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FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED  
2009 SEP 11 AM 9:09

F. PAGAY  
CLERK

MASTER

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

|                      |   |                                   |
|----------------------|---|-----------------------------------|
| IN THE MATTER OF THE | ) | EQUITY NO. 2176                   |
| TRUST ESTATE         | ) | (IRREVOCABLE TRUST)               |
|                      | ) |                                   |
| OF                   | ) | MASTER'S POSITION ON GEORGE       |
|                      | ) | GALBRAITH'S INTENT WITH           |
| GEORGE GALBRAITH,    | ) | RESPECT TO DISTRIBUTION           |
|                      | ) | UPON TERMINATION                  |
| Deceased.            | ) |                                   |
|                      | ) | DATE OF HEARING: TO BE DETERMINED |
|                      | ) | TIME OF HEARING: 10:00 a.m.       |
|                      | ) | JUDGE: Hon. COLLEEN K. HIRAI      |
|                      | ) |                                   |

MASTER'S POSITION ON GEORGE GALBRAITH'S INTENT  
WITH RESPECT TO DISTRIBUTION UPON TERMINATION

Comes now, MICHAEL J. LUM, the duly appointed and acting Master pursuant to that certain Order of Reference filed herein on July 31, 2007, to examine and review the Petition for Instructions, for Review and Settlement of Final Accounts, and for Release of Trust Registration filed herein on July 12, 2007, and respectfully reports to this Court as to George Galbraith's intent follows:

I. Background.

A. A Brief Synopsis of the Trust.

Prior to his death, George Galbraith (G.Galbraith) entered into leases on his lands in an amount exceeding \$10,000.

Upon his death on November 5, 1904 and under the terms of his Will, he directed his Trustee, Hawaiian Trust Co., to pay out to 49 specific Annuitants various sums of monies contained within 19 separate Annuities. Six of the Annuities lapsed. Over the years, the Trustee has paid the amounts due under his complex plan to the now numerous beneficiaries of the remaining 13 Annuities in the total amount of \$7,500.00 per annum until termination. The maximum amount payable under the terms of the Trust was only a portion of the income of the trust. The balance was to be retained by the Trustee and to be distributed along with the corpus at termination, or April 26, 2007, or as soon as practicable thereafter.

B. A Brief Synopsis of Prior Cases.

The following cases have been pivotal in the administration of the G.Galbraith Trust. In FITCHIE V. BROWN, 18 Hawaii 52 (1906), the Hawaii Supreme Court stated at 18 Hawaii 75:

"We have thus answered in substance all of the questions submitted which can now be settled. Whether the trust fund is to go to the heirs of the annuitants proportionately, meaning that the representatives of each annuity take the share of the fund determined by the ratio between the annuity and the aggregate sum of the annuities, or equally without regard to such ratio, are questions which can not be adjudicated now."

HAWAIIAN TRUST CO. V. THOMAS GALBRAITH ET AL, 22 Hawaii 78 (1914), determined the rights of the descendants of Anne Jane Galbraith, one of the initial annuitants who died unmarried in Belfast, Ireland. The Supreme Court held that the common law did not apply and applied the statutory law of descent of the Territory

of Hawaii to determine the rights of her heirs. Thus, as to distributions of the shares of the initial annuitants the laws of the Territory of Hawaii applied.

In HAWAIIAN TRUST CO. v. MCMULLEN, 23 Hawaii 685 (1917), the Supreme Court held ". . . that the annuities were given to them for the period during which the trust was designed to continue" (at p. 690). The Court went on to hold that after the death of the initial annuitant, the heirs, legatees, or distributees of the subsequent beneficiaries would be determined by the laws of the decedent's domicile (see p. 693).

In HAWAIIAN TRUST CO. v. THOMAS GALBRAITH ET AL, 25 Hawaii 174 (1919), the Supreme Court held that the annuity was assignable since there was no prohibition against it (a spendthrift clause).

#### C. Beneficiary Responses.

While a number of Responses have been filed regarding the intent of George Galbraith (hereinafter G.Galbraith), only two of them appear to have been in conformity with the Hawaii Probate Court Rules; however, these two Responses represent the ends of the spectrum of possibilities. The first, by Julie Gurdin Finley & Jonathan Michael Gurdin, advocates that G.Galbraith intended to have the estate divided into 13 equal annuities and proportionately within each annuity thereafter. Your Master has difficulty with this proposition and believes that had G.Galbraith intended to divide his estate into 13 equal annuities he could have easily

written his Will in that manner. The same would be true of the position equally amongst the annuities and equally within the annuities. G.Galbraith instead set forth an elaborate scheme of distribution favoring different people in varying amounts.

