

Deconstructing *The Descendants*: How George Clooney Ennobled Old Hawaiian Trusts and Made the Rule Against Perpetuities Sexy

By
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The first and last sections of this essay are about a reel story. Of course I'm talking about the movie, *The Descendants*. It is based on a book of the same name, written by Kauai Hart Hemmings.¹ The stories in the book and the film are quite similar, but not identical.²

The movie was nominated for five Academy Awards: best screenplay, best editing, best direction, best leading actor, and best movie. It won for best screenplay. If you saw the movie and stayed to watch all the credits—and I mean *all* the credits—you saw my name. It was the last name, on the last screen—appearing right after Dollar Rent-A-Car—but it was there.

My involvement began three years earlier with a phone call from one of the movie's producers wanting me to meet with Alexander Payne, the creative genius who was writing the script and in a few months would be directing the movie. I had not yet read the book, but the chance to meet with a successful moviemaker sounded like fun, so I invited both of them—Alexander and the producer—over to dinner. I also invited my *Broken Trust*³ co-author, federal judge Sam King,

¹ Hemmings happens to be the daughter of longtime family friends. *The Descendants* is her first novel. Interestingly, the movie's producers acquired the movie rights to the book while it was just a pre-publication manuscript.

² Selected differences between the movie and book are noted in footnotes.

³ The so-called Bishop Estate began in 1884 when Princess Bernice Pauahi Bishop, the last acknowledged descendant of the Hawaiian monarch Kamehameha I, placed the bulk of her estate in trust to establish and maintain two schools, "one for boys and one for girls...called the Kamehameha Schools." Near the end of the Twentieth Century, Bishop Estate was described by The New York Times as "a feudal empire so vast that it could never be assembled in the modern world" (Todd S. Purdum, *Hawaiians Angrily Turn of a Fabled Empire*, THE NEW YORK TIMES, p. 1, Oct. 14, 1997) and by The Wall Street Journal as "the nation's wealthiest charity" (Alix M. Freedman and Laurie P. Cohen, *Bishop's Gambit: Hawaiians Who Own goldman Sachs Stake Play Clever Tax Game*, THE WALL STREET JOURNAL, April 25, 1995). The book in question, SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST* (2006), describes a scandal that occurred in the late 1990's. See Ron Aucutt, *Book Review: Broken Trust*, 42 REAL PROP. PROB. & TR. J. 409 (2007) ("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.")

and his wife, Anne. The Roths and Kings immediately read Kauai's book and learned more about Alexander's movies, including the one that had already won an Academy Award—*Sideways*.⁴

Early in the dinner conversation I kiddingly asked Alexander if the George Clooney character in the movie, Matt King, would be patterned after the 94-years old Sam King. Before Alexander could respond, Sam said that he would prefer to be played by Dwayne "The Rock" Johnson. Alexander loved Sam's humor, including Sam's response when asked if King Street in Honolulu had been named after someone in the King family. Sam smiled and said, "You know, there's a Queen Street, too."

I started to describe some of the real people and stories that had come to mind as I read Kauai's book; for example, there is a thrill-seeking person suddenly on life support because of a speedboat racing accident (which brings Tom Gentry to mind);⁵ and a spendthrift playboy whose father invented the shopping cart (which because of the shopping cart connection brought the Goldman brothers to mind).⁶ Before I could describe any of the many other connections I had made, Alexander reassured everyone at the table that he would *never* pattern a movie on the life of a real person without that person's full knowledge and informed consent. Anne King smiled sweetly and said, "I don't believe you!" Alexander roared with laughter.

Toward the end of a delightful evening, Alexander asked if I would be willing to comment on selected sections of the movie script. I jumped at the opportunity. This led to a series of emails⁷ and two face-to-face meetings, during which we discussed a trustee's power to act unilaterally,

⁴ *Sideways* won the Academy Award for Best Screenplay in 2004. Alexander Payne's other films include *Citizen Ruth*, *Election*, and *About Schmidt*.

⁵ Barbara Lloyd, *Tom Gentry, 67, Powerboat Racing Record Holder*, N.Y. TIMES, Jan. 17, 1998 ("[A] wealthy real estate developer whose fascination with powerboat racing brought him several world records, died at home in Honolulu Thursday, nearly four years after a severe crash at a world championship left him hospitalized and in a coma. . . . Just a month before the 1994 crash, Mr. Gentry set a world speed record for his class by driving Team Gentry at an average of 157.4 miles an hour in San Diego Bay. In 1989, Mr. Gentry set the trans-Atlantic speed record of 62 hours 7 minutes. . . . [Gentry's son, Norman, told Associated Press], 'He took and overcame risks, both in business and in sports. He loved the pulse of business and the intensity of competition.'")

⁶ Alfred and Monte Goldman reportedly inherited more than \$400 million from their father, Sylvan Goldman, who invented the shopping cart. In 1971 Alfred and Monte purchased the 7.5-acre Henry Kaiser Estate in the Portlock area of Hawai'i Kai. According to later news reports, the Goldman brothers dissipated most of their inheritance before at least one and perhaps both of them committed suicide. See, e.g., Toddi Gutner Block, "*When Wealth's a Curse*," FORBES, Sept. 11, 1995, at 188; *Former Kaiser Estate Owner Found Dead*, HONOLULU STAR-BULLETIN, Oct. 28, 1997 ("Alfred Goldman . . . found dead . . . a possible suicide. . . . Monte Goldman died of a single self-inflicted gunshot wound"); see also Jenny Quill, *Honolulu's Kaiser Estate Still Seeks Buyer*, HONOLULU MAGAZINE, Sept. 16, 2010 ("the estate sits lifeless and idle, as if a *Great Gatsby*-esque party rolled through and left in a hurry."). In the book, the fellow who was driving the speedboat at the time of the accident was a son of the man who invented the shopping cart, and he had "little to do except sleep with lots of women and put my wife in a coma," according to Matt King.

⁷ In his first email to me, Alexander wrote, "Please let me know if I'm on the right track, if it rings true, if any additional details might help experts like you think that, well, I consulted an expert! I can take it all like a man."

the fiduciary duties trustees owe to trust beneficiaries, problems associated with co-ownership of valuable undeveloped land, and reasons why some trusts must eventually terminate.⁸

I was not optimistic about Alexander's chances of making a Hollywood blockbuster that would satisfy detail-oriented trust lawyers, but he tweaked his script and I was surprised by how much I enjoyed the movie.⁹ In fact, my heart nearly skipped a beat when I realized that George Clooney was about to utter those three magic words: Rule ... Against ... Perpetuities.

The details of this ancient law are legendary among law students as being virtually indecipherable, but its fundamental purpose is really quite simple: it limits how long the dictates of a dead person can be imposed on the living.¹⁰ The maximum time allowed by the Rule usually works out to about 100 years.¹¹

⁸ We also discussed advance directives, but that topic is not relevant to this essay. With Russell Ota's permission, here is the background on how the advance directive document that he prepared ended up in the movie: "[O]ne of my partners . . . knew the person in charge of props and gave them my name. The document I prepared for the movie was rejected twice. The first time it was because 'it didn't look like a legal document.' I added a blue back and changed the font to look like an old style will. The second time it wasn't notarized (hello, Elizabeth Thorson King is not a real person!). . . . The third time was the charm, and I put my name and address on the blue back My parents were quite impressed."

