons represented, all arguments that could have been made by the person represented will be made by the representative. Therefore, to save time and money (by avoiding the appointment of a guardian *ad litem* for living persons under disability) and because of necessity (the impossibility of obtaining jurisdiction over unborns), one party to the proceeding is allowed to represent others with the same interest.[164]

The virtual representative represents all parties of a particular interest, named or unnamed, identified or unidentified, thereby allowing currently living persons to make decisions even though other beneficiaries may come into existence later.[165] Under the doctrine, all beneficiaries of estates and trusts are treated as necessary parties in litigation involving their interests.[166]

A Hawai'i case provides a current example of how the virtual representative doctrine serves as a means of representation. In *In re Herbert M. Dowsett Trust*,[167] the court stated that virtual representation is traditionally applied in the area of probate proceedings to bind persons who are "unknown, unascertained, or unborn through 'representation by someone with clearly aligned interests.'"[168] In *Dowsett*, the doctrine of virtual representation was used unsuccessfully as an argument to preclude relitigation of an issue by a

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[162] *See* Begleiter, *supra* note 152, at 723.

[163] *See* ANDERSON ET AL., *supra* note 161, at 327.

[164] Begleiter, *supra* note 152, at 723-24. Another court expressed the utility of the virtual representation doctrine as such:

> The concept of virtual representation has been regarded generally as an advance in procedural methods and as a means of expediting relief and of reducing the expense of litigation while at the same time providing both a sufficient basis for jurisdiction and adequate protection to all interests requiring representation in a proceeding.

In re Estate of O'Connor, 339 N.Y.S.2d 726, 729 (N.Y. Sur. Ct. 1973). For an explanation of the various categories of virtual representatives and their limits, see Begleiter, *supra* note 152, at 724-36.

[165] *See* ANDERSON ET AL., *supra* note 161, at 327.

[166] *See* Begleiter, *supra* note 152, at 721. Professor Begleiter notes that a "[f]ailure to join a necessary party results in, at best, a judgment that will not bind the absent party or, at worst, a finding that the court lacks jurisdiction to decide the case." *Id.*

[167] 7 Haw. App. 640, 791 P.2d 398.

[168] *Id.* at 648, 791 P.2d at 403 (citing 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457 (1981)).

party sharing a substantial identity with another party.[169] The court ruled that a "close family relationship," without more, was not enough to bind a non-party under the doctrine of virtual representation.[170]

State courts are not alone in recognizing the virtual representative doctrine. Federal courts have also held that individuals may be bound by a prior judgment if a party to the suit was so closely aligned with that individual's interests so as to be his virtual representative.[171] The doctrine of virtual representation is generally used in this defensive posture unless the party is a member of a class action, is involved in a will contest or a trust matter, or in a suit in which the parties come under the doctrine of virtual representation.[172] It would appear that the beneficiaries of the KSBE trust fall under two of these three exceptions: Kamehameha School students are members of a class of beneficiaries who are in a position to bring a class action, and a trust matter is involved here. Thus, virtual representation converts the traditional doctrine of res judicata from a clear rule into a vague principle that relies on the balancing of the equities, requiring a close analysis and inspection of the relationship between the parties in each individual case.[173] Any court attempting to apply this doctrine must closely examine the relationships between the parties to find and balance several elements, such as participation, apparent acquiescence, or an express or implied legal relationship where the first parties are accountable to the second parties.[174] Areas of law traditionally grounded in equity seem to demand this kind of approach.

There are risks involved in applying the virtual representation doctrine. As one court noted:

> [The doctrine of virtual representation], resting as it does on principles of convenience and necessity in the administration of justice and being in derogation of the general rule that a judicial decree does not bind a person not

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[169] *See id.* at 642, 647-48, 791 P.2d at 403-04.

[170] *See id.* at 647, 791 P.2d at 403. *Dowsett* also discusses res judicata, citing an early case involving KSBE, *In re Bishop Estate*, 36 Haw. 403, 416 (1943). *See Dowsett*, 7 Haw. App. at 644, 791 P.2d at 401.

[171] *See* Chase Manhattan Bank v. Celotex Corp., 56 F.3d 343 (2d Cir. 1995)(holding that res judicata did not apply under the virtual representative doctrine as the requisite privity between the parties was lacking); Aerojet-General Corp. v. Askew, 511 F.2d 710 (holding that a person can be bound to a prior judgment if that party's interests are so closely aligned with the interests are original party); Doctor's Assocs., Inc. v. Reinert & Duree, P.C., No. 98-9156, 1999 WL 606843 (2d Cir. May 5, 1999)(holding that an agent of a principal was not a virtual representative).

