DECONSTRUCTING *THE DESCENDANTS*: HOW GEORGE CLOONEY ENNOBLED OLD HAWAIIAN TRUSTS AND MADE THE RULE AGAINST PERPETUITIES SEXY

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Editors' Synopsis: The Descendants*, an award winning film, depicts real controversies involving old Hawaiian Trusts while highlighting the modern debate of whether Hawai'i is overdeveloped. This Article, using the film as its basis, gives further insight into the real stories echoed in the film in light of the legal issues that influenced the outcome of each story—that is, the Rule Against Perpetuities and a trustee's duty to the trust and its beneficiaries. This Article artfully places the reader in the center of the disputes, begging the question of whether Hawai'i should continue "paving paradise."*

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I. INTRODUCTION

The first and last sections of this essay are about a reel story. Of course I am talking about the movie, *The Descendants*.[1] The movie is based on a book of the same name, written by Kaui Hart Hemmings.[2] The stories in the book and the film are quite similar, but not identical.[3]

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 of the credits—and I mean *all* of the credits—you saw my name. My name was the last name on the last screen—appearing right after Dollar Rent A Car—but it was there.

My involvement began three years before the movie's release 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 begin 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*[4] coauthor, Federal Judge Sam King, and his wife,

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[1] *See* THE DESCENDANTS (Fox Searchlight Pictures 2011).

[2] *See* KAUI HART HEMMINGS, THE DESCENDANTS (2007). Kaui is the daughter of long-time 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 prepublication manuscript.

[3] Selected differences between the movie and book are noted in footnotes.

[4] *See* SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST (2006). 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." *Id.* at 31; *see also id.* at 32. Near the end of the twentieth century, the *New York Times* described the Bishop Estate as "a feudal empire so vast that it could never be assembled in the modern world." Todd S. Purdum, *Hawaiians Angrily Turn on a Fabled Empire*, N.Y. TIMES (Oct. 14, 1997), http://www.nytimes.com/1997/10/14/us/hawaiians-angrily-turn-on-a-fabled-empire.html?pagewanted=all&src=pm. The *Wall Street Journal* described it as "the nation's wealthiest charity." Alix M. Freedman & Laurie P. Cohen, *Bishop's Gambit: Hawaiians Who Own Goldman Sachs Stake Play Clever Tax Game*, WALL ST. J., Apr. 25, 1995, at A1. The book in question, *Broken Trust*, describes a scandal that occurred in the late 1990s. *See generally* Ronald D. 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

Anne. The Roths and Kings immediately read Kaui's book and learned more about Alexander's movies, including the one that had already won an Academy Award—*Sideways*.[5]

Early in the dinner conversation I kiddingly asked Alexander if he would pattern the George Clooney character in the movie, Matt King, after the 94-year-old Sam King. Before Alexander could respond, Sam said that he would prefer for Dwayne "The Rock" Johnson to play the role. Alexander loved Sam's humor, including Sam's response when asked if King Street in Honolulu was 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 came to mind as I read Kaui's book; for example, in the book there is a thrill-seeking person who suddenly needs life support because of a speedboat racing accident—bringing Tom Gentry to mind,[6] and a spendthrift playboy whose father invented the shopping cart, which because of the shopping cart connection brought the Goldman brothers to mind.[7] Before I could describe any of the

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> reader, especially a professional whose practice has anything to do with tax-exempt organizations and charitable giving.

Id. at 409.

[5] *See* SIDEWAYS (Fox Searchlight Pictures 2004). *Sideways* won the Academy Award for best screenplay in 2004. Alexander Payne's other films include ABOUT SCHMIDT (New Line Cinema 2002), CITIZEN RUTH (Miramax 1996), and ELECTION (Paramount Pictures 1999).

[6] *See* Barbara Lloyd, *Tom Gentry, 67, Powerboat Racing Record Holder*, N.Y. TIMES (Jan. 17, 1998), http://www.nytimes.com/1998/01/17/sports/tom-gentry-67-powerboat-racing-record-holder.html.

> [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 The Associated Press[:] "He took and overcame risks, both in business and in sports. He loved the pulse of business and the intensity of competition."

Id.

[7] Alfred and Monte Goldman reportedly inherited more than $400 million from their father, Sylvan Goldman, who invented the shopping cart. *See Former Kaiser Estate Owner Found Dead*, HONOLULU STAR-BULLETIN (Oct. 28, 1997), http://archives.starbulletin.com/1997/10/28/news/briefs.html. In 1971 Alfred and Monte purchased the 7.5-acre Henry J. Kaiser Estate in the Portlock area of Hawai'i Kai. *See id.* According to news reports, the Goldman brothers dissipated most of their inheritance before at least one, and perhaps both, of them committed suicide. *See id.* ("Alfred Goldman . . . was found dead in . . . a possible suicide . . . . Monte Goldman died of a single self-inflicted gunshot wound."); *see also* Jenny

many other connections I 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 offer led to a series of e-mails[8] and two face-to-face meetings, during which we discussed a trustee's power to act unilaterally, 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.[9]

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.[10] In fact,

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Quill, *Honolulu's Kaiser Estate Still Seeks Buyer*, HONOLULU MAG. (Sept. 16, 2010), http://www.honolulumagazine.com/Honolulu-Magazine/Real-Estate/September-2010/Honolulu-rsquos-Kaiser-Estate-Still-Seeks-Buyer/ ("[T]he 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. *See* HEMMINGS, *supra* note 2, at 66. According to Matt King, the son had "little . . . to do except sleep with lots of women and put my wife in a coma." *Id.*

[8] In his first e-mail 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."

[9] We also discussed advance directives, but that topic is not relevant to this essay. My friend, Russell Ota—an attorney in Honolulu—prepared the advance directive document for the movie. With Russell Ota's permission, here is the background on how the document ended up in the movie:

> One 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.

[10] Legal authorities and publications that publically reviewed the movie declared it a winner. *See, e.g.*, Jeffrey A. Cramer, *Movies About Estate Planning:* The Descendants, CRAMER L. CENTER BLOG (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."); *Film for Trust Buffs* "The Descendants" *Wins Golden Globe for Best Drama*, THE TR. ADVISOR (Jan. 16, 2012), http://thetrustadvisor.com/headlines/desendants-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,

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 impose on the living.[11] The maximum time allowed by the Rule usually works out to about 100 years.[12]

II. THE STORY IN THE MOVIE

In the movie, Matt King[13] is the sole trustee[14] and one of about twenty beneficiaries of a family trust that his great-great-grandparents, a Hawaiian

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George Clooney Makes Estate Planning Sexy, FORBES (Feb. 23, 2012), http://www.forbes.com/sites/deborahljacobs/2012/02/23/the-descendants-buries-estate-planning-lessons-in-george-clooney-drama/ ("[T]he legal issues were painstakingly developed and fact-checked."); Joseph S. Karp, "The Descendants" *Shows Challenges for Trustees*, LEXISNEXIS LEGAL NEWSROOM EST. & ELDER L. BLOG (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."); 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."); Paul E. Trudelle, *Hollywood, and the Rule Against Perpetuities*, TORONTO EST. L. 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.").