⁹ Legal authorities and publications that publically reviewed the movie declared it a winner. See, e.g., *Film for Trust Buffs "The Descendants" Wins Golden Globe for Best Drama*, THE TRUST ADVISOR, Jan. 16, 2012, <http://thetrustadvisor.com/headlines/descendants-golden-globe> ("This is the Trust Advisor's favorite film of the season, a depiction of what the trust industry is all about. This is a MUST see for anyone in the trust world."); Deborah L. Jacobs, *George Clooney Makes Estate Planning Sexy*, FORBES (Feb. 23, 2012, 2:37 PM), <http://www.forbes.com/sites/deborahljacobs/2012/02/23/the-descendants-buries-estate-planning-lessons-in-george-clooney-drama/> (last visited Mar. 4, 2013) ("[T]he legal issues were painstakingly developed and fact-checked."); Joseph S. Karp, *"The Descendants" Shows Challenges for Trustees*, LEXISNEXIS ESTATE PRACTICE & ELDER LAW COMMUNITY (Nov. 29, 2011, 2:20 PM), <http://release.allnet.com/community/estate-elderlaw/blogs/trusts/archive/2011/11/29/quot-the-descendants-quot-shows-challenges-for-trustees.aspx> ("The film . . . masterfully portrays how difficult it can be to satisfy all family members when an estate planning pie must be divided and distributed. The situation depicted in the film is spot-on realistic."); *Hollywood, and the Rule Against Perpetuities*, TORONTO ESTATE LAW BLOG, (Nov. 28, 2011), <http://estatelaw.hullandhull.com/2011/11/articles/topics/estate-trust/hollywood-and-the-rule-against-perpetuities/> ("The Descendants . . . is a great movie from the perspective of an estates and trusts lawyer."); Arthur S. Leonard, *The Descendants: The Rule Against Perpetuities Provokes a Family Crisis*, ART LEONARD OBSERVATIONS BLOG Jan. 16, 2012), <http://www.artleonardobservations.com/the-descendants-the-rule-against-perpetuities-provokes-a-family-crisis/> ("[T]he whole thing is well put together."); Jeffrey A. Cramer, *Movies About Estate Planning: The Descendants*, CRAMER LAW CENTER (Apr. 10, 2012), <http://cramerlawcenter.com/areas-of-practice/estate-planning/movies-about-estate-planning-the-descendants/> ("The Descendants deals with the estate planning issues accurately, while entertaining and enlightening the viewer.").

¹⁰ The dead person's instructions are sometimes characterized as "dead-hand control." For hundreds of years, the law allowed dead-hand control for only so long. In recent years, however, a growing number of states have repealed the Rule Against Perpetuities—including Hawai'i, in the case of certain trusts. See Haw. Rev. Stat. § 554G.

¹¹ The common-law Rule provides that no private trust can last longer than twenty-one years beyond the death of some life in being at the creation of the interest. Many states now have a statutory Rule Against Perpetuities that sets a maximum time of ninety years, and a small but growing number of states recently abolished the Rule, so that any trust—private as well as charitable—can be designed to last "forever" (i.e., operate in perpetuity).

The Story in the Movie

In the movie, Matt King¹² is the sole trustee¹³ and one of about twenty beneficiaries of a family trust that had been established many years earlier by his great, great grandparents, a Hawaiian princess and a *haole*¹⁴ banker.¹⁵ The trust's most valuable holding is a 25,000-acre parcel of breathtakingly beautiful land on the island of Kauai. Because of the Rule Against Perpetuities, the trust will dissolve in another seven years.¹⁶ Matt says there will be a “train wreck” at that time if he distributes this particular land to the beneficiaries—which alludes to the likelihood that the co-owning cousins would end up in a cumbersome and costly partition lawsuit. In order to avoid such an outcome, and because many of the cousins need money, Matt initially decides to sell the land to either of two potential buyers: a group out of Chicago¹⁷ that has offered the most money—a half-billion dollars—or a guy by the name of Holitzer who grew up on Kaua‘i, and whose approach to development might be more in tune with local preferences.¹⁸ Several of the beneficiaries and many of the locals on Kauai do not want the land developed by anyone.¹⁹

As the sole trustee, Matt must decide whether to sell and to whom, but he polls the other beneficiaries anyway, to see what they view as being in their best interests.²⁰ Almost all of them

¹² Matt King is basically a good man who has lost touch with his wife and daughters—and with life in general—for reasons that are never made clear. He is suddenly shaken from his midlife ennui by a personal tragedy: his thrill-seeking wife has been placed on life support because of a speedboat-racing accident. Standing next to her nearly lifeless body in the hospital, Matt promises to be a better father, more-attentive husband, better person . . . if only she will recover. But his rediscovered love for her is shaken when he learns that she had been having an affair with a realtor, Brian Speers. She eventually dies, but not before Matt achieves his goal of becoming a better father and husband . . . and sticks it to Brian Speers. This article addresses only the part of story that involved valuable land in an old Hawaiian trust that must terminate in seven years.

¹³ In the book, instead of being the trustee, Matt's vote simply counts more than that of any other beneficiary's, because he has a one-eighth interest and each of the others has only a one-twenty-fourth interest.

¹⁴ *Haole*, literally “without breath,” means “foreigner” in Hawaiian. In modern colloquial usage, *haole* refers only to Caucasians. Matt (played by Clooney) and his cousins may look Caucasian, but because of their Native Hawaiian ancestry, they are not *haole*.

¹⁵ Princess Kealohilani (her name in the book is Princess Kekipi) was one of the last direct descendants of King Kamehameha I (in the book, Kekipi was the very last descendant of Kamehameha). The Princess had been slated to marry her own cousin (her brother in the book), but that did not happen; instead, she married her *haole* banker, Edward King (in the book, Edward was her estate planner and they had a scandalous affair before marrying).

¹⁶ Kealohilani and Edward evidently provided that the trust was to last as long as the law would allow. In the book, the trust was formed in 1920 and the Rule Against Perpetuities is not mentioned.

¹⁷ This higher bidder in the book is a publically traded company out of New York, and Matt says that he is “wary of giving New Yorkers this much land [in Hawai‘i] . . . it just doesn't seem right.”

¹⁸ In the movie, one of Matt's cousins comments that, “at least with Holitzer there won't be any Walmart.” In the book, Matt expresses a preference to sell to someone “with a history here” and considers it a plus that Holitzer would “lease some land to the conservancy.” The movie includes a comment that the profits from developing the land would “stay in Hawai‘i” if the sale is to Holitzer.

¹⁹ They think it would just attract more people and more cars, and that their island paradise would never be the same.

²⁰ A trustee is supposed to carry out the trust's purpose in a way that serves the beneficiaries' best interests, as determined by the trustee. The beneficiaries' opinions are relevant, but just because beneficiaries say they want something, or consent to a trustee's proposed action, does not mean that they cannot later sue the trustee for a perceived breach of trust. A trustee who makes a decision that in hindsight looks bad will sometimes be sued by one

want to sell the land, and the clear majority prefers Holitzer to the Chicago group, but just as Matt is about to sign the sales document he decides that he and his cousins should be approaching this more like Native Hawaiians and less like *haole*. Matt's ancestors would want this "piece of paradise" preserved, not developed, according to Matt.²¹ So he puts down the pen and announces that he will not be selling to anyone and that he has seven years to find a way to preserve the land.²² Because at least some of the cousins need money and do not share Matt's newly discovered sense of Hawaiianness, a future lawsuit is quite possible.

Real Stories Echoed by the Movie

The Descendants echoes real stories from Hawai'i. Perhaps the most obvious is the description of Matt King's ancestors as a *haole* banker and a Hawaiian princess descended from Kamehameha the Great, which precisely describes Charles Reed Bishop and Princess Bernice "Pauahi" Bishop. And like the banker and princess in the movie, Charles and Pauahi transferred large amounts of wealth, including breathtakingly beautiful land, into trusts.²³ Unlike the movie, however, Charles and Pauahi left no descendants and their trusts were charitable rather than private—which is why the Rule Against Perpetuities never applied to them.²⁴

The Bishop Estate

Pauahi's trust currently operates under the trade name of Kamehameha Schools but outside of Hawaii it is still widely known as Bishop Estate.²⁵ There are many interesting similarities between Matt King and the Bishop Estate trustees. Like Matt, the Bishop trustees feel

or more beneficiaries who claim that the decision did not meet the trustee's standard of care, and that their consent to the transaction was based upon misleading or incomplete information.

²¹ In the book Matt says, "I belong to one of those Hawaiian families who make money off of luck and dead people," and, "we've turned our backs on our legacy." Matt also has a very personal reason not to sell to Holitzer: Brian Speers, the man who had been having an affair with Matt's wife, works with Holitzer and would undoubtedly enjoy a financial windfall if Matt sells the land to Holitzer. In both the book and movie, Matt says, "I don't want it to go to Brian Speers," but in the movie it seems that Matt decides not to sell for relatively selfless reasons, rather than to get back at Brian Speers.

²² According to movie critic Roger Ebert, "An undercurrent, which Payne wisely keeps subtle, is that perhaps Matt lost touch with his wife and daughters after first losing his special bond to the land. . . . The film follows Matt's legal, family and emotional troubles in careful detail, until Payne shows us, without forcing it, that they are all coiled together. A solution for one must be a solution for all. This is so much more complex than most movie plots, where good and evil are neatly compartmented and can be sorted out at the end."

