
CHARITABLE TRUSTS AS A DEVICE FOR INDIGENOUS PEOPLES TO MERGE AND DEVELOP CUSTOMARY LAND

I. Introduction

Indigenous peoples throughout the world are struggling to survive as viable communities, preserve their culture, and attain self-determination. In Hawai'i, one historical tool that has been employed to aid the preservation of indigenous people has been charitable trusts. These trusts were created by members of the Hawaiian royalty, ali'i, with the express purpose of aiding indigenous Hawaiian people.

The main charitable trusts in Hawai'i are referred to as the "Ali'i Trusts" and include the Lunalilo Trust, Kamehameha Schools Bishop Estate, and Queen Lili'uokalani Trust.

This paper provides an overview of the legal principles applicable to charitable trusts and then summarises the three primary charitable trusts created in Hawaii to aid native Hawaiian people.

II. The History Of Charitable Trusts

A. Charitable Trusts in England

Before the seventeenth century, the English statute of wills and mortmain statutes limited an individual's power to make gifts and bequests to charity.¹ These statutes were designed to protect the king

¹Lars G. Gustafsson, "The Definition of "Charitable" for Federal Income Tax Purposes," (1996) 33 *Hous L Rev* 587, 603.

and lords from being deprived of property that would otherwise pass to them.² Despite these statutes, charitable trusts were upheld generally under the common law and courts exercised equitable power to enforce charitable trusts, which were usually for the benefit of the poor, the church, or for education.³

While recognized at common law, charitable trusts were virtually unmonitored. Consequently, it was not uncommon that property transferred for a charitable purpose would be misapplied to the detriment of the beneficiaries.⁴ Therefore, in the early seventeenth century, the English Parliament enacted the Statute of Charitable Uses, 43 Eliz. c. 4 (1601).⁵ The statute was intended to protect and enforce charities.⁶ Under this statute, courts were empowered to appoint commissioners to examine donations to charity. The statute also allowed the decisions of these commissioners to be appealed to the courts; however, the statute is most noted for its preamble which sets out the more important uses of charitable contributions, including the relief of the poor; the maintenance of the sick and maimed soldiers and mariners; schools of learning; free schools; schools in universities; the repair of bridges, ports havens, causeways, churches, seabanks, and highways; the education and preferment of orphans, the maintenance of houses of correction; the aid of young tradesmen and handicraftsmen; and the aid of poor persons in the payment of taxes.⁷

Due to a gradual decline in the use of the remedy set out in the Statute of Charitable Uses, the statute, but not the preamble, was repealed.⁸ The power to enforce charitable trusts then fell to the Attorney-General. When that proved to be inadequate, a Charity Commis-

²*Ibid* 604.

³See William F. Fratcher, *Scott on Trusts*, 4th ed., § 348.2 (1989).

⁴*Supra* n 1 at 604.

⁵*Supra* n 3 § 348.2.

⁶*Ibid*.

⁷See *Second Nat. Bank v. Second Nat. Bank*, 190 A 215, 219 (Md 1937); *Restatement (Second) of Trusts* § 368, comm. a.

⁸*Supra* n 3 at § 348.2.

sion was formed. The commission was given the power to supervise charitable trusts through the *Charitable Trust Act*, 16 & 17 Vict. c. 33, enacted in 1853. The commission developed a register of charities, and charities were required to make reports to the commission.⁹

B. Charitable Trusts in the United States

Today, the policy of the law in the United States is to enforce gifts for charitable purposes and courts use their equitable powers to uphold the donor's charitable intent.¹⁰ While all states now recognize the validity of charitable trusts, a few states initially held that charitable trusts were invalid.¹¹ These states were New York, Michigan, Minnesota, Maryland, Virginia, West Virginia, and Wisconsin.¹² In these jurisdictions, the courts refused to recognize charitable trusts because the Statute of Charitable Uses, enacted in England in the seventeenth century as discussed above, was not enacted in these states. However, this was based on the misconception that charitable trusts were not enforced by the courts in England under common law prior to the enactment of the Statute of Charitable Uses.¹³

Currently, some states lend validity to charitable trusts by considering the Statute of Charitable Uses to be part of the common law. Other states have enacted legislation specifically allowing charitable trusts; however, most states, including Hawai'i, enforce charitable trusts through the court's general equitable jurisdiction.¹⁴

⁹George G. Bogert, *Trusts and Trustees*, 2nd ed., § 321.