[11] The dead person's instructions are sometimes characterized as "dead-hand control." ROBERT J. LYNN THE MODERN RULE AGAINST PERPETUITIES 10 (1966). 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. ANN. § 525-4 (LexisNexis Supp. 2012).

[12] 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 duration time of ninety years, and a small but growing number of states recently abolished the Rule so that any creator of a trust—private as well as charitable—can design it to last forever (that is, operate in perpetuity). *See* Frederick R. Schneider, *A Rule Against Perpetuities for the Twenty-First Century*, 41 REAL PROP. PROB. & TR. J. 743, 748 (2007).

[13] 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. *See* THE DESCENDANTS, *supra* note 1. He is suddenly shaken from his midlife ennui by a personal tragedy: his thrill-seeking wife is now on life support because of a speedboat racing accident. *See id.* 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 would recover. *See id.* But his rediscovered love for her is shaken when he learns that she had been having an affair with a realtor, Brian

princess and a *haole*[15] banker, established many years earlier.[16] The trust's most valuable holding is a 25,000-acre parcel of breathtakingly beautiful land on the island of Kaua'i.[17] Because of the Rule Against Perpetuities, the trust will dissolve in another seven years.[18] Matt says that distributing this particular land to the beneficiaries would be a "train wreck"—alluding to the likelihood that the co-owning cousins would end up in a cumbersome and costly partition lawsuit.[19] 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 Chicago[20] that 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.[21] Several of the beneficiaries and many of the locals on Kaua'i do not want the land developed by anyone.[22]

Speer. *See id.* She eventually dies, but not before Matt achieves his goal of becoming a better father and husband—and not before he sticks it to Brian Speer. *See id.* This Article addresses only the part of the story that involved valuable land in an old Hawaiian trust that must terminate in seven years.

[14] In the book, instead of serving as the trustee, Matt's vote simply counts more than that of any other beneficiary's vote because he has a one-eighth interest and each of the others has only a one twenty-fourth interest. *See* HEMMINGS, *supra* note 2, at 23, 160.

[15] *Haole*—literally translates to "without breath"—means foreigner in Hawaiian. ALBERT J. SCHÜTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 213 (1994) (noting several other etymologies for the word); *see also* MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN-ENGLISH DICTIONARY 55 (1957). In modern colloquial usage, *haole* refers only to Caucasians. *See* PUKUI & ELBERT, *supra*. Matt (played by Clooney) and his cousins may look Caucasian, but because of their Native Hawaiian ancestry, they are not *haole*.

[16] *See* THE DESCENDANTS, *supra* note 1. 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). *Compare id.*, *with* HEMMINGS, *supra* note 2, at 35. The Princess was slated to marry her own cousin (her brother in the book), but that marriage 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). *Compare* THE DESCENDANTS, *supra* note 1, *with* HEMMINGS, *supra* note 2, at 36.

[17] *See* THE DESCENDANTS, *supra* note 1.

[18] *See id.* Kealohilani and Edward evidently provided that the trust was to last as long as the law would allow. *See id.* In the book, the trust was formed in 1920 and the Rule Against Perpetuities is not mentioned. *See* HEMMINGS, *supra* note 2, at 36.

[19] Jacobs, *supra* note 10; *see also* THE DESCENDANTS, *supra* note 1.

[20] *See id.* The higher bidder in the book is a publicly 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 . . . ." HEMMINGS, *supra* note 2, at 40.

[21] *See* THE DESCENDANTS, *supra* note 1. In the movie, one of Matt's cousins comments that "at least [with Holitzer] there ain't going to be any Walmart." *Id.* In the book, Matt

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.[23] Almost all of them 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 situation more like Native Hawaiians and less like *haole*.[24] Matt's ancestors would want this piece of paradise preserved, not developed, according to Matt.[25] So he puts down the pen and announces that he will not sell to anyone and that he has seven years to find a way to preserve the land.[26] Because at

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expresses a preference to sell to someone "who has a history here" and considers it a plus that Holitzer would "lease some land to the conservancy." HEMMINGS, *supra* note 2, at 39, 159. The movie includes a comment that the profits from developing the land would stay in Hawai'i if the sale were to Holitzer. *See id.*

[22] *See* THE DESCENDANTS, *supra* note 1. They think the development would just attract more people and more cars, and that their island paradise would never be the same. *See id.*

[23] 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. One or more beneficiaries will sometimes sue a trustee who makes a decision that in hindsight looks bad, claiming that the decision did not meet the trustee's standard of care and that the beneficiaries consented to the transaction based upon misleading or incomplete information.

[24] *See* THE DESCENDANTS, *supra* note 1.

[25] In the book, Matt says, "I belong to one of those Hawaii families who make money off of luck and dead people," and "[w]e've turned our backs to our legacy . . . . " HEMMINGS, *supra* note 2, at 7, 22. Matt also has a very personal reason not to sell to Holitzer: Brian Speer, 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 Speer," but in the movie it seems that Matt decides not to sell for relatively selfless reasons, rather than to get back at Brian Speer. HEMMINGS, *supra* note 2, at 229; *see also* THE DESCENDANTS, *supra* note 1.

[26] 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.
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> . . . .
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> 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.

Roger Ebert, The Descendants *Review & Film Summary*, ROGER EBERT.COM, www.rogerebert.com/reviews/the-descendants-2011 (last visited Oct. 7, 2013).

least some of his cousins need money and do not share Matt's newly discovered sense of Hawaiianness, a future lawsuit is quite possible.[27]

III. REAL STORIES ECHOED BY THE MOVIE

The Descendants echoes real stories from Hawai'i. Perhaps the most obvious story is the description of Matt King's ancestors as a *haole* banker and a Hawaiian princess who descended from Kamehameha the Great, which precisely describes Charles Reed Bishop and Princess Bernice "Pauahi" Bishop.[28] And like the banker and princess in the movie, Charles and Pauahi transferred large amounts of wealth, including breathtakingly beautiful land, into trusts.[29] Unlike the movie, however, Charles and Pauahi left no descendants and their trusts were charitable rather than private,[30] which is why the Rule Against Perpetuities never applied to them.[31]

A. The Bishop Estate

Pauahi's trust currently operates under the trade name of Kamehameha Schools, but outside of Hawai'i the trust is still widely known as the Bishop Estate.[32] There are many interesting similarities between Matt King and the Bishop Estate trustees. Like Matt, the Bishop trustees feel responsible to protect the *aina*[33] and preserve Native Hawaiian culture.[34] And in both

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[27] *See* THE DESCENDANTS, *supra* note 1.

[28] *See supra* note 4 and accompanying text.