[172] *See* California & Hawaiian Sugar Co. v. Bunge Corp., 593 S.W.2d 739 (Tex. Civ. App. 1979).

[173] *See* 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.46 (3d ed. 1992).

[174] *See id.*

> before the court, is applied with great caution. And ordinarily, the principle of virtual representation may be invoked only when it is made to appear, and the pleadings should so show, that the persons not before the court have an interest in common—an interest similar—to that of the parties who sue or defend on behalf of others. In short, to bind unborn persons, it must be made to appear that the rights or interests asserted by the parties before the court are identical with those that might reasonably be expected to be asserted by unborn persons if they were *in esse* and before the court.[175]

One of the risks of virtual representation is neatly handled by the nature of the state's duties in regard to charitable trusts. When a virtual representative does not forcefully present the position of the party he or she represents, the attorney general provides the needed teeth for sanctions against breach of duties. In the case of the Kamehameha Schools, all students—past, present, and future—ought to be represented in any proceedings against the KSBE trustees. A virtual representative elected by the students themselves, such as their student body president, could quite adequately represent current students. Alumni and future students may have interests that conflict with those of current students in terms of present expenditures of funds, aggressive or conservative styles of investment, and other matters related to portfolio growth and diversity. A duly elected alumni representative could represent the interests of future students and alumni. The doctrine of virtual representation brings a much-needed and important added measure of accountability, not to mention a different perspective, to proceedings such as those initiated against the KSBE trustees.

So should trust beneficiaries participate in the selection or removal of successor trustees? We argue that they should. Such representation might more adequately advance the interests of the beneficiaries than would guardian *ad litem* representation because the individual acting as the virtual representative is appointed by the direct beneficiaries of KSBE, the students of the Kamehameha Schools. Princess Bishop's testamentary direction for court appointment of successor trustees, however, fits well with the court appointment of a guardian *ad litem*. Either method adds a dimension of representation conspicuously absent in the KSBE litigation. Provision for such representation can only add to the preservation of the charity's purpose.

C. Preserve the Charitable Purpose

Clearly, charitable trusts operate under different or special rules. Often, such trusts need—even deserve—special treatment. We have already observed this in KSBE, in that the state is the enforcer of the trust in the

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[175] McPherson v. First & Citizens Nat'l Bank, 81 S.E.2d 386, 398 (N.C. 1954).

absence of definite beneficiaries.[176] Although we make the point in this Article that a charitable trust ought not to be limited by such enforcement, this tends to be one of the unique features of a charitable trust. Likewise, a charitable trust is not subject to the Rule Against Perpetuities, as a charitable trust generally is designed to benefit many future generations.[177] Would it be prudent to preserve the trustee's duty of loyalty by requiring beneficiary participation in trustee succession? We submit it would be not only prudent, but also beneficial and wise.

Furthermore, the charitable purpose is a function of the original time and place of establishment of that purpose.[178] Princess Bishop had Hawaiian history in mind in forming her ideals for education of Hawaiian children. She desired to end the oppression of the Hawaiians. It is important to maintain those benefits tied to the charitable purpose.[179]

Of course, it should be noted that the trust's administration and enforcement cannot involve "state action."[180] That concern does not appear to be an issue in the affairs of KSBE or the Kamehameha Schools because the school is privately funded by the private assets of the estate, the land being owned and developed by KSBE. Neither is equal protection a concern for this reason, and for reasons that we have discussed previously.[181] Furthermore, deviation is allowed for trust administration purposes only.[182] Our goal here has been to proffer some innovative concepts in preserving the role of the beneficiaries of a charitable trust, without compromising the nature of the charitable trust

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[176] *See supra* notes 110-17 and accompanying text.