¹⁰*Ibid* § 323; *Estate of Heil*, 259 Cal Rptr. 28 (6th Dist 1989); *Ould v. Washington Hospital*, 95 US 303 (1877).

¹¹*Supra* n 3 at § 348.3

¹²*Ibid*.

¹³*Ibid*.

¹⁴Douglas C. Smith, "Kapiolani Park Preservation Society v. City and County of Honolulu: The Lease of Public Park Land as a Breach of a Charitable Trust," (1989) 11 *UHL Rev* 199, 206.

III. Requirements For The Creation Of A Charitable Trust

The Restatement (Second) of Trusts defines a charitable trust as:

[A] fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.¹⁵

In creating a valid charitable trust, the requisites for creating a private trust are applicable.¹⁶ The settlor must specify the property to be held in trust, or specify the means by which the property will be ascertained.¹⁷ The settlor must also have the requisite intent to create a charitable trust.¹⁸ While these elements for creating a valid charitable trust mirror the elements to create a private trust, there are differences between the two types of trusts in terms of beneficiaries and purpose.

A private trust requires that the beneficiaries of the trust be definite and ascertainable.¹⁹ In contrast, a charitable trust can be created even if the beneficiaries are not definite and unascertainable.²⁰ This is consistent with the idea that the purpose of a charitable trust is for the benefit of the community, not for specific individuals.²¹

IV. Selection Of Trustees

When a trust is created, the original appointment of trustees is governed by the settlor's intent. If the settlor does not name a trustee, or the named person refuses to accept the appointment or is deceased at the time the trust is created, then the court will appoint a trustee.²²

¹⁵Restatement (Second) of Trusts § 348.

¹⁶Supra n 9 at § 323.

¹⁷Supra n 15 at § 363, comm. b.

¹⁸Supra n 15 at § 351.

¹⁹Supra n 15 at § 112.

²⁰Supra n 15 at § 364.

²¹Ibid at comm. a.

²²George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees*, 2nd ed, 1991, § 398.

However, if the settlor indicated that the trust was to be administered only by a particular person or entity then that person's refusal or death, or the corporation's merger or dissolution will cause a resulting trust in the settlor or the successors.²³ In general, the trustee must be a natural person who can take and hold property.²⁴ A corporation, a state and the United States also have the capacity to act as trustee for a charitable trust.²⁵ However, unincorporated associations which are unable to take and hold property cannot act as trustees.²⁶

If after the administration of the trust has begun, a trustee dies, resigns or is removed, then the settlor's intent controls the appointment of a successor trustee.²⁷ If no successor trustee is indicated, the court will appoint one.²⁸ A court is not obligated to appoint a successor trustee.²⁹ And, a court may increase or decrease the number of trustees or it may 'appoint a successor with increased or limited powers.'³⁰ During the vacancy period, the surviving trustees may continue to exercise their powers unless the trust instrument and all the circumstances dictate otherwise.³¹

V. Succession

Generally, the treatises and cases do not address the dynamics of succession in governance by the trustee. They merely state that a successor trustee will be appointed if not provided for by the trust instrument.³²

²³*Ibid* § 398 n.4.

²⁴*Supra* n 15 at § 378.

²⁵*Ibid*.

²⁶*Ibid*.

²⁷*Supra* n 22 at § 398.

²⁸*Ibid*.

²⁹*Supra* n 22 at § 532.

³⁰*Ibid*.