²³ There is an even more direct connection in the book, where Matt says that the princess "wanted the land used to fund a school for children of Hawaiian descent," which is the mission being pursued by the Bishop Estate's real-world trustees. The movie, however, makes no mention of any such plan or possibility.

²⁴ The Rule Against Perpetuities does not apply to charitable trusts, so they are allowed to operate in perpetuity.

²⁵ See generally SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST* (2006). Toward the end of the Twentieth Century, the Bishop Estate was grossly mismanaged and in serious danger of losing its tax-exempt status. Since then, the Bishop Estate has reorganized itself and significantly expanded its education mission.

responsible to protect the *aina*²⁶ and preserve Native Hawaiian culture.²⁷ And in both cases, the governing document does not explicitly include land stewardship or cultural preservation as a trust purpose.²⁸

Charles' trust, once known as The Bernice P. Bishop Museum Trust, no longer exists. In 1975 its trustees converted that charitable trust into a nonprofit entity called Bishop Museum Corporation.²⁹

The Waterhouse Estate

An article in Alexander Payne's hometown newspaper, the Omaha World-Herald,³⁰ noted that the land shown in the movie—known as *Kipu Kai*³¹—belongs to the Waterhouse Estate and that it has other connections to the movie. For example, *Kipu Kai* was once owned by Princess Ruth

²⁶ *Aina* generally refers to Hawaiian ancestral lands. *Aloha aina*—to nurture and care for the land—is at the core of the Hawaiian culture and spiritual beliefs.

²⁷ The following appeared on Kamehameha Schools Endowment Group's webpage on March 14, 2005: "In additions to its core and non-core real estate assets, the Endowment Group manages 360,000 acres of Hawaii land zoned for agriculture and conservation. The land includes 63 miles of ocean frontage, 100 miles of streams, historic fishponds, forests and lava fields. These lands and resources are deeply tied to the Hawaiian culture and define KS as an ali'i trust. Consequently, they are managed separately from KS' freely traded investment portfolio."

²⁸ According to the book, Matt's great grandmother "wanted the land used to fund a school for children of Hawaiian descent," but according to the movie, neither she nor her husband left explicit instructions regarding trust purpose, other than to benefit descendants. In both the book and the movie, Matt studies old documents and letters, trying to figure out what exactly his ancestors intended. Was the whole idea of the trust to enrich their descendants, or did they have something more noble in mind? As he puts it in the book, it's difficult "imagining what two people I've never met would want." See also KING & ROTH, *supra* note 24, at 297 (Bishop Estate trustees hold 360,000 acres of non-income-producing land as "program assets," to be held in perpetuity "for educational purposes"); see also *id.* at 301-03.

²⁹ The trustees of Charles' trust got permission from the probate court to terminate the trust by transferring all trust property to a new nonprofit corporation that had directors (the trustees), but no shareholders. So instead of managing trust property as trustees, the now-former trustees carried on as directors of the new corporation. They continue to owe fiduciary duties and the state Attorney General continues to provide oversight, but as directors they have considerably more latitude than they did as trustees in reshaping the organization's management structure and mission (e.g., they could legally change that charity's mission without anyone's approval, even if the new mission is dramatically different than the one Charles Reed Bishop described).

³⁰ Bob Fischbach, 'Descendants' Beachfront Property is Real, OMAHA WORLD-HERALD (Feb. 25, 2012, 1:00 AM), <http://www.omaha.com/article/20120225/LIVING/702259987> ("That pristine Hawaiian beachfront property in Alexander Payne's 'The Descendants,' the land George Clooney's character ponders selling, isn't just the stuff movies are made of.").

³¹ *Kipu Kai* is a 3,000-acre cattle ranch in a rare coastal valley on the southeast end of Kauai. It has been used in the filming not only of *The Descendants*, but also *Raiders of the Lost Ark*, *The Lost World* (sequel to *Jurassic Park*), *Outbreak*, *Mighty Joe Young*, and *Six Days/Seven Nights*. In 1977, John T. "Jack" Waterhouse deeded the property to the State, but carved out what amounts to a life estate for his nieces and nephews. At the time of the gift, Waterhouse expressed hopes that *Kipu Kai* would eventually be used as a nature, animal, and wildlife preserve. Roughly half the land is currently classified as conservation land, the other half as agricultural use. *Kipu Kai* is not accessible to the public by land. The single-lane road over the high ridges of the Haupu Range is private property and blocked by gates. Tour operations can reach it only by boat and are confined to one of its four beaches, and only up to the high-water mark.

Ke‘elikolani who, like Matt King’s ancestor, was one of the last descendants of Kamehameha the Great and married a *haole*.³² Princess Ke‘elikolani’s will said that *Kipu Kai* was to pass to her sister, Princess Pauahi, but she sold the land to the Governor of Kauai, William Hyde Rice, before dying.³³ One of Rice’s relatives, Jack Waterhouse,³⁴ put *Kipu Kai* into a trust—known locally as the Waterhouse Estate—for the benefit of his nieces and nephews. Under the terms of the governing document, when all of the beneficiaries who were alive at the trust’s formation have died, possession of *Kipu Kai* will pass to the State of Hawai‘i.³⁵ Matt King would presumably view this as a happy ending if he expected the State to preserve *Kipu Kai* in a culturally responsible way.

Then again, picturing *Kipu Kai* in the hands of a government agency brings to my mind litigation in the late 1980s regarding Kapiolani Park. In that litigation, the Honolulu City Park Department wanted to lease a small portion of that magnificent park to a Burger King restaurant. That clearly violated the terms of the controlling trust document, but the state attorney general gave his blessing to the transaction nevertheless. Fortunately (if you like preserving undeveloped land for public use more than you like eating at Burger King), a group called the Kapiolani Park Preservation Society managed to obtain standing to sue, and did so successfully.³⁶

More recently, Governor Neil Abercrombie and other well-placed state officials have proposed that public-private partnerships develop state-owned land without having to comply with various zoning and permitting requirements.³⁷ Environmental and Native Hawaiian groups have

³² Actually, she married two. See, e.g., Michael Tsai, *The Princess Diaries*, HONOLULU ADVERTISER (June 7, 2004), <http://the.honoluluadvertiser.com/article/2004/Jun/07/il/il01a.html>.

³³ The author of the article, Bob Fischbach, asked a member of the Rice family if the movie rang true. His response was, “I didn’t find a single false detail.” Bob Fischbach, *supra* note 29.

³⁴ Waterhouse descended from missionaries who came to Hawai‘i in the 1830s, and from William Alexander, who co-founded Alexander & Baldwin (A&B) in 1870. A&B is one of the “Big 5” companies that dominated sugar and pineapple in Hawai‘i until the latter part of the twentieth century. A&B currently owns over 88,000 acres of land in Hawai‘i, primarily on the islands of Kauai and Maui.

³⁵ See, e.g., Jan TenBruggencate, *Kipu Kai Gets Power From Nature*, HONOLULU ADVERTISER, April 23, 2002.

³⁶ *Kapiolani Park Preservation Soc’y v. City and Cnty. of Honolulu*, 69 Haw. 569, 751 P.2d 1022 (1988) (Trust was established in 1896 by “(1) the Kapiolani Park Association, which held a little over nine acres of land in fee, and a larger area on lease from the Republic, as a park, (2) William G. Irwin, who owned certain fee premises in the area, and (3) the Republic of Hawaii.” The agreement was that “(a) . . . Irwin would convey certain of his fee lands, which were leased to the [P]ark [A]ssociation for park use, to the Republic, to be used permanently as a free public park, in exchange for certain other lands owned by the Republic, (b) the Park Association would turn over its leased and fee lands to the Republic, for the same use, and (c) the Republic, in turn, would deed the lands received from Irwin and the Park Association, and certain Crown lands then under lease, to six individuals as the Kapiolani Park Association . . . for the maintenance of a free public park, . . . [but that] ‘the said Commission shall not have authority to lease or sell the land comprising the said park or any part thereof[.]’”) The City argued that the transaction with Burger King was a permitted license rather than a prohibited lease. To that, Justice Padgett quoted Shakespeare, “What’s in a name? That which we call a rose by any other name would smell as sweet.” *Id.* at 578, 751 P.2d at 1028.

