

SIXTY-FIFTH DAY

Thursday, May 14, 1998

The Senate of the Nineteenth Legislature of the State of Hawaii, Regular Session of 1998, convened at 12:17 o'clock a.m. with the President in the Chair.

The Divine Blessing was invoked by the Honorable Cal Kawamoto, Hawaii State Senate, after which the Roll was called showing all Senators present.

The President announced that he had read and approved the Journal of the Sixty-Fourth Day.

At this time, Senator Baker introduced Governor Benjamin Cayetano, who was seated in the press gallery.

MESSAGE FROM THE GOVERNOR

Gov. Msg. No. 344, dated May 14, 1998, transmitting the Executive Order providing for a further extension of the Regular Session of 1998 of the Nineteenth State Legislature, as follows:

"EXECUTIVE ORDER

WHEREAS, Section 10 of Article III of the Constitution of the State of Hawaii provides that an extension of not more than fifteen days of any session may "be granted by the presiding officers of both houses at the written request of two-thirds of the members to which each house is entitled or may be granted by the governor"; and

WHEREAS, pursuant to said Section 10 of Article III, the Regular Session of 1998 of the Nineteenth Legislature of the State of Hawaii has been extended; and

WHEREAS, the Governor has been requested to grant a further extension and it appears that such a further extension is necessary;

NOW, THEREFORE, I, BENJAMIN J. CAYETANO, Governor of Hawaii, pursuant to the power vested in me by Section 10 of Article III of the Constitution of the State of Hawaii, do hereby further extend the Regular Session of 1998 of the Nineteenth Legislature of the State of Hawaii for a period of 1 hour following 1:00 a.m., May 14, 1998.

DONE at the State Capitol, Honolulu,
State of Hawaii, this 14th
day of May, 1998

/s/Benjamin J. Cayetano
BENJAMIN J. CAYETANO
Governor of Hawaii

APPROVED AS TO FORM:

/s/ Margery S. Bronster
MARGERY S. BRONSTER
Attorney General"

was read by the Clerk and was placed on file.

SENATE RESOLUTIONS

The following resolutions (S.R. Nos. 108 to 115) were read by the Clerk and were disposed of as follows:

Senate Resolution

No. 108 "SENATE RESOLUTION RECOGNIZING WITH GRATITUDE EACH OF THE INDIVIDUALS WHO OPENED A DAY OF THE SENATE, NINETEENTH LEGISLATURE OF THE STATE OF HAWAII, REGULAR SESSION OF 1998, WITH AN INSPIRATIONAL INVOCATION."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 108 was adopted.

No. 109 "SENATE RESOLUTION EXPRESSING DEEPEST APPRECIATION TO THE MEMBERS OF THE VARIOUS MEDIA FOR THEIR COVERAGE OF THE ACTIVITIES OF THE NINETEENTH LEGISLATURE, REGULAR SESSION OF 1998."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 109 was adopted.

No. 110 "SENATE RESOLUTION REGARDING COMPLETION OF THE WORK OF THE NINETEENTH LEGISLATURE SUBSEQUENT TO THE ADJOURNMENT THEREOF."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 110 was adopted.

No. 111 "SENATE RESOLUTION AUTHORIZING THE PRESIDENT TO DESIGNATE THE EMPLOYEES WHO WILL WORK AFTER ADJOURNMENT."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 111 was adopted.

No. 112 "SENATE RESOLUTION RETURNING ALL BILLS, CONCURRENT RESOLUTIONS, AND RESOLUTIONS TO THE CLERK'S DESK."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 112 was adopted.

No. 113 "SENATE RESOLUTION AUTHORIZING THE PRESIDENT TO APPROVE THE JOURNAL OF THIS SENATE FOR THE SIXTY-FOURTH AND SIXTY-FIFTH DAY."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 113 was adopted.

No. 114 "SENATE RESOLUTION RELATING TO THE PRINTING OF THE JOURNAL OF THE SENATE."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 114 was adopted.

No. 115 "SENATE RESOLUTION INFORMING THE HOUSE AND GOVERNOR THAT THE SENATE IS READY TO ADJOURN SINE DIE."

Offered by: Senators Ihara, McCartney, Anderson.

On motion by Senator Ihara, seconded by Senator Slom and carried, S.R. No. 115 was adopted.

At this time, Senator Chumbley rose on a point of personal privilege and stated:

"Mr. President, I rise on a point of personal privilege.

