

# Why the Justices Should Stop Appointing Bishop Estate Trustees

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## I. INTRODUCTION

Public confidence in the judicial system is critical to a free society. The court is a manifestation of society's conscience, compassion and wisdom and when judges speak, they are society's voice. Hawai'i's Code of Judicial Conduct ("Code") prohibits certain conduct merely because that conduct "appears" wrong.<sup>1</sup> Nothing more is needed than that. It requires a judge to curtail personal activities based on appearances alone because it recognizes that public confidence in the judiciary must be placed above all else.<sup>2</sup> It is only confidence in the integrity and impartiality of the court that allows the public and litigants to say, "I don't agree with the decision, but I accept it as fairly and honestly rendered and will abide by it."<sup>3</sup>

The justices of the Hawai'i Supreme Court appoint the trustees under the will of Bernice Pauahi Bishop,<sup>4</sup> which empowered the justices of the supreme court to select trustees<sup>5</sup> to the charitable trust established under the will. The

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<sup>1</sup> See HAW. REV. CODE OF JUDICIAL CONDUCT CANON 2A (1992).

<sup>2</sup> Professor Abramson notes:

For generations . . . it has been taught that a judge must possess the confidence of the community; that [the judge] must not only be independent and honest, but equally important, believed by all . . . to be independent and honest . . . "[J]ustice must not only be done, it must be seen as done." Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy.

Leslie Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 962-63 (1996)(alterations in original except for first ellipsis)(quoting *In re Del Rio*, 256 N.W.2d 727, 753 (Mich. 1977)).

<sup>3</sup> See Alan B. Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More Than Just the Highest Ranking Judge*, 1 CONST. COMM. 57 (1984)(describing the power of the office).

<sup>4</sup> Princess Bernice Pauahi Bishop died on October 16, 1884. Her will was executed on October 31, 1883, with codicils executed on October 4, 1884. The will established a perpetual charitable trust with income used for establishing and maintaining an educational facility described elsewhere in her will.

<sup>5</sup> The Will provides:

I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection made from persons of the Protestant religion.

court has ruled that the justices act in their individual capacity in selecting trustees.<sup>6</sup> This decision is itself controversial. The power to appoint is a perquisite of office, which power the justices receive upon their appointment to the court and are divested from upon their departure.<sup>7</sup> In the eyes of the public, it is one of the trappings of their judicial position.<sup>8</sup> Kamehameha

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*Will of Bernice Pauahi Bishop*, art. 14 [hereinafter *Will*], reprinted in Appendix B to this issue of the *University of Hawai'i Law Review*. See *Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973) (holding that appointment is not state action). The will of William Charles Lunalilo also vested such authority in the justices by will dated January 31, 1874. See *Will of William Charles Lunalilo*, sec. 3. Since that time, the justices have apparently declined other requests to nominate trustees under a will. See Samuel King, Msgr. Charles Kekumano, Walter Heen, Gladys Brandt & Randall Roth, *Broken Trust*, HONOLULU STAR-BULLETIN, Aug. 9, 1997, at B-1 [hereinafter *Broken Trust*], reprinted in Appendix C to this issue of the *University of Hawai'i Law Review*.

<sup>6</sup> See *King v. Smith*, 250 F. 145 (9th Cir. 1918); *Kekoa*, 55 Haw. 104, 516 P.2d 1239.

<sup>7</sup> "[T]he Hawaii Supreme Court Justices select the trustees specifically because of their status as Supreme Court Justices, and not as named individuals or because of anything they have accomplished or attained as individuals outside the court." Jon M. Van Dyke, *The Kamehameha Schools/Bishop Estate and the Constitution*, 17 U.HAW.L.REV. 413, 421 (1995). The potential for both personal and governmental liability for negligent appointments is certainly conceivable. Personal liability for negligent selection seems possible under a negligent hiring theory. See *Janssen v. American Haw. Cruises, Inc.*, 69 Haw. 31, 731 P.2d 163 (1987) (holding that negligent hiring depends on foreseeability). As to governmental liability, the court has held that an employer can be liable for negligent conduct of an employee if "the employee's conduct was related to the employment enterprise or if the enterprise derived any benefit from the activity." *Wong-Leong v. Hawaiian Indep. Refinery, Inc.*, 76 Haw. 433, 441, 879 P.2d 538, 546 (1994). The power to appoint is an incident of their employment as justices, a point reinforced by the fact that the selection committee considered how judicial candidates would exercise their power to appoint Bishop Estate trustees if selected. Although they purportedly serve as individuals and the justices are free not to participate, their philosophy on selection was apparently a regularly explored topic during the justice selection process. "Hare [Michael Hare, a member of the Judicial Selection Committee] said he recalled asking similar questions of potential candidates . . . His questioning, he said, was along the lines of criteria and process for picking trustees." *Bishop Estate Critics Press for Answers*, HONOLULU ADVERTISER, Aug. 17, 1997, at B3. Moreover, the cloak of absolute judicial immunity cannot shield the government because it applies only for their judicial actions. See *Seibel v. Kemble*, 63 Haw. 516, 521, 631 P.2d 173 (1981).