³⁷ See, e.g., Editorial, *Making Most of State Lands Seems Doable*, HONOLULU STAR-ADVERTISER, Jan. 27, 2013 (“Gov. Neil Abercrombie has chalked a middle path in land utilization that deserves serious exploration . . . It lies between the status quo of undercapitalized state resources and the controversial Public Land Development Corp. [that he previously championed], which drew heated criticism from those concerned that the public would not have a

expressed outrage and the general public also appears to be mostly opposed, but the battle is likely to continue indefinitely.³⁸

The Damon Estate

A *Hawaii Reporter* news story³⁹ compared the movie to the circumstances of a different local trust, the \$1 billion Damon Estate.⁴⁰ The article pointed out that Samuel Mills Damon had been a banker, just like Edward King in the movie, and that although Damon never married a Hawaiian princess, a significant portion of his fortune had been given to him by Princess Pauahi Bishop.⁴¹ The article also highlighted the fact that the Damon Estate bumped up against the Rule Against Perpetuities. Unlike Matt King's decision in the movie, however, the Damon trustees

say in its projects. . . . Especially in the parks arena, public-private partnerships are gaining favor in other states . . . weaning state parks there off the public purse.”).

³⁸ See, e.g., Jim Carlton, *Development Encounters Trouble in Paradise*, THE WALL STREET JOURNAL, Aug. 9, 2013 (“... Kauai Island residents are protesting plans that call for building expensive homes along a ridge that overlooks the beach The struggle is the latest to pit developers and preservationists against each other over the future of some of the most idyllic real estate in the world. ... In recent years, foes have stymied developments in Oahu and the Big Island of Hawaii.”) and Richard Borreca, Editorial, *Even Lipstick Can't Disguise PLDC Look-Alikes*, HONOLULU STAR-ADVERTISER, Feb. 24, 2013 (“[T]he law that would allow the state to transfer property to developers in order to raise money for state programs was rejected [P]rojects would be allowed to skip many zoning and environmental laws. That many exemptions had environmentalists fuming ... and Native Hawaiian groups fearing that the exemptions would allow development of land they wanted preserved. ... [A new proposal] starts out bemoaning our lack of money, and would allow the state Department of Hawaiian Home Lands to enter into a public-private partnership with individuals or private entities ‘to create revenue for the department.’”).

³⁹ Jim Dooley, *Real Life Version of “The Descendants” Now Playing in Court*, HAW. REPORTER, Dec. 12, 2011 (the news hook for the article involved a complaint by two of the Damon beneficiaries that the trustees had not provided sufficient information about the dissolution; they specifically wanted to know how much had been paid to Goldman Sachs; one of the complainants was the brother of a Damon trustee, the other was that trustee's ex-wife).

⁴⁰ The Damon Estate was founded in 1924 by the will of Samuel Mills Damon, who at that time headed the bank currently known as First Hawaiian Bank. He also owned 121,000 acres of land. Damon's will—which had no punctuation other than a single period at the end of the 10-page document—was unclear about what he intended at the trust's termination. Indeed, it was unclear about *when* the trust should terminate. In 1994, the Hawaii Supreme Court decided that the trust must terminate at the death of the last surviving grandchild who was alive at Damon's death. See *Trust Created Under the Will of Damon*, 76 Haw. 120 (1994) (Hawai'i Supreme Court found unreasonable a lower court's ruling that Samuel Damon intended for the trust to last for an “extra” twenty-one years). Twenty beneficiaries qualified for termination distributions in 2004. Some took the position that *per stirpes*, as used in Damon's will, should be interpreted a *per capita* (i.e., equal shares for each descendant). Others argued for interpretations that in each case maximized the share of the arguing family member. See *In re Estate of Damon*, 109 Haw. 502 (2006) (*per stirpes*, as used by *Damon*, calls for “strict” or “English” *per stirpes*, which means much larger shares for descendants of Damon's one son as compared to those of his more prolific other son). Some of Damon's great grandchildren got nearly three times as much as other great grandchildren. In *The Descendants*, Matt King has a one-eighth interest and each of his cousins has only a one-twenty-fourth interest. Because neither the book nor the movie mentions disagreement among the cousins on that point, the governing document is evidently clearer than was Damon's will. See generally Mary Vorsino, *High Court Settles Damon Estate Distribution*, HONOLULU STAR-BULLETIN, Feb. 17, 2006.

⁴¹ See KING & ROTH, *supra* note 24, at 34 (in a codicil to her will, Pauahi gave Damon the *ahupua'a* (district) of Moanalua).

sold all the trust's land and distributed cash to the beneficiaries.⁴² That decision might have been influenced by the fact that beneficiaries had sued or threatened to sue the Damon trustees at various times during the trust's existence. Selling assets to the highest bidder and distributing only cash to the beneficiaries is a relatively simple approach that arguably reduces the chances of a lawsuit when the trust terminates.

It also appears that Damon trustees—like Matt King in the movie—wanted to ensure that culturally sensitive land would never be developed. As part of the pre-termination sales program, the Damon trustees sold the 3,716-acre Moanalua Valley to the Trust for Public Land for \$5.5 million. The buyer then transferred that breathtakingly beautiful property to the State Division of Forestry & Wildlife, to add to its Forest Reserve system.⁴³

The Knudsen Estate

Thirty years ago, one of two large Knudsen trusts⁴⁴ also had to terminate because of the Rule Against Perpetuities. At the time of that trust's termination, it owned many acres of land on Kaua'i, in the general vicinity of *Kipu Kai* (the land used in the filming of *The Descendants* movie). As part of the termination plan, the trustee distributed selected parcels of land to separate branches of the family, so that each group of beneficiaries ended up a sole owner of some of the former trust land, as opposed to a co-owner of all the former trust land.

In the 1990s, beneficiaries of the other Knudsen Estate filed suit against the Knudsen trustee, First Hawaiian Bank, alleging a failure to make the trust property reasonably productive.⁴⁵ The beneficiaries of the trust in the movie might consider making a similar claim against Matt King if he does not either sell the land or take reasonable steps to produce substantial income from it.

⁴² The Damon trustees sold 220 acres of light industrial lands in Mapunapuna in 2003 for \$466 million and around the same time they sold a 25% stake in First Hawaiian Bank to the bank's parent, Banc West Corp., for \$500 million. See Rick Daysog, *Damon Heirs to Get \$500M: Beneficiaries Will Receive Payments Representing 70% of the Cash Assets*, HONOLULU STAR-BULLETIN, Nov. 28, 2004. The Damon trustees also sold the 3,716-acre Moanalua Valley to the Trust for Public Land for \$5.5 million.

⁴³ According to Lea Hong at the Trust for Public Land: "The [transactions] ended an over 30-year community struggle over the land, once slated for a freeway development. The culturally sensitive and native-species rich valley has served as a refuge over the millennia. With nine miles of meandering streams, well-used hiking trails, historic stone bridges, and 14 endangered plant and animal species, the valley continues to serve as an outdoor classroom for children and others. The valley is an important watershed area for Honolulu, and serves as one of the few natural open spaces within minutes of urban Honolulu." The valley had an appraised value of \$5,570,000. TPL negotiated a purchase price of \$5.5 million. . . . The State of Hawai'i appropriated \$3 million, and obtained a grant of \$1.6 million from the U.S. Fish & Wildlife Recovery Land Acquisition Program. The Trust for Public Land secured \$900,000 through the U.S. Army buffer program."

⁴⁴ The two Knudsen Trusts were established by Eric and Augustus Knudsen with land received from their father, Val Knudsen. When Augustus's trust terminated, he left no living descendants, so the remainder interest in that trust passed to heirs of his father. Each family group received 100% ownership of certain parcels. Properties subject to long-term leases, however, were put into entities and then shares in those entities were distributed to all the family groups. Eric's trust will terminate twenty years after the death of his last surviving child.

⁴⁵ Civil No. 94-4593-12 in Circuit Court, and on the probate calendar as T. No. 95-0120 (trustees generally has a duty to make trust property reasonably productive).