[177] *See* ANDERSEN ET AL., *supra* note 161, at 328, 331-35. "The Rule Against Perpetuities is among those rules of law which limit the power of one generation to restrict the uses future generations put to property." *Id.* at 387; *see also* WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS & ESTATES § 13.8 (1988); HASKELL, *supra* note 140, at 59, 88-90. Haskell explains: "It should be noted that the rule against perpetuities and the rule against the suspension of the power of alienation do not apply to charitable trusts, and that the law does not limit the duration of charitable trusts." *Id.* at 59. He further explains:

> When it is said that there is no limit upon the duration of a charitable trust, this does not constitute an exception to the rule against perpetuities because the rule does not deal with the duration of trusts. However, if there is a future interest under a trust in which all interests are charitable, it is not subject to the rule against perpetuities, and that does constitute an exception to the rule.

Id. at 89.

[178] *See* RESTATEMENT (SECOND) OF TRUSTS § 368 (1957).

[179] *See generally* ANDERSEN ET AL., *supra* note 161, at 328-31.

[180] *See In re* Estate of Wilson, 452 N.E.2d 1228 (N.Y. 1983).

[181] *See* discussion *supra* note 106.

[182] Although beyond the scope and purposes of this Article, a thorough review of deviation may be found at *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TR. J. 391 (1973)(Report of Committee on Charitable Trusts and Foundations).

to secure trustee accountability, and to propose additional guidelines and safeguards for trustee succession.

CONCLUSION: APPLICATION TO KSBE AND SIMILAR CHARITABLE TRUSTS

A recent symposium reviewed some of the concepts that we have presented in this Article, concluding, as we have, that remedies need not be exclusive of one another.[183] We have suggested that the appointment of a guardian *ad litem* to represent the beneficiaries of the trust is appropriate. Current Kamehameha Schools students would do well to protect the interests of the beneficiaries of the KSBE trust. Alternatively, we have suggested the possibly better method of virtual representation, allowing for example, the Kamehameha Schools student body president or some equivalent student-elected representative to represent current and future students of the schools in any trust litigation. A virtual representative or a guardian *ad litem* would serve not only to represent the beneficiaries, but to act on behalf of the beneficiaries to hold the KSBE trustees' attorneys accountable. These attorneys must be trustworthy and active in their positive representation of the trust.[184] The appointment of a

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[183] *See generally Foundation, Charities and the Law, supra* note 117.

[184] Professor Randall W. Roth of the University of Hawai'i School of Law pointed out in a letter to the Interim Trustees the importance of the role of the attorneys for the Estate. In June 1989, the Interim Trustees promoted the Estate's long-time general counsel, Nathan Aipa, to the position of Chief Operating Officer. They also have continued to use the estate's long-time outside trust counsel, Bruce Graham. The following is from a memo Professor Randall W. Roth sent in response to these actions:

> As a citizen of this state, I want to thank the five of you for your willingness to accept the responsibilities that now confront you. Like many others, I view Kamehameha Schools Bishop Estate as a great institution whose resources are exceeded only by the importance of its mission.
>
> As the only tax and trust law professor in this state, I've felt both uniquely qualified and morally obligated to do what I could to help make things right at KSBE. For better or worse, this didn't end with the temporary removal of your predecessors.
>
> I'm writing now to express serious concerns. In case it isn't obvious, I'll begin by stating that I have nothing personal to gain by bringing these matters to your attention. I am not interested in being appointed to any position in government or at KSBE. I also bear no ill will toward any of the persons mentioned below.
>
> NATHAN AIPA AS COO AND BRUCE GRAHAM AS OUTSIDE COUNSEL. I find it hard to understand the degree of trust that seemingly has been placed in Nathan Aipa. Many specific actions attributed to him suggest either ignorance of basic trust law, or that he regularly buckled under the weight of pressure from trustees. Examples include his alleged role in insurance-procurement and related improprieties; an opinion letter that co-investment in the McKenzie Methane Gas deal was not improper; advice that fiduciary accounting income properly could be diverted to corpus, that this diversion could be done without proper disclosure, and that it could be hidden by asserting attorney-client privilege. These are just examples, a complete list of questionable actions would be much longer.

virtual representative is a compelling concept. It would bring to clearer light the settlor's intent, serving simultaneously to revive and preserve the original charitable purpose.[185]

What has become a grave concern with the Kamehameha Schools and the KSBE trust has been the total unfettered flexibility and freedom afforded to

Even more troubling is his long history of inaction in the face of obvious trustee improprieties. Examples include ignored court orders; use of trust funds to lobby against enactment of intermediate sanctions law; improper calculation of maximum trustee fees; ignorance (or worse) of the over-riding common law prohibition against unreasonable compensation; failure to educate trustees regarding their fiduciary duties; and failure to provide critical information to *all* trustees. Again, these are just examples. A complete list of questionable "inactions" would be even longer than one for "actions."