<sup>8</sup> See *King*, 250 F. 145 (affirming *In re Estate of Bishop*, 23 Haw. 575 (1917) and holding that the terms of the will called for appointment by the justices individually). When the will was made, granting to the holder of a certain judicial position the power to appoint was not an entirely unusual term in a will. See *Moore v. Isbel*, 40 Iowa 383, 388 (1875) ("[A]cting county judge . . . conferred the power of appointment upon the individual who filled the office of county judge at the time the appointment should be demanded"); *National Webster Bank v. Eldridge*, 115 Mass. 424, 427 (1874) (providing that in default of appointment by trustees, the vacancy was to be filled by "the judge of probate or by any justice of the Supreme Judicial Court"); *Shaw v. Paine*, 12 Allen (Mass.) 293 (1866) (specifying that trustee was to be "appointed by said judge of probate, or by one or more of the justices of the supreme judicial court"). When the several justices of the Hawai'i Supreme Court were divested of original

Schools Bishop Estate ("Bishop Estate" or the "Estate") is an important charitable institution with significant wealth, land and influence in Hawai'i; its activities impact the lives of all citizens of Hawai'i.

The Bishop Estate regularly appears before the courts of Hawai'i, including the supreme court. From time to time, but not always, the justices have recused themselves from hearing some Bishop Estate matters.<sup>9</sup> Moreover, the supreme court reviews the actions of the probate court, which in turn hears matters related to charitable trusts.<sup>10</sup> Finally, the state's attorney general, who must oversee, regulate, and prosecute the conduct of trustees appointed by the

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jurisdiction in probate and equity by the Judiciary Act of 1892, their power of appointment might have been transferred to the appropriate court with jurisdiction over trust appointments rather than finding the will granted the power to the individuals. *See In re Estate of Bishop*, 11 Haw. 33 (1897)(deciding that although will directs accounting to the "Chief Justice of the Supreme Court, or other highest judicial officer in this country," the Master's report should be filed with the probate court); *see also In re Lovejoy*, 227 N.E.2d 497, 500 (Mass. 1967)(holding that trustee to be appointed by the "appropriate court" was governed by statute and not within the discretionary power of the court); *Harvey v. Fiduciary Trust Co.*, 299 Mass. 457 (1938)(ruling that power to appoint guardian vested in probate court and not individually in the judge).

Several authors have questioned the role of the justices as state actors because of the Bishop Estate's racial and religious preferences in admission and hiring. *See Leigh Caroline Case*, Note, *Hawaiian Eth(n)ics: Race and Religion in Kamehameha Schools*, 1 WM. & MARY BILL RTS. J. 131 (1992); Van Dyke, *supra* note 7, at 420 (noting that at time of publication, justices had not made clear that they will consider non-Protestants as trustees). The teacher hiring preferences were struck down in *Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993).

<sup>9</sup> Recusal is a problem, not a solution. If important matters arising out of the current controversy are appealed, Hawai'i's citizens will either see a supreme court tainted by a relationship to the Bishop Estate or one wholly sitting by designation, and thereby be deprived of the judicial wisdom of its highest judicial officers. One observer criticized the Hawai'i Supreme Court justices' decision to appoint trustees, noting:

The fact that an entire court felt compelled to disqualify (in *Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973)) itself may indicate that an appointment power was exercised that should have been declined. A judiciary generally should not accept additional duties that may result in recusation unless the duties are of such a nature that judicial performance is required and alternatives do not suffice.

Michael P. Cox, *Application of "Sunset Principles" to State Judicial Functions: The Power to Appoint*, 33 OKLA. L. REV. 204, 299-303 (1980).