[29] *See supra* note 4 and accompanying text. An even more direct connection exists in the book, where Matt says that the princess "wanted the land to be used to fund a school for children of Hawaiian descent," which is the mission that the Bishop Estate's real-world trustees are pursuing. HEMMINGS, *supra* note 2, at 229. The movie, however, makes no mention of any such plan or possibility. *See* THE DESCENDANTS, *supra* note 1.

[30] *See* KING & ROTH, *supra* note 4, at 31.

[31] The Rule Against Perpetuities does not apply to charitable trusts, so those trusts are allowed to operate in perpetuity. *See, e.g.*, HAW. REV. STAT. ANN. § 525-4(3) (LexisNexis Supp. 2012).

[32] *See* KING & ROTH, *supra* note 4, at 267. Toward the end of the twentieth century, the Bishop Estate was grossly mismanaged and in serious danger of losing its tax-exempt status. *See id.* at 195, 204. The Bishop Estate is now reorganized and its education mission is significantly expanded. *See generally id.* ch. 21, at 283.

[33] *Aina* generally refers to Hawaiian ancestral lands. *See* PUKUI & ELBERT, *supra* note 15, at 10. *Aloha aina*—to nurture and care for the land—is at the core of the Hawaiian culture and spiritual beliefs. *See id.* at 19.

[34] The following statement appears on Kamehameha Schools Endowment Group's webpage:

> In addition[] to its core and non-core real estate assets, the Endowment Group manages 360,000 acres of Hawai'i land zoned for agriculture and

cases, the governing document does not explicitly include land stewardship or cultural preservation as a trust purpose.[35]

Charles' trust, once known as The Bernice P. Bishop Museum Trust, no longer exists.[36] In 1975, its trustees converted that charitable trust into a nonprofit entity called Bishop Museum Corporation.[37]

B. The Waterhouse Estate

An article in Alexander Payne's hometown newspaper, the Omaha World-Herald,[38] noted that the land used in the filming of *The*

> 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.

Land Stewardship and Eco-Cultural Education, KAMEHAMEHA SCHOOLS ENDOWMENT GROUP, www.ksbe.edu/staticpages/index.php?page=20050307152611590 (last visited Oct. 7, 2013).

[35] In both the book and the movie, Matt studies old documents and letters trying to figure out what his ancestors intended. *See* HEMMINGS, *supra* note 2, at 41; THE DESCENDANTS, *supra* note 1. Was the whole idea of the trust to enrich their descendants or did they have something more noble in mind? As Matt puts it in the book, "imagining what two people I've never met would want" is difficult. HEMMINGS, *supra* note 2, at 41. According to the book, Matt's great-grandmother "wanted the land to be used to fund a school for children of Hawaiian descent," HEMMINGS, *supra* note 2, at 229, but according to the movie, neither she nor her husband left explicit instructions regarding trust purpose, other than to benefit their descendants. *See* THE DESCENDANTS, *supra* note 1; *see also* KING & ROTH, *supra* note 4, at 297 (noting that the Bishop Estate trustees hold 350,000 acres of nonincome producing land as "program assets," to be held in perpetuity "for educational purposes"). To interpret Princess Pauahi's will, see KING & ROTH, *supra* note 4, at 301–03.

[36] *See* JOYCE D. KAHANE, LEGIS. REG. BUREAU, STATE FUNDING FOR THE BISHOP MUSEUM 36 (1988), *available at* lrbhawaii.info/lrbrpts/87/fundbish.pdf.

[37] *See id.* at 38, 84 app. C. The probate court gave the trustees of Charles' trust permission to terminate the trust by transferring all trust property to a new nonprofit corporation that had directors (the trustees), but no shareholders. *See id.*; *see also id.* at 39 exhibit 11. So, instead of managing trust property as trustees, the now-former trustees carried on as directors of the new corporation. *See id.* at 38. 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. For example, 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.

[38] *See* Bob Fischbach, 'Descendants' *Beachfront Property is Real*, OMAHA WORLD-HERALD (Feb. 25, 2012), 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.").

Descendants—known as Kipu Kai[39]—belongs to the Waterhouse Estate and that it has other connections to the movie. For example, Kipu Kai was once owned by Princess Ruth Keʻelikolani who, like Matt King's ancestor, was one of the last descendants of Kamehameha the Great and married a *haole*.[40] Princess Keʻelikolani's will said that Kipu Kai was to pass to her sister, Princess Pauahi, but Princess Keʻelikolani sold the land to the Governor of Kauaʻi, William Hyde Rice, before dying.[41] One of Rice's relatives, Jack Waterhouse,[42] put Kipu Kai into a trust—known locally as the Waterhouse

[39] Kipu Kai is a 3,000-acre cattle ranch in a rare coastal valley on the southeast end of Kauaʻi. *See About Kipu Ranch*, KIPU RANCH ADVENTURES, www.kiputours.com/tour-location.php (last visited Oct. 7, 2013). Kipu Kai has not only been a filming site for *The Descendants*, but also for *Raiders of the Lost Ark*, *The Lost World* (sequel to *Jurassic Park*), *Outbreak*, *Mighty Joe Young*, and *Six Days, Seven Nights*. *See* Sarah Le, The Descendants: *Filmed on Location in Hawaii*, REEL-SCOUT BLOG, www.locationshub.com/blog/post/463/thedescendants-filmed-on-location-in-hawaii#.UIN-DyRJDAg (last visited Oct. 7, 2013); Jan TenBruggencate, *Kipu Kai Gets Power From Nature*, HONOLULU ADVERTISER (Apr. 23, 2002), the.honoluluadvertiser.com/article/2002/Apr/23/ln/ln29a.html. John T. "Jack" Waterhouse deeded the property to the state, but he carved out what amounts to a life estate for his nieces and nephews. *See* TenBruggencate, *supra*. At the time of the gift, Waterhouse expressed hopes that Kipu Kai would eventually be used as a nature, animal, and wildlife preserve. *See id.* Roughly half the land is currently classified as conservation land, the other half as agricultural use. *See* U.S. DEPT. OF THE INTERIOR, NAT'L PARK SERV., MAHAʻULEPU, ISLAND OF KAUAʻI: RECONNAISSANCE SURVEY 8 (2008), *available at* malama-mahaulepu.org/source/docs/nps_study.pdf. Kipu Kai is not accessible to the public by land. *See id.* at 7. The single-lane road over the high ridges of the Haupu Range is private property and blocked by gates. *See id.* at 43. 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. *See id.* at 9.

[40] Actually, she married two *haoles*. *See, e.g.*, John Berger, *Getting to Know Ruth*, HONOLULU STAR-BULLETIN (May 30, 2004), archives.starbulletin.com/2004/05/30/features/story1.html; Michael Tsai, *The Princess Diaries*, HONOLULU ADVERTISER (June 7, 2004), http://the.honoluluadvertiser.com/article/2004/Jun/07/il/il01a.html.

