

Art Imitates History



The Descendants features Kipu Kai, a land area on Kauai's south-east coast. Photo courtesy of Wings Over Kauai.

by Randall W. Roth and John G. Roth

The Descendants movie garnered the Golden Globe for Best Picture, the American Film Institute's Movie of Year, and five Academy Award nominations—Best Picture, Best Actor, Best Director, Best Screenplay, and Best Editing—and won for Best Screenplay.

The movie's title and script derived from a novel of the same name, written by Hawaii's own Kauai Hemmings. The *Wall Street Journal*, *Forbes*, and other publications praised the skillful treatment of the tension between a trustee's fiduciary duties to trust beneficiaries and his power to act contrary to their wishes; the legal implications of advance directives; the disparate needs and values in an extended family that develop over time; and the looming presence of the notorious rule against perpetuities.

The Reel Story

George Clooney plays the role of Matt King, a man suddenly shaken from midlife ennui by a speedboat-racing accident that put his wife on life support. Standing next to her nearly lifeless body in the hospital, Matt promises to be a better father and more attentive husband. Soon thereafter, he discovers she had been having an affair with a local realtor named Brian Speers.

Meanwhile, Matt meets with his wife's doctor and father, to discuss the legal implications of her Advance Directive. He also gathers with some of his cousins, to discuss a major real estate transaction involving a trust established by their common great-great grandparents, a Hawaiian princess and a *haole* banker. Matt is the sole trustee and, along with his cousins, one of several dozen beneficiaries.

Matt explains the trust will dissolve in seven years "because of something called the rule against perpetuities." The trust's most valuable holding is a 25,000-acre


parcel of breathtakingly beautiful, undeveloped land on the island of Kauai. Matt thinks the distribution of undivided interests to the beneficiaries would create a legal train wreck, because the cousins would not be able to agree on what to do with it. To avoid such an outcome, and because many of the cousins are badly in need money, Matt initially decides to sell the land to either of two potential buyers: a group out of Chicago that has offered the most money—a half-billion dollars—or a guy by the name of Holitzer who grew up on Kauai and whose approach to development would probably be more in tune with local preferences. Several of the beneficiaries and many of the locals on Kauai do not want the land developed by anyone.

Matt believes that as sole trustee he “holds all the cards,” because a trustee has the power of an outright owner. But being a prudent person by nature, Matt polls all the other beneficiaries to determine their preferences. Almost all want him to sell the land, and a clear majority prefers Holitzer to the Chicago group.

As Matt is about to sign the papers that would transfer ownership to Holitzer, however, he decides the trust’s settlors would want this piece of paradise preserved, not developed. Matt dramatically puts down the pen and tells his cousins he will not be selling to anyone ... and he has seven years to find a legally viable way to preserve this “piece of paradise.”

Some movie-goers undoubtedly like Matt’s decision and view it as noble. But others are left wondering if Matt may have been influenced by his knowledge that Brian Speers, the man who had been having an affair

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with his wife, would have enjoyed a financial windfall if Matt had sold the land to Holitzer.

Real Stories from Hawaii's Past

Bishop Estate, Bishop Museum, and Kamehameha Schools

The description of Matt King's great-great grandparents as a *haole* banker and a Hawaiian princess descended from Kamehameha the Great recalls Charles Reed Bishop and Princess Bernice "Pauahi" Bishop. Like the banker and princess in the movie, Charles and Pauahi transferred large amounts of wealth, including breathtakingly beautiful undeveloped land, into trusts. Unlike the settlers in the movie, however, Charles and Pauahi left no descendants, and their trusts were explicitly charitable rather than private, which is why the rule against perpetuities never applied to them.

Pauahi's trust currently operates under the trade name of Kamehameha Schools. Like Matt King in the movie, the trustees of Pauahi's trust want to protect some of the trust's undeveloped land and preserve Native Hawaiian culture. That Pauahi's will does not explicitly include land stewardship or cultural preservation as a trust purpose may portend Matt King's legal arguments if ever there is a sequel to *The Descendants*.