The Campbell Estate

A 2011 *Wall Street Journal* article about *The Descendants* movie⁴⁶ marveled at the number of “echoes” in the movie from actual people and events in Hawai‘i, and suggested that the strongest echo came from yet another local trust—the \$2.3 billion Campbell Estate.⁴⁷

When James Campbell died in 1900, his \$3 million estate passed to the trustees of a trust for the benefit of his wife and descendants: “It being my purpose to provide a safe and certain income and maintenance for my wife, our children and grandchildren, for and during the period of the trust.” The trust was to end twenty years after the death of his last surviving daughter. Campbell also directed that “the Trustees and their successors keep intact my estate and administer the same under the name of ‘The Estate of James Campbell’ ... and that the realty thereof shall be particularly and especially preserved intact and shall be aliened only in the event, and to the extent, that the obvious interest of my estate shall so demand.” So like the trust in the movie, Campbell Estate was private—that is, for the benefit of the trust settlor’s descendants rather than for a public purpose—and therefore subject to the Rule Against Perpetuities. Unlike the movie, however, Campbell made clear a preference that his property not be sold unless “obvious interest of my estate shall so demand.”

Matt King’s sense of “Hawaiianess” near the movie’s end is reminiscent of a battle between the Campbell Estate trustees and a few of that trust’s beneficiaries in 1999. Several beneficiaries publicly complained that the trustees were shifting the focus of trust investment activity to outside Hawai‘i. They pushed to have Associate Justice Robert Klein appointed to a vacancy on the four-person board of Campbell trustees, because as a Native Hawaiian Klein supposedly would be more sensitive to local issues than were the existing trustees, who were *haole* and not originally from Hawai‘i.⁴⁸

Another similarity is that the Campbell trustees spent a great deal of time with that trust’s beneficiaries when the mandatory termination was just seven years away. A spokesperson for the Campbell trustees explained: “Because it will be easier to get court approval for a proposal that is supported by beneficiaries, the trustees have been gathering their feedback. The trustees are faced with the problem of being fair to everybody.”⁴⁹

⁴⁶ Julia Flynn Siler, *‘The Descendants’ Aims to Lay Down the Law in Hawaii*, WALL ST. J. BLOG (Nov. 26, 2011).

⁴⁷ James Campbell was born in 1826 in Londonderry, Ireland. He went to sea at age thirteen and eventually made his way to Hawai‘i after surviving the wreck of a whaling ship and capture by natives in the Tuamotus. He made a good living as a carpenter and made a fortune investing in sugar production and real estate investing after inheriting property from his first wife, Hannah Barla, in 1858.

⁴⁸ See Ken Kobayashi, *Campbell Heirs Clash Over Priorities*, HONOLULU ADVERTISER, May 20, 1999.

⁴⁹ *Id.* One of the dissident beneficiaries also took the position that the trustees had a duty to sue their lawyers for malpractice over a botched arbitration. When the trustees declined to sue trust counsel, the beneficiary sued the trustees. The trustees then agreed to sue their lawyers, using the lawyer who had been selected by the unhappy beneficiary to sue the trustees! In fact, their agreement to sue trust counsel was conditioned on the agreement of the complaining beneficiaries not to sue the trustees. This *quid pro quo* drew additional criticism. Critics faulted the

Like Matt King in the movie, one Campbell beneficiary had a larger interest in the trust than did any other single beneficiary—and like Matt, she had a one-eighth interest. Unrelated to the movie but interesting nonetheless, she was James Campbell’s great-granddaughter by blood but a granddaughter by legal adoption.⁵⁰

In anticipation of Campbell Estate’s mandatory termination in 2007, the Campbell trustees—rather than liquidate all trust property and distribute cash like the Damon trustees had done, or distribute parcels of land like the Knudsen trustee had done—dropped most of the Campbell Estate’s undeveloped land into an LLC and then distributed interests in the LLC to beneficiaries when the trust dissolved.⁵¹ The Campbell trustees did, however, sell the spectacular Honouliuli Forest Preserve to the Trust for Public Land for just over \$4 million.⁵²

The Castle Estate

The Campbell trustees’ strategy of operating as an LLC beyond the trust’s mandatory termination date might have itself echoed steps taken in the 1980’s by the trustees of the Harold and Alice Castle trusts,⁵³ who dropped trust assets, including the trust’s undeveloped land,⁵⁴ into a group of LLCs with Kaneohe Ranch LLC as the common parent.⁵⁵ Because of the Rule Against Perpetuities, the last of the Castle trusts will eventually have to terminate, but there is no legal reason why Kaneohe Ranch and its baby LLCs cannot go on forever. A related Harold Castle charitable foundation has awarded over \$173 million in local grants since 1967 and is expected to continue in perpetuity.⁵⁶

trustees for factoring their personal interests into the equation—and doing so without first petitioning the probate court, as a statute arguably requires when trustees find themselves in a conflict of interests.

⁵⁰ Pat Omandam, ‘Kekau’ Lives Up to Her Royal Lineage: Abigail Kawanānākoa Has Been President of Friends of Iolani Palace Since 1971, HONOLULU STAR-BULLETIN, July 22, 1998; see also Jon Van Dyke, WHO OWNS THE CROWN LANDS OF HAWAII? p. 370 (the widow of James Campbell adopted a grandchild “in order to recognize her priority as royal heir . . . and as heiress of the Campbell Estate”).

⁵¹ Several of the Campbell beneficiaries chose to take at least a portion of their distribution amount in the form of cash rather than LLC interests.

⁵² More precisely, the Campbell trustees sold a much bigger tract to the Gill/Olson Joint Venture, which then sold the preserve to the Trust for Public Land, which then transferred the land to the State Forest Reserve system.

⁵³ For a brief history of Harold K.L. Castle and description of Kaneohe Ranch, see KANEOHE RANCH, <http://www.kaneoheranch.com/history/harold-castle.cfm> (last visited March 9, 2013)..

⁵⁴ Harold Castle purchased 9,500 acres of undeveloped land in the Kailua ahupua‘a in 1917 and led the way in developing the town of Kailua. He also made major contributions—often in the form of land—to Hawaii Loa College, Castle Hospital, Iolani School, Castle High School, Kainalu Elementary School and the Kaneohe Marine Corps Base. See <http://www.castlefoundation.org/founder-history.htm> (last visited April 17, 2013)

⁵⁵ Kaneohe Ranch is now owned by the Castle family directly and through a variety of trusts. The Harold and Alice Castle trust still owns only Kapaa Quarry. Trustees of that trust distributed LLC units and other assets to trust beneficiaries and some of them placed their interests in new trusts. Among Kaneohe Ranch’s commercial properties is the 38-acre town center in Kailua on the windward side of Oahu. See Duane Shimogawa, *Rising Hawaii land values prompt Kaneohe Ranch to list property portfolio*, PACIFIC BUSINESS NEWS, May 17, 2013.

⁵⁶ The foundation got 29% of Harold Castle’s assets in 1967 at the time of his death. In 2011, it received 38% of the downtown Kailua revenue. As of 2012, it had made total contributions of \$168 million and currently owns assets

The Galbraith Estate

A recent *Wall Street Journal* article⁵⁷ compared the movie to yet another private trust that was forced to dissolve—this time it was the Galbraith Estate.⁵⁸ The Journal suggested that the

worth \$162 million. It is being run with a goal and expectation of lasting indefinitely. For more information about the Harold K.L. Castle Foundation, see HAROLD K.L. CASTLE FOUNDATION, <http://www.castlefoundation.org/> (last visited March 9, 2013).

⁵⁷ Jim Carlton, *Heirs Preserve Hawaiian Tract*, WALL ST. J., Nov. 18, 2012 (“The trustee for hundreds of heirs to a large land tract here on Oahu island has agreed to sell their inheritance to the state for preservation as farmland, reversing a decades-long trend of most such open land being developed. . . . The episode recalls “The Descendants,” a 2011 movie starring George Clooney as a trustee in a similar predicament—whether to sell a huge parcel of Hawaii land for development.”).

