Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries

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I. INTRODUCTION

The Law Professor Advisory Group for Trusts and Estates (Group) is composed of some thirty law professors and additional members of collateral boards, all pledged to attempt to improve the administration of trusts.[1] Complaining trust beneficiaries report to the Group that they meet resistance to requests for information and requests for other assistance.[2] In litigation, trust beneficiaries complain that

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[1] The Group was founded by Professor Whitman, who served as its first Chair. The present Chair of the Group is Professor Ronald Chester, of New England Law School. Professor Chester can be reached at: rchester@fac.nesl.edu. Another force advocating the expansion of trust beneficiary rights is the Heirs Group, headed by Standish Smith. Mr. Smith can be reached at (610) 525-4442. He is the author of THE HEIRS PERSONAL TRUST HANDBOOK, which attempts to help lay individuals understand the world of trusts. Information regarding English practice has been obtained from Geoffrey A. Shindler, of Halliwell Landau (Shindler). Mr. Shindler can be reached at gas@halliwells.co.uk.

[2] The duty of a trustee to respond to requests for information and requests for other assistance is clear. *See* GEORGE GLEASON BOGERT, ET AL., TRUSTS & TRUSTEES § 961 (rev. 2nd ed. 1977) (hereinafter cited as BOGERT); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 173 (4th ed. 1987) (hereinafter cited as SCOTT). *See also*, *e.g.,* Fletcher v. Fletcher, 253 Va. 30, 480 S.E. 2d 488 (1997) (trustee has duty to furnish information).

> The Uniform Trust Code (UTC) § 813 provides:
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> (a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.
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> (b) A trustee:
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> (1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust

instrument;
(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance of the trustee's name, address, and telephone number;
(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and
(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or non-qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

The UTC has recently been promulgated by the National Conference of Commissioners of Uniform State Laws (NCCUSL). It is now being presented to the states for adoption. The stated purpose for the UTC is to supply uniform statutory law regarding trusts to states that have little law on the subject.

Drafting the UTC, as well as drafting other uniform acts, is a highly political process. The Commissioners are anxious to create Acts that will be broadly passed by the states so that they are quite sensitive to the lobbying efforts of powerful groups. In the case of the UTC, this would include the lobbying efforts of major corporate

fiduciaries. It is noteworthy that the UTC's stated goals do not emphasize an attempt to fashion a trust administration system that creates a fairer and more level playing field for all of the interested parties, or a system that works better than the systems now in place. Given the checkered and political history of probate and trust administration, the NCCUSL may have missed an opportunity to create a uniform act that would be truly groundbreaking.

Beyond being highly sensitive to lobbying from major institutions, which has lead to the creation of the UTC as a relatively conservative statute, the Commissioners, in creating uniform law, do not attempt to change local procedural rules. Thus, in the case of the UTC there is far less positive impact on the rights of powerless trust beneficiaries than would be the case if procedural rules were considered and liberalized. Finally, too often the Commissioners work with little or no empirical evidence, input from experts in related fields or input from all interested parties.

Standish Smith, of the Heirs Group, and Professors Ronald Chester and Robert Whitman, at their request, were among the parties invited to the drafting sessions of the UTC as observers/advisers. In a number of cases, however, formulations worked out at the drafting sessions would later be revised without notice to the observers/advisers, presumably because of pressure from various lobbying groups, including corporate fiduciaries. Much thought can be given in the future to how the NCCUSL drafting session procedures might be improved.

The NCCUSL is likely to remain a major source for trust administration reform for some time. Hope that reform measures will be enacted by the Federal Government seems inappropriate, since trust administration has always been considered an area reserved to the states. While corporate fiduciaries are regulated by the Office of the Comptroller of the Currency (OCC), that office does not see itself as attempting to spearhead reform of the system.

According to Craig Stone of the OCC, "A major focus of the OCC is to respond to complaints and inquiries from customers of national banks. The OCC's Customer Assistance Group (CAG) captures, monitors, and analyzes data related to these complaints and inquiries to identify trends that are used in developing new policies and positions. While in many instances the issues brought forward are regulatory in nature and the OCC has jurisdiction and the ability to affect resolution, some of the complaints from customers of national banks are non-regulatory. In the case of factual or a contractual dispute, the OCC may ultimately advise the consumer that their issue is outside of the OCC's regulatory jurisdiction and that the only recourse is through the court system." E-mail from Craig Stone to Robert Whitman (November 20, 2001). *See also* Joel Miller, *Regulation of National Banks by the Comptroller of the Currency*, ALI-ABA Course of Study Material (July, 2001). Interestingly, the OCC is funded by the banking industry. In court, the OCC regularly supports the banking community against consumers. Accordingly, the reforms that are now needed and will be needed in the future should come from cooperative efforts between trustees and beneficiaries.

