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Understanding the Differences Between Wills and Trusts

When you've worked long and hard to build your estate over your lifetime, it's only natural to also want to retain control over what happens to your estate upon your death. The best way to do this is to create an estate plan. An estate plan is typically comprised of the following five documents: a will, trust, short form trust, power of attorney and advance health care directive. This article focuses on the will and the trust and explains the purpose of each document as well as each document's benefits and limitations.



By Ikaika Jobe



A will is a legal document that distributes any property in your probate estate (all property not in trust, held jointly, or with a designated beneficiary) to the beneficiaries named in your will on your death. The will is revocable and may be amended at any time during your lifetime while you have capacity. The will nominates a personal representative who is the person responsible for managing the legal affairs of your estate. The will can also nominate a guardian and conservator to manage the estates of any beneficiaries who are minors.

A trust (also referred to as an "inter vivos" or "revocable living" trust) is a legal document executed during your lifetime for the purpose of managing assets and transferring assets outside of probate. You are the primary beneficiary of the trust during your lifetime and can amend or revoke the trust while you are alive and have the capacity to do so. Upon your death or incapacity, the trust becomes irrevocable and your nominated successor trustee is then responsible for managing your trust estate based upon the instructions set forth in your trust agreement.

The six major differences between a will and a trust are as follows:

- 1. Avoiding Probate.** A trust avoids the probate process whereas the will does not. A will is only valid if it is probated. The same is not true for a trust. Probate is the court-supervised collection of a decedent's assets, payment of a decedent's bills and estate and transfer taxes, and distribution of a decedent's property to his or her beneficiaries. Probate can be a lengthy process depending on the size and complexity of the estate involved. There can be a months-long delay in getting someone appointed as the personal representative by the courts and the estate must be open for at least six months before it can be closed. There is no delay in appointing a successor trustee for a trust and the trust can be terminated right away as long as this is in accordance with the trust's terms.

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- 2. Flexibility and Control.** A trust allows you to retain more flexibility and control over your assets than a will. With a trust, you can make distributions to yourself from the trust while you are alive and then also control the manner in which your beneficiaries receive trust assets upon your death. For example, upon your death you can hold assets in trust for your beneficiaries until they reach a certain age with distributions allowed to them for health, education, maintenance and support needs as determined by your successor trustee. You can even hold assets in trust with certain conditions or incentives to receiving trust distributions (i.e., graduating from college, being employed, or remaining drug free) and protect trust assets from beneficiaries' creditors. In this way, the trust allows you to customize your distribution plan to meet your specific needs as well as the needs of your beneficiaries. With a will, distributions are made outright at the time the will is probated and you cannot further control the gift after it has been made.
- 3. Planning for complex estates.** A trust offers certain tax planning benefits that a will does not. For those large estates (estates in excess of the \$5 million exemption amount; \$5.43 million in 2015 when adjusted for inflation) a trust can offer certain tools to reduce the amount of estate taxes paid.
- 4. Planning For Incapacity.** A trust plans for your incapacity whereas a will does not. The successor trustee of your trust can step in to manage your trust affairs in the event you become incapacitated. The trust can also direct how mental incapacity is determined. With a will, there is no such person appointed to act on your behalf in the event you become incapacitated and a court proceeding may be necessary to appoint a conservator and guardian to act on your behalf. Conservatorship and guardianship proceedings are costly and it can take months to have a conservator and guardian appointed for you by the court.
- 5. Maintaining Privacy.** A trust is a private document whereas a will is a public document. In general, a trust is never publicly filed and the only parties entitled to view the trust are the trust beneficiaries. In contrast, a will is filed with the court as part of the probate process and the contents of the will, including the names and addresses of beneficiaries, and also possibly the assets in the estate and their values are included as part of the public court record.
- 6. Cost.** A trust can save your estate from the costs of a probate, conservatorship, and guardianship court proceeding that are all required if you only have a will. Court costs can vary depending on the complexity of the case but can easily end up in the thousands of dollars for even a simple matter.

The benefits of a trust are obvious but there may also be cases where having just a will is appropriate. Keep in mind, however, that without a trust, you might be sacrificing many significant benefits for yourself and your loved ones. Ideally, you should speak with an estate planning attorney that can provide you with further guidance based upon your own unique situation.

Most people are exceedingly relieved once the estate planning process is completed.