David Lorne Dickinson's position is a literal interpretation of the relevant paragraph and advocates division into as many equal shares as there are physical beneficiaries without regard to their share of income or from which annuity they derive their interest. Your Master has difficulty with this proposition in that this position does not give any consideration to G.Galbraith's pre-termination distribution and he believes that G.Galbraith never intended to leave his estate other than to the heirs of those persons he named in his Will. To allow this methodology would be to reward those persons who have split their interests intentionally, no matter how small the end result, as long as there is a numerically high number of potential beneficiaries.

Other Responses filed herein have supported a variation of one of the two positions above. The Response of Robert Bruce Graham eloquently sets forth the reasons why various potential scenarios should fail, except for division into 13 equal shares, each representing an annuity, and proportionately within the annuities thereafter, the same result proposed by Julie Finley and Jonathan Gurdin.

The Response of Sheilagh Pauline Morin through her counsel, Douglas C. Smith, proposes that the estate be divided equally amongst the initial annuitants who had more than a life interest and who numbered 43 people, and proportionately thereafter. This method is similar to your Master's initial impression as to G.Galbraith's intended distribution as later indicated herein.

Lastly although not advocated, various other interpretations have been presented by the Trustee's counsel in their filing on June 18, 2008.

## II. The Standard.

Prior Responses have adequately set forth the standard which the Courts are to follow in interpreting the trust; to wit: the intention of the Settlor shall prevail unless contrary to law. In determining the Settlor's intent, the document must be read as a whole on a consistent basis. No single word is to be given literal effect without the consideration of the other words. All words are to be given effect.

## III. Dictionary Definitions.

Your Master went to his law school version of Black's Dictionary published in 1968 and notes that the Preface states: "In the period of more than thirty five years since the publication of the Third Edition, the law has undergone substantial changes and developments." In his version of Black's Law Dictionary, Equally

Divided is defined as "Provision in will that property shall be 'equally divided,' or divided 'share and share alike' means that the property shall be divided per capita and not per stirpes. However, these phrases may be so modified by other parts of the will as to require distribution per stirpes." Per Capita means "By the heads or polls; according to the number of individuals; share and share alike. This term, derived from the civil law, is much used in the law of descent and distribution, and denotes that method of dividing an intestate estate by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent, without reference to their stock or the right of representation. It is the antitheses of *per stirpes*." Per Stirpes means "By roots or stocks; by representation. This term, derived from the civil law, is much used in the law of descent and distribution, and denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled to, taking thus by their right of representing such ancestor, and not as so many individuals." And it is interesting to note that the Uniform Probate Code, as adopted in 1996, changes those definitions.

But, if we focus too much on the "mathematical" or literal meaning of the word "equally" we lose the human element of purposefulness. As can be seen by the above definitions, both *per stirpes* and *per capita* results in an "equal" distribution but among

different groups of people. The word "equally" must be tempered by fairness and reasonableness in order to ferret out the human intent of the testator. G.Galbraith was not clear in his wording and a multitude of factors should be considered to determine what he intended.

#### IV. Historical Background.

Although your Master understood that G.Galbraith was somewhat of a recluse, he was concerned about the lack of historical information in the Responses filed by the parties. He conducted his own preliminary research without much success. Your Master also sought the assistance of Mele-Aina Dancil, a graduate student in Hawaiian Language Studies, who attempted to research historical information regarding G.Galbraith, including Hawaiian language information in the archives of Bishop Museum. To the frustration of both, neither your Master, nor Ms. Dancil, was able to find any contemporaneous written historical information regarding G.Galbraith, including information about his early life, for example, when he came to Hawaii, although it is believed to be in the mid-1800s, and at what age.