³¹Austin W. Scott & William F. Fratcher, *The Law of Trusts*, 4th ed., 1989. § 384.

³²*Supra* n 22 at § 398.

VI. Standard Of Care

The standard of care owed by charitable trustees is similar to that owed by private trustees.³³ The trustee is required to "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."³⁴ It is the "care, skill, prudence, diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question."³⁵ The standard is an objective one so that a trustee may be liable even though he or she utilized all the care and skill he or she was capable of.³⁶ Liability may be imposed even if a trustee was honest and well-intentioned.³⁷ The standard of care is not that of a particular trustee as to his own affairs but one measured by the ordinary prudent person. To provide otherwise would be to exonerate the careless trustee in the same case that a vigilant trustee would be held liable.³⁸

However, if a trustee has greater skill than an ordinary prudent person, the trustee may be liable for not utilizing that skill.³⁹ Moreover, if a trustee obtains an appointment by representing greater skill than a person of ordinary prudence then he will be held to that higher standard.⁴⁰

The trustee's conduct is considered in the context of the circumstances as they reasonably appeared to the trustee at the time of the conduct in question.⁴¹ Thus changing business and economic conditions may alter the standard of care.⁴² However, ignorance of the trust terms will not protect a trustee from liability.⁴³ And, blind adherence

³³*Supra* n 15 at § 379 cmt. a.

³⁴*Supra* n 15 at § 174.

³⁵*Supra* n 22 at §§ 541, 394.

³⁶*Supra* n 15 at § 174 cmt. a.

³⁷*Supra* n 22 at § 541.

³⁸*Ibid.*

³⁹*Supra* n 15 at § 174 cmt. a.

⁴⁰*Ibid.*

⁴¹*Supra* n 15 at § 174 cmt. b.

⁴²*Supra* n 22 at § 541.

⁴³*Supra* n 15 at § 174 cmt. c.

to the opinion of a specialist may also subject a trustee to liability.⁴⁴ The trustee has a duty to ascertain whether an expert's opinion is sound to the extent that a reasonably intelligent person could ascertain.⁴⁵ Although seeking the advice of a specialist like an attorney or appraiser tends to show the use of reasonable care.⁴⁶

Many statutes governing the conduct of trustees impose a higher standard of skill and care.⁴⁷ For example, the Uniform Probate Code requires a trustee to act as a prudent person who is dealing with the property of another rather than as a prudent person dealing with his own property.⁴⁸

Moreover, the standard of care can be altered by the settlor who can reduce or enlarge the standard.⁴⁹ But the mere grant of broad discretionary powers to the trustee will not eliminate the duty to use ordinary care.⁵⁰

The applicable treatises do not seem to differentiate between the standard of care a trustee is held to when acting in different capacities.⁵¹ One of the significant difference is with directors of nonprofit charitable corporations who are often held to a lower standard of care.⁵² Directors of nonprofit charitable corporations are governed by corporate rather than trust law and as such they need only exercise ordinary care.⁵³ They must act in good faith and exercise "the care of an ordinarily prudent person who reasonably believes he is acting in the best interests of the corporation."⁵⁴

⁴⁴*Supra* n 22 at § 541.

⁴⁵*Ibid.*

⁴⁶*Ibid.*

⁴⁷*Supra* n 22 at § 541.

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰*Ibid.*

⁵¹*Ibid.*

⁵²*Ibid.*

⁵³*Ibid.*

⁵⁴*Ibid.*

The only other area of differentiation is with professional trustees.⁵⁵ Increasingly, statutes and court decisions have required a higher standard of care for professional trustees: banks, trust companies or individuals who do a large amount of trust work.⁵⁶ This is in contrast to an individual with little or no experience who has agreed to act as trustee.⁵⁷ The exact standard is not discussed; it is merely higher than the ordinary prudent person standard.⁵⁸

