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Commentary: A Law Professor's Suggestions for Estate and Trust Reform

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COMMENTARY: A LAW PROFESSOR'S SUGGESTIONS FOR ESTATE AND TRUST REFORM

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Within a short time, trusts and the trust community will enter the 21st century. In that century, what changes in the trust industry are we to expect? Should we expect a greater emphasis by trustees, and those who serve them, on acting primarily in the public's interest?

In the latter part of the 20th century, trusts have become big business. There has been some tendency for corporate fiduciaries to view trusts merely as profit centers, opportunities to expand into new areas of profit generation. Perhaps it has been the lack of opportunity for communication among members of the trust community that has allowed the search for increased profits to overshadow the absolute need for the trust industry to properly serve the pub-

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lic's interests. It is unlikely that we will ever see a return to the flagrant use of the trust system to dispense political patronage and enrich fiduciaries at the expense of beneficiaries. However, it is not enough that trust administration has merely improved somewhat. Only by aggressive planning by the trust industry and by emphasizing excellent service can trusts be expected to remain vital and survive.

Fortunately, in recent years consumer organizations devoted to protecting the interests of trust beneficiaries and helping them assert their rights, have come on the scene. These organizations have, sometimes painfully, reminded the trust industry of the full extent of its obligations to the public it serves. Unfortunately, because of lack of communication between all interested groups, there has been to date more court clashes than working conferences, more anger than understanding.

In an effort to organize properly for needed reforms, twenty-six law professors have formed a new organization, The Law Professor Advisory Group For Trusts and Estates (The Group). Rejecting litigation as an appropriate avenue for conflict resolution, The Group has made its services available to all members of the trust community. To date, it has served as an advisor to HEIRS, Inc. and to several corporate fiduciaries. In a number of situations The Group has been successful in diffusing anger and mistrust by working with the parties to reach mutually agreeable solutions to the issues at hand.

The materials presented below represent a sample of The Group's work product. In January, 1998, The Group will hold a conference to which all members of the trust community have been invited. It is hoped that all major groups will participate in the conference and new and creative solutions to common problems of the trust industry will be worked on then and regularly thereafter on into the next century.

I. SHOULD WILL BENEFICIARIES HAVE GREATER CONTROL OVER CHOICE OF EXECUTOR?

Recently, several informal surveys were conducted to gauge interest in the following proposal (The Proposal):

A. The Proposal

Without the need to show cause, a court having jurisdiction may appoint as the personal representative of a will the nominee of the beneficiaries of the will in the following circumstance: The deceased testator leaves a valid will. She names X as personal representative and under the will the entire estate is to be distributed outright to an individual, or a group of individuals, all of whom have capacity. All beneficiaries are in agreement that they wish a different personal representative to serve. The beneficiaries have informed the court of their unanimous decision. The court finds no compelling circumstances requiring an appointment of a personal representative other than the one unanimously wanted by the beneficiaries.

B. Comment

While ordinarily it is the testator's intent with regard to the appointment of the personal representative that is to be respected, where the testator has given the entire estate to one or more capable beneficiaries, unless there are special circumstances the beneficiaries preferences for a personal representative should prevail.

This rule recognizes that after the will is drawn, circumstances unforeseen by the testator, may make the original choice of personal representative undesirable to the beneficiaries. The law should recognize that, where all the beneficiaries are in agreement as to the person they wish to have in charge of administration, potential costly conflicts between the beneficiaries and the personal representative can be avoided by allowing the beneficiaries to choose the personal representative they want. The rule recognizes the possibility that the testator may not have understood the full implications of her choice of personal representative.

In addition, especially when time has elapsed from the date the will is drawn to the testator's death, circumstances may have changed dramatically. A favored local corporate fiduciary may have merged with a larger out-of-state bank unfamiliar to the testator and her beneficiaries. Minor beneficiaries may have grown-up; individuals named to serve may have moved away, retired, had a

dramatic change of personal circumstances, or lost full capacity.

Nonetheless, the court is not to appoint as executor of the will the choice of the beneficiaries if the court finds that such appointment would not be in the best interests of the beneficiaries.