<sup>10</sup> The dual roles are plagued by conflict. In the justices' response to the "Broken Trust" article, they stated that one reason they abandoned the blue ribbon committee's list was "[b]ecause we were not assured that the panel reached out to all potential applicants, regardless of race, religion or political persuasion." Ronald T.Y. Moon et al., *Justices Reject 'Broken Trust' Criticisms*, HONOLULU STAR-BULLETIN, Aug. 21, 1997, at A-19. When the justices abandoned the religious criteria for trustees set in the will were they required to seek permission of the probate court? The Commission on Judicial Conduct had issued a ruling that the justices could not participate in discriminatory practices. *See Commission on Judicial Conduct, Formal Advisory Opinion #14-93*, Apr. 7, 1994.

justices, must also appear before those justices in matters concerning the state and its people.<sup>11</sup> The justices should stop appointing the trustees of the Bishop Estate because exercising the appointment power bestowed by the will raises an appearance of impropriety, bias and conflict under the Code and has the potential to undermine the confidence of the public in our judicial system.

*CANON 2: A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities*

A judge must "avoid impropriety and the appearance of impropriety in all of the judge's activities" and act at all times in a manner that "promotes public confidence in the integrity and impartiality of the judiciary."<sup>12</sup> Yet, publicity, controversy and criticism<sup>13</sup> have long followed the justices as they fulfill their appointment duties to Bishop Estate.<sup>14</sup> Criticism is not new; citizens twice have tried to block the current justices' predecessors from appointing trustees.<sup>15</sup>

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<sup>11</sup> As one commentator noted:

The Bishop Estate is fully entangled with the state . . . . The legislative, executive, and judicial branches regulate the trust: the legislature sets the salaries of the trustees, the Governor appoints the Supreme Court Justices, the Attorney General is *parens patriae* of the trust, and the judiciary nominates and confirms the trustees."

Case, *supra* note 8, at 135 (citations omitted).

<sup>12</sup> HAW. REV. CODE OF JUDICIAL CONDUCT Canon 2A (1992).

<sup>13</sup> Case, *supra* note 8, at 135, concludes that the justices' participation in the selection process constitutes state action, in part because the factors they would consider in appointing trustees are considered when the candidates for justice are considered. "The imprimatur of the state is found not only in this obligation of the State Attorney General to enforce the appointment of the trustees, but also in the action of the Governor and State Senate in nominating and confirming the Supreme Court justices." *Id.* Retired Judge Walter Heen alleges that when he was interviewed as an applicant for justice of the Hawai'i Supreme Court, he was asked what kind of person he would select for Bishop Estate trustee. See *Broken Trust*, *supra* note 4.

<sup>14</sup> See Van Dyke, *supra* note 7, at 418, nn. 21-26 (describing public criticism during appointment process of Gerard Jervis); see also, e.g., Dan Boylan, *Courting Disaster in Bishop Business*, MIDWEEK, Sept. 10, 1997, at A-9 ("Indeed the honorable court's choices over the last quarter-century have been so singularly political in appearance that in the public's mind they've turned the Bishop Estate into the ultimate 'high three' retirement of Hawaii politics."); John Flanagan, *Break the Circle of Patronage*, HONOLULU STAR-BULLETIN, Aug. 23, 1997, at B-1; Desmond Byrne, *High Court Must Stop Picking Bishop Trustees*, HONOLULU ADVERTISER, Aug. 22, 1997, at A12; A.A. Smyser, *'Broken Trust' Report Was Sorely Needed*, HONOLULU STAR-BULLETIN, Aug. 14, 1997, at A-24 (describing the "collusive cob web linking the estate trustees, the justices of the state Supreme Court, and the Judicial Selection Commission and former Gov. John Waihee."); Robert R. Midkiff, *Bishop Estate Has Outgrown Its Status as a Trust*, HONOLULU STAR-BULLETIN, Aug. 22, 1997, at A-19 ("[T]he appointment of individual trustees by the Hawaii Supreme Court is no longer appropriate.").