"Mr. President and members, I do have some very lengthy comments on H.B. No. 2362, S.D. 1, Relating to Charitable Trusts, and given the lateness of the hour, Mr. President, I ask that they be inserted into the Journal.

"Thank you."

The Chair having so ordered, Senator Chumbley's remarks read as follows:

"Historically, trustees of private trusts in Hawaii were not compensated, and the work of a trustee was viewed as a position of service. As trusts became more prolific, the legislature decided to establish a percentage that trustees could receive based upon the activity level of the trust, presuming that the smaller trusts would not enrich anyone, and the larger trusts were not at a level that would allow windfall profits for trustees. Until this time, charitable trusts were not included in these deliberations. However, in 1943, the legislature revisited the trust laws and decided to adjust the schedule for private trusts and impose a schedule of commissions on charitable trusts as well.

"During this session, we found ourselves faced with evaluating the adequacy and efficacy of this schedule. As we discussed the various options available to us, we determined that the statutory schedule was no longer effective and therefore it was appropriate to repeal it. However, we also realized that we needed to provide the court with some direction regarding the appropriate level of compensation for trustees of charitable trusts.

"Despite criticisms to the contrary by the Senate Minority Leader and others, H.B. No. 2362, S.D. 1, which was adopted by both the House and the Senate, and which is presently pending before the governor, is an improvement over the current law. By setting trustee compensation to a **'reasonable amount under the circumstances'** we are providing a standard for the court that is supported in both common law principles and federal law. Common law principles provide that in determining the amount of compensation, the court should consider the nature of the job itself, the character of the trust, and the roles and responsibilities of each trustee. Federal intermediate sanctions law, as provided in the Internal Revenue Code, includes regulations to determine the reasonableness of trustee compensation.

"Therefore, based upon our understanding of legal precedent and placing our trust in the probate court, we believe that H.B. No. 2362, S.D. 1, as adopted, provides adequate direction for both the court and the charitable trusts to determine a reasonable level of compensation.

"Mr. President, I have additional comments which I would like to insert into the Journal.

"First, H.B. No. 2362, S.D. 1, unburdens charitable trusts of a long-standing problem regarding setting trustee compensation by a statutory fee schedule, and improves the law by providing a reasonableness standard based in common law principles and existing federal law.

"Repealing the statutory fee schedule is meant to improve the law by removing the presumption that the fees set by this schedule are reasonable notwithstanding common law principles. This presumption, we have come to understand, is

extremely difficult to overcome, especially in light of the Hawaii Supreme Court opinion *In re: Estate of Bishop*, 53 Haw. 604 (1972). In that case, the Hawaii Supreme Court held that:

'The question of whether the formula used in computing trustee's commissions should be reexamined, however, is a legislative problem, and we are unable to reduce the amounts of the commissions awarded in the absence of legislative actions.' (Id. at 606)

"Thus, while the Hawaii Supreme Court recognized the need to reevaluate the schedule, the Court determined that it was bound by legislative action from remedying the situation. Further, it would have been difficult for the Court to reach the issue as to whether the compensation met the requisites of reasonableness under the common law as there was no factual record nor independent fact-finding, at the time, on the reasonableness of the compensation.

"We have agreed that trustees of all charitable trusts should be bound by the standard of reasonableness, and we are ready to explicitly so state because repealing the statutory fee schedule by itself will create a void in the law where legislative guidance has been provided for over 50 years. Prior to the enactment of the schedule of percentage commission, we understand that charitable trustees, including Bishop Estate trustees, received little or no compensation. In fact, the will of Princess Bernice Pauahi Bishop did not make any provision whatsoever with respect to trustee compensation. Merely repealing the statute, without providing some direction, would create a chaotic situation wherein trustees would seek guidance from the governing documents, the settlor's intent, and common law in order to determine to what extent compensation should be provided.

"Second, by virtue of codifying the common law, we believe that trustees compensation will be limited to a reasonable amount, and determination of reasonableness is for the courts to decide. These common law principles are established pursuant to the Restatement of Trusts, Section 242:

'Among the circumstances to be considered in determining the amount of compensation are (1) the amount and character of the trust property, (2) extent of risk and responsibility of the trustee, (3) the character of the services rendered by the trustee, (4) the degree of difficulty in administering the trust, (5) the skill and success of the trustee in administering the trust, and (6) the statutory rates of compensation for executors and administrators.'