Charles' trust, once known as The Bernice P. Bishop Museum Trust, no longer exists. Its trustees converted that charitable trust into the Bishop Museum Corporation in 1975. The trustees carried on as directors of the new nonprofit entity and, as such, gained the legal flexibility to reshape the organization's management structure and mission.

Waterhouse Estate

The land shown in the movie is actually *Kipu Kai*, a 3,000-acre cattle ranch on the southeast corner of Kauai. It is not accessible to the public by land. It has been used in filming *Raiders of the Lost Ark*, *The Lost World* sequel to *Jurassic Park*, *Outbreak*, *Mighty Joe Young*,

Six Days/Seven Nights, and *The Hawaiians*, as well as *The Descendants*.

Kipu Kai was once owned by Princess Ruth Keelikolani who, like Pauahi in real life and Matt King's great-great grandmother in the movie, was one of the last descendants of Kamehameha the Great and married a *haole*. Keelikolani's will said that *Kipu Kai* was to pass to her sister, Princess Pauahi, but that devise addeemed because she sold the land to William Hyde Rice before dying. A later owner, John T. "Jack" Waterhouse, put *Kipu Kai* in trust for his nieces and nephews for their lives, and then the State. Waterhouse expressed hope the State would use *Kipu Kai* as a nature, animal, and wildlife preserve, a use that might have appealed to Matt King in the movie.

The legal controversy began when the City attempted to lease a small portion of park land to Burger King. The terms of the trust forbid commercial leases, but the state attorney general gave his blessing to the transaction anyway, calling it a license.

Picturing *Kipu Kai* in the government's hands recalls litigation in the late 1980s involving Kapiolani Park on Oahu. Then and now, the City of Honolulu holds that land in charitable trust. The legal controversy began when the City attempted to lease a small portion of park land to Burger King. The terms of the trust forbid commercial leases, but the state attorney general gave his blessing to the transaction anyway, calling it a

license. A group called the Kapiolani Park Preservation Society obtained standing to sue, and used it to stop the transaction. Writing for a unanimous court, Justice Padgett quoted Shakespeare: "What's in a name? That which we call a rose by any other name would smell as sweet."

Damon Estate

Damon Estate was established in 1924 by the will of Samuel Mills Damon. He had co-founded the bank currently known as First Hawaiian Bank. He also owned 121,000 acres of land that Pauahi had devised to him in fee simple. Damon's will—which had no punctuation other than a single period at the end of the 10-page document—placed his entire estate into trust for his descendants. The Hawaii Supreme Court later ruled the trust must terminate at the death of the last surviv-

ing grandchild who was alive at Damon's death, which meant that twenty Damon descendants qualified to receive termination distributions in 2004. The Supreme Court separately ruled on Damon's intended meaning for the term *per stirpes* in his will. Several of Damon's great grandchildren got nearly three times as much as other great grandchildren, based on that ruling.

The Damon Estate was worth about \$1 billion at termination. Unlike Matt King's decision in the movie, the Damon trustees sold the trust's land and distributed the proceeds to trust beneficiaries, a decision that might have been influenced by the number of times the beneficiaries had sued or threatened to sue the Damon trustees during the trust's existence. Selling assets to the highest bidder and distributing cash to the beneficiaries arguably reduces the chances of a lawsuit when a large land trust terminates.

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

Knudsen Estate

Eric and Augustus Knudsen each funded a trust with land received from their father, Val Knudsen. Augustus' trust terminated because of the rule against perpetuities, but because he had no living descendants, the land in that trust—large tracts that happened to be in the general vicinity of *Kipu Kai*—passed to his father's heirs. Rather than distribute undivided interests in all the undeveloped land to each of them, different branches of the family received separate parcels.