<sup>15</sup> Both challenges were the result of an outcry over a nominee. See, e.g., *Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973)(regarding objection to Matsuo Takabuki; a court

Speculation concerning political influence demeans the image of the court and its justices and cheats well-qualified trustees of public respect they may otherwise deserve.<sup>16</sup> In 1993-1994, the justices unsuccessfully attempted to cure the appearance of conflict and political influence from their selection process<sup>17</sup> by appointing a "blue ribbon" panel to screen applicants.<sup>18</sup> In the

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sitting by designation following recusal of justices rules that the justices' action is not state action because they serve in their individual capacity); *King v. Smith*, 250 F. 145 (9th Cir. 1918)(regarding objection to William Williamson; justices select trustees in their individual capacity and are not disqualified from reviewing cases).

Of import, in *King*, the court explained that the justices "get nothing, can expect nothing, . . . and derive no benefit from the act whatsoever." *Id.* at 150. However, in 1994, when the justices appointed Gerard Jervis, they appointed a person who had served on the selection committee that had appointed several of them to the Supreme Court. *See Broken Trust, supra* note 3. Moreover, Bishop Estate trusteeship has long been criticized as a "political plum" awarded to loyal friends of the state's most powerful. Thus, the appointment of politicians, confidantes of politicians and, in one case, a former supreme court justice, suggests that an unquantifiable amount of influence is bestowed on one who can appoint another to a post boasting a yearly paycheck just under a million dollars.

<sup>16</sup> In light of Bishop Estate's influence in the state, Canon 5's admonition against "engag[ing] in political activity" is also applicable. *See Commission on Judicial Conduct, Formal Advisory Opinion #14-93, Apr. 7, 1994.* The appointment of trustees with interests aligned with the political power of the current government broadens the power of both the Bishop Estate and the incumbent political party. *See Case, supra* note 8.

Such suspicions, however unfounded, will be inevitable as long as the Hawaii Supreme Court continues to select the trustees. It would be fairer both to the trustees and to the justices if a different process were used, and ultimately the Hawaiian beneficiaries should play a central role in this process.

*Van Dyke, supra* note 7, at 425.

<sup>17</sup> The appointment of retiring supreme court justice William S. Richardson by his colleagues certainly raises questions as well. After all, he had shared the power of appointment with his fellow justices for years. They necessarily struggled, debated, compromised and negotiated to reach consensus and act as one court as they administered justice. Now, in their private capacity, they elevated one of their peers to a position of wealth and power. It raises, at best, "an appearance of impropriety." While Justice Richardson's career and service to Hawai'i made him well-qualified to serve the trust, his affiliation to the body that appointed him overshadowed his qualifications.

<sup>18</sup> The 1993-94 selection process was described as follows:

In 1993-94, the Hawaii Supreme Court Justices went through an elaborate process to pick a new trustee, and received widespread criticism for their actions. The Court first appointed an 11-member panel of citizens who nominated five candidates. Then the Justices received a ruling from the Commission on Judicial Conduct stating that it does not violate the law or judicial ethics for them to select the Bishop Estate Trustees.

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After the Justices received this qualified green light, they reopened the process, but this time without the help of the blue-ribbon citizens panel . . . and added ten new names to the list of candidates to make a list of 15.

*Van Dyke, supra* note 7, at 418 (footnotes omitted).

end, the justices did not select an appointee from the list generated by their blue ribbon panel. Instead, they selected a person who was both a friend of Governor John Waihee and had served and chaired the Judicial Selection Commission during the time several of them were appointed to the bench by Governor Waihee.

In response to recent criticism concerning their role in the last trustee appointment, the justices recently publicly explained why they disregarded the panel's recommendations and assured the public that their decision was not politically motivated.<sup>19</sup> However, it is nevertheless inescapable that the interwoven relationships of key people in the appointment process raise questions as to the motives that might lie behind various appointments, first of the justices to the bench and then of the individuals to the Estate.<sup>20</sup> Regardless of either the justices' or the trustees' qualifications, the process employed in 1994 raised questions as to whether *either* judicial nominees or trust appointees were appointed based on political connections rather than merit.

The appointment of an unpopular appointee also reflects on the justices' judgment and integrity in the eyes of the appointee's detractors, and thus unnecessarily draws the justices into a controversy unrelated to their judicial office.<sup>21</sup> The public outcry following the justices' choices, whether justified or not, has the potential to, and has, demeaned the judiciary in the eyes of the public.<sup>22</sup> When the public is drawn into a debate over the qualifications of the trustees, the judgment of those hiring them may also be questioned. The latest

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<sup>19</sup> See Moon et al., *supra* note 10.

<sup>20</sup> See Van Dyke, *supra* note 7, at 418 (describing public criticism of the appointment process).