[41] Bob Fischbach, a writer at the *Omaha World-Herald*, asked a member of the Rice family, David Scott, if the movie rang true. Scott's response was, "I didn't find a single false detail." Fischbach, *supra* note 38.

[42] Waterhouse descended from missionaries who came to Hawaiʻi in the 1830s, and from William Alexander, who cofounded Alexander & Baldwin (A&B) in 1870. *See History*, ALEXANDER & BALDWIN, alexanderbaldwin.com/our-company/history/ (last visited Oct. 7, 2013); *What We Do*, ALEXANDER & BALDWIN, alexanderbaldwin.com/our-company/what-we-do/ (last visited Oct. 7, 2013). A& B is one of the "Big 5" companies that dominated sugar and pineapple in Hawaiʻi until the latter part of the twentieth century. *See* Richard Borreca, *Sugar Yields Sweet Deal for 'Big Five' Firms* (July 12, 1999), archives.starbulletin.com/1999/07/12/millennium/story1.html; Rob Perez, *Big 5 Companies Were All-Powerful*, STAR-BULLETIN (Oct. 25, 1999), archives.starbulletin.com/1999/10/25/news/story5.html. A&B currently owns over 87,000 acres of land in Hawaiʻi, primarily on the islands of Kauaʻi and Maui. *See What We Do*, *supra*.

Estate—for the benefit of his nieces and nephews.[43] 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.[44] Matt King would presumably view this result 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 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.[45] That potential lease clearly violated the terms of the controlling trust document, but the state attorney general gave his blessing to the transaction nevertheless.[46] 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.[47]

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

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[43] *See supra* note 39 and accompanying text.

[44] *See supra* note 39 and accompanying text.

[45] *See* Kapiolani Park Pres. Soc'y v. City & Cnty. of Honolulu, 751 P.2d 1022, 1024 (Haw. 1988).

[46] *See id.* at 1025–26.

[47] *See id.* at 1029. The 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." *Id.* at 1025. The agreement stated:

> (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] "[t]he said Commission shall not have authority to lease or sell the land comprising the said park or any part thereof[.]

Id.

The City argued that the transaction with Burger King was a permitted license rather than a prohibited lease. To that argument, 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 1028.

requirements.[48] Environmental and Native Hawaiian groups have expressed outrage and the general public also appears to mostly oppose, but the battle is likely to continue indefinitely.[49]

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[48] *See, e.g.*, Editorial, *Making Most of State Lands Seems Doable*, HONOLULU STAR-ADVERTISER (Jan. 27, 2013), www.staradvertiser.com/s?action=login&f=y&id=188466931.

> 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 say in its projects.
>
> . . . .
>
> . . . Especially in the parks arena, public-private partnerships are gaining favor in other states . . . .
>
> . . . [Government officials plan on] weaning state parks [in various states] off the public purse.

Id.

[49] *See, e.g.*, Richard Borreca, *Even Lipstick Can't Disguise PLDC Look-Alike Proposals*, HONOLULU STAR-ADVERTISER (Feb. 24, 2013), www.staradvertiser.com/s?action=login&f=y&id=192805021&1d=19280521.

> [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 . . . .
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> . . . .
>
> Native Hawaiian groups fear[ed] that the exemptions would allow development of land they wanted preserved.
>
> . . . [This new proposal] bemoan[s] 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."

Id.; Jim Carlton, *Development Encounters Trouble in Paradise*, WALL ST. J. (Aug. 9, 2013), online.wsj.com/news/articles/SB10001424127887323420604578652053337562418.

> Kauai Island residents are protesting plans that call for building expensive homes along a ridge that overlooks the beach . . . .
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> . . . .
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> 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.
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> . . . .
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> In recent years, foes have stymied developments in Oahu and the Big Island of Hawaii.

Carlton, *supra*.

C. The Damon Estate

A *Hawaii Reporter* news story[50] compared the movie to the circumstances of a different local trust, the $1 billion Damon Estate.[51] The article pointed out that Samuel Mills Damon was a banker, just like Edward King in the movie, and that although Damon never married a Hawaiian princess, Princess Pauahi Bishop gave him a significant portion of his fortune.[52] The article also highlighted the fact that the Damon Estate bumped up against the Rule Against Perpetuities.[53] Unlike Matt King's decision in the movie, however, the Damon trustees sold all the trust's land and distributed cash to

[50] *See* Jim Dooley, *Real Life Version of* "The Descendants" *Now Playing in Court*, HAW. REP. (Dec. 12, 2011), www.hawaiireporter.com/real-life-version-of-the-descendants-now-playing-in-court/123. The news hook for the article involved a complaint by two of the Damon beneficiaries—the brother of a Damon trustee and that trustee's ex-wife—that the trustees had not provided sufficient information about the dissolution; they specifically wanted to know how much the Damon estate paid Goldman Sachs. *See id.*

[51] *See id.* Samuel Mills Damon, who at that time headed the bank currently known as First Hawaiian Bank, founded the Damon Estate in 1924 by his will. *See* Mary Vorsino, *High Court Settles Damon Estate Distribution*, HONOLULU STAR-BULLETIN (Feb. 17, 2006), archives.starbulletin.com/2006/02/17/news/story07.html. He also owned 121,000 acres of land. *See id.* Damon's will—which had no punctuation other than a single period at the end of the ten-page document—was unclear about what he intended at the trust's termination. *See In re* Will of Damon, 869 P.2d 1339, 1342 n.1, 1343 (Haw. 1994). Indeed, the will was unclear about *when* the trust should terminate. *See id*. at 1342. In 1994, the Hawai'i Supreme Court decided that the trust must terminate at the death of the last surviving grandchild who was alive at Damon's death. *See id.* at 1346 (finding a lower court's ruling that Samuel Damon intended for the trust to last for an extra twenty-one years unreasonable). Twenty beneficiaries qualified for termination distributions in 2004. *See* Vorsino, *supra*. Some took the position that per stirpes, as used in Damon's will, should be interpreted as per capita (that is, equal shares for each descendant). *See In re* Estate of Damon, 128 P.3d 815, 826 (Haw. 2006). Others argued for interpretations that in each case maximized the share of the arguing family member. *See id.* (per stirpes 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. *See* Rick Daysog, *Damon Heirs to Get $500M: Beneficiaries Will Receive Payments Representing 40% of the Cash Assets*, HONOLULU STAR-BULLETIN (Nov. 28, 2004), archives.starbulletin.com/2004/11/28/news/story1.html. In *The Descendants*, Matt King has a one-eighth interest, and each of his cousins has only a one twenty-fourth interest. *See* HEMMINGS, *supra* note 2, at 23. 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.

[52] *See* KING & ROTH, *supra* note 4, at 34 ("[I]n a codicil to her will, Pauahi gave Damon the *ahupua'a* (district) of Moanalua.").