There is to be a rebuttable presumption, particularly applicable when the will was executed prior to the enactment of this section, that if the testator at the time of making her will had been asked if she would want the personal representative to be the person wanted by all the capable beneficiaries, the testator would have chosen the result provided above. Furthermore, where the testator specifically indicates in the will an intent not to allow all of the beneficiaries to override her designee, the court shall not grant the request made by the beneficiaries.

C. The Surveys

Thus far three informal surveys have been conducted on the merits of The Proposal.[1] The first survey was taken among the members of the Law Professor Advisory Group. The result was heavily for The Proposal (four to one), with some strong dissent. The second survey was taken among law students enrolled in Professor Whitman's Trust and Estates class in the fall of 1996. The result was heavily in favor of The Proposal (four to one). The third survey was conducted among the members of the State Laws Committee of The American College of Trusts and Estates Counsel (ACTEC) meeting in Palm Springs, California, in January, 1997. The result was heavily against The Proposal (five to one) with strong feeling that the law in this area should not change.

Among the concerns expressed by those against The Proposal were: 1) that if a change were to be made, it must be only for wills executed after the enactment of the new rule, 2) that testators would simply always show a clear intent in the will not to have the new rule take effect, 3) that some testators use the appointment to reward a loyal professional (e.g., lawyer, accountant), 4) that the use of an independent executor helps avoid fights among the bene-

[1] A copy of the survey format is reproduced at the end of this article. All readers are invited to respond to the survey.

ficiaries, and 5) The Proposal would create uncertainty in an area where certainty now exists.

II. PROPOSED BILL OF RIGHTS FOR TRUST BENEFICIARIES[2]

A. Overriding Principle - Trusts Are For the Benefit of Beneficiaries

1. Trusts are created primarily to benefit beneficiaries. Under no circumstances are fiduciaries (e.g., Trustees, and those who serve them) to place their interests above the interests of the beneficiaries they serve. Fiduciaries, and those who serve them, are pledged to put the interests of the beneficiaries above their own interests and to concentrate on exclusively serving the public's need.

2. It is the trust industry's responsibility, as a group, to engage in meaningful, coordinated reform efforts aimed at serving the public interest and, particularly, the interests of trust beneficiaries.

3. It is the trust industry's responsibility, as a group, to understand and clarify that service as a trustee is not to be seen as simply a profit-maximizing activity, i.e., acting as a trustee is primarily a quasi-public service.

4. The trust industry, as a group, is responsible for organizing coordinated efforts both to monitor and assess present practices and, where appropriate, to make needed changes.

5. Steps need to be taken to create new law that provides, unless

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[2] At the request of HEIRS, Inc., The Law Professor Advisory Group For Trust and Estates has drafted this proposed Bill of Rights For Trust Beneficiaries. A draft of a proposed Bill of Rights was originally drawn by Bob Whitman, with the assistance of Professor Ronald Chester, of the New England Law School. The first public discussion of The Bill of Rights was at The HEIRS, Inc. Conference, held at the Breakers Hotel, Palm Beach, Florida, on January 3-4, 1997. HEIRS, Inc. is a consumer organization of trust beneficiaries seeking to work with the trust community to foster protection for trust beneficiaries. As an initial step toward organizing needed reforms, HEIRS, Inc. asked The Law Professor Advisory Group to draft the Bill of Rights. Anyone interested in commenting on The Bill of Rights should contact the Professor Whitman at University of Connecticut School of Law, 65 Elizabeth Street, Hartford, CT 06510.

clearly indicated to the contrary in a governing instrument, that the presumption is that a settlor:

a. wants measures taken that will make trust administration economical;

b. wants appropriate actions taken to meet changed circumstances;

c. has the needs of the beneficiaries uppermost in mind;

d. expects the trustee to be devoted exclusively to the interest of the beneficiaries;

e. has no desire to reduce fiduciary responsibility and liability; and

f. expects fees, and other expenses, to be reasonable and to be explained in detail.