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New Rules Require Permits for All Commercial Use of State Waters, Including Surf Schools

Hawaii beachgoers have likely noticed the influx of surf schools at popular beaches across the state, especially in areas such as Waikiki and the North Shore of Oahu. It is perhaps unsurprising to learn that surf schools and other ocean commercial operations such as kayak tours, canoe rides, and snorkeling and scuba diving tours have been largely unregulated by the state.

That all changed in September 2014, when the Department of Land and Natural Resources (“DLNR”) implemented new statewide rules requiring all operators of commercial vessels, water craft, and other water sports equipment to obtain commercial use permits to operate on state ocean waters. Failure to obtain a commercial use permit may result in citations, fines, and confiscation of equipment. Prior to the rule changes, DLNR was for the most part only able to regulate commercial activity on state ocean waters for activities originating from state harbors and launching facilities. Note that businesses already holding a state harbor commercial use permit must also obtain a permit to use state ocean waters.

Even ocean recreation businesses operating out of private property (e.g., marinas) are required to obtain a commercial use permit. And those operating out of county parks must comply with county permitting requirements in addition to obtaining a commercial use permit from DLNR. Commercial operators are also required to register all water sports equipment, including canoes, kayaks, stand-up paddle boards, and surfboards.

To comply with the new rules, businesses must submit the following documentation with their commercial use permit application: a General Excise Tax License; a commercial insurance policy naming the state as an additional insured with policy limits commensurate with use; a Certificate of Vendor Compliance; business formation documents; PUC for any applicable vehicle; Certificate of Documentation or Certificate of Inspection for any vessels; and any necessary permits or letters of permission evidencing legal access to ocean waters from county or private property.



By E. Kumau Pineda-Akiona

Although seemingly stringent, DLNR does not appear to have capped the amount of commercial use permits being issued, as it did in its Hanalei Bay rule changes in November 2011. Specifically in the case of commercial water sports instruction and tours, including surfing, stand-up paddle boarding, kayak, canoe, diving, snorkeling, parasailing, and sailboarding, there is a limit of eight total commercial use permits allocated for Hanalei Bay. Further, each permit only allows one instructor per day to conduct water sports instruction, and each instructor is allowed to have no more than four students at any given time. DLNR apparently stepped up enforcement of the Hanalei Bay rule requirements in conjunction with the statewide rule changes in September 2014.

Similar to Hanalei Bay, DLNR recently proposed a rule change for Kahaluu Bay in Kona, which would limit commercial surf instruction to four business permit holders, each of which could have up to eight students in the water at a time, but no more than four students per instructor.

Although both the rule change for Hanalei Bay and the proposed rule amendment for Kahaluu Bay appear to be well-intended—to promote increased ocean safety, increase professionalism, reduce liability, etc.—there are simply not enough permits for all businesses. In the case of Hanalei Bay, some instructors who were not awarded permits are apparently contemplating legal action regarding the permitting process. If the proposed Kahaluu Bay rule amendment is implemented, there will likely be similar backlash as seen in Hanalei Bay.



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Hawaii's Medical Marijuana Dispensary Law - Boon or Burden for Landlords?

On May 7, 2015, the Legislature passed H.B. 321 (the "Bill"), which establishes a statewide licensing system for medical marijuana dispensaries. The Bill allows for the issuance of up to eight dispensary licenses statewide – three for the City & County of Honolulu, two each for Hawai'i County and Maui County, and one for Kaua'i County. Each licensee may open up to two retail dispensaries and up to two production centers under its license. The Bill contains extensive regulations on licensees covering, among other things, employment, dispensary and production facility locations and operations, and inventory tracking to ensure that public health and safety is protected and, further, that licensees are supplying marijuana for lawful purposes.



By Ikaika B. Rawlins

For Hawaii landlords, the Bill's passage means that a new (albeit limited) pool of tenants has entered the marketplace. Landlords with vacant space should be encouraged by the fact that dispensaries on the mainland typically pay above-market rent and are more willing to consider non-traditional locations in urban areas than other categories of tenants. The problem, however, is that, although legal under Hawaii law, the use, transportation, sale, and possession of marijuana is illegal under federal law, raising conflict of law and enforcement issues that must be considered before entering into a lease with this category of tenant.