"The fact is that reasonableness is based on more than merely the job itself, contrary to what we heard from Trustee Henry Peters to justify his argument that reasonable compensation for the Bishop Estate trustees is even greater than that currently set in statute. And it is excessive commissions that this measure is intended to remedy. Citing testimony from the Attorney General and Professor Randall Roth of the Richardson School of Law choosing a reasonableness standard does not guarantee that excessive compensation will be reduced.

"Finally, some people have criticized the reasonableness standard, indicating that it could open the door for higher compensation for Bishop Estate trustees, because now the trustees may simply hire a compensation expert to justify the amount sought by the trustees, at the expense of the trust. If this should occur, we also anticipate that the probate court will select an independent compensation expert who will advise the court regarding the value of each trustee's services within the local marketplace. Hopefully, this independent expert will be assigned to determine the value of each individual trustee's services to the trust, and the expenses of using this expert will be paid by the trust. Further, since the attorney general's job is to protect the interest of the beneficiaries, the attorney general's costs should be reimbursed by the trust, as is the usual case in probate matters dealing with charitable trusts.

"However, what is of most concern, is that the cost of any efforts by the trustees to influence the court, or to appeal the court's decision, should be borne by the trustees, and not the trust. We do not intend that this law result in 'bleeding' the trust to justify excessive or increase compensation for trustees by engaging in extensive litigation.

"As Judge Cardozo stated in 1929:

"Many forms of conduct permissible in a workday world for those acting at arms length, are forbidden by those bound by fiduciary ties. A trustee is held to something stricter than the morals or the marketplace. Not honesty alone, but the punctilio of 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 the courts of equity when petitioned to undermine the rule of undivided loyalty..." (Meinhard v Salmon, 164 N.E. 545, (N.Y. Ct. App. 1929))

"Princess Bernice Pauahi Bishop chose her initial trustees because of their loyalty, over and above all else, to carry out her legacy as she wished. It is our duty as legislators to ensure that this is done, and that is our intent in adopting H.B. No. 2362, S.D. 1.

Reasonable Compensation

- Guidelines for determining a reasonable amount: 'Among the circumstances to be considered in determining the amount of compensation are (1) the amount and character of the trust property, (2) the extent of the risk and responsibility of the trustee, (3) the character of the services rendered by the trustee, (4) the degree of difficulty in administering the trust, (5) the skill and success of the trustee in administering the trust, and (6) the statutory rates of compensation for executors and administrators.'
- As stated in Hopkins and Tesdahl's Intermediate Sanctions: Curbing Nonprofit Abuse, 'The process for determining reasonable compensation is much like that for appraising an item of property: it is an evaluation and application of generally recognized factors that have a bearing on computation of value. It is an exercise of comparing a mix of variables that also pertains to the compensation of others.'
- Title 30A. Uniform Probate Code HRS 560, uses the term reasonable compensation in the following three sections:
 - §560:3-719 **Compensation of personal representative.**
 - §560:5-105 **Compensation of guardian ad litem, etc.**
 - §560:5-414 **Compensation and expenses.**
- Black's Law Dictionary- Reasonable- Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.
- Reasonable compensation already is required by the common law of trusts over the past several centuries.
- Reasonable compensation is required under Federal Intermediate Sanctions Law. (July '96)

- Reasonable compensation is required by tax law in related areas under the Federal Internal Revenue Services Code.
- The United States Treasury Department has extensive legislative history on reasonable compensation."

Senator Slom rose on a point of personal privilege as follows:

"Mr. President, I rise on a point of personal privilege.

"I just want to thank you, Mr. President, and thank my colleagues for another session in which you extended courtesy and patience, and I learned a great deal. I think that we produced a product here that in many ways was much better than what we did last year. As was said this evening, however, or last evening, we could always strive to do better. But we are a team. We stayed together this year. We, I think, stood against some tremendous pressures and I think the public will be responsive to that.

"It seems like just yesterday, the Senator from Manoa was giving his analogy about baseball. Well, yes it was yesterday just several hours ago. And I want to say that we are a team, although we did see a little bit of sliding that went on during the session. We saw some stealing, a balk or two. But we do know that there will be some new team members next year because a couple of our colleagues have been put out on waivers, and we possibly will have a new general manager and field general. But the Senate will come back better than ever to attack the problems, solve the problems for our community because our community is worth it, because our people are worth it. They have put their faith and their confidence in us.