Eric Knudsen's trust is set to terminate twenty years after the death of his last surviving child. Its beneficiaries sued the trustee in the late 1990s, alleging a failure to make the trust property reasonably productive. Perhaps some of the beneficiaries in *The Descendants* would be inclined to file a similar claim against Matt King if he fails to make the land in that trust reasonably productive during that trust's remaining seven years.

Campbell Estate

When James Campbell died in 1900 his \$3 million

estate passed in trust for the benefit of his wife and descendants. Campbell instructed the trust be called Campbell Estate and terminate twenty years after the death of his last surviving daughter. Like the trust in the movie and most of the trusts mentioned in this article, Campbell Estate was private—that is, intended to benefit the settlor's descendants, which is why it was subject to the rule against perpetuities. By the time of its mandatory termination date in 2007, Campbell Estate was worth \$2.3 billion.

Matt King's internal struggle near the movie's end is reminiscent of a battle between Campbell Estate trustees and several beneficiaries who complained the trustees were shifting the focus of trust investment activity to outside Hawaii. They also wanted a Hawaiian appointed to a trustee vacancy, contending that such a person would be more culturally sensitive than were the existing three trustees, who were *haole*.

Like Matt King in the movie, the Campbell trustees reportedly spent a great deal of time with trust beneficiaries when the mandatory termination date was seven years away. A spokesperson for the Campbell trustees at that time explained: "Because it will be easier to get court approval for a proposal that is supported by beneficiaries, the trustees have been gathering their feedback. The trustees are faced with the problem of being fair to everybody."

In anticipation of Campbell Estate's mandatory termination in 2007, the Campbell trustees—rather than sell all the land so they could distribute cash like the Damon trustees had done, or distribute separate parcels of land like the Eric Knudsen trustee—dropped most of the trust's land into an LLC and then distributed LLC interests to trust beneficiaries. Campbell trustees did, however, sell the spectacular Honouliuli Forest Preserve to the Trust for Public Land for just over \$4 million.

Castle Estate

Campbell Estate trustees' strategy of operating as an LLC following the trust's mandatory termination date recalled steps taken in the 1980s by the trustees of the Harold and Alice Castle trusts, who transferred trust assets, including the trust's undeveloped land, to a group of LLCs, with Kaneohe Ranch LLC as the common parent. Because of the rule against perpetuities, all the Castle noncharitable trusts must terminate eventually, but there is no legal reason why Kaneohe Ranch and its baby LLCs could not stay legally alive forever. A

related Harold Castle charitable foundation is expected to operate in perpetuity.

Galbraith Estate

George Galbraith died in 1904 with an estate worth \$260,000. He left a will and three codicils, all dated January 21, 1904. The drafter—reportedly a notary public who drew up wills on the side—evidently did not want to retype the entire document each time Galbraith decided to change something in the will document, which had not yet been signed. Read together, the four documents gave Galbraith’s estate to Hawaiian Trust Company as trustee of a private trust that was to pay annual annuities of up to \$8,450 in nineteen specified shares to forty-nine recipients, “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 to be divided equally amongst those persons entitled at that time to the aforementioned annuities.”

Among the glaring problems: What, exactly, 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 by the trust’s termination date. The absence of a spendthrift clause made the annuity interests freely transferable by gift, sale, and inheritance. This made it laughably easy for an annuitant to convert his beneficial interest into any number of beneficial interests, by dividing it among family, friends, controlled entities, or investors.

The Hawaii Supreme Court had ruled in 1909 that Galbraith’s trust was valid, but declined to rule on the meaning of the word equally. The Court acknowledged this question would need to be answered sooner or later, but it did not consider the question “ripe.” The U.S. Supreme Court affirmed that ruling, and annuities continued to be paid for twenty-one years beyond the death of the last surviving annuitant named in the will or a codicil. By the time of the trust’s termination in 2007, there were more than 600 owners of beneficial interests

in the trust, and the size of their respective annuity interests varied dramatically. The estate had a market value of approximately \$91 million, per the 6,000-page final accounting submitted to the probate court. Not all the beneficiaries liked the probate court’s determinations, but all threatened and ongoing litigation came to an end.