<sup>21</sup> Despite the importance of selection of trustees to the success of the Estate, no particular process to select trustees has been articulated by justices over the past 100 years. Apparently, the last appointive round marked the first attempt to articulate a procedure. The process apparently has not included beneficiary input. The secrecy of the process makes the justices even more vulnerable to criticism. The cure calls for institutional reform because ad hoc changes by the current justices to improve and open the process could easily be abandoned by their successors.

<sup>22</sup> The Hawai'i Supreme Court is noted for landmark rulings sparking public controversy. Public questions concerning the justices' ability to appoint qualified trustees to this highly visible trust may equate to the justices' general competence in the eyes of some. Thus, it seems prudent that a court making innovative legal rulings should especially eschew controversy in its extra-judicial activities, lest the public make misplaced generalizations about the justices. See Robert J. Albers & Kenneth C. Fonte, *Is Section 2C of the Model Code of Judicial Conduct Justified? An Empirical Study of the Impropriety of Judges Belonging to Exclusive Clubs*, 8 GEO. J. LEGAL ETHICS 597 (1995) (arguing that the public perceives judge's biases in light of judge's affiliations); Abramson, *supra* note 2, at 949; Stephen Lubet, *Participation by Judges in Civic and Charitable Activities: What Are the Limits?*, 69 JUDICATURE 68, 80 (1985) [hereinafter *Charitable Activities*].

publicity has battered public confidence in the justices' ability to make sound appointments.<sup>23</sup> Because the Code asks judges to guard the image of the judiciary, the mere fact that the public perceives the current appointees negatively and questions both the propriety and competence of the justices' role in the appointment process is reason enough for them to shun future appointments.

*CANON 4: A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations*

The fact that the justices do not act in their official capacity when appointing the trustees is irrelevant. Chief Judge Benjamin Cardozo once wrote, "[a judge should not accept] as an individual what the judge must reject. At least this is so when what is done is official and not personal in its quality and incidents."<sup>24</sup> Under the Code, a judge must avoid extra-judicial conduct which "(1) cast[s] doubt on the judge's capacity to act impartially as a judge; (2) demean[s] the judicial officer; or (3) interferes with the proper performance of judicial duties."<sup>25</sup> The court's selecting of trustees raises all three issues. First, the justices' faithful obedience to the will raises doubts as to whether the justices can be unbiased toward the Bishop Estate when Estate matters come before the court. Second, the controversial nature of the appointments, especially of politically well-connected nominees, potentially tarnishes the perception that the judiciary in this private act or in its judicial decision making is independent and free of political influence. Finally, the necessity to recuse itself in matters concerning the management of the largest private landowner in the State, the awkward role of oversight over the justices by their own inferior probate court, and the attorney general's regulatory oversight of their activity in the Bishop Estate all interfere with performance of their judicial duties.

The Code's commentary reminds a judge to "regularly reexamine the activities of each organization with which the judge is affiliated to determine

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<sup>23</sup> A full 69% of the public in a September 1997 public opinion poll believe that the justices' current trustee appointments are NOT doing a good job. Sixty four percent also feel that the Bishop Estate "has too much power" in Hawai'i. Most telling, 48% want the justices out of the business of appointing trustees. Thirty-two percent believe the justices should continue to appoint the trustees and 20% are not sure. See Jim Witty, *90 Percent Back Bishop Inquiry*, HONOLULU STAR-BULLETIN, Sept. 23, 1997, at A-1. While the justices must never yield to public opinion in their judicial role, they must yield in their extra-judicial role because they are the guardians of public confidence in the independence and integrity of the system.

<sup>24</sup> *In re Richardson*, 160 N.E. 655, 662 (N.Y. 1928)(quoted in Cox, *supra* note 9, at 300 n.98 (1980), criticizing decisions of Hawai'i Supreme Court justices to appoint trustees).