I suspect that Nathan saw his as an impossible predicament, and that had he stood up to your predecessors he would have been fired . . . or worse. I will accept that as a given. Exhibit A is Bobby Harmon. When he said no, Henry Peters set out to crush him, and did a reasonably thorough job of it. It's understandable that Nathan would not want to be on the receiving end of such unflinching brutality. . . .

But the bottom line for me is that he regularly chose not to take a principled stance when he had not just opportunity, but *duty* to do so. I have similar concerns about Bruce Graham.

Some people might see Nathan and Bruce as mere pawns, or even as victims. For example, I can imagine a lay person saying, "sure, these guys were in the command center when the ship ran aground, but they were just following orders." The problem with this analogy is that Nathan and Bruce are lawyers, not sailors. They both had a duty *not* to blindly follow orders.

Probate Court Rule 42(c), for example, explicitly requires lawyers "to bring to the attention of the court the nonfeasance of the fiduciary." Has either of them discussed with you the possibility that you have a duty to sue one or both of them? Do you think either of them will do so? Would you rely on their explanations if they did?

My point is that Nathan and Bruce both have personal exposure and each has a self-interest not to disclose vital information to you and the attorney general. Your continued reliance on them baffles me and, quite frankly, subjects you to unnecessary personal liability.

. . . .

TRUSTEE-SELECTION PROCESS. I was delighted to read recently that you are planning to propose a trustee-selection plan to the probate court. However, I'm troubled by what's been reported by the media as a plan to ban all past and present politicians, not just as potential trustees, but as participants in the selection process as well. While certainly a crowd pleaser under current circumstances, such a ban is irrational and eventually would prove to be ill-considered. To paraphrase Kipling, it's important that the five of you keep your heads even as others are losing theirs.

Letter from Randall W. Roth, Professor of Law, University of Hawai'i School of Law, to Robert Kihune, David Coon, Francis Keala, Connie Lau, and Ron Libkuman, Interim KSBE Trustees 1-3 (May 24, 1999)(on file with authors).

[185] Furthermore, the use of the guardian *ad litem* or the virtual representative may be appropriate and protective if the court requires the representative to apply for court approval, establishment, and order of their selection of successor trustee(s).

the court-appointed trustees.[186] The trustees were afforded flexibility in accomplishing Princess Bishop's wishes, but flexibility without proper accountability has led to a selfish and decaying freedom. Freedom without boundaries or accountability can lead to destruction.

Affording students of the Kamehameha Schools with a mechanism for holding the KSBE trustees accountable would have impeded trustee misconduct. A trustees' responsibilities[187] must be set, established and patterned at the outset, and watched closely by those most profoundly affected. Allowing a virtual representative or guardian *ad litem* to give a voice to the interests of the students certainly puts a different face on those responsibilities.

Finally, there is not only room for judicial discretion in the equitable nature of a trust proceeding, but an absolute need for such discretion. Human nature dictates, and the expelled KSBE trustees have demonstrated, that fiduciaries may not self impose checks on their conduct. Limits can, however, be imposed by the courts and enforced by representatives of beneficiaries acting as officers of the court. Judgment in favor of greater accountability can only serve to further prevent the waste of trust assets intended to benefit trust beneficiaries, rather than to aid trustees in their own escapades. Restoring accountability can also help to guard against the selection of successor trustees based on politics.

KSBE and the Kamehameha Schools are charities that not only warrant, but deserve, this kind of attention. A trustee, by any standard, ought to act in the state of mind which the settlor contemplated when she set up the trust. Princess Bishop wanted to bring freedom to her people through education. Our proposals in this Article would indeed add protections to hold the trustees accountable to the ideals which Princess Bishop intended when she established KSBE.

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[186] *See* Samuel King, Msgr. Charles Kekumano, Walter Heen, Gladys Brandt & Randall Roth, *Broken Trust*, HONOLULU STAR-BULLETIN, Aug. 9, 1997, at B-1, reprinted in Appendix C to this issue.

[187] The KSBE trustees have always had knowledge of the general duties ascribed to trustees, including the duty to furnish information to their beneficiaries and the duty to render court accounting, with court approval. *See id.; see also* RESTATEMENT (SECOND) OF TRUSTS, §§ 172, 173, 220 (1957).