

PRESS RELEASE

December 20, 1997

Four justices of the Supreme Court of Hawai'i, in their individual capacities, issued the following statement today:

Statement by RONALD T. Y. MOON, STEVEN H. LEVINSON,
PAULA A. NAKAYAMA, AND MARIO R. RAMIL

For more than a century, justices of the Supreme Court of Hawai'i have selected trustees to manage the trust left by Princess Bernice Pauahi Bishop. For the past eighty years, the law has said the justices act as individuals, not as officials, when appointing the trustees. Justices past and present have performed these tasks out of respect for the Princess' wishes and a sense of duty to Hawaii's rich history. In our August statement on the subject of trustee selection, we looked at what had occurred in the past. We now look to the future.

We believe that continuing to exercise the powers of appointment granted by the Princess will further promote a climate of distrust and cynicism and, more particularly, will undermine the trust that people must have in the Judiciary. Likewise, we believe that we must devote our energies, personal and otherwise, to the work of the Court. We have therefore concluded that we should no longer exercise the powers of appointment delegated to us by Ke Ali'i Pauahi. Accordingly, should a vacancy occur on the Board of Trustees of the Bishop Estate, we will not exercise the powers of appointment granted by the will of Princess Bernice Pauahi Bishop to fill the vacancy.

Because the powers of appointment are exercised as individuals, we cannot bind future justices to our decision. Future justices may choose to revisit the issue.

We understand the magnitude of this decision and the need to be deliberative. Despite intense public interest and the vocal and incessant calls for change, we have refused to be intimidated or pressured into taking or not taking any particular action. The issue of trustee selection is too important to the native Hawaiian community and too steeped in the traditional duties of the former Ali'i for us to act impulsively or reactively. Indeed, we have reached our decision after much thought and discussion, among ourselves and with others, about our public duties to the institution of the Supreme Court and our sense of obligation to Hawaii's past.

We have agonized over this matter. We recognize and respect the profound and sincere feelings of those in the native Hawaiian community who believe that the literal wishes of the Ali'i should and must be carried out, even into these present times when government in general and the Judiciary in particular have significantly changed. When the will of Ke Ali'i Pauahi was probated, the government was a kingdom and Supreme Court justices had probate jurisdiction. It was acceptable at that time, even laudable, for judges to display charitable conduct by appointing trustees to or sitting on boards of charitable institutions. Official discrimination on

ethnic or religious grounds was widely practiced. The government is now a representative democracy, and governmental discrimination on ethnic and religious grounds is, as it should be, prohibited. Supreme Court justices no longer have original probate jurisdiction, and judges are governed by a code of conduct that recognizes the value of charitable activity but, nevertheless, prohibits judges from engaging in charitable activities that are likely to cause conflicts between private and official acts. We have deep respect for the wishes of the Princess. We understand that Ke Ali'i Pauahi tried, by will, to pass on the tradition of caring for the people by sharing her accumulated wealth with those for whom she bore traditional responsibilities.

We have concluded, however, that our primary duties -- as present-day justices -- are to the law, the institution of the Supreme Court, the Judiciary, and all of the people of Hawai'i. Although we have great respect for the wishes of Ke Ali'i Pauahi, the values she hoped to pass on, and the Hawaiian community that is served by her legacy, we cannot allow our respect and our sense of historic duty to inadvertently create an appearance of a link between the Princess' estate and the Supreme Court.

We are aware that many in the Hawaiian community will believe that our decision is a further erosion of the will of Ke Ali'i Pauahi. We do not, however, believe that our decision will alter the major focus of the Princess' will. Her instruction to educate children remains as clear today as it was when she wrote the document, in spite of societal changes that no longer permit segregation of the students by sex, or the hiring of Protestants only as teachers, or the appointment of Protestants only as trustees, or that encourage college preparation instead of vocational training. While we are very concerned about the deep-seated feelings of many native Hawaiians, our first duty as justices must be to the Supreme Court of Hawai'i and to all the people it serves.

We are acutely aware that our decision no longer to exercise the delegated power to fill vacancies on the Board of Trustees of the Bishop Estate will result, at least in the short run, in a procedural vacuum regarding the appointment process. For the last two months, the five justices have been engaged in an ongoing dialogue with respected leaders and representatives of numerous native Hawaiian civic organizations, reflecting a significant segment of the indigenous Hawaiian community. The primary purpose of our discussions has been to determine whether there is consensus within the Hawaiian community regarding an ideal process of selecting trustees that most closely achieves the goals of Ke Ali'i Pauahi in light of contemporary realities -- whether we, as individuals, remain a part of that process or not. We have been deeply moved by their expressed sentiments and willingness to share their views and positions.