<sup>25</sup> HAW. REV. CODE OF JUDICIAL CONDUCT Canon 4A (1992).

if it is proper for the judge to continue the affiliation."<sup>26</sup> The Code justifies intruding into a judge's personal activities in recognition that public confidence in the judiciary is imperative to public cooperation, and thus essential to a free society. "A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."<sup>27</sup> The reason for this stricture is clear:

The need for the judiciary to avoid the appearance of partiality exists even in the absence of actual wrongdoing or favoritism. Judges are customarily assisted only by bailiffs; like the Pope, they have no regiments. Consequently, in a democracy the enforcement of judicial decrees and orders ultimately depends on public cooperation.<sup>28</sup>

The regulation of a judge's extra-judicial charitable conduct serves three broad policies related to public perception of the judiciary. First, a judge must avoid the appearance of partiality toward organizations finding his or her personal favor.<sup>29</sup> Second, the association of a judge with specific organizations may erode public confidence in the judge's independence or judgment.<sup>30</sup> Third, a judge must not allow personal endeavors to distract from his or her judicial activities.<sup>31</sup>

The general rule is that "judges must refrain from service in organizations which are regular or likely litigants . . . ."<sup>32</sup> The Code discourages a judge from having a key extra-judicial role in organizations precisely because of the kind of perceptions here.<sup>33</sup> The dual role of appointing the trustees and ruling

<sup>26</sup> *Id.* Canon 4C(3)(a) commentary. For example, Canon 4's commentary cautions that as "charitable hospitals are now more frequently in court than in the past[,] a judge should examine the propriety of any affiliation. *Id.*

<sup>27</sup> *Id.* Canon 2A commentary.

<sup>28</sup> *Charitable Activities*, *supra* note 22, at 69-70; Stephen Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 986 (1985) ("Should the citizenry conclude, even erroneously, that cases were decided on the basis of favoritism or prejudice rather than according to law and fact, then regiments would be necessary to enforce judgments.").

<sup>29</sup> *See Charitable Activities*, *supra* note 22, at 69; *see also Nielson v. Nielson*, No. 03A01-9506-CV-00186, 1996 WL 16018 (Tenn. Ct. App. Jan. 18, 1996) (requiring recusal and acknowledging violation of code of conduct; judge's participation on the advisory board of a civic organization is improper, non-legal advice where the organization's membership may occasionally be called as expert witnesses in proceedings before the court).

<sup>30</sup> *See Charitable Activities*, *supra* note 22, at 69.

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at 80.

<sup>33</sup> Although each justice does not serve as an "officer, director, trustee or non-legal advisor," roles specifically prohibited on behalf of charities which might come before the court or in a court over which the judge has appellate jurisdiction under Canon 4C(3)(a), the justices' unique power to appoint is certainly a substantial and key role in an organization frequently appearing before them or their inferior courts. "The provisions of this Code are to be construed

on trust business<sup>34</sup> raises an appearance of conflict and bias. As one critic commented, “[w]hen the Supreme Court is the ultimate arbiter of what’s okay and what isn’t with respect to trustee liability, it’s most unfortunate to have them be the ones who have picked the trustees . . . .”<sup>35</sup> Certainly a litigant in a lease-to-fee conversion suit or other lawsuit against the Bishop Estate might have justifiable concern when learning that the supreme court selected the trustees with whom the litigant now quarrels.

Canon 4E discourages a judge from accepting fiduciary roles generally and especially as to parties likely to come before them.<sup>36</sup> A fiduciary relationship exists “wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another . . . and it may exist in the absence of a specific or technical trust or agency.”<sup>37</sup> It arises “in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence . . . .”<sup>38</sup>

The justices enjoy an extremely important power under the will, and when exercising their appointment power, they owe a fiduciary duty to the trust’s beneficiaries. The beneficiaries, like the Princess before them, place their trust in the justices to exercise this power wisely. The Code generally prohibits judges from engaging in fiduciary activities because of the dual and conflicting roles of fiduciary and judge. By placing the interests of the beneficiaries first, they necessarily must place the public and their judicial role second. When the justices’ appointees are ones with close ties to the government or to the judiciary, one might logically ask whose interests their appointments served—the state’s or the Bishop Estate’s?

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and applied to further [the integrity and independence of the judiciary].” HAW. REV. CODE OF JUDICIAL CONDUCT Canon 1A (1992).

<sup>34</sup> See, e.g., *Murray v. Kobayashi*, 50 Haw. 104, 431 P.2d 940 (1967)(providing instructions on interpreting provision in will requiring religious hiring practices); *Richards v. Midkiff*, 48 Haw. 32, 396 P.2d 49 (1964)(involving suit by one of several trustees against others); *In re Estate of Bishop*, 37 Haw. 111 (1945)(concerning dispute between trustees and attorney general over trustee commissions); *In re Estate of Bishop*, 36 Haw. 728 (1944)(involving a dispute over accounting); *In re Bishop Estate*, 36 Haw. 403 (1943)(involving compensation of trustee); *Collins v. Hodgson*, 36 Haw. 334 (1943)(regarding dispute over expenditures).