[53] *See* Dooley, *supra* note 50.

the beneficiaries.[54] The fact that beneficiaries sued or threatened to sue the Damon trustees at various times during the trust's existence may have influenced the trustees' decision. 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 pretermination sales program, the Damon trustees sold the 3,716-acre Moanalua Valley to the Trust for Public Land for $5.5 million.[55] The buyer then transferred that breathtakingly beautiful property to the State Division of Forestry & Wildlife to add to its Forest Reserve system.[56]

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[54] *See* Daysog, *supra* note 51. The Damon trustees sold "220 acres of light industrial lands in Mapunapuna" in 2003 for $466.1 million, and around the same time they sold a 25% stake in First Hawaiian Bank to the bank's parent, Banc West Corporation, for $500 million. *Id*.

[55] *See* Diana Leone, *State Plans to Conserve Moanalua Land Buy*, HONOLULU STAR-BULLETIN (Feb. 11, 2006), archives.starbulletin.com/2006/02/11/news/story03.html.

[56] According to Lea Hong on behalf of the Trust for Public Land:

> The transaction "ended an over 30 year community struggle [over the land]. Once slated for 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."

TPL PROJECTS IN THE HAWAIIAN LANDS, TR. PUB. LAND 6–7, *available at* hawaii.gov/dlnr/dofaw/llcp/fy13-applications/FY13%20App_Whitmore_TPL-ADC.pdf (last visited Oct. 7, 2013). "The valley is an important watershed area for Honolulu," and serves as one of the few natural open spaces "just ten minutes from downtown Honolulu." Press Release, Tr. Pub. Land, 3,716 Acres Projected at Moanalua Valley (Apr. 2, 2008), www.tpl.org/news/press-releases/3716-acres-protected-at-moanalua.html. The valley had an appraised value of $5,570,000. *See* REGULAR MEETING MINUTES, ALIAMANU/SALT LAKE/FOSTER VILLAGE NEIGHBORHOOD BOARD NO. 18, 6 (2007), *available at* www1.honolulu.gov/refs/nco/nb18/07/18_2007_03min.pdf. TPL and the Damon Estate negotiated a purchase price of $5.5 million. *See* Press Release, Tr. Pub. Land, 3,716-Acre Moanalua Nature Preserve Dedicated (HI) (Feb. 20, 2008), www.tpl.org/news/press-releases/3716-acre-moanalua-nature-preserve.html. The State of Hawai'i appropriated $3 million, and the U.S. Fish and Wildlife Fund gave a $1.6 million Recovery Land Acquisitions grant. *See id.* In addition, the Trust for Public Land secured $900,000 through the U.S. Army buffer program. *See id.*

D. The Knudsen Estate

Thirty years ago, one of two large Knudsen trusts[57] 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. 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 as 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.[58] The beneficiaries of the trust in the movie might have considered making a similar claim against Matt King if he did not either sell the land or take reasonable steps to produce substantial income from it.

E. The Campbell Estate

A 2011 *Wall Street Journal* article about *The Descendants* movie[59] 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.[60]

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:[61] "It being my

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[57] Eric and Augustus Knudsen established the two Knudsen Trusts with land received from their father, Valdemar 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.

[58] *See* Complaint at 7, 9, Knudsen v. First Hawaiian Bank, No. 94-4593-12 (1st Cir. filed Dec. 7, 1994) (listing the trustees' duties, including "duty to make the [Eric A. Knudsen] Trust property productive.").

[59] *See* Julia Flynn Siler, 'The Descendants' *Aims to Lay Down the Law in Hawaii*, WALL ST. J. BLOG (Nov. 26, 2011, 12:00PM), blogs.wsj.com/speakeasy/2011/11/26/the-descendants-aims-to-lay-down-the-law-in-hawaii/.

[60] *Id.* James Campbell was born in 1826 in Londonderry, Ireland. *See* THE ESTATE OF JAMES CAMPBELL, JAMES CAMPBELL, ESQ. 2 (7th ed. 2003). 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. *See id.* He made a good living as a carpenter and made a fortune investing in sugar production and real estate after inheriting property from his first wife, Hannah Barla, in 1858. *See id.* at 2, 4, 21.

[61] *See id.* at 22.

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."[62] The trust was to end twenty years after the death of his last surviving daughter. Campbell's will also directed:

> [T]hat "the Trustees and their successors keep intact [his] 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."[63]

So like the trust in the movie, the Campbell Estate was private—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 '"the obvious interest of my estate shall so demand."'[64]

Matt King's sense of "Hawaiianness" 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.[65] Several beneficiaries publicly complained that the trustees were shifting the focus of trust investment activity to outside of Hawai'i.[66] 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.[67]

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.[68] A spokesperson for the Campbell trustees explained: "The trustees are faced with the problem of being fair to everybody. . . . Because it

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[62] *Id.* at 25 (citation omitted) (internal quotation marks omitted).

[63] *Id.* (citation omitted).

[64] *Id.* (citation omitted).

[65] *See* Ken Kobayashi, Campbell Estate Clash Over Priorities, HONOLULU ADVERTISER, May 20, 1999, at A1.

[66] *See id.*

[67] *See id.*

[68] *See id.*

will be easier to get court approval for a proposal that is supported by beneficiaries, the trustees have been gathering their feedback."[69]

Like Matt King in the book, 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.[70]

In anticipation of the Campbell Estate's mandatory termination in 2007, the Campbell trustees—rather than liquidating all trust property and distributing cash like the Damon trustees or distributing parcels of land like the Knudsen trustee—dropped most of the Campbell Estate's undeveloped land into a limited liability company (LLC) and then distributed interests in the LLC to beneficiaries when the trust dissolved.[71] The Campbell trustees did, however, sell the spectacular Honouliuli Forest Preserve to the Trust for Public Land for just over $4 million.[72]

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[69] *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. *See id.* When the trustees declined to sue trust counsel, the beneficiary sued the trustees. *See id.* The trustees then agreed to sue their lawyers, using the lawyer whom the unhappy beneficiary selected to sue the trustees! *See id.* In fact, the trustees' agreement to sue trust counsel was conditioned on the agreement of the complaining beneficiaries not to sue the trustees. *See id.* This quid pro quo agreement drew additional criticism. *See id.* Critics faulted the trustees for factoring the trustees' personal interests into the equation, and for doing so without first petitioning the probate court as a statute arguably requires when trustees find themselves in a conflict of interests. *See id.*

[70] *See* Pat Omandam, *'Kekau' Lives Up to Her Royal Lineage: Abigail Kawananakoa Has Been President of the Friends of Iolani Palace Since 1971*, HONOLULU STAR-BULLETIN (July 22, 1998), archives.starbulletin.com/1998/07/22/news/story3.html; *see also* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 370 (2008). The widow of James Campbell adopted a grandchild "in order to recognize her priority as royal heir . . . and as heiress of the Campbell Estate." *Id.*

[71] *See* Rick Daysog, *The Great Divide*, HONOLULU ADVERTISER (June 11, 2006), the.honoluluadvertiser.com/article/2006/Jun/11/bz/FP606110312.html. 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. *See id.*

[72] *See* Andrew Gomes, *Gills, Partner Acquire Campbell Tract*, HONOLULU ADVERTISER (Oct. 16, 2009), the.honoluluadvertiser.com/article/2009/Oct/16/bz/hawaii910160332.html. More precisely, the Campbell trustees sold a much bigger tract to the Gill–Olson Joint Venture, and sold the adjacent forest preserve to the Trust for Public Land, which then transferred the land to the State Forest Reserve system. *See id.*; *see also* Eloise Aguiar, *Oahu's Honoliuli Forest Reserve Now State-Protected*, HONOLULU ADVERTISER (June 3, 2010), the.honoluluadvertiser.com/article/2010/Jun/03/ln/hawaii6030321.html.