Marijuana is a "Schedule I" narcotic under the Controlled Substances Act ("CSA") – the most dangerous category of narcotics under federal law.¹ Sanctions for violating the CSA range from fines of \$1,000 to \$2 million to jail terms from less than a year to up to 20 years.² Of relevance to Hawaii landlords and their lenders, the CSA makes it illegal to lease space to any tenant that manufactures, distributes, or uses any controlled substance and/or to manage or control any real property as a mortgagee if that property is used for manufacturing, storing, distributing, or using a controlled substance.³ Thus, even if a tenant is licensed under Hawaii law, a

landlord and lender would technically be in violation of the CSA. In addition to violating the CSA, leasing space to a dispensary could result in violations of multiple federal laws by Hawaii landlords and their lenders.⁴

The federal government's position on enforcement of these laws is unsettled, though the recent trend is moving toward upholding the validity of state medical marijuana laws. Although the Obama administration formally opposes legalizing marijuana for any reason,⁵ the Department of Justice ("DOJ") has taken a position limiting its enforcement of the CSA in states where certain marijuana-related activity is legal to eight priority areas.⁶ Furthermore, in December 2014, Congress approved, as part of its spending bill for 2015, a provision stating that none of the funds appropriated to DOJ could be used to prevent states from implementing their own laws pertaining to medical marijuana.⁷ While this does not change marijuana's status as an illegal drug under federal law, these recent developments indicate that the federal government is moving away from rigid application of the CSA toward respecting state's rights. Whether this trend will continue remains to be seen.

For more information on this article, please call Ikaika Rawlins at 531-8031 ext 610 email him at ibr@hawaiilawyer.com or scan the code with your smartphone.



¹ 21 U.S.C. § 812, Schedule I(c)(10).

² See 21 U.S.C. §§ 844, 856.

³ See 21 U.S.C. § 856(a).

⁴ For a more detailed explanation of how medical marijuana dispensaries violate these and other related federal statutes, see Painter, J. Marcus, *Rents, Refi's, and Reefer Madness*, Probate & Property 12-25 (Am. Bar Assoc. Feb. / Mar. 2015).

⁵ The White House, Office of Nat'l Drug Control Pol'y, *Marijuana*, <https://www.whitehouse.gov/ondcp/marijuana>

⁶ Cole, James M., Office of Deputy Att'y Gen., Dep't of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.dfi.wa.gov/documents/banks/cole-memo-08-29-13.pdf>

⁷ H.R. 83, Consolidated and Further Continuing Appropriations Act, 2015 § 538 (enacted Dec. 16, 2014), available at <http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT91668/pdf/CPRT-113HPRT91668.pdf>

Ikaika Jobe Joins Damon Key

Making the Right Things Happen

At the age of two, Ikaika Jobe's parents put a tennis racquet in his hand, and lessons at Waialae Country Club followed at about the age of ten. Later, means to sharpen his burgeoning tennis skills, Ikaika made it a point to compete against players who were older and stronger. Many times, those opponents were attorneys who enjoyed the sport and would share stories about their work. Those interactions sparked an interest in the legal profession that would stick. After a successful career in tennis at the collegiate and professional levels, Ikaika is now Damon Key Leong Kupchak Hastert's newest attorney in the firm's Estate Planning & Probate practice group.

A graduate of the University of Hawaii's William S. Richardson School of Law, Ikaika most recently served as Law Clerk to Chief Judge Derrick H.M. Chan of the First Circuit Court of Hawaii, where he researched, analyzed, and summarized probate and trust petitions for the court's review, among other key responsibilities.

Prior to that, Ikaika worked as a research attorney for the Office of Senator Clayton Hee, researching and preparing proposed legislation, attending meetings with various lobbyists and organizations, and creating general research memoranda for the Senate Judiciary and Labor Committee. While in law school, he was a Legal Extern for the Law Offices of Frank K. Goto, at which time he drafted the Hawaii Rules of Professional Conduct review section for BARBR bar preparation course.

Ikaika earned his bachelor's degree in business administration, magna cum laude, at Boise State University. Prior to that, he studied in the Aviation Science/Professional Pilot program at Saint Louis University, earning his pilot's license and instrument ratings.

As a two-time tennis singles state champion, Ikaika was a standout student-athlete at Punahou School, where he now serves as varsity boys head coach. He went on to become a member of the NCAA Division 1 men's tennis teams at Boise State University and Saint Louis University. At Saint Louis, Ikaika served as team captain and was among ten national recipients of the Arthur Ashe Jr. Sport Scholar Award in 2003. While on the Boise men's tennis team, Ikaika experienced the elation of winning the Western Athletic Conference (WAC) championship, which was played in Hawaii.

