

# CLOSING AGREEMENT

## ATTACHMENT 6

## PROCEDURE FOR REMOVAL OR SUSPENSION OF TRUSTEE(S)

Pursuant to the inherent power of the courts of equity and the authority codified in Hawaii Revised Statutes Section 560:7-201, the Circuit Courts of the State of Hawaii have power to remove for cause a trustee of a charitable trust, including a trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate. As stated by the Supreme Court of Hawaii:

A court of equity may and will remove a trustee who has been guilty of some breach of trust or violation of duty. The exercise of this function by a court of equity belongs to what is called its sound judicial discretion and is not controlled by positive rules except that the discretion must not be abused.

In re Estate of Holt, 33 Haw. 352, 357 (1935).

A petition for removal of a trustee may be commenced by another trustee, the court-appointed master, or the Attorney General of the State of Hawaii, as *parens patriae*. See Richards v. Midkiff, 48 Haw. 32, 42-43 (1964); Hawaii Revised Statutes Section 560:7:101.

Pursuant to Recommendation No. 13 of the *Stipulation Concerning Master's Recommendations (109th Annual Account)*; Order entered on December 19, 1997, in Estate of Bernice P. Bishop, Deceased, Equity No. 2048, First Circuit, State of Hawaii, the Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate have acknowledged that where any of them is aware of a potential breach of trust by any other Trustee, there is an affirmative duty to act to protect the Trust Estate. In instances where *bona fide* issues are raised regarding a

breach of trust by one or more Trustees, it is incumbent upon the other Trustees to investigate the facts and circumstances, to identify applicable legal standards that may have been violated, to determine if the Trust Estate has been injured or prejudiced by the acts or omissions, and to take appropriate steps to seek redress for the Trust Estate. In appropriate circumstances, such action includes initiating or cooperating in proceedings for the removal of the offending Trustee.

Removal is warranted if the Court concludes that allowing a Trustee to continue in office would be detrimental to the interests of the trust estate. Restatement (Second) Trusts § 107, comment a (1959). Grounds for removal of a Trustee include, but are not limited to, the following:

1. Incapacity (usually due to sickness or mental infirmity);
2. Unfitness;
3. Extreme personal improvidence, insolvency, or bankruptcy;
4. Commission of a serious crime, especially one involving dishonesty;
5. Misconduct evidencing moral turpitude or abuse of office;
6. Knowing failure to obey a court order;
7. Knowing failure to comply with law and regulation applicable to the trust estate;
8. Knowing failure to render complete and accurate accounts;
9. Knowing misrepresentation of the affairs of the trust estate;
10. Disobedience to the directions and terms of the trust instrument;
11. Failure to act appropriately in the affairs of the trust;
12. Activity detrimental to the obvious best interest of the trust;
13. Neglect of the office of trustee;
14. Unreasonable or corrupt failure to cooperate with co-trustees;

15. Failure to respond in a timely and reasonable manner to reasonable requests of the court appointed master or the Attorney General as *parens patriae* for information concerning the affairs of the trust estate.
16. Mismanagement of the trust estate;
17. Commingling trust and personal funds;
18. Acquiring a personal interest adverse to the trust;
19. Self-dealing;
20. Permitting or accepting any degree of private inurement;
21. Failure to disclose known conflicts of interest;
22. Failure to abstain from any involvement in transactions in which the trustee has a conflict of interest;
23. Appropriation of trust property to personal use;
24. Making unauthorized dispositions of trust property;
25. Waste of trust assets;
26. Activities which jeopardize the tax exempt status of the trust estate;
27. Activities which expose the trust estate or its subsidiaries to significant civil or criminal penalties and forfeitures; and
28. Willful and wanton abuse of discretion.

The foregoing list of grounds is not exhaustive. In all cases the burden of proof is upon those seeking removal of a Trustee and the determination lies with the Court. Nonetheless, a Trustee whose removal is sought has a fiduciary duty to assess the allegations against him and, if it is clear that they are substantially accurate and the Trustee's continued service would be detrimental to the trust estate, whether monetarily or otherwise, the Trustee should tender his resignation to the Court. The Trustee thereafter is entitled to defend himself and to seek discharge from any liability to the trust estate but, in removal proceedings as in all other trust affairs, should place the welfare of the trust estate ahead of personal vindication.

A trustee who acts maliciously, recklessly or in knowing disregard of the facts in seeking removal of a co-trustee is himself liable for removal.

In all things, Trustees must be guided by the often-quoted words of Chief Justice Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1 (1928).