VII. Supervision Of Charitable Trusts

A. Supervision by the Attorney General

The attorney general is vested with a common law power to supervise charitable trusts but this power has been rarely exercised.⁵⁹ As a result, a number of states have enacted statutes designed to provide the attorney general with the information necessary to carry out supervisory function.⁶⁰ Statutes like the Uniform Supervision of Trustees for Charitable Purposes Act require charitable trusts to register and periodically file financial reports.⁶¹

In addition, those statutes authorize the use of investigative procedures by the attorney general to determine whether the trust purposes are being carried out.⁶² The attorney general has the power to subpoena and to compel testimony and the production of papers.⁶³ Thus a trustee must furnish records and information relating to the administration of the trust, at the attorney general's request, regardless of whether there has been an allegation of breach of duty or misman-

⁵⁵*Ibid.*

⁵⁶*Ibid.*

⁵⁷*Ibid.*

⁵⁸*See Ibid.*

⁵⁹Edith L. Fisch et al., *Charities and Charitable Foundations*, 1974, § 685.

⁶⁰*Ibid* § 683.

⁶¹*Ibid* §§ 683, 686.

⁶²*Ibid.*

⁶³*Ibid* § 686.

agement of the trust so long as the demand is reasonable under the circumstances.⁶⁴

Overall, attorney generals rarely initiate enforcement litigation.⁶⁵ This is due to a number of factors. First of all, many groups are exempted from coverage by statute.⁶⁶ For example, religious groups, states, the United States, schools, hospitals, and charitable corporations are often excluded.⁶⁷ In addition, lack of time, funding, and staff contributes to disuse of the supervisory power.⁶⁸ Finally, "any high political official may be expected to approach rather cautiously the investigation of charges that respectable trustees are guilty of wrongdoing or even mismanagement."⁶⁹

B. Supervision by the Courts

A small minority of states have statutorily provided for court supervision of charitable trusts.⁷⁰ With court reporting, periodic reports are sent to the requisite court which notifies the appropriate state official if enforcement is needed.⁷¹ The state official then brings the required proceeding.⁷² Court reporting has been largely unsuccessful because charities have not reported as required and when they do the required accountings do not provide enough information.⁷³ In addition, courts are not equipped to perform supervisory functions in that they are more suited to judicial rather than administrative tasks.⁷⁴ Finally, courts

⁶⁴C. P. Jhong, Annotation, "Duty of Trustees of charitable trust to furnish information and records to attorney general relating to trust administration," (1962) 86 ALR2d 1375.

⁶⁵*Supra* n 59 at § 723.

⁶⁶*Supra* n 59 at § 685.

⁶⁷*Ibid.*

⁶⁸*Supra* n 59 at § 723.

⁶⁹*Ibid.*

⁷⁰*Supra* n 59 at § 689.

⁷¹*Supra* n 59 at § 690.

⁷²*Ibid.*

⁷³*Ibid.*

⁷⁴*Ibid.*

lack staff trained in auditing financial reports and are already busy with crowded dockets.

C. Other Supervisory Mechanisms

The Internal Revenue Service indirectly supervises charities. It requires the filing of an application and annual reports by charities who are seeking an income tax exemption. Furthermore, the Code requires notification by the Service to state officials of denials of applications for charitable tax exemption rulings and revocations of tax exemptions.

VIII. Surcharge

A charitable trustee incurs liability for breach of trust to the same extent that a private trustee does.⁷⁵ Thus a trustee will be liable if his conduct or inaction falls below the requisite standard of care and results in loss to the beneficiaries.⁷⁶ Any breach of trust may result in an adjudication of negligence and an assessment of damages against the trustee.⁷⁷ For example, a charitable trustee who makes an improper investment is liable for the loss that results.⁷⁸ And, if a trustee misappropriates or expends trust funds in breach of trust the trustee has to return that money to the trust.⁷⁹ In addition to liability for actual losses, the trustee's conduct may be subject to an injunction prohibiting further breaches of trust.⁸⁰ In addition, the transactions involving breaches of duty are voidable at the attorney general's option.⁸¹ Furthermore, in the event of a breach of trust, the trustee's compensation may be reduced or denied and in the case of a serious breach, the trustee may

⁷⁵*Supra* n 3 at § 386.