<sup>35</sup> Stephen G. Greene, *Misplaced Trust?*, CHRON. PHILANTHROPY, Oct. 2, 1997, at 1. The article continues, “What’s more, the attorney general’s ability to oversee and regulate charities is potentially hampered when that official must also argue cases periodically before the same body that has appointed the trustees of a charity that he or she may wish to investigate.” *Id.* (quoting “Ed Halbach, a former dean at the University of California at Berkeley law school and an expert on trust law.”).

<sup>36</sup> See HAW. REV. CODE OF JUDICIAL CONDUCT Canon 4E (1992).

<sup>37</sup> 36A C.J.S. *Fiduciary* (1961).

<sup>38</sup> *Id.*

## II. 1994 COMMISSION ON JUDICIAL CONDUCT OPINION #14-93

In 1994, the Commission on Judicial Conduct issued an advisory opinion commenting on the propriety of the justices' involvement in the appointment of trustees.<sup>39</sup> Ironically, the Commission commended the justices for attempting to remove political influence from the process by using a blue ribbon committee to screen applicants. Unfortunately, history shows that the process failed and the justices rejected the panel's work. Moreover, even were these particular justices able to devise a selection process free of political influence and other conflicts, the justices have no power to ensure that the changes would endure beyond their tenure. The controversial role of the justices in the selection process spans decades and calls for institutional reform.

The 1994 opinion largely neglected analysis under Canon 4 governing extra-judicial conduct; nevertheless, the Commission's cautious pronouncements as to the propriety of continuing under Canons 1, 2, and 5 were hardly an endorsement of continued involvement in appointing trustees. First, the Commission noted that its own members were divided as they began their deliberations—a telling comment, for it mirrors how the people of Hawai'i view the justices' role. The Commission also cautioned the justices that they must revisit the appropriateness of their role if public perceptions place the image of the judicial system at risk.<sup>40</sup> The opinion further warned:

The Commission understands that the uniqueness of Hawaii's socio-economic and geographical features renders the question presented here in Hawaii significantly distinguishable from those settings in other jurisdictions, which do not have the unique cultural conditions present in our State. However, such factors cannot and do not serve as the basis for our conclusion. Of much greater importance to this Commission is the fact that public confidence in, respect for, and perception of the integrity of our judicial system, greatly outweighs the importance of the Bishop Estate trustee selection.<sup>41</sup>

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<sup>39</sup> Commission on Judicial Conduct, Formal Advisory Opinion #14-93, Apr. 7, 1994.

<sup>40</sup> Specifically, the Commission stated:

The Commission recognizes that there is a question about whether or not public perception in Hawai'i is that the trustee appointment process may be significantly and improperly influenced by political factors. This Commission concludes that the allegation that such a perception exists, to the extent it significantly and detrimentally affects the integrity of the judicial system is not supportable, certainly not to the extent that such a finding would require immediate disqualification or prohibition against the Justices from further participation in the appointment of Bishop Estate trustees. On the other hand, it is equally important to recognize and understand that public perception on this matter is extremely difficult to measure and determine. Consequently, to give the benefit of the doubt to the present Justices in this initial inquiry is more appropriate than it might be upon any future consideration of this matter.

*Id.*

<sup>41</sup> *Id.*

The opinion then concluded that justices who choose to participate must "avoid or eliminate" acts or activities which are likely to create a perception that the selection process:

- 1) is in any way influenced by political factors or favors,
- 2) will influence or otherwise affect the judicial process to the extent Bishop Estate is involved in litigation,
- 3) utilizes judicial resources to the detriment of the judiciary,
- 4) is influenced in anyway by religious or racial discrimination,
- 5) is lending the prestige of the court to the benefit of the Bishop Estate or its trustees.<sup>42</sup>

Finally, the Commission predicted that if such negative effects could not be removed from the process, then the Commission expected the matter to "be before the Commission again."<sup>43</sup>

### III. CONCLUSION

The current loud and public debate has overshadowed the justices' service to our judicial system, and it is time for the justices to reevaluate their service to the Bishop Estate. While their sense of responsibility to the terms of the will is admirable, they must weigh these activities against the detrimental effects their participation has upon citizen confidence in the judiciary. The Code asks all judges to put aside their private, extra-judicial activities for the sake of public respect for, and confidence in, our judicial system. Regardless of their good intent, under the Code, they must acquiesce to public opinion against their involvement in this extra-judicial activity, so that all who come before them will have trust and confidence in the integrity of the court.