Following his undergraduate studies and prior to enrolling in law school, Ikaika relocated to Miami, the Mecca of tennis training, and competed professionally for three years. Ikaika describes the experience as a true adventure, carefully designing his schedule so that he could travel the globe and immerse himself in worldwide cultures. Tournament locations included small cities in Australia, China, Egypt, Finland, Germany, Japan, Poland, and Thailand, among other intriguing locations. Always well prepared for the next challenge, Ikaika picked up a Law School Admission Test (LSAT) prep book and studied while on tour.

In 2009, Ikaika was offered scholarship opportunities at several mainland law schools but decided it was time to return to Hawaii after being away for eight years. He enrolled at William S. Richardson School of Law, where he was a recipient of the Kua'ana Merit Scholarship for Native Hawaiian students.

Today, Ikaika looks forward to defending client's rights at Damon Key. "Estate planning is about trying to make sure the right things happen—fighting for correct interpretations," said Ikaika. "It's satisfying to make an individual's wishes reality."



Hawaii Appellate Court Emphasizes Importance of Indemnity Provisions

Indemnity provisions in construction or other service-related contracts can be extremely important to all parties. Moreover, if a party does not fully understand its contractual indemnity obligations, it may be agreeing to a major, but unexpected, expense. It is therefore critical to carefully review any indemnity obligations in a contract you sign.



By Tred R. Eyerly

Typically, an indemnity provision means that one party promises to compensate or reimburse the other party if an accident happens while performing the contract. For example, construction contracts frequently require that subcontractors will indemnify the contractor if an accident occurs at the construction site.

Another important aspect of many indemnity provisions is the duty to defend the benefitting party if an accident occurs. A commitment to defend could be as great or even exceed the expense of reimbursing damages owed by the party benefitting from the indemnity.

In a 1997 case entitled *Pancakes of Hawaii, Inc. v. Pomare Prop. Corp.*, the Hawaii Intermediate Court of Appeals (ICA) held that the duty to defend in a contractual indemnity obligation was similar to the insurance company's duty to defend.

The ICA recently reaffirmed *Pancakes*. See *Arthur v. State of Hawaii, Dept. of Hawaiian Home Lands*, 2015 Haw. App. LEXIS 109 (Haw. Ct. App. Feb. 27, 2015). In *Arthur*, Mona Arthur, a resident of the Kalawahine Streamside Housing Development, was tending her garden when she slipped and fell from a hillside adjacent to the project. At the bottom of the hill was a two foot fence in front of a drainage ditch, where Mona allegedly hit her head and was killed.

Mona's husband, William Arthur, sued a variety of defendants including the Kamehameha Investment Corporation (KIC), the developer, and Sato and Associates, the civil engineer who prepared the construction plans. William alleged the defendants were

negligent in the design, construction, and supervision of the construction of the hillside area.

There were many indemnity provisions running back and forth. In one indemnity provision, Sato, the civil engineer, agreed to indemnify, defend and hold harmless KIC, the developer, for all claims, demands, losses, etc. The parties may not have understood the potential financial commitments they were undertaking by agreeing to indemnify and defend other parties.

In determining the indemnity obligations, the circuit court relied on *Pancakes* and held that Sato's duty to defend KIC was determined at the outset of the litigation. Further, as soon as the complaint was filed against KIC, Sato's duty to defend was triggered.

Sato appealed, arguing, in part, that *Pancakes* was wrongly decided because Sato could not be held liable for defense costs or indemnity obligations to KIC until Sato's wrongful conduct was proven.

Relying on *Pancakes*, the ICA rejected Sato's contention. Instead, Sato's duty to defend KIC was triggered upon the filing of the complaint and/or the tender of KIC's defense to Sato. Further, the duty encompassed all claims that could potentially come within the scope of the indemnity.

Therefore, a party entering a contract needs to fully understand the implications of an indemnity provision. It is important to review any indemnity obligations before signing a contract in order to appreciate the financial obligations you may be agreeing to. Having to pay not only the damages for the benefitting party, but also having to pay the defense costs, can be very expensive.



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Presenting the Owners' Counsel Crystal Eagle to University of Hawaii Law Professor David Callies

In March, the firm hosted a ceremony and reception for University of Hawaii Law School Professor David L. Callies to celebrate the award of the Owners' Counsel of America's Crystal Eagle. This was a follow-on event to a February ceremony at the Owners' Counsel annual meeting in San Francisco which recognized Professor Callies for his lifetime of scholarship and teaching about property law and property rights. Callies teaches property and administrative law at U.H.'s William S. Richardson School of Law.