F. 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 1980s by the trustees of the Harold and Alice Castle trusts,[73] who dropped trust assets, including the trust's undeveloped land,[74] into a group of LLCs with Kaneohe Ranch LLC as the common parent.[75] Because of the Rule Against Perpetuities, the last of the Castle trusts must eventually 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.[76]

G. The Galbraith Estate

A recent *Wall Street Journal* article[77] compared the movie to yet another private trust that was forced to dissolve—this time it was the Galbraith

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[73] For a brief history of Harold K.L. Castle and a description of Kaneohe Ranch, see *Kaneohe Ranch History* KANEOHE RANCH, http://www.kaneoheranch.com/about-home/Kaneohe-ranch-history (last visited Oct. 7, 2013).

[74] 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. *See About Us: Founder & History*, CASTLE FOUND., www.castlefoundation.org/founder-history.htm (last visited Oct. 7, 2013). He also made major contributions—often in the form of land—to Hawai'i Loa College, Castle Hospital, Iolani School, Castle High School, Kainalu Elementary School, and the Kaneohe Marine Corps Base. *See id.*

[75] The Castle family now owns Kaneohe Ranch directly and through a variety of trusts. *See id.* The Harold and Alice Castle trust still owns only Kapaa Quarry. *See* Russ Lynch, *Castle to King*, HONOLULU STAR-BULLETIN (Feb. 5, 2003), archives.starbulletin.com/2003/02/05/business/story2.html. 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*, PAC. BUS. NEWS (May 17, 2013), www.bizjournals.com/pacific/news/2013/05/17/rising-hawaii-land-values-prompt.html.

[76] *See About Us: Founder & History*, *supra* note 74. 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 worth $162 million. *See Castle Foundation Has Given More Than $168M Since 1963*, PAC. BUS. NEWS (Dec. 26, 2012), www.bizjournals.com/pacific/news/2012/12/26/castle-foundation-has-given-more-than.html. The foundation has 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 Oct. 7, 2013).

[77] *See* Jim Carlton, *Heirs Preserve Hawaiian Tract*, WALL ST. J. (Nov. 18, 2012), online wsj.com/article/SB10001424127887324073504578107410529884112.html.

Estate.[78] The *Journal* suggested that the Galbraith trustee's sale of 1,750 acres of undeveloped land[79] near Wahiawa in late 2012 was the kind of deal the

> 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.
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> . . . .
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> 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 Hawai'i land for development.

Id.

[78] *See id.* George Galbraith died in 1904 with an estate worth $260,000. HAWAIIAN TR. CO., GEORGE GALBRAITH TRUST ESTATE 1 (1975), *available at* galbraith.ilind.net/brochure 1975.pdf. Nearly half that value came from 2,000 acres of ranch land near Wahiawa, sixteen miles from the center of Honolulu. *See id.* 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. *See id.* at 1–2. 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 [is] to be divided equally amongst those persons entitled at that time to the aforementioned annuities." Last Will and Testament of George Galbraith 2–3 (Jan. 21, 1904), *available at* galbraith.ilind.net/galbraithwill/source/galbraith1a.htm. There were glaring problems: First, the limiting law the drafter evidently had in mind—the Rule Against Perpetuities—is not a statute. *See* Fitchie v. Brown, 18 HAW. 52, 69 (1906), *aff'd*, 211 U.S. 321 (1908) ("the rule against perpetuities is law in Hawaii, being a rule of the English common law . . . ."). 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. *See* HAWAIIAN TR. CO., *supra*, at 6. 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. *See id.* 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). *See id.* Disputes also arose 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 ten or one hundred interests simply by splitting it up among family, friends, and investors (that is, 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). *See generally* Hawaiian Trust Co. v. Galbraith, 25 Haw. 174 (1919). Perhaps the annuitant could even increase his share 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

movie's Matt King would have loved. The Trust for Public Land negotiated this deal on behalf of the City, State, U.S. Army, and Office of Hawaiian Affairs.[80] 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 received full value for their interests in the trust.[81]

Galbraith's will. *See* 18 HAW. at 74. The court acknowledged that it would need to answer this question sooner or later, but it did not consider the question ripe. *See id.* 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. *See* Fitchie v. Brown, 211 U.S. 321, 331 (1908). The remaining corpus and surplus income were distributed in accordance with the terms of the will and codicils as a court interpreted them roughly 100 years later. *See id.* at 334–35. In *Hawaiian Trust Co. v. Galbraith*, 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. *See* 25 HAW. at 177. That ruling 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. *See id.* 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. *See* Ian Lind, *About* GEORGE GALBRAITH INFO BLOG, galbraith.ilind.net/blog/?page-id=2 (last visited Oct. 7, 2013). 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. *See* Petition for Instructions, for Review and Settlement of Final Accounts, and for Release of Trust Registration at 22, *In re* Estate of Galbraith, No. 2176 (1st Cir. Haw.).

[79] The land is classified for agriculture use and developers reportedly were uncertain of their ability to get it reclassified to urban use. *See* Carlton, *supra* note 77.

[80] *See* Press Release, Tr. Pub. Land, Galbraith Estate in Central O'ahu Protected for Farming (Dec. 11, 2012), www.tpl.org/news/press-releases/2012-press-releases/galbraith-estate-protected.html.

> The Trust for Public Land assembled the $25 million purchase price from a variety of sources, including $13 million from a [Hawaii] state general obligation bond; $4.5 million from the U.S. Army; $4 million from the City and County of Honolulu Clean Water & Natural lands Fund; $3 million from the Office of Hawaiian Affairs; and $500,000 from D.R. Horton-Schuler Division.

Id. The U.S. Army money came from the Pentagon's Readiness and Environmental Protection Initiative (REPI), which protects land around military bases. *See id.*

[81] *See* Carlton, *supra* note 77. 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. *See id.*

Years earlier, the Galbraith trustee tried to develop the land and then to sell it to a developer, but both efforts proved unsuccessful.[82] Because the land was classified for agriculture use, a trustee could not be certain of the chances of getting the reclassification and various permits necessary to develop the Galbraith land.