⁷⁶*Supra* n 22 at § 541.

⁷⁷*Ibid.*

⁷⁸*Supra* n 3 at § 386.

⁷⁹*Ibid.*

⁸⁰Kenneth L. Karst, "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility," (1960) 73 *Harv L Rev* 433, 462.

⁸¹*Ibid.*

be removed.⁸² Under the Restatement, a court may remove a trustee "if his continuing to act as trustee would be detrimental to the accomplishment of the purposes of the trust."⁸³ A trustee can also be removed for unfitness, serious breaches of duty, long absence, or where his views are hostile to the purposes of the trust.⁸⁴

IX. Beneficiaries-Standing

Charitable trusts operate to benefit the public.⁸⁵ As a result, the attorney general is vested with authority to enforce the terms of the trust and members of the general public are denied standing.⁸⁶ This limitation on standing to enforce a charitable trust arises from a concern that trustees will be "vexed by frequent suits, possibly based on an inadequate investigation and brought by irresponsible parties" and that courts will find their "calendars clogged with an unnecessarily large amount of litigation."⁸⁷

Similarly, beneficiaries have often been denied standing. In particular, "potential beneficiaries" lack standing especially in cases where the benefits of a trust are conferred on the public at large or upon an indefinite class of persons.⁸⁸ However, courts have allowed standing to beneficiaries with a special interest. *Restatement, supra*, § 391. Some commentators phrase this requirement more narrowly requiring an interest that is "more or less fixed".⁸⁹

⁸²*Ibid* at §§ 541, 394.

⁸³*Supra* n 15 at § 387.

⁸⁴*Supra* n 3 at § 387.

⁸⁵*Supra* n 22 at § 414.

⁸⁶*Supra* n 59 at § 720.

⁸⁷*Ibid*.

⁸⁸*Supra* n 22 at § 414 (emphasis added); *Restatement, supra* n 15 at § 391 cmt. c.

⁸⁹*See supra* n 22 at § 414 (allowing standing only in special circumstances where the beneficiary's interest was special or direct). *Cf. Restatement, supra* n 15 at § 391 cmt. c (if a charitable trust is created to promote education and certain persons are entitled to preference then those people can maintain suit to enforce the trust).

⁹⁰*Ibid*.

In several recent cases, representatives of a class of beneficiaries were allowed to bring suit against the trustees.⁹⁰ This is not the majority rule but a minority of states and the Uniform Trustees Accounting Act do recognize beneficiary standing.⁹¹

X. The Ali'i Trusts

In Hawai'i, the "Ali'i Trusts" were established by members of the Hawaiian Ali'i for the primary or exclusive benefit of indigenous native Hawaiian people. They are charitable perpetual trusts characterized by original grants of land and mandates to serve particular needs of the native Hawaiian population.

A. The Lunalilo Trust

The first of these trusts was established by the will of King Lunalilo in 1874 and is known as the Lunalilo Trust. It is estimated that before Captain Cook's arrival to the Hawaiian islands, there were more than 300,000 indigenous native Hawaiians.⁹² By 1874, this population had fallen to less than 65,000.⁹³ The Lunalilo Trust was designed to provide a facility for destitute and sick people of Hawaiian blood with preference given to elderly native citizens to live for the remainder of their years.⁹⁴ In recognizing this severe decline of the native Hawaiian population, Lunalilo established the trust and conveyed his land holdings to it. The trust was designed to fight the demise of native people.