6. A plan of action needs to be developed (hopefully by a joint effort on the part of HEIRS, INC. and the trust industry (and those who serve it) in order to bring about:

a. an attitude of courtesy, concern, and caring by professionals in the trust industry leading to more effective communication with, and service to, beneficiaries so that they can fully understand transactions being made for their benefit.

b. more of an opportunity for beneficiaries to have choices and to be heard meaningfully;

c. summary procedures for terminating trusts and/or changing trustees where this is called for in the best interest of the beneficiaries;

d. training of trust administration personnel, which is designed to reduce attitudes inimical to the purposes of The Bill of Rights;

e. effective, uniform accounting procedures;

f. more uniform and effective procedures for resolving complaints against fiduciaries in a fast and inexpensive manner;

g. provision for proper notice to all interested parties, including notice of any applicable statute of limitations; and

h. the development and general use of alternative dispute resolu-

tion systems.

7. Ethical codes of conduct concerning treatment of beneficiaries need to be created for all professional groups involved with trusts.

8. A group to organize individual trustees needs to be created.

9. A collective organization should be created to study the possibility of changing legal rules to foster the elimination of the unnecessary use of trusts, or the simplification of their use in areas where they do not help beneficiaries and/or society.

10. An ongoing interchange should be facilitated between all groups representing beneficiaries, trustees, and advisors to trustees.

11. The obligation for implementing the above suggestions lies first with the trustees and with those who serve their needs. Each involved organization should take inventory regarding how it has acted to help beneficiaries. Each organization should prepare a report detailing the work that it has done to insure the protection of the rights of the beneficiaries. A long range plan for the future must be developed and disseminated. The committees established for this purpose, and their agendas should be reported on. Also, the plan in place (or to be put in place) for directly involving beneficiaries in decision-making should be detailed.

12. An independent oversight committee should be promptly created to carry out the goals expressed in The Bill of Rights.

III. OFFERING TRUST BENEFICIARIES A LIMITED ROLE IN INVESTMENT DECISIONMAKING

Increasingly, there has been vocal criticism by trust beneficiaries concerning rising fees and falling rates of return achieved by corporate fiduciaries. This outcry has fueled a fire to allow portability - the right of the beneficiaries to replace one corporate trustee with another without the need to show cause.

Regardless of the merits and final outcome of the debate, giving some choice regarding investment decisions to trust beneficiaries could quiet present criticisms, reduce the need for financial analysts and bank staff and thereby, hopefully, permit reduction of

ever-spiraling bank trust fees.

Consider corporate fiduciary X whose investments are being made, in part, into mutual funds 1,2,3,4 or 5. Instead of the bank alone deciding on appropriate allocations between these funds, suppose the bank offered the beneficiaries of Trust A - collectively - the right to agree unanimously on the allocations desired for some part, or all, of the trust assets.

Under this arrangement, the participating trust beneficiaries are empowered to share in creating their own futures. If their choices produce extraordinary investment results, everyone is happy. If their choices produce poor results, at least the corporate fiduciary will not be blamed.

What now prevents corporate fiduciaries shifting in part to this pattern of allowing beneficiaries to play this limited role in investment? First, the law would need to be changed to allow for the delegation of some investment decision making power to the beneficiaries. Then, it would be made clear that if the creator of the trust wants all investment decisions to be made solely by the corporate fiduciary, she can clearly say so.

Where beneficiaries would be allowed some limited say in investment, since the corporate fiduciary controls the choice of the funds being dealt with, there is still assurance that high risk speculation will be avoided. Furthermore, as additional protection, the corporate fiduciary can offer beneficiaries investment choices with regard to only a portion of trust assets.

The argument asserting that if individuals are free to make investment decisions regarding their 401K plans and IRAs, trust beneficiaries should be given similar control over some investment choices, seems persuasive. Only by constantly considering proposals for reforming trust administration will the practice of using trusts remain viable.

SURVEY FORM REGARDING CHOICE OF FIDUCIARY YOUR CHANCE TO BE HEARD

To register your opinion regarding the reform proposal, please fill out the following survey form:

SURVEY

Please indicate your view on the above.

Check One

_____ 1. I agree with the above proposal.

_____ 2. I disagree with the above proposal.

COMMENTS

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Name of Person Responding & Position Held: _____

Date: _____

In order to take part in the survey, please fill out this page and return it to Ms. Linda Kirk (Professor Whitman's Secretary). You can respond to Ms. Kirk by mail at University of Connecticut School of Law, 65 Elizabeth Street, Hartford, CT 06105, or by FAX (860) 570-5242, or by e-mail at LKirk@Holmes.law.uconn.edu.