H. 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.[83] 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. The buyer was the former CEO of AOL and Time Warner, Steve Case.[84]

As further evidence of a likely connection, the article pointed out that Kaui Hemmings is related to George Norton Wilcox, the man who founded Grove Farm, and in 1933 willed all his Grove Farm stock to his nieces and

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[82] *See Proposed Development Raises Trust Company Questions*, HAW. MONITOR, Jan. 1993, at 1, *available at* ilind.net/hawaii_monitor/hm3-2.pdf. In the early 1990s, Hawaiian Trust Company announced plans to build thousands of homes on 892 acres of land in Wahiawa. *See id.* According to a commentary in the now-defunct Hawai'i Monitor, "probably no-one was more surprised than the owners of the land—the beneficiaries of the George Galbraith Trust Estate." *Id.* This statement was less than precise in describing beneficiaries as land owners. Hawaiian Trust Company, as trustee, effectively owned the land and held the power to develop or sell it. The beneficiaries had only what is called beneficial or equitable interests, which do not give them any real power to manage trust property. Depending on a number of variables, Hawaiian Trust Company may have had not only the *power*, but also a *fiduciary duty* to develop or sell the land. According to above-mentioned commentary, here is 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, nor should we ask them. But we do inform them from time to time." *Id.* There are much nicer ways of communicating this message.

[83] *See* Jacobs, *supra* note 10; *see also* Stewart Yerton, *Grove Farm - A House Divided*, HONOLULU STAR-BULLETIN, Apr. 23, 2006, Apr. 24, 2006 [hereinafter *Grove Farm Series*], *available at* archives.starbulletin.com/2006/04/23/news/story03.html, archives.starbulletin.com/2006/04/24/business/story01.html.

[84] *See* Jacobs, *supra* note 10. Steve Case was on *Forbes*' list of billionaires. *See* Stewart Yerton, *Case Sued Over Purchase of Grove Farm*, HONOLULU STAR-BULLETIN (Dec. 3, 2005), archives.starbulletin.com/2005/12/03/business/story03.html. 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 company's bylaws. *See id.* In the book version of *The Descendants*, Holitzer's chief financial officer is the son-in-law of the trust's longtime lawyer. *See* HEMMINGS, *supra* note 2, at 39.

nephews in equal shares.[85] 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 overleveraged at a time when the bottom had fallen out of the Kaua'i real estate market.[86] Virtually all the Wilcox nieces and nephews (and the descendants of the ones who 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.[87]

One of the allegations regarded the legal representation of Steve Case by his father while his father's law firm was also representing Grove Farm.[88] 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 was not consentable.[89]

When asked by *Forbes* if she based *The Descendants* on what happened at Grove Farm, Hemmings said that she was 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—opposed the sale.[90]

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[85] *See* Jacobs, *supra* note 10.

[86] 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. *See* Jan TenBruggencate, *Grove Farm Sale Challenged*, HONOLULU ADVERTISER (Dec. 12, 2005), the.honoluluadvertiser.com/article/2005/Dec/12/bz/FP512120307.html. In the book, Matt King initially blamed the King trust's weak financial performance on "the hurricane." HEMMINGS, *supra* note 2, at 230.

[87] *See* TenBruggencate, *supra* note 86.

[88] *See* Yerton, *supra* note 83. Compare to 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. *See* HEMMINGS, *supra* note 2, at 39.

[89] *See, e.g.*, Combs v. Case Bigelow & Lombardi, 222 P.3d 465 (Haw. Ct. App. 2010); Fisher v. Grove Farm Co., 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 at *1–2 (D. Haw. Dec. 19, 2007); Sheehan v. Grove Farm Co., 163 P.3d 179, 182–85 (Haw. Ct. App. 2005).

[90] *See* Jacobs, *supra* note 10; *see also* Michael Tsai, *The Other Side of Paradise*, HONOLULU ADVERTISER (June 8, 2007), the.honoluluadvertiser.com/article/2007/Jun/08/il/FP706080317.html.

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."[91]

Hemmings 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 $1.2 billion[92] is small potatoes compared to Pierre Omidyar,[93] the eBay founder who is planning a controversial resort development on Kaua'i near Hanalei,[94] and Larry Ellison,[95] the Oracle founder who is planning to do heaven-only-knows-what to the island of Lana'i.[96]

I. 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.[97] Things got interesting from a legal standpoint

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[91] Jacobs, *supra* note 10. Movie critic Roger Ebert speculated that the book might be autobiographical in another way. He said he "suspect[ed] that there must be a lot of her in Alexandra and Scottie." Ebert, *supra* note 26.

[92] *See Steve Case*, www.forbes.com/profile/steve-case (last updated Sept. 2013).

[93] Omidyar reportedly has a net worth of $8.5 billion. *See Pierre Omidyar*, www.forbes.com/profile/pierre-omidyar/ (last updated Sept. 2013).

[94] *See* Andrew Walden, *Pierre Omidyar: The Secret Empire of a Resort Developer*, HAW. FREE PRESS (Nov. 18, 2012), www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/8247/Pierre-Omidyar-The-Secret-Empire-of-a-Resort-Developer.aspx. The property in question includes the ridge that runs along Hanalei River on the hillside between Princeville and Hanalei as well as land north of there that slopes to the ocean. *See* Chris D'Angelo, *History Hidden* in *Hanalei*, GARDEN ISLAND (July 29, 2013), thegardenisland.com/news/local/history-hidden-in-hanalei/article_8b417706-f806-11e2-8233-001a4bcf887a.html. The property has spectacular views and contains an ancient Hawaiian fishpond. *See id.*

[95] Ellison reportedly has a net worth of $41 billion. See *Larry Ellison*, www.forbes.com/profile/larry-ellison/ (last updated Sept. 2013).

[96] 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, *available at* www.staradvertiser.com/s?action=login&f=y&id=188469531. ("'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.'") Even the Maui Mayor, Alan Arakawa, commented: "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." *Id.*

[97] *See generally* Malia Zimmerman, *Family in Center of Kauai's Ka Loko Dam Breach Faces Extensive Legal Battles*, HAWAII REP. (May 5, 2006), archives.hawaiireporter.com/family-in-center-of-kauais-ka-loko-dam-breach-faces-extensive-legal-battles/. In 1862, the "favorite wife" of Kamehameha the Great, Kaahumanu, informally adopted a Native Hawaiian infant, Mary Nauepu, who eventually married Charles Lucas. *Id.* When Mary

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.[98] Rather than seek instructions from the probate court as the 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.[99] When the real estate market on Kaua'i improved, however, some of the beneficiaries had second thoughts and sued the Lucas trustees.[100]

The self-dealing controversy was settled out of court, but it ended up costing the Lucas Estate and its trustees more than $5 million.[101] The trustees then sued their lawyers, arguing that they received and relied on flawed legal advice as evidenced by the costly settlement of the beneficiary's lawsuit.[102] The parties settled the malpractice claim confidentially minutes before a jury returned with a verdict in excess of $4 million.