The Galbraith trustee’s sale of its 1,732 acres of undeveloped land near Wahiawa in late 2012 was the kind of deal Matt King would have loved. The Trust for Public Land assembled the \$25 million purchase price from a variety of sources, including \$13 million from a Hawaii state bond; \$4.5 million from the U.S. Army; \$4

million from the City and County of Honolulu; \$3 million from the Office of Hawaiian Affairs; and \$500,000 from D.R. Horton-Schuler Division. The U.S. Army money came from the Pentagon’s Readiness and Environmental Protection Initiative, which protects land around military bases.

Grove Farm Company, Inc.

George Norton Wilcox founded Grove Farm and eventually devised it to his nieces and nephews in equal shares. Because they received stock outright rather than in trust, the rule against perpetuities had nothing to do with the forced sale of the company many years later. Grove Farm had found itself over-leveraged at a time when the bottom fell out of the Kauai real estate market. Virtually all the nieces and nephews—and descendants of the ones who had died—agreed to the sale, but some did so reluctantly and later had second thoughts. Once market conditions improved, they filed lawsuits in federal and state courts alleging various forms of wrongdoing.

The buyer was the former America Online CEO and Time Warner board chairman, Steve Case. Like Holitzer in the movie, Case had family roots on Kauai and made a fortune in the high-tech world. Interestingly, the sale to Case had taken 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. In the book version of *The Descendants*, Holitzer’s chief financial officer was the son-in-law of the trust’s longtime lawyer.

Among the glaring problems: What, exactly, did the word equally mean in the context of the final distribution under this trust?

Lucas Estate

Like the trust in the movie, Lucas Estate owned thousands of acres of spectacularly beautiful land on the island of Kauai, totaling 2,035 acres. Things got interesting from a legal standpoint when one of the Lucas trustees decided to buy a large tract of undeveloped trust land for his personal account. Rather than seek instructions from the probate court as a Hawaii statute arguably requires whenever there is a conflict of interests, the Lucas trustees obtained the consent of each beneficiary. When the real estate market on Kauai improved, however, some of the beneficiaries had second thoughts and sued. The self-dealing controversy, which was settled out of court, cost Lucas Estate and its trustees more than \$5

million. The trustees then sued their lawyers. That malpractice claim settled confidentially minutes before a jury returned with a verdict in excess of \$4 million.

The Sequel

Moviegoers must wonder what Matt King is going to do during the seven years following the movie's end, to prevent the land's commercial development. It is tempting to assume a sale to a group like the Office of Hawaiian Affairs or Trust for Public Land, as was done to some degree by trustees of the Campbell, Damon, and Galbraith Estates. But the land in the movie is worth half a billion dollars, which means it is readily developable.

The land used in the filming of the movie, *Kipu Kai*, has a market

value far below \$500 million in the real world, largely because it is classified as conservation and agricultural property. Its market value may be much closer to the amount paid for Galbraith Estate's agricultural land, \$25 million, or perhaps the smaller amounts paid for conservation land of Campbell and Damon Estates.

Distribution of undivided interests in the land to Matt and his cousins could be problematic, because any co-owner could veto the idea of any other co-owner, or even of all the other co-owners. This would almost certainly lead to a costly partition lawsuit, and the land would probably end up in the hands of a developer, thereby defeating Matt King's reason for not selling.



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If Matt first carves the tract into separate parcels for distribution to the beneficiaries, he would probably thereby reduce the total market value significantly, because breaking a very large tract of developable land into relatively small pieces can reduce the land's total value for development purposes.

If the land in the movie were not commercially developable because of land-use laws, chopping it into smaller parcels might increase the total value. But that land obviously is developable, as stated and evidenced by conceptual drawings of planned development, plus a current value of half a billion dollars.