Thus, little is known of G.Galbraith. It is surmised that he was originally on his way to California perhaps to mine for gold, somehow settled in Hawaii and became a rancher since he owned land in Wahiawa. According to the TESTIMONY (and the best source of information) taken at the time of the admission of his Will,

G.Galbraith was eccentric (per George L. Bigelow & Cecil Brown) and died at the age of 80 years (per Cecil Brown). Cecil Brown also testified that he had known G.Galbraith for the past 40 years and had been his attorney for the last 20 years, except for the making of the Will presented for probate. Cecil Brown further indicated that he had a prior Will (which presumably Cecil Brown had drafted), but Cecil Brown did not know what happened to that Will.

In attempting to establish the mind set of an elderly person roughly the age of G.Galbraith living the early 1900s in Honolulu, your Master viewed data from the life expectancy tables found at [www.infoplease.com/ipa/A0005140.html](http://www.infoplease.com/ipa/A0005140.html). In 1890, a male age 70, had a life expectancy of an additional 10 years. A male born in 1890 had an average life expectancy of 42.5 years, while one born in 1900-1902 had an expectancy of 48.23 years. A 10 year old male in 1900-1902 was expected to live to 60½ years, and a 50 year old male was expected to live 70+ years. During that period, death took its toll on the very young, a lot of whom died in childbirth, as well as the old. G.Galbraith must have known that he was fortunate to have lived so long.

Further in December 1899, Bubonic Plague swept through Honolulu causing many deaths and the torching of Chinatown ([www.archives.starbulletin.com/2000/01/24/features/story1.html](http://www.archives.starbulletin.com/2000/01/24/features/story1.html)). G.Galbraith must have been aware of the many deaths caused by such events and the fragility of life.

G.Galbraith also resided in Hawaii during a period when the Hawaiian monarchy had recently created charitable trusts (ie. Princess Bernice Pauahi Bishop's trust was created in 1884 upon her death) and when wealthy men such as James Campbell and Samuel Damon, created trusts for their families. Although your Master does not know if G.Galbraith had actual knowledge of these trusts, he believes that G.Galbraith would have been aware of them.

V. Master's Position.

Your Master's quest for G.Galbriath's intent took him down two (2) distinct and different paths. In your Master's practice, the hardest people to estate plan for are single persons who have never been married and who are without children. G.Galbraith must have been such a person. It is rumored that he had a part-Hawaiian illegitimate son whom he included in his Will, but it does not appear that he was close to his son, so he left the bulk of his estate to his friends and his siblings and their families in varying amounts based on his own criteria.

G.Galbraith does not appear to be a well-known person. His ranch and lands were in Wahiawa although he had a home in Nuuanu and properties near downtown Honolulu. The TESTIMONY at his probate hearing indicates that he was not a trusting person, although he was intelligent and penurious.

Your Master believes that G.Galbraith wanted to be remembered, and while he had funds, he did not have funds to the

extent of say, James Campbell or Samuel M. Damon. So he devised a scheme whereby he would provide to some extent for those who knew him, yet at the same time allow his estate to grow. Shortly before his death, G.Galbraith entered into agricultural leases for his lands. His Will provided that a portion of the proceeds were to be distributed in the form of annuities and the balance was retained and allowed to grow. At that time, taxes as we know it did not exist and initially the money grew with very little taxation. As time went on however, various forms of taxation have affected the accumulation of wealth.

At the time of his death, G.Galbraith was about 80 years of age and must have known that he was old for the times he lived in. His Will named people of various ages (including minors) and stated that it was to go for as long as possible. He knew that at the end of the Trust, the beneficiaries would not know him, but hoped that they would know of him. Your Master does not believe that G.Galbraith had any concept of how long his Trust would last and how many beneficiaries there would be.

A. EQUALLY.

A great deal of emphasis has been placed on the word "EQUALLY" and what it means in the context of the sentence, "ON 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." Is it to be taken literally or does it have other meanings?

In Re Estate of Damon, 110 Hawaii 281 (2006), a dynastic trust created around the time of G.Galbraith's trust, contains an interesting discussion of "per stirpes" and "per capita", but more importantly brings up the issue of "stirpital root". Your Master is greatly influenced by the Court's statement that "[i]n accordance with Dwight that the stirpital root begins with the ancestors of those who are to take and not with the takers themselves . . . ."

Your Master believes that G.Galbraith did not understand the difference between "per stirpes" and "per capita" as defined at that time, nor did he care since he had no legitimate issue of his own. For G.Galbraith, and for most of us even today, future generations, like great-grandchildren, are "but a twinkle in our mind's eye", something nice, but neither tangible nor real.