When established, the Lunalilo Trust was the largest single landholding estate in Hawai'i. Unfortunately, the will provided that the land was to be sold to fund the construction of the facility. Lunalilo did not specify that the land could be leased or held to help pay for the continued expenses of the trust despite evidence that the trustees

⁹¹*Ibid.*

⁹²David S. Poepoe, *The Lunalilo Estate and the Betrayal of Trust*, (1993).

⁹³*Ibid.*

⁹⁴Galvteria, *Lunalilo* 68 (Rev. Ed. 1993).

had raised enough money to provide for the construction of the facility without selling much of the land. The trustees sought the Hawai'i supreme court's instruction as to whether they had the power to lease the land remaining in trust to provide income to the trust.⁹⁵ The court held that the trustees had to sell all of the land; that they had no authority to lease or retain the land; and that it was the duty of the trustees to sell the whole of the estate.⁹⁶ The impact of this decision was to leave the trust with very little assets to support the continued operation of the trust. The trust is governed by three trustees with vacancies filled by the state probate court.

B. Kamehameha Schools Bishop Estate

The Kamehameha Schools Bishop Estate was established by the will and codicils of Princess Bernice Pauahi Bishop in 1887. The trustees have written that "For Bernice Pauahi Bishop, education held the last hope for the future of her people. Having witnessed firsthand the loss of almost 90 percent of the Hawaiian population and the accompanying sense of dislocation and alienation felt by survivors, she realized that education was the only force strong enough to bring renewed hope. Her estate, as guided by her last will and testament and under the stewardship of her trustees, is a living instrument of this undying hope". The estate is a "perpetual charitable trust with an educational purpose which gets much of its revenue from land rental."⁹⁷ The will and codicils provided that the trustees could use part of the principal of the land within the trust, totalling over 400,000 acres at the death of the Princess, to establish the schools.⁹⁸ The will and codicils do not explicitly provide that only native Hawaiians and part-Hawaiians should be allowed to enroll in the school; however, the trustees, were given broad discretion and control of student admission to the schools by the will and there has been a long standing policy of giving preference to native Hawaiian children.

⁹⁵In the Matter of the Estate of His Late Majesty Lunalilo, 4 Haw 381 (1881).

⁹⁶*Ibid* 382-83.

⁹⁷*Ibid* 21.

⁹⁸*Excerpts from the Will and Codicils of Princess Bernice Pauahi Bishop and Facts About the Kamehameha Schools/Bernice Pauahi Bishop Estate* (1976) at 5.

The trust is governed by five trustees. The first five were named in the will. In the instance of a vacancy, the will provided that the Hawai'i supreme court justices, acting in their private capacities, should act to fill the vacancy.⁹⁹

C. The Queen Lili'uokalani Trust

The Lili'uokalani trust was created in 1909 by Queen Lili'uokalani, the last reigning Queen of Hawai'i. Queen Lili'uokalani provided a trust for orphans and other needy children. The original corpus consisted principally of land on the islands of Oahu and Hawai'i. The trust states that today it is a Hawaiian organization established for the benefit of Hawaiian children to "help orphan and destitute Hawaiian children by providing for a safe, nurturing family and a permanent home."

The Trust provides children with stable home environments, assists in their educational endeavors, provides direct financial assistance in some instances, and encourages self-esteem through cultural awareness. Children are helped to understand and bridge traditional Hawaiian and Western systems.

XI. Conclusion

The creation and management of charitable trusts have been the subject of extensive discussion in Hawai'i. Issues ranging from critiques of the purposes and exclusivity associated with the trusts to claimed political involvement in the selection of trustees and breaches of fiduciary duties have been the focus of very recent media, public, and governmental attention. Charitable trusts, however, have been able to preserve a large land base as a potential umbilical cord linking the preservation and enhancement of customs and cultural preservation, cultural identity, and communal activities for native Hawaiians. This accomplishment makes it worthy of consideration as a device for indigineous peoples to merge and develop customary land, thereby

⁹⁹*Ibid* 22.

aiding their struggle to survive as viable communities, preserve their culture, and attain self-determination.

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