

BOOK REVIEW:
BROKEN TRUST^{*}
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Broken Trust, written by Senior U.S. District Court Judge Samuel P. King and University of Hawai'i School of Law Professor Randall W. Roth, tells the story of the legacy of Hawaiian Princess Pauahi, the great-granddaughter of Kamehameha the Great. It is the story of Kamehameha Schools, which the Princess's will directed her trustees to establish and operate. It also tells the story of the Bishop Estate. The Bishop Estate received its name because the Princess died in 1884 as Bernice Pauahi Bishop and long-term testamentary trusts have been called "estates" in Hawai'i since the days of the Kingdom.

As a mere story, even if it were fiction, the book would be fascinating reading. Beginning with a sensitive portrait of the cultural and political setting for the Princess's life and the formation of her values and vision, the book combines the lure of the Islands with the intrigue of a whodunit to draw the reader inescapably into the drama. Like readers of any good novel, we join the plot vicariously, we picture the action, we pick heroes and cheer, and we identify villains and hiss. We turn page after page.

But the book is not a mere story. It proves the axioms about fiction that truth is stranger still and that there are some things even the most creative novelist could not make up. The book's subtitle is "Greed, Mismanagement & Political Manipulation at America's Largest Charitable Trust"—seemingly audacious to one who picks up the book for the first time, but if anything, seen as understated by the reader who plunges into the narrative. The events exposed in the book are real. They not only could happen, they somehow did happen, which is bound to get the attention and sharpen the focus of any reader, especially a professional whose practice has anything to do with tax-exempt organizations and charitable giving.

In 1995, the *Wall Street Journal* called the Bishop Estate the nation's wealthiest charity with an endowment estimated to be \$10 *billion*—greater than the endowments of Harvard and Yale combined. Yet, as the book documents, the oversight of the Bishop Estate by its five trustees had become rotten with political corruption, gross self-serving, mismanagement, and arrogance. By the summer of 1997, Professor Roth had prepared a draft

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of an essay of roughly 6,000 words, entitled “Broken Trust,” which documented the breaches of fiduciary duty that, in his words, “screamed for attention.” After four co-authors, including Judge King, had signed on to the essay and made editorial contributions, Roth took the essay one Thursday in August 1997 to the Honolulu *Star-Bulletin*. The Paper’s editors published it in the Sunday edition three days later.

The essay played an enormous role in galvanizing the public outrage over abuses by the Bishop trustees and in focusing official attention. This focus culminated in the Internal Revenue Service audit that ultimately brought down the trustees in disgrace and forced reforms in the governance of the Bishop Estate and oversight of Kamehameha Schools.

The book *Broken Trust* expands on the hard-hitting themes of the essay, chronicles the downfall of the trustees barely two years later, marshals incredible detail about the way the Bishop trustees lost their fiduciary bearings, and candidly critiques the effectiveness of the recent reforms.

The book provides a valuable public service, and Judge King and Professor Roth have decided to donate all royalties to charities serving early childhood educational needs in Hawai‘i.

Broken Trust documents the former Bishop trustees’ violations of virtually every rule known to tax-exempt organizations. A page on the related website, www.brokentrustbook.com (which is a treasure trove of documentation), identifies and describes, in alphabetical order, no less than 48 separate legal issues raised by the book. The issues range from the trustees’ aggressive invocation of attorney-client privilege to a strained will construction by the Territorial Supreme Court in 1910. In between, the book deals with expected issues such as conflict of interest and reasonable compensation, surprising issues such as a religious test for trustees and teachers, and the trustees’ extravagant use of trust funds to lobby against congressional enactment of intermediate sanctions in 1996.

This book is must reading for anyone who advises charities because this is a book about temptations that any trustee could encounter. No dramatic turning point occurred when previously pristine trustees resolved henceforth to be evil. The book documents the slippery slope along which the trustees became entangled with political back-scratching in the Hawai‘i Supreme Court’s appointment of trustees, took on a self-absorbed and imperious style of micromanagement, and lost all sense of accountability. All this occurred while under the influence of unprecedented affluence, which the trustees were not equipped to manage, but, which rapidly supplanted education as their principal focus. The reader’s first reaction is amazement, then disgust, but quickly becomes apprehension. While there may never be another fact

scenario like the Bishop Estate, combining so many issues in one case study with such high stakes, a list of lapses can be shorter than the Bishop trustees' list and still be extremely serious.

This book will provoke tough questions and help answer them. How should a charity be structured to minimize such calamities? How can an adviser spot weaknesses in accountability, and what can be done about them? Where can one turn when even the courts are unresponsive and the rule of law seems to have stopped working? Even in a day when Congress and others who shape public policy increasingly are looking for ways to make tax-exempt governance more transparent, there surely is a role for the first responder on the scene, imbued with old-fashioned common sense, vigilance, and moral courage. *Broken Trust* is that first responder's inspiration.

The lessons of the book go beyond tax-exempt entities. Although Princess Pauahi was the richest woman and largest landowner in the Kingdom of Hawai'i, the estimated value of her estate when she died in 1884 was less than a half million dollars. With changes in the law helping to make large, very long-term trusts more popular, how equipped are we today to draft a governing instrument for a trust that will last a century and a quarter or longer? How can clients be assured that their vision will be safeguarded by fiduciaries they will never meet? How can we prevent the stewardship of any large aggregation of wealth from becoming politicized? These questions are humbling and difficult, but they are better asked than overlooked, and *Broken Trust* encourages a constructive dialogue about the challenges of long-term trusts.

Professor Roth's own preferred structure for long-term governance is a charitable corporation or, if a trust cannot be avoided, a trust with volunteer trustees setting policy to be carried out by professional managers. But the nationwide consolidation and strengthening of corporate trust departments, as well as the renewed interest in accountability and professionalism reflected in the rise of private trust companies, are also encouraging developments. *Broken Trust* will be useful reading for trust and investment professionals as well as their attorneys and other advisers. The trumpet call of the book, above all others, is to seek and heed good counsel.

Broken Trust provides broad civics lessons. Most obvious are the serious questions raised by the incestuous political relationships among the executive, legislative, and judicial branches and the Bishop trustees. But the book is also provocative at other levels. For example, the tax lawyers among us will read, with great interest and some concern, about the highly activist and visible role of the Internal Revenue Service in dictating

management reorganizations at the Bishop Estate. This may have been the only way to get these trustees' attention, but the jury is still out on the suitability of the Internal Revenue Service as a national probate court. *Broken Trust* provides a good backdrop for thinking about that question.

If there is any part of the book that will give some readers pause, it may be the authors' less than resounding evaluation of the progress in the last seven years. While noting the improvements the new trustees have made, the authors see too great a tendency to use the same personnel and similar practices as their predecessors. Consensus about history is often easier to find than consensus about the interpretation of current events. But one of the attractions of this book is that, cover to cover, the authors are faithful to their hard-hitting, public-minded mission.

The Bishop Estate continues to make legal headlines. Now formally renamed Kamehameha Schools, but still organized as a trust, the Estate is defending against challenges to its preference for native Hawaiians in its admission policy. On December 5, 2006, the Court of Appeals for the Ninth Circuit, sitting en banc, upheld Kamehameha Schools' policy by the narrowest margin of 8-7. As this drama unfolds, some of the elements of the Schools' cultural and political history addressed in *Broken Trust* may resurface. Whether they do or not, *Broken Trust* provides an enduring look at the background of this large and fascinating educational trust, and it does so in a manner that is captivating, provocative, instructive, and simply well done.