### UPDATE

Since this Article was written, four of the five justices of the Hawai'i Supreme Court announced that they would no longer participate in the selection of the Bishop Estate Trustees.<sup>44</sup> The justices cited a desire to combat the growing distrust and cynicism toward the judiciary as their prime motive.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Rick Daysog, *Selection of Trustees Explored*, HONOLULU STAR-BULLETIN, Dec. 22, 1997, at A-1.

Justice Robert Klein did not concur, emphasizing the Hawai'i Supreme Court's long history and tradition of appointing trustees.<sup>45</sup>

Deciding how trustees should be appointed remains an unsettled and urgent concern because "interim" trustees serve in place of the variously permanently or temporarily ousted trustees at the present. Now that this provision in the will has failed (at least for the time being), the probate court needs to establish a process for the selection and appointment of trustees.

Although the four justices have bowed out of the process, the propriety of judges appointing the trustees in their unofficial capacity remains a vital topic. In September 1999, the Hawai'i State Attorney General ("Attorney General") recommended to the probate court that the four sitting members of the Intermediate Court of Appeals ("ICA") fill future vacancies.<sup>46</sup>

The Attorney General informed the probate court that the ICA judges were willing to assume this responsibility.<sup>47</sup> The Attorney General reasoned that using the ICA judges would best approximate the process prescribed in the Princess' Will now that a majority of the Supreme Court had elected not to participate in appointing trustees.<sup>48</sup> The Attorney General further reasoned that employing the ICA judges rather than the supreme court justices cured most, if not all, of the ethical and practical problems associated with judicial involvement in the appointment process.<sup>49</sup> The Attorney General noted that historically the ICA did not hear Bishop Estate cases and so its recusal from Bishop Estate matters would not interfere with the delivery of judicial services to the state.<sup>50</sup>

The Attorney General attributed the perception of impropriety and politics in the appointment process to the compensation issue, explaining:

The perception of political influence will exist even if the appointment power is, contrary to the Will, removed from members of the judiciary. So long as KSBE trustees are overpaid in relation to their skills or experience or in relation to their contribution to society, an appointment will be perceived as political no matter who makes it.<sup>51</sup>

The Attorney General's view is simplistic. Bishop Estate trusteeship will always be prized because of the Estate's great wealth, land, and status as an important Hawaiian institution.

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<sup>45</sup> *See id.*

<sup>46</sup> *See* Attorney General's Response to Petition for the Establishment of a Procedure for Selection of Future Trustees, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Sept. 13, 1999).

<sup>47</sup> *See id.* at 11.

<sup>48</sup> *See id.* at 7.

<sup>49</sup> *See id.* at 7-11.

<sup>50</sup> *See id.* at 8, 10.

<sup>51</sup> *Id.* at 9-10.

The court rejected the Attorney General's position, calling it "unpersuasive" and "illogical."<sup>52</sup> The court instead appointed a seven-member selection committee comprised of community leaders to identify candidates for final selection by the probate court.<sup>53</sup> However, the court also noted that the supreme court may one day resume the practice of appointing trustees if it so chose.<sup>54</sup>

Finally, an important question lingers. In 1993, the justices abandoned the religious preference toward Protestants prescribed in the will because they could not discriminate on the basis of religion, even when acting unofficially. If an independent selection process is developed and judicial involvement is limited to appointing the trustee selected and recommended by others, then may the Protestant qualification within the will be honored?<sup>55</sup> Certainly a court will need to visit this issue.

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<sup>52</sup> See Rick Daysog, *Judge Appoints Panel to Nominate Future Trustees*, HONOLULU STAR-BULLETIN, Jan. 7, 2000, at A-8.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of a discriminatory provision in a private contract violates the Fourteenth Amendment). Whether enforcement of discriminatory testamentary provisions constitute improper state action likely depends on the extent of state involvement. See *In re Estate of Wilson*, 452 N.E.2d 1228 (N.Y. 1983); *In Re Estate of Laning*, 339 A.2d 520 (Pa. 1975); *In re Certain Scholarship Funds*, 575 A.2d 1325 (N.H. 1990).