⁵⁸ George Galbraith died in 1904 with an estate worth \$260,000. Nearly half that value came from 2,000 acres of ranch land near Wahiawa, sixteen miles from the center of Honolulu. Galbraith left a will and three codicils, all dated January 21, 1904 (apparently the drafter—a notary public who drew up wills on the side—did not want to retype the entire document each time Galbraith decided to change something in the will document that had not yet been signed), which gave his estate to Hawaiian Trust Company as trustee of a private trust that was to pay up to \$8,450 each year in nineteen specified shares to forty-nine recipients. The trust was to continue “as long a period as is legally possible . . . the termination or ending of said trust to take place when the law requires it under the statute;” and then “[o]n the final ending and distribution of the trust, the trust fund [was] to be divided equally amongst those persons entitled at that time to the aforementioned annuities.” There were glaring problems: The limiting law the drafter evidently had in mind—the Rule Against Perpetuities—is not a statute. Also, exactly what did the word “equally” mean in the context of the final distribution under this trust? Applied literally, each beneficiary would take an equal share regardless of the size of his or her respective annuity segment, some of which were more than 100 times larger than others. Most lawyers thought equally in this document meant “proportionately,” so that a beneficiary whose annuity distribution was 100 times larger than another’s annuity distribution would get a 100 times larger share of the final distribution. But some beneficiaries thought equally meant that one-thirteenth of the final distribution amount should go in equal shares to each of the thirteen annuity segments, and then those amounts should be divided among the recipients of each annuity segment equally—oops, there’s that word again. There were also disputes over whether the annuity interests in the trust could be freely transferred, as the will seemed to say, and, if so, whether they could be transferred by gift, sale, and inheritance, making it easy for an annuitant to convert his interest into 10 or 100 interests, simply by splitting it up among family, friends and/or investors (i.e., an annuitant could arguably increase his share of the final distribution tenfold by giving a sliver of his annuity interest to each of nine close family members). Perhaps he could even do this by transferring tiny interests to nine brand new, wholly owned corporations! In *Fitchie v. Brown*, the Hawai‘i Supreme Court held that the trust was valid but declined to rule on the meaning of “equally” in Galbraith’s will. *Fitchie v. Brown*, 18 Haw. 52, 74 (1906), *aff’d*, 211 U.S. 321 (1908). The Court acknowledged that this question would need to be answered sooner or later, but it did not consider the question to be “ripe.” *Id.* In *Fitchie v. Brown*, 211 U.S. 321 (1908), the U.S. Supreme Court affirmed the ruling, so payment of the annuities continued for twenty-one years beyond the death of the last survivor of the annuitants named in the will and codicils, and that the remaining corpus and surplus income are to be distributed in accordance with the terms of the will and codicils, as a court interpreted them roughly 100 years later. In *Hawaiian Trust Co. v. Galbraith*, 25 Haw. 174 (1919), the Supreme Court of Hawai‘i held that persons who succeeded to the interests of the original trust annuitants as the heirs of those original annuitants acquired so-called absolute ownership of “estates of inheritance.” That made it clear that annuitants could transfer all or part of their respective interests in the trust by inheritance, sale, inter vivos gift, or devise. By the time of the trust’s termination in 2007, there were more than 600 owners of beneficial interests in the trust, and the size of their respective annuity interests varied dramatically. The estate on that date had a market value of approximately \$91 million, according to the 6,000-page final accounting submitted to the probate court.

Galbraith trustee's sale of 1,732 acres of undeveloped land⁵⁹ near Wahiawa in late 2012 was the kind of deal the movie's Matt King would have loved. It was negotiated by the Trust for Public Land on behalf of the City, State, U.S. Army, and Office of Hawaiian Affairs.⁶⁰ Not all of the 600 Galbraith beneficiaries were happy with the sale or sales price, but the *Wall Street Journal* portrayed the transaction as having a win-win-win outcome: cultural sites preserved, agricultural use facilitated, and beneficiaries receiving full value for their interests in the trust.⁶¹

Years earlier, the Galbraith trustee had tried to develop the land, and then to sell it to a developer, but both efforts proved to be unsuccessful.⁶² Because the land was classified for agriculture use, there was uncertainty over the chances of getting the reclassification and various permits that would be necessary to develop the Galbraith land.

Grove Farm Company, Inc.

Forbes magazine saw a connection between the movie and an early twenty-first century controversy on Kaua'i that pitted cousins against cousins over the indirect transfer of large tracts of spectacularly beautiful land owned by Grove Farm.⁶³ The buyer was someone who, like Holitzer in the movie, had family roots in Kaua'i and made a fortune in the high-tech world. It was the former CEO of AOL and Time Warner, Steve Case.⁶⁴

⁵⁹ The land is classified for agriculture use and developers reportedly were uncertain of their ability to get it reclassified to urban use.

⁶⁰ The Trust for Public Land assembled the \$25 million purchase price from a variety of sources, including \$13 million from a Hawaii state bond; \$4.5 million from the U.S. Army; \$4 million from the City and County of Honolulu; \$3 million from the Office of Hawaiian Affairs; and \$500,000 from D.R. Horton-Schuler Division. The U.S. Army money came from the Pentagon's Readiness and Environmental Protection Initiative (REPI), which protects land around military bases.

⁶¹ Some of the 600 beneficiaries have privately expressed disappointment in the sales price and a few say they wanted land in lieu of money, but the beneficiary quoted in the Journal article praised the deal as having served the interests of both the public and the beneficiaries.

⁶² In the early 1990's, Hawaiian Trust Company announced plans to build thousands of homes on 892 acres of land in Wahiawa. According to a commentary in the now-defunct Hawaii Monitor, "probably no one was more surprised than the owners of the land—the beneficiaries of the George Galbraith Trust Estate." This statement was less-than-precise in describing beneficiaries as land owners. Hawaiian Trust Company, as trustee, *owned* the land and held the power to develop or sell it. The beneficiaries had only what is called beneficial or equitable interests, which does not give them the power to manage trust property. Depending on a number of variables, Hawaiian Trust Company may have had not only the *power*, but a *fiduciary duty* to develop or sell the land. According to above-mentioned commentary, here's how a trust officer with the corporate trustee responded to the reporter's question about the planned development being a surprise to the beneficiaries (the journalist happened to be one of the beneficiaries): "We don't need their approval, nor do we seek it. We don't have to ask them. But we do inform them from time to time." There are much nicer ways of communicating this message.

⁶³ Deborah L. Jacobs, *George Clooney Makes Estate Planning Sexy*, FORBES, Feb. 23, 2012; Stewart Yerton, *Litigation that divides family stems from sale clouded in suspicions*, HONOLULU STAR-BULLETIN, Apr. 23, 2006 (part 1 of 2-part series—Grove Farm: A House Divided; *Suitors bring relief, and strife, to cash-poor kama'aina company*, HONOLULU STAR-BULLETIN, Apr. 24, 2006 (part 2 of 2-part series—Grove Farm: A House Divided).

⁶⁴ Steve Case was on *Forbes'* list of billionaires. Interestingly, the sale took place only after a proposed sale to the son-in-law of Grove Farm's CEO garnered slightly less than the 75% shareholder approval required by the

As further evidence of a likely connection, the article pointed out that Kauai Hemmings is herself related to George Norton Wilcox, the man who founded Grove Farm and in 1933 willed all his Grove Farm stock to his nieces and nephews in equal shares. Because they received the stock outright rather than in trust, the Rule Against Perpetuities had nothing to do with their “forced” sale of the company. Simply put, Grove Farm found itself over-leveraged at a time when the bottom had fallen out of the Kauai real estate market.⁶⁵ Virtually all the Wilcox nieces and nephews (and the descendants of the ones who had died) eventually agreed to the sale, but many did so reluctantly at the time and later had second thoughts. When market conditions improved, they filed lawsuits in federal and state courts alleging various forms of wrongdoing.⁶⁶

One of the allegations had to do with the legal representation of Steve Case by his father while his father’s law firm was also representing Grove Farm.⁶⁷ The plaintiffs acknowledged that the conflict of interests had been pointed out ahead of time and that both clients consented to the arrangement, but argued (unsuccessfully) that the conflict had not been consentable.⁶⁸

When asked by *Forbes* if the book is based on what happened at Grove Farm, Kauai said that she had been away at school when Grove Farm was sold, but that she remembers family members talking about it, and that her step-grandfather—federal Judge Martin Pence—had opposed the sale.⁶⁹ She then told the reporter that estate planning was the world of her parents and grandparents, and added, “I’m just writing about all my elders.”⁷⁰

Kauai has not said whether there will be a sequel, but if Steve Case is on the list of echoes in her first book, perhaps she should raise the financial stakes the next time. Steve Case’s reported net worth of \$1.7 billion is small potatoes compared to Pierre Omidyar,⁷¹ the Ebay founder who is

company’s bylaws. In the book version of *The Descendants*, Holitzer’s CFO is the son-in-law of the trust’s longtime lawyer.