The overwhelming preference of the indigenous Hawaiian community, as expressed throughout our discussions, is unquestionably that the justices remain a part of the trustee selection process in accordance with the wishes of the Princess. For the reasons discussed above, however, we are regretfully unable to do so. What we can do, based on other preferences overwhelmingly expressed throughout our discussions, is to make certain suggestions regarding the ongoing implementation of the process. We emphasize that any suggestions we may make as individuals can bind neither the probate court nor the legislature, and these suggestions do not reflect an analysis of current law that may or may not allow such suggestions to be implemented. Nevertheless, we offer them as reflective of our views.

Because, as we have indicated, Ke Ali'i Pauahi undertook, by will, to share her wealth with those for whom she bore traditional responsibilities, we believe that the ultimate "ownership" of the trustee selection process should lie in the indigenous Hawaiian community. Our discussions have demonstrated that it would be foolish for us to try to define the composition of that community with precision; suffice it to say that it should be viewed as inclusively as reasonably possible. We believe that a panel or committee of representatives of respected indigenous Hawaiian organizations should be delegated the authority to define and implement the trustee selection process. That authority would include, but not necessarily be limited to, the enumeration of the terms and conditions of service as a trustee, establishment of selection criteria, solicitation of applications, processing and evaluation of applications based, among other things, upon input received from the community at large, identification of those applicants deemed highly qualified to serve as trustees, and narrowing of the highly qualified applicant pool to a "short list" of finalists. Conceivably, the short list could consist of one individual. That list would then be submitted to the probate court, which would appoint or certify the appointment of an individual, included on the list, to the position of trustee.

In short, we believe that the Bishop Estate ultimately "belongs" to the Hawaiian people. In making this statement, we express no opinion regarding the identity of the Estate's "beneficiaries" in the legal sense. We have every trust and confidence that the Hawaiian people are fully capable of overseeing the estate in perpetuity.

Although it has been overshadowed by the recent furor surrounding the Bishop Estate, we note that the will of King William Charles Lunalilo established a trust, whose trustees the justices of the Supreme Court have the delegated power to appoint. For the reasons discussed above, we will no longer exercise that power either. We have advised the probate court and the Trustees of each estate of our decisions.

Finally, we recognize that some will criticize our decision. That is to be expected, but it cannot be our primary concern. Ultimately, our first and foremost responsibility is to ensure that the integrity of the Judiciary, as an independent and coequal branch of the state government, is maintained. At all times, and never more so than now, that has been our guiding principle.

THIS STATEMENT IS AND WILL BE THE ONLY PUBLIC COMMENT MADE BY THE JUSTICES ON THE SUBJECT. ANY REQUESTS FOR INTERVIEWS, ON OR OFF CAMERA, WILL BE DECLINED.



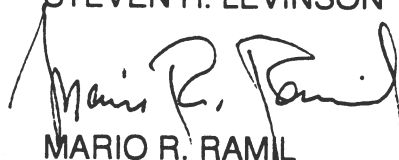
RONALD T. Y. MOON



STEVEN H. LEVINSON



PAULA A. NAKAYAMA


MARIO R. RAMIL

STATEMENT OF ROBERT G. KLEIN

I must respectfully yet strongly disagree with the decision of my colleagues to abandon their role in the Bishop Estate trustee selection process. While looking to the future, they have forgotten the past, and in their eloquence, have left the estate and its Hawaiian beneficiaries without a trustee selection process. Besides being unwise, their decision is untimely. In the midst of the fury surrounding Bishop Estate, now more than ever, we should symbolize the eye of the storm.

Ke Ali'i Pauahi understood that the perpetual estate created by her will would be buffeted by changes in society that might give rise to legal challenges from time to time. It must have been equally clear to her that there would always be a Supreme Court at the head of the legal system served by Justices to whom she could entrust the appointment power in perpetuity. As a result, in the fourteenth provision of her will, the Princess directed " . . . that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court . . . " This naked appointment power has been regularly exercised for 113 years by men and women dedicated to upholding, as closely as possible, the intent of Princess Pauahi. This power of appointment does not include overseeing the operations of Kamehameha Schools/Bishop Estate and does not impose a duty to regulate or sanction trustees.

As long as there exists a reasonable possibility of fulfilling her intent, we must strive to do so. Otherwise, the legal void created by our withdrawal could have drastic future ramifications for the entire fabric of the will. Permitting the selection of Bishop Estate trustees to become an official function of the probate court, rather than the individual action of the justices of the Supreme Court, constitutes a major, unprecedented and uncharted leap of blind faith.

Addressing valid concerns about the erosion of Princess Pauahi's will, my colleagues say that their decision will not alter the will's "major focus" of educating children. In other words, the decision to voluntarily alter the will is insignificant as long as Princess Pauahi's major educational goals are left intact.