"And I know that right now we've spent a great deal of time talking about the negative things within our community and the problems that many of our friends and neighbors have had. Almost all of us in this room, I think, have been touched by saying good-bye to loved ones, friends, or associates. We are aware of the struggles, economic and otherwise, that people are having. But I think that the message that we want to send this morning to everyone is that we are going to continue working and we urge our citizens, the best and most hardworking and most creative and innovative anywhere in the world, not to give up and not to give in because this, too, we shall overcome. We will have a brighter day and we will make Hawaii work again.

"And so in the words, Mr. President, of that great poet and that leader that has influenced so many of us on so many occasions, 'could have, should have, would have, might have, but we did.' And the main thing is we are willing to continue to work.

"So again, Mr. President and colleagues, thank you and Aloha."

Senator Sakamoto also rose on a point of personal privilege and said:

"Personal privilege, Mr. President.

"Just following up, also, to the Senator from Manoa. I was inspired to hear that. And I'm glad, well, just for the Co-Majority Leader from Kahaluu, I guess as coach of the team. Even though some of us played outfield, left field, at least he threw the ball once in a while and sometimes when we were in right field he'd come up and at least keep the ball in play. So I appreciate that."

At this time, the President delivered the following closing remarks:

"As presiding officer, I have a few remarks. The hour is late so I'll keep my remarks very brief. I know that you need to

catch up on much needed rest rather than listening to a long closing session speech.

"As the Senate, we were faced with many complexed issues this session. And after careful consideration and deliberation, we came to agreement with the House of Representatives on several measures that will lay the foundation for improving Hawaii's economy and helping all of our people in this State of Hawaii.

"First and foremost, with the assistance of the governor, we will provide our residents with the largest personal income tax relief in the history of this state. We will create a tourism authority and give our number one industry in this state a permanent source of funding for marketing and promotion. We will give our University of Hawaii autonomy to take care of its business. And we will establish a managed competition process to allow public workers to compete with private contractors for government work. We will streamline the regulatory processes for all businesses and development-related permit approvals and licenses that don't fall under federal guidelines. Last but not least, there will be no increase in the general excise tax.

"We kept the safety net intact for people by preserving direct services, especially for our schools, and at the same time we listened to the people's loud and clear message -- no new taxes.

"Just because a session ends does not mean our work ends. We face many more challenges in the year ahead. As an island state in a global economy, so much of our economy depends on outside factors. While we must be the first to help ourselves, we can't do it alone. We must continue to remind the federal government that we need its help to provide jobs for our people. We must also continue to pursue opportunities for job creation through high technology, life-long learning, and health care incentives. These are but a couple of areas that we need to work on.

"On a personal note, I want to take a moment to thank Senator Mike McCartney as he retires from the State Senate. He came to this body ten years ago as one of the youngest Senators and leaves a legacy that will not be forgotten. His people skills are without equal. He has earned the admiration and respect of his colleagues for his style in building consensus during the legislative process. He lived up to his personal philosophy -- strive to reach your maximum human potential. Mike, we're grateful for your commitment and will miss your wise counsel. You have served the people of Hawaii very well and you have made this institution very proud.

"In closing, I'd like to share a few words from President Theodore Roosevelt which reflect the hard work of all of you Senators. President Roosevelt said, 'The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes up short again and again; who knows the great enthusiasms, the great devotions, and spends himself in a worthy cause; who at the best knows the triumph of high achievement and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.'

"You, as Senators of the Nineteenth State Legislature, have spent yourself in a most worthy cause -- the people's work. And while we may not have triumphed in all areas, you dared greatly.

"I thank all of you and your staff for your hard work. To those of you who face re-election, I wish you all the best. I look forward to working with all of you next session.

"Aloha and Mahalo!"

At this time, the President appointed Senators Ihara, McCartney, Levin, Anderson and Slom to inform the House of Representatives that the Senate is ready to adjourn, Sine Die.

At 12:32 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 12:59 o'clock a.m.

ADJOURNMENT

Senator McCartney moved that the Senate of the Nineteenth Legislature of the State of Hawaii, Regular Session of 1998, adjourn Sine Die, seconded by Senator Slom and carried.

At 1:00 o'clock a.m., the President rapped his gavel and declared the Senate of the Nineteenth Legislature of the State of Hawaii, Regular Session of 1998, adjourned Sine Die.