⁶⁵ The Company had constructed roads, sewer treatment plants and other utilities for a major residential development when Hurricane Iniki hit with devastating force and left much of the island in shambles. In the book, Matt King initially blames the King trust’s weak financial performance on “the hurricane.”

⁶⁶ See e.g., Jan TenBruggencate, “Grove Farm Sale Challenged,” HON. ADVERTISER, Dec. 12, 2005.

⁶⁷ See e.g., Stewart Yerton, *Case Sued Over Purchase of Grove Farm: Shareholders Claim Steve Case Had Insider Information That Helped Him Buy the Company*, HONOLULU STAR-BULLETIN, Dec. 3, 2005. An interesting twist from the book that did not make it to the movie screen: the trust’s lawyer encouraged Matt to sell to Holitzer—which troubled some of Matt’s cousins partly because they wanted the sale to generate as much cash as possible, but mostly because the trust lawyer’s son-in-law was Holitzer’s chief financial officer—an apparent conflict of interests.

⁶⁸ See, e.g., *Combs v. Case Bigelow & Lombardi*, 122 Hawai‘i 58, 222 P.2d 465 (Haw. Ct. App. 2010); *Fisher v. Grove Farm*, 123 Hawai‘i 82, 230 P.3d 382 (Haw. Ct. App. 2009). For a summary of the underlying facts, see *Combs v. Case*, No. 05-00741 REJ-KSC, 2007 WL 4440958 (D. Haw. 2007); *Sheehan v. Grove Farm Co.*, 114 Hawai‘i 376, 379-82, 163 P.3d 179, 182-85 (Haw. Ct. App. 2005).

⁶⁹ Deborah L. Jacobs, *supra* note 61.

⁷⁰ *Id.* Movie critic Roger Ebert speculated that the book might be autobiographical in another way. He said he suspected that there must be a lot of her in Alexandra and Scottie. Roger Ebert, *The Descendants*, ROGER EBERT (November 16, 2011), <http://www.rogerebert.com>.

⁷¹ Omidyar reportedly has a net worth of \$8.2 billion.

planning a controversial resort development on Kaua‘i near Hanalei,⁷² and Larry Ellison,⁷³ the Oracle founder who is planning to do heaven-only-knows-what to the island of Lana‘i.⁷⁴

The Lucas Estate

Scriptwriters for a sequel might also want to consider the Lucas Estate, which, like the trust in the movie, owns thousands of acres of spectacular land on the island of Kaua‘i.⁷⁵ Things got interesting from a legal standpoint a few years ago when one of the two trustees decided to buy a large tract of undeveloped Lucas Estate land for his personal account.⁷⁶ Rather than seek instructions from the probate court as a Hawai‘i statute requires a trustee to do when there is a conflict of interests, the Lucas trustees sought and received the consent of all the beneficiaries. When the real estate market on Kaua‘i improved, however, some of the beneficiaries had second thoughts and sued the Lucas trustees.

The self-dealing controversy was settled out of court, but ended up costing the Lucas Estate and its trustees more than \$5 million.⁷⁷ The trustees then sued their lawyers, arguing that they had received and relied on flawed legal advice, as evidenced by the costly settlement of the beneficiary’s lawsuit. The malpractice claim was settled confidentially minutes before a jury returned with a verdict in excess of \$4 million.

A Question

⁷² See Jim Carlton, *Development Encounters Trouble in Paradise*, THE WALL STREET JOURNAL JOURNAL, Aug. 9, 2000 (The property in question includes the ridge that runs along Hanalei River on the hillside between Princeville and Hanalei, and land north of there that slopes to the ocean. It has spectacular views and contains an ancient Hawaiian fishpond.).

⁷³ Ellison reportedly has a net worth of \$41 billion.

⁷⁴ Some residents of Lana‘i have expressed optimism about the impact Ellison will have on them and their community. See, e.g., Andrew Gomes, *Big Plans for Lanai*, HONOLULU STAR-ADVERTISER, Jan. 26, 2013 (“‘Overall the community is I think excited and optimistic about the potential,’ said Butch Gima, a social worker and president of Lanaians for Sensible Growth.. ‘There are really no red flags at this point.’”) (Maui Mayor Arakawa, as quoted in the article: “I see Ellison as trying to find all the things that can enhance Lanai . . . I don’t think it has to be his way or the highway.”).

⁷⁵ See Malia Zimmerman, *Family in Center of Kauai’s Ka Loko Dam Breach Faces Extensive Legal Battles*, HAWAII REPORTER, May 5, 2006 (In 1862, the “favorite wife” of Kamehameha the Great, Kaahumanu, informally adopted a Native Hawaiian infant, Mary Naupeu, who eventually married Charles Lucas; when Mary Lucas died in 1965 at the age of 103, she left 4,000 acres of land to her descendants . . . in a trust that many people call the Lucas Estate; that trust currently owns about 1,000 acres on Kauai, most of it near the Ka Loko Reservoir, which burst on March 14, 2006, killing seven people); Harold Nedd, *Son Sues Father, Uncle in Fight Over Lucas Estate*, PACIFIC BUSINESS NEWS, Mar. 19, 2007 (this story is mostly about the Charlotte Cassiday Trust but involves land in Hawai‘i Loa Ridge, Niu Valley, and Niu Beach, that Charlotte received from her mother Mary Lucas, who had received it from her grandfather sea captain, Alexander Adams, who had received it from Kamehameha I).

⁷⁶ The five tracts of undeveloped land ranged from 21 to 1,073 acres and totaled 2,035 acres. See *id.*; see also Tom Finnegan, *Pflueger Drives Wide Emotions on Kauai*, HONOLULU STAR-BULLETIN, March 26, 2006.

⁷⁷ See Malia Zimmerman, *supra* note 73.

After watching a movie, my wife will sometimes ask, “How do you think the story will end?” The first few times she did this, I resisted. After all, the story in a movie is not real, or at least is not supposed to be real—those are called documentaries. I quickly learned, however, that it can be fun to talk about how a movie’s story will (or should) end.

So here’s my question for readers of this essay: What will Matt King do during the seven years following the end of the movie, to prevent the land from being developed?

While considering the possibilities, one must keep in mind that the land in the movie is supposedly worth half a billion dollars.⁷⁸ If it were not for that inconvenient fact, Matt might be able to arrange for an organization like the Trust for Public Land, Nature Conservancy or Office of Hawaiian Affairs to buy it at market value.⁷⁹ Also keep in mind that distribution of the land to the cousins—now or in seven years—could be problematic if beneficiaries receive undivided interests in the entire property or full ownership of carved-out portions of the property: If Matt distributes undivided interests, any one co-owner could veto the idea of any other co-owner, no matter how many of the co-owners liked it. Accordingly, the cousins would almost certainly end up in a costly and highly inefficient partition lawsuit, and the land would end up in the hands of a developer—defeating Matt’s reason for not selling now.

If instead, Matt first carved the tract into separate parcels for distribution to the cousins, he would probably thereby reduce the total market value significantly (i.e., breaking a large tract of developable land in Hawaii into relatively small pieces tends to reduce the land’s total value for development purposes). If the land in the movie could not be developed because of land-use laws, it might actually increase total value by breaking it up into smaller parcels—but it obviously can be developed, as stated in the movie and further evidenced by the huge amount of money—upwards of \$500 million—that two different developers were willing to pay.

There would be additional legal issues if Matt wanted to buy the land from the trust or drop it into a new entity with a goal of preventing its development. Matt undoubtedly has the power as trustee to sell the land to himself, but that power is limited by strict fiduciary duties. Self-dealing is generally prohibited. Even if Matt could somehow get the consent to such a transaction from all of the other beneficiaries—which is conceivable if Matt offered to pay an amount comparable to what Holitzer or the Chicago group was willing to pay—Matt would first need to petition the probate court, a lesson that the trustees of the Lucas Estate learned the hard way. Matt would

⁷⁸ The land used in the filming of *The Descendants*, *Kipu Kai*, is surely worth far less than \$500 million because it is classified as conservation property. Its market value is probably much closer to the amount recently paid for the Galbraith Estate land, \$25 million.