There would be additional legal issues if Matt wanted to buy the land from the trust or drop it into an entity with a goal of preventing its

development. Matt has the power to sell the land to himself, but limited by strict fiduciary duties—and self-dealing is generally prohibited. Even if Matt could somehow get the other beneficiaries' consent to such a transaction, which is conceivable only if Matt offers to pay an amount comparable to what Holitzer was willing to pay, Matt should first petition the probate court—a lesson that the trustees of Lucas Estate learned the hard way. Matt would also run the risk that one or more of his cousins would later argue that he had provided incomplete or misleading information when seeking their consent, as was argued in the Grove Farm litigation. And one can only wonder how Matt would fund the \$500 million purchase price if his plan is to preserve rather than

develop the land in question.

If Matt transferred the land to an entity, such as an LLC, he would continue to owe fiduciary duties to the other trust beneficiaries, and the decisionmakers in the new entity would also be subject to fiduciary duties. The latter are not quite as restrictive as are a trustee's duties, but the differences are not great enough to somehow enable Matt to avoid selling or developing the land.

Some of Matt's cousins might sue him in any event for letting the land just "sit there," as one described it in the movie. This is because trustees generally have a duty to make trust property reasonably productive, and to ensure that trust assets are reasonably diversified—neither of which Matt appears to have done.

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Anything Matt might do to reduce the land's market value, such as granting a conservation easement or seeking a more restrictive land classification or zoning status, would clearly breach his duty of loyalty—unless, perhaps, doing so furthered an important trust purpose.

Matt studied old documents and letters, trying to figure out what the trust's settlors had in mind for the trust as it neared its termination date. Was the whole idea to enrich their descendants, or did they have something more noble in mind? In the book, Matt says that the Princess "wanted the land used to fund a school for children of Hawaiian descent," but the movie makes clear neither the Princess nor her husband left explicit instructions regarding trust purpose, other than to benefit their descendants.

Maybe someone could convince the probate court that Matt's ancestors intended this land eventually be held in trust for a public benefit, rather than sold, developed, or distributed to beneficiaries, somewhat like what's planned for *Kipu Kai* when the Waterhouse Estate terminates. Courts sometimes interpret original intent liberally, especially with the passage of time: The Hawaii Supreme Court in 1950 read the word may to mean must in order to achieve what the court perceived to be Queen Emma Kaleleonalani's intent for the trust she established many years earlier for both private and charitable purposes.

Consider, too, that Pauahi's trustees have for many years operated somewhat like a Nature Conservancy with respect to the trust's undeveloped land, despite the absence of language in the governing instrument instructing or authorizing them to do so.

A "Bad" Ending for the Reel Story

The reel story appears likely to end badly for Matt King. If he does not change course, one or more of the cousins will sue him for breach of trust, and probably win. Such a lawsuit could cost the trust millions in legal fees, impose compensatory damages on Matt, and only delay the inevitable.

Meanwhile, there is real controversy in Hawaii today between those who view further real estate devel-

opment favorably and those who worry that Hawaii may already be over-developed. Perhaps that is why a book and movie about Matt King's internal struggle and last-minute conversion struck a chord with many in Hawaii.

Readers who sympathize with Matt King and want to keep the country country can take heart that *Kipu Kai* and many equally spectacular undeveloped properties are currently classified as conservation or agricultural land. They might also want to pay close attention to ongoing efforts to change the classification of many such properties and to garner exemptions from various other land-use and environmental laws.

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Randall Roth will retire from the University of Hawaii School of Law in June 2017. He has served as President of the Hawaii State Bar Association, Hawaii Justice Foundation, and Hawaii Institute for Continuing Legal Education, and as Associate Reporter for the American Law Institute's Restatement of the Law Third, Trusts. John Roth holds J.D. and M.B.A. degrees from the University of Hawaii and is the founder of Hawaii Trust & Estate Counsel, a statewide estate planning law firm with offices in Waimea, Hilo, Kona, and Honolulu.