IV. A QUESTION

After watching a movie my wife will sometimes ask, "How do you think the story will end?" The first few times she asked, 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 talking about how a movie's story will (or should) end can be fun.

So here is 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?

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. *See id.* That trust currently owns about 1,000 acres on Kaua'i, most of it near the Ka Loko Reservoir, which burst on March 14, 2006, killing eight people. *See id.*; *see also* Harold Nedd, *Son Sues Father, Uncle in Fight Over Lucas Estate*, PAC. BUS. NEWS (Mar. 18, 2007), www.bizjournals.com/pacific/stories/2007/03/19/story3.html?page=all (discussing the Charlotte Cassiday Trust, but detailing the history of the dispute involving land in Hawai'i Loa Ridge, Niu Valley, and Niu Beach, which Charlotte received from her mother Mary Lucas; Mary Lucas received it from Alexander Adams, her grandfather, the sea captain; and Alexander Adams received it from Kamehameha I).

[98] *See* Zimmerman, *supra* note 97. 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 Kaua'i*, HONOLULU STAR-BULLETIN (Mar. 26, 2006), archives.starbulletin.com/2006/03/26/news/story02.html.

[99] *See* Zimmerman, *supra* note 97.

[100] *See id.*

[101] *See id.*

[102] *See id.*

While considering the possibilities, one must keep in mind that the land in the movie is supposedly worth a half-billion dollars.[103] The land's worth is an inconvenient fact. Valued differently, 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.[104] 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 another 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 (that is, breaking a large tract of developable land in Hawai'i into relatively small pieces tends to reduce the land's total value for development purposes). If the land in the movie was ineligible for development because of land-use laws, breaking it up into smaller parcels might actually increase the land's total value; however, the land obviously is eligible for development 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.

Additional legal issues would arise if Matt wanted to buy the land from the trust or to 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,

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[103] The land used in the filming of *The Descendants*, Kipu Kai, is surely worth far less than $500 million because the land is classified as conservation property. Its market value is probably much closer to the amount recently paid for the Galbraith Estate land, $25 million. *See* Press Release, Tr. for Pub. Land, *supra* note 80.

[104] Equally beautiful land in Hawai'i has a relatively low value because its land classification does not permit development or because of practical problems with potential development. *See, e.g.*, *Transfer of Land Confirms Preservation Commitment*, MAUI NEWS (Jan. 15, 2013), www.mauinews.com/page/content.detail/id/568924.html.

> 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 . . . .

Id.

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.[105] Matt would 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.[106] 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 like a 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 fiduciary duties are not quite as restrictive as 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).[107] A governing document could authorize or instruct a trustee not to make productive assets 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,[108] would clearly breach his duty of loyalty—unless, perhaps, that reduction furthered an important trust purpose.[109]

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[105] *See* discussion *supra* p. 63; *see also* Zimmerman, *supra* note 97.

[106] *See* TenBruggencate, *supra* note 86.

[107] *See supra* text accompanying note 58.

[108] Similarly, a trustee cannot simply convert a private trust to a charitable trust.

[109] 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, "[w]e've turned our backs to our legacy . . . ."; "[w]hy 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." HEMMINGS, *supra* note 2, at 7, 228, 230.

Maybe someone could convince the probate court that Matt's ancestors intended for a trust to hold this land for the public's benefit rather than being sold, distributed to beneficiaries, or developed.[110] Courts sometimes interpret original intent liberally.[111] Matt has been unable to document any such intent,[112] but he has another seven years to look. Hope springs eternal.

V. 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 his 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 would accomplish little more than to delay the inevitable.[113] What a bummer. Maybe the movie ending when it did is a good thing!

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 overdeveloped. Native Hawaiian

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[110] This result is essentially what will happen to Kipu Kai when the Waterhouse Estate finally terminates.

[111] *See, e.g.*, Queen's Hosp. v. Hite, 38 Haw. 494, 494 (1950). The Hawai'i Supreme Court essentially read the word "may" as meaning "must" in order to achieve what the court perceived as Queen Emma Kaleleonalani's intent regarding the trust she established for both private and charitable purposes. *Id.* 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 operation—"The land in question 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 [Kamehameha Schools] as an ali'i trust." Kamehameha Schools Annual Report, KAMEHAMEHA SCHOOLS 29 (2002–2003), *available at* www.ksbe.edu/allpdfs/annualreport03/KSAnnual_Report2003.pdf; *see also* PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 440 (Tentative Draft No. 2, 2009) ("[A]fter the passage of a significant period of time . . ., the policy of adhering to the terms in the trust . . . increasingly weakens."); Peter Luxton, *Cy-Près and the Ghost of Things That Might Have Been*, *in* THE CONVEYANCE AND PROPERTY LAWYER 109, 117–18 (J.T. Farrand & J.E. Adams eds., 1983) (concluding that courts tend to read governing language more liberally as the trust ages so that the trust creator's intention becomes 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 Doctrin*e, 21 U. HAW. L. REV. 353, 355–56 (1999).

[112] *See* HEMMINGS, *supra* note 2, at 41 ("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.").

[113] 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." HEMMINGS, *supra* note 2, at 231. So he evidently thinks there is a way to maintain the status quo, in one form or another, despite the Rule Against Perpetuities.

organizations and environmental activists are at the front of this latter group, but they are not alone in fighting against the "paving of paradise."[114] Many others see overdevelopment as a long-term threat to Hawai'i's economy because of its adverse impact on tourism.[115] 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.[116]

Readers of this essay who sympathize with Matt King and want to KEEP HAWAII *HAWAII*,[117] 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,

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[114] Joni Mitchell sang about this over development in *Big Yellow Taxi*: "They paved paradise and put up a parking lot." JONI MITCHELL, BIG YELLOW TAXI (Asylum Records 1974). Mitchell describes the development 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*, L.A. TIMES (Dec. 8, 1996), articles.latimes.com/1996-12-08/entertainment/ca-6804_1_early-songs.

[115] According to journalist Ken Kobayashi, the controversy involving the Campbell Estate:

> [P]arallels to a broader struggle evolving in Hawaii in recent decades, which pits those who advocate a local sensitivity—supportive of the 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.

Kobayashi, *supra* note 65, at A2.

[116] *Cf.* Editorial, *Campbell Struggle Part of a Larger Island Story*, HONOLULU ADVERTISER, May 21, 1999, at A12.

> 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.

Id.; Paul "Doc" Berry, *Limits of Growth: This Canoe is at a Tipping Point*, HONOLULU WKLY., Apr. 17, 2013 (source available with author) ("Generations forward, what will our grandchildren and their children say about how we dealt with the limits of Hawaii's population growth?").

[117] 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 O'ahu.

commercial, or industrial use. Readers 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.[118]

[118] *See* Dennis Hollier, *Why Big Development is So Difficult in Hawaii*, HAWAII BUS. (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), http://www.staradvertiser.com/s?action=login&f=y&id=221598711&id=221598711 ("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.").