If the slightest emphasis is on the word "EQUALLY", then G.Galbraith intended to **divide his trust estate equally amongst the issue of those persons whom he name specifically in his Will**. They would not be "real" people to G.Galbraith, but "a twinkle in his mind's eye", someone who would remember him because he left them something. A parent (1<sup>st</sup> generation) could tell a child (2<sup>nd</sup> generation) who G.Galbraith was, but the 3<sup>rd</sup> generation would not know much about him since the 2<sup>nd</sup> generation did not know him personally. Once divided equally in the 2<sup>nd</sup> generation, he would have expected it to go "per stirpes" or **proportionately thereafter**.

Additionally, with the anticipated life expectancy at the time and the number of epidemics which occurred in the 1800s, "EQUALLY" in the 2<sup>nd</sup> generation would have assured G.Galbraith that his estate would be spread out amongst a greater number of people increasing the probability that he would be remembered.

Lastly, your Master believes that G.Galbraith did not intend interests in his estate to be assignable. The Supreme Court has held that the laws of intestacy for Hawaii shall apply to the 1<sup>st</sup> generation (43 people) whose heirs-at-law (2<sup>nd</sup> generation), the "stirpital root", would take without assignment.

If emphasis is place on the word "EQUALLY", it is these people, the 2<sup>nd</sup> generation, whom your Master believes should be entitled to share equally in the Galbraith Estate and proportionately thereafter.

#### B. ENTITLEMENT.

Another way of viewing the sentence is to look at G.Galbraith's testamentary plan as a whole. One comes to the conclusion that he meant **EQUALLY ACCORDING TO ENTITLEMENT**. Why did G.Galbraith set up an elaborate scheme to dispose of his estate? He wanted his estate to grow, hence he distributed only a portion of the income which it generated, never allowing for an increase in distributions. He probably did not conceive of the number of annuitants who would exist on the termination date, April 26, 2007, and did not realize the cost of distribution would be so many

multiples of the actual distribution. His emphasis was on growth, but he also had a scheme, an overall plan, a purpose to his distributions.

When one looks at his Estate as a whole, his plan for distributions was not equal among the annuities, nor the annuitants. He favored some more than others as indicated by the sizes of the annuities. He gave to people, and he gave to classes of people. He gave no one enough to be a "trust fund baby", but enough so that they would not starve if they were as penurious as he was. He cared only about helping the initial group of annuitants after which their shares became more and more diluted until the termination date when they would hit the "motherlode".

#### C. RECONCILIATION AND CONCLUSION.

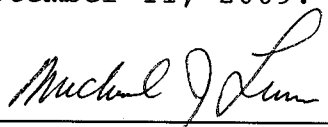
Was the annual annuity scheme also the formula for the final entitlement of the future generations to share, or was this fixed formula to be undone by one word, "EQUALLY"?

Being the astute person that G.Galbraith was, he knew that the actual takers of his bounty and estate would be people he did not actually know. He himself was old for his time. He had named young people intentionally and knew of them, but probably did not know them. He wanted his estate to grow for as many years as possible before final distribution. He knew that at the end (termination) there would be numerous beneficiaries who would remember him because he had left them something.

G.Galbraith had a testamentary scheme, a reason for distributing his estate in varying amounts both before and after his death. While your Master believes that G.Galbraith wanted to be remembered by as many people "as possible", he was after all a single person and a recluse. It may well be that G.Galbraith actually wanted those who did not procreate to get more.

Your Master believes too much emphasis has been placed on the word "EQUALLY" itself by those who have responded thus distracting us from the intricate plan created by G.Galbraith himself. Other wills created at that time were stirpital in nature, but G.Galbraith had no legitimate children and hence no issue. He created a scheme of descent and distribution to match his circumstances. George Galbraith intended that his estate be divided **equally in proportion to each annuitant's share of the non-lapsed annuities**, being \$7,500 as the denominator and their interest in the Income Distribution as the numerator, OR, a percentage equal to what they were entitled to immediately prior to the termination of his Estate on April 26, 2009. [For example, the share of a One Dollar interest would be  $\$1/\$7,500$  times the distributable value of the estate.]

Dated: Honolulu, Hawaii, September 11, 2009.

  
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MICHAEL J. LUM,  
MASTER