This reasoning minimizes the effect of my colleagues' decision to withdraw. In fact, any voluntary change to Princess Pauahi's will may very well serve as precedent for further deterioration of the will. No change is insignificant, particularly change which impacts the method in which trustees are appointed. Because trustees set the policies that guide the educational programs of the schools, their method of selection was of paramount importance to the Princess. This is exactly why she entrusted the appointment power in perpetuity to the Justices of the Supreme Court.

Over the last several months, we have had productive meetings with the leadership of many Hawaiian community groups. We sought their counsel in order to improve the trustee selection process, making it clear that the issue of our continued participation was an open one. With a certain understanding of the history and meaning of Princess Pauahi's will, these groups (the exception being the Native Hawaiian Bar Association which voted kanalua or undecided) were unanimous in urging us to continue to exercise the appointment function, lest the will of Princess Pauahi be deteriorated.

The key issue underlying their support was our agreement to work with Hawaiian groups towards improving the trustee selection process whether or not we justices participate in it. Each of us as individuals is deeply committed to establishing an open selection process based upon known criteria subscribed to and owned by the Hawaiian community. In my case, I would agree to select a trustee only after these, and perhaps other, Hawaiian community groups had managed the selection process, reserving to the individual justices of the Supreme Court the ultimate power of appointment from a list of approved names. In the case of my colleagues, our discussions with the Hawaiian groups will result in a suggested process to the probate court, which it is free to reject.

In addition, by withdrawing from the process, my fellow justices have removed themselves from an important dialogue with the Hawaiian community just at the moment that the talks have turned productive. As a direct result of our efforts to repair the process by including Hawaiian groups, we now see that these groups have joined together to begin frank talks with the trustees themselves. This turn of events is further evidence of the positive gains that can be made when we work in unison with the Hawaiian leadership. Now is not the time to entrust the selection process to an unknown fate.

I agree that the members of this court must adhere to our guiding ethical principles and, more importantly, that all of our citizens must hold the view that not only does the entire court system render justice, but that justice is not belied by the appearance of impropriety.

Because we were and are concerned about our ethical constraints in the Bishop Estate trustee selection process, we sought the advice of the Commission on Judicial Conduct in connection with an inquiry in 1994 by Common Cause of Hawaii. After conducting its review, the Commission issued Formal Advisory Opinion No. 14-93, in which it concluded that our involvement in the appointment process was not improper, subject to the admonition that we comply with the letter and spirit of the Revised Code of Judicial Conduct.

It is true that we should not voluntarily put ourselves in a position where we must often recuse ourselves in cases before the court. Other Hawaii Supreme Court justices have balanced ethical considerations and the power of trustee appointment under the will in an unabated line since the nineteenth century. When and as appropriate, justices have recused themselves when deciding Bishop Estate matters, e.g., Kekoa v. Supreme Court of Hawaii, 55 Haw. 104, 516 P.2d 1239, cert. denied, 417 U.S. 930 (1973); Richards v. Midkiff, 48 Haw. 32, 396 P.2d 49 (1964); and Takabuki v. Ching, 67 Haw. 515, 695 P.2d 319 (1985).

Historically, cases involving Bishop Estate provide an infrequent reason for recusal particularly where our present workload is roughly nine hundred cases per annum. I do not believe that the infrequent, appropriate use of recusal can reasonably raise the appearance of impropriety. Because we gauge our ethical obligations on a case by case basis, it is unsatisfactory to simply decide that insurmountable ethical conflicts will arise as a result of exercising the power of appointment under the will of Princess Pauahi. In fact, declining the power of future appointments at this time will not eliminate or even reduce our recusals in Bishop Estate matters, because we have already selected most of the present trustees.

My colleagues believe they are taking the high road to protect the Hawaii State Judiciary. I believe public perception of the judiciary has been adversely affected because our trustee selections have not earned the respect of the community they were chosen to serve and not because the vast majority of people perceive us to have an ethical dilemma. It stands to reason that restoring the public's faith in the judiciary must come the hard way -- by creating and adhering to an open selection process based upon known criteria subscribed to and managed by the Hawaiian community. When we have reconciled with the Hawaiian people, we will have gone a long way towards gaining the reputation we seek.

In my view, we should announce a selection process that incorporates openness and stresses qualifications determined in a manner satisfactory to the Hawaiian community. This process should reflect any changes made by the legislature and the probate court, if and when they take action. Given the momentous step of declining to exercise the appointment power, timing is important. After all, no predictable vacancy occurs until 2001 and by then the selection process and the Estate itself could be restructured in such a way that present ethical concerns would be eliminated. There is, to my knowledge, no good reason to announce declination at this time.

I would like to personally thank the leaders of the Hawaiian groups who met with us for the forthrightness and Aloha they have shared with us during our meetings. I am sure they understand how sincerely we have tried to reach the right result.



ROBERT G. KLEIN