Annually, Owners' Counsel identifies an individual who has made a substantial contribution toward protecting the civil right of private property ownership and presents that individual with the Crystal Eagle. In addition to his researching, thinking, and writing about property and takings law, Owners' Counsel Executive Director Cathy Newman noted, "we are grateful to Professor Callies for educating and mentoring several generations of lawyers, and impressing upon them the essential relationship between property rights and individual liberties."

Damon Key lawyer Robert Thomas is the Hawaii member of Owners' Counsel, an invitation-only national network of the most experienced property rights and eminent domain lawyers. Limited to one lawyer per state, Owners' Counsel members have joined together to advance the law and to preserve and protect the constitutional rights of private property owners. They have participated in many of the landmark property rights decisions from the courts in the last half-century.

Supreme Court of Hawaii Associate Justice Sabrina S. McKenna, a former student and faculty colleague



of Professor Callies, introduced him to an audience of more than 100 students, former students, judges, lawyers, legal scholars, and friends.

Robert also gave a short retrospective of Professor Callies' long career, which includes leading the Real Property and Financial Services Section of the Hawaii State Bar Association, past chair of the American Bar Association Section of State and Local Government Law, and the recipient of its Lifetime Achievement Award in 2006.

Robert noted, "property law is one of those areas where the rest of the country — and indeed the world — follows with a keen eye what we do here in our kuleana, so David's expertise isn't limited to us locally, but his reputation extends across the nation and internationally."

The Crystal Eagle is currently on display at the University of Hawaii Law Library.



1. Professor Callies and current and former students, including Damon Key's Sommerset Wong (third from left)
2. The Crystal Eagle
3. Justice Sabrina McKenna, Professor David Callies, Robert Thomas
4. Professor Callies and a former student, Damon Key's Mark M. Murakami

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A D V E R T I S I N G M A T E R I A L

Legal Alert is published periodically by Damon Key Leong Kupchak Hastert to inform clients of legal matters of general interest. It is not intended to provide legal advice or opinion.

Attorneys in the News

Moderating a panel on “Number of Occurrences,” **Tred R. Eyerly** attended the ABA’s Insurance Coverage Litigation Committee’s annual seminar in Tucson in March. Justice Peter Maassen of the Alaska Supreme Court, a friend of Tred’s, was a panel member. The panelists also submitted a paper for the seminar.

Clare M. Hanusz, will be giving a HSBA CLE Series Seminar on Immigration Law 101 “Functional Understanding of Basic Concepts in Immigration Law and Practice” on July 6th at HSBA from 12noon to 1:00pm.

Christine A. Kubota, Honorary Chair of the Pan-Pacific Festival Advisory Committee, attended the Pan Pacific Festival which celebrated its 36th anniversary this year with more than 1,500 participants from Japan. The Festival encourages intercultural friendships and understanding through sharing of culture and highlighting music, dance, sports and art. The Parade on Sunday featured the Royal Hawaiian Band as well as local high school bands. Over 40 groups of participants helped to create a fun-filled afternoon for the Waikiki audience.

Christine is featured in the June 2015 *Hawaii Business* magazine story “Dream Meets Reality,” about Japanese nationals who run businesses in Hawaii. “According to Christine, the most common type of working visa is the E-2, which allows a foreigner to live and work in the U.S. but requires a substantial investment. For Japanese, she says, this is considered to be an investment greater than \$100,000.”

Anna H. Oshiro was featured in the *Pacific Business News* story “Opponents say Okada Trucking case raised Hawaii construction costs.” Anna has written a 50-page analysis of the *Okada Trucking* case, and told PBN there hasn’t been a push during this legislative session to change the decision. “The decision has negatively impacted the public procurement process, has made public procurement more expensive, and now threatens to impact economic growth, to the detriment of the state,” Anna wrote in her analysis, titled “Okada Trucking: How the Supreme Court redefined what it means to be a general contractor in Hawaii.”

Judy A. Schevtchuk presented at the HSBA Family Law Section on June 26th about Military Family Law Issues along with Tom Farrell, Esq. Colonel US Army Retired.

In April, **Robert H. Thomas** attended the ABA Section of State and Local Government Law conference in Philadelphia. Robert is the Secretary of the Section, and presented a session on the latest property case being considered by the U.S. Supreme Court.

In July, Robert will be on the faculty of the 31st annual Land Use Institute in Chicago, the nation’s leading continuing legal education program on land use law. Robert will be speaking about the latest eminent domain court decisions, and issues related to the “sharing economy” such as AirBnB and Uber.