⁷⁹ There is equally beautiful land in Hawaii that has a relatively low value because its land classification does not permit development and/or because of practical problems with any potential development. See, e.g., *Transfer of Land Confirms Preservation Commitment*, THE MAUI NEWS, Jan. 15, 2013 (“The Molokai Land Trust has received the deed to a 5-mile stretch of remote and environmentally sensitive coastline along the rugged north shore of Molokai that has endangered ferns, subsistence gathering areas and an extensive tidal pool system, the trust announced Monday. The 1,719 acres is known as the Mokio Preserve. . . . The gift from Molokai Properties [from Molokai Ranch] . . . took more than four years to complete. . . .”).

also run the risk that one or more of his cousins would later argue that they were given and relied upon incomplete or misleading information when Matt sought their consent, as was argued in the Grove Farm litigation. And one can only wonder how Matt would fund the \$500 million purchase price if his plan was to preserve rather than develop the land in question.

Of course Matt could drop the land into an entity, such as an LLC, but he would continue to owe fiduciary duties to the other trust beneficiaries, and the decisionmakers in the new entity would owe their own fiduciary duties. Those are not quite as restrictive as are a trustee's duties, but the differences are not great enough to somehow enable Matt to avoid selling or developing the land simply by putting an entity between the land and the trust.

Some of Matt's cousins might sue him in any event for letting the land just "sit there," because trustees generally have a duty to make an under-productive asset reasonably productive and to ensure that trust assets are reasonably diversified (which appears not to be the case in the movie). A governing document could authorize or instruct a trustee not to make productive and not to diversify trust holdings, but there is no indication of any such provision in Matt's case, according to both the book and the movie. And anything that Matt might do to reduce the land's market value, such as grant a conservation easement or seek a more restrictive land classification or zoning status,⁸⁰ would clearly be a breach of his duty of loyalty—unless, perhaps, that furthered an important trust purpose.⁸¹

Maybe someone could convince the probate court that Matt's ancestors intended that this land be held in trust for the public's benefit, rather than sold, distributed to beneficiaries or developed.⁸²

⁸⁰ Similarly, a trustee cannot simply convert a private trust to a charitable trust.

⁸¹ The book and the movie both make clear that neither the princess nor her husband left explicit instructions regarding trust purpose. In the book Matt says, "we've turned our backs on our legacy," "Why let some *haole* swoop it up?" and "I want all this land to go to a good home ... but [I] don't like our decision [to sell the land, and] neither would my father."

⁸² This is essentially what will happen to *Kipu Kai* when the Waterhouse Estate finally terminates.

Courts sometimes interpret original intent liberally.⁸³ Matt has been unable to document any such intent,⁸⁴ but he has another seven years to look. Hope springs eternal.

A “Bad” Ending for the Reel Story

The story, as told in the movie, is likely to end badly for Matt. If he does not change course, one or more of the cousins will probably sue him for breach of trust, and will probably win. Such a lawsuit would cost Matt and the trust millions in legal fees and accomplish little more than to delay the inevitable.⁸⁵ What a bummer. Maybe it is a good thing the movie ended when it did!

More importantly, there is *real* controversy in Hawai‘i today between those who view further real estate development favorably and those who worry that Hawai‘i may already be over-developed. Native Hawaiian organizations and environmental activists are at the front of this latter group, but they are not alone in fighting against the “paving of paradise.”⁸⁶ Many others see over-development as a long-term threat to Hawai‘i’s economy because of its adverse impact on tourism.⁸⁷ In short, Matt King’s personal struggle and last-minute decision to protect the land surely struck a chord with many people in Hawai‘i.⁸⁸

⁸³ See *Queen’s Hospital v. Hite*, 38 Haw. 494 (1950), where the Hawai‘i Supreme Court essentially read the word “may” as meaning “must” in order to achieve what the court perceived to be Queen Emma Kaleleonalani’s intent regarding the trust she established for both private and charitable purposes. Consider, too, that the Bishop Estate trustees continue to operate somewhat like a Nature Conservancy without language in the governing instrument instructing or authorizing that. The land in question includes 63 miles of ocean frontage, 100 miles of streams, historic fishponds, forests and lava fields. According to the trustees, “These lands and resources are deeply tied to the Hawaiian culture and define KS as an ali‘i trust.” *Kamehameha Schools Annual Report, July 1, 2002 – June 30, 2003*, 1, 29 (2003), www.ksbe.edu/allpdfs/annualreport03/KSAnnual_Report2003.pdf. See also Peter Luxton, *Cy-Pres and the Ghost of Things That Might Have Been*, 1983 CONVEY. 107 (the author concludes that courts tend to read governing language more liberally as the trust ages, so that the trust creator’s intention become less important with the passage of time), Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 355-356 (1999), and Principles of the Law of Nonprofit Organizations §440 (T.D. No. 2, 2009) (“after the passage of a significant period of time . . . , the policy of adhering to the terms in the trust . . . increasingly weakens”).

⁸⁴ In the book, Matt says, “I look at everything. I even try to decipher documents and letters from 1920, imagining what two people I’ve never met would want. The princess, the last in the royal lineage. My great-grandfather [great great grandfather in the movie], that frisky white boy.”

⁸⁵ In the book, Matt tells his cousins, “I’ve decided that you won’t be receiving any money, but we’ll all get to keep something, and we’ll get to pass it on.” So he evidently thinks there’s a way to maintain the status quo, in one form or another, despite the Rule Against Perpetuities.

⁸⁶ Joni Mitchell sang about this in *Big Yellow Taxi*: “They paved paradise to put up a parking lot.” JONI MITCHELL, *Big Yellow Taxi*, on MILES OF AISLES (Asylum Records 1974). Here is Mitchell’s description as it appeared in a Los Angeles Times article: “I wrote *Big Yellow Taxi* on my first trip to Hawaii. I took a taxi to the hotel and when I woke up the next morning, I threw back the curtains and saw these beautiful green mountains in the distance. Then, I looked down and there was a parking lot as far as the eye could see, and it broke my heart . . . this blight on paradise. That’s when I sat down and wrote the song.” Robert Hilburn, *Both Sides, Later*, LOS ANGELES TIMES, Dec. 8, 1996 (alterations in original).

⁸⁷ According to journalist Ken Kobayashi, a controversy involving the Campbell Estate “parallels to a broader struggle evolving in Hawaii in recent decades, which pits those who advocate a local sensitivity—supportive of the

Readers of this essay who sympathize with Matt King and want to KEEP HAWAII *HAWAII*,⁸⁹ can take heart that *Kipu Kai* and many equally spectacular undeveloped properties are currently classified for agricultural use or conservation and therefore cannot legally be developed for residential, commercial, or industrial use. They might also want to pay close attention to the ongoing battle in Hawai‘i over continual attempts to change the classification of many such properties and to garner exemptions from various other land-use and environmental laws.⁹⁰

rights and needs of Native Hawaiians and local residents—above the quest for profits by large landowners such as Campbell. . . . Money and power and the future of the Hawaiian economy are at the heart of the issues.” Ken Kobayashi, *Cracks in the Campbell Estate: Family Feud*, HONOLULU ADVERTISER, May 19, 1999.

⁸⁸ “This broader story has to do with the rapidly changing face of Hawaii’s economy and social culture. It is a story of Hawaii losing its isolation It is a story of the struggle, perhaps a losing one, to preserve some of what makes Hawaii’s culture and traditions so different from the rest of the world.” Editorial, *Campbell Struggle Part of a Larger Island Story*, HONOLULU ADVERTISER, May 21, 1999. Paul “Doc” Berry, *Limits of Growth: This canoe is at tipping point*, HONOLULU WEEKLY, Apr. 17, 2013 (“Generations forward, what will our grandchildren and their children say about how we dealt with the limits of Hawaii’s population growth?”).

⁸⁹ This saying appears on bumper stickers in Hawai‘i, as do others that express similar sentiments. “KEEP THE COUNTRY *COUNTRY*” is ubiquitous in rural areas like the North Shore of ‘Oahu.

⁹⁰ See Dennis Hollier, *Why big development is so difficult in Hawaii*, HAWAII BUSINESS, April 2013, <http://www.hawaiibusiness.com/Hawaii-Business/April-2013/Why-big-development-is-so-difficult-in-Hawaii>; see also, Cynthia Oi, *Recent Cases Show State Lousy at Land Management*, HONOLULU STAR-ADVERTISER, Aug. 29, 2013 (“That state-owned land leased to a commercial outfit would discourage public use doesn’t seem to factor in the [state’s] view, even as the need for open vistas and public spaces will grow as the [state] allows developers to crowd Honolulu’s south shore with thousands of condo units.”)