For purposes of this article, no distinction is drawn between an individual trustee, a corporate fiduciary, or co-trustees. The problems discussed appear to arise with all types of trustees. The authors are not aware of any empirical study attempting to investigate whether a particular group of trustees regularly achieves higher beneficiary satisfaction as well as an overall degree of trust beneficiary satisfaction. It may be that the vast majority of trust beneficiaries are reasonably satisfied. It is the

trustees, represented by capable experienced litigators, mount vigorous defenses, taking advantage of any device that can be used to defeat a trust beneficiary's complaint.

While the Group receives numerous complaints from trust beneficiaries that on their face appear to lack merit,[3] other complaints

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absence of empirical evidence regarding levels of satisfaction that makes it difficult to gauge the realities surrounding the issues involved.

[3] In many cases it appears that there is a basic lack of information available to trust beneficiaries regarding what standard of trust administration should be considered "satisfactory." Too often, a complaint voiced to the Group is that when the market is rising the trustee is unable to match the investment performance of a specific index, or a successful mutual fund. The suggestion is that a trustee must be clairvoyant.

Furthermore, it is not uncommon for a complaining trust beneficiary to fail to take into account limiting provisions of the governing instrument and/or the trustee's duty to benefit and protect all beneficiaries. The sheer volume of these patently inappropriate trust beneficiary complaints must strain the patience and resources of many trustees. Indeed, some trust beneficiaries could be considered a true challenge because they will constantly complain about anything and everything. Making matters worse, some complaining trust beneficiaries have taken to the street in order to vent their frustrations by picketing certain corporate fiduciaries.

On the other hand, there does not appear to be available today any published standards that would give a reasonable lay trust beneficiary any benchmark by which the performance of a trustee can be properly judged. The creation of such standards and their dissemination by an appropriate group would prove salutary.

Published standards should lower the amount of inappropriate trust beneficiary complaints. It would seem that trustees who, at the outset of the relationship, provide detailed information to beneficiaries in order to help them realistically appraise the stewardship of the trustee, can minimize complaints. Continuous communication providing clear explanations regarding the basis for various forms of trustee decisionmaking should also help avoid misunderstandings during administration that might otherwise form the basis for unrealistic complaints.

Would the creation of materials, including perhaps videos, help avoid a great deal of misunderstanding and mistrust? It has been suggested that the root causes for trust beneficiary dissatisfaction may, at least in part, lie elsewhere. Anger at the settlor for tying monies up in trust, thereby expressing doubts regarding the capability of the beneficiary to invest and manage funds; concerns about investments in growth stocks that reduce income payments; disputes about the appropriateness of discretionary distributions; concerns of remaindermen regarding investment for income and/or discretionary distributions to income beneficiaries; personality defects on the part of complaining trust beneficiaries; and arrogance on the part of trust officers all have been cited as contributing root causes of trust beneficiary complaints.

To date, little has been done to study the question of whether the flow of complaints may in fact not be cured by better communication, education and excellent customer service. Lawyers are rightly accused of stirring up suits (particularly class actions) in order to gain profit. There sometimes exists an attitude within the trust administration community that no matter how hard a trustee tries, some beneficiaries will never be satisfied.

received appear on their face to be justified. The concern raised in this article is that trust beneficiaries who appear to have justified complaints are often left without redress because litigation presents an uneven playing field for some trust beneficiaries.[4]

Given the lack of empirical evidence concerning trustee performance, for purposes of this article the basic assumption being made by the authors is that the bulk of trust administration in the United States today is being properly carried out. Nonetheless, informal information[5] suggests that if greater efforts were made to educate trust beneficiaries and ensure fair hearing of their complaints, trust beneficiary satisfaction levels could be raised.[6] Clearly, there are

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Another reason for the lack of production of creative materials that are addressed to trust beneficiaries could be fear that a non-lawyer fiduciary would be giving legal advice. Where this is a concern, an appropriate disclaimer indicating legal advice is not being given should prove effective.

Another concern may be the fear that the fiduciary who provides too much information could be awakening a "sleeping" beneficiary.

[4] *See supra* note 3.

[5] It is quite common to hear dissatisfaction voiced concerning the capability of fiduciaries. One joke often heard is: Q: "How do you make a small fortune?" A: "You hand over a large one to a fiduciary." *See* Geoffrey A. Shindler, *Nothing Stinks Quite Like Muck*, TRUSTS AND ESTATES L.J. at 3 (2001). *See also* Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALBANY L. REV. 543, 548 (1998) (high-mindedness in trust law is fading like an old picture in a family album).

At an open meeting held in 1995, a committee of the Real Property Probate and Trust Law Section of the American Bar Association invited comment on the need for trust administration reform. Many speakers, including seasoned bankers and lawyers, voiced many of the concerns raised in this article and strongly advocated the need for meaningful reforms.

[6] A large expansion in the use of trusts has occurred in the United States in an effort to avoid probate, protect assets against creditors' claims, and save taxes. The design of the federal estate tax laws have purposely encouraged the use of trusts as well as the use of independent trustees.

Trust theory sets up an array of protections for a trust beneficiary. *See* Bogert § 541 et seq.; Scott § 170 et seq. In practice, however, these protections are often not actually available, especially to powerless trust beneficiaries. For example, fiduciaries may understand their legal obligations, but choose to avoid communication with trust beneficiaries in order to avoid raising awareness about difficult questions. On balance, failure to communicate may be risked in order to cover up actual or potential mistakes. Such actions help to create an atmosphere of suspicion on the part of trust beneficiaries. Beyond that, fiduciaries may simply view their role as one in which increasing their bottom line profits is the most important task. It is unclear as to the extent, if any, corporate fiduciaries educate employees regarding the essential differences in acting as a fiduciary as compared to acting in other banking capacities. If fiduciaries project an image of being primarily interested in profits for the banks it undermines the trust

instances in which trustees fail to achieve a satisfactory level of performance, both in carrying out the duties involved in servicing trust beneficiaries and in accounting for the trustee's stewardship. As in any system involving a large number of participants, some trustees totally fail in the performance of their duties.[7]

The concern expressed here is that some trustees compound their failures by working hard to prevent complaining trust beneficiaries from learning about failures and effectively asserting their rights.

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beneficiaries' view that the banks will capably carry out the role of a fiduciary, putting the interests of the trust beneficiaries above the interests of the bank.

The authors believe that periodic, clearly-written communications and the establishment of independent persons who could quickly and inexpensively evaluate the merits of a trust beneficiary's complaint would best serve the fiduciary community, since continued and increasing trust beneficiary complaints will in the long run impede the growth of the use of trusts in the United States and abroad.

[7] At least some of the failures in trust administration may be connected to the relative unimportance fiduciaries place on the trust administration process, as compared with efforts to gain new trust business and produce profits.

High turnover of trust administration personnel and low budgets at corporate fiduciaries are often reported. It appears to be common knowledge that often trust administration positions are filled with entry level, or relatively lower level, personnel. Marketing, on the other hand, is considered an essential activity because it is felt that new business must be aggressively sought to continue to maximize the profit potential of the trust department.

Once business is captured, there is some feeling that it is now "owned" by the corporate fiduciary. *See infra* note 13. While legal theory stresses that trustees must perform at a very high level, trust administration is now often viewed by corporate fiduciaries as any other business function is viewed. This means that maximization of profit is the major goal and there is less concern for proper fiduciary conduct. *See* Dobris, *supra* note 5, at 545 (Cardozo is turning over in his grave [at this loss of concern for proper fiduciary conduct]).

Restrictive legal rules regarding the right of trust beneficiaries to seek trustee removal and/or termination of the trust add to this sense of "ownership" of the trust by the trustee and the importance of the business aspects of the trust business. Extensive lobbying efforts have been carried out at the state level as well as the level of the drafting of the UTC to ensure the continuation of restrictive provisions regarding trustee removal. *See supra* note 2.

It has been argued that a sense of trustee "ownership" contributes to trustee apathy concerning trust beneficiary complaints. Beyond this, trustees sometimes display an attitude that suggests that they feel trust beneficiaries are not fully deserving because they have not earned their money. But, more importantly, the reality is that what may be most important to corporate fiduciaries is the need to regularize procedures and budget efforts in order to be able to economically administer trusts and earn a reasonable profit. This suggests that in some cases, even where a breach of fiduciary duty may be clear, litigation may be chosen over settlement for budgetary reasons.

In this article, the authors focus on a class of trust beneficiaries, defined as "powerless trust beneficiaries." By "powerless trust beneficiaries" reference is made to trust beneficiaries who cannot gain the services of an attorney to carry out the necessary procedural steps required to bring a trustee before the court. The authors conclude that far too often numerous hurdles exist in bringing an action in a state court, resulting in the shielding of an allegedly unscrupulous trustee. Among the hurdles that exist are: state procedural rules requiring formal litigation in order to force a court hearing or a fiduciary accounting; and the ability of a trustee to set off costs of defense against trust assets; the advantages gained by trustees who employ skilled advocates who may present questionable counterclaims and impose unneeded expenses and delays. All of these impediments, and others, set up an opportunity for the unscrupulous trustee to effectively fend off beneficiary attempts to gain information and redress, so that a "powerless trust beneficiary" is unable to effectively assert in court the rights that the law has, in theory, granted to a trust beneficiary.

The major conclusion of the authors is that where a trust beneficiary is "powerless," the chance that the trust beneficiary will not be able to effectively assert rights is greatly increased. The authors suggest that procedures available today to complaining trust beneficiaries who need to come to court to seek assistance to force a trustee to properly perform, or need to come to court to force a trustee's removal, or to gain an award against a poorly performing trustee, often, in practice, prove to be inadequate. Court rules requiring the following of formal litigation procedures allow trustees who have poorly served to force beneficiaries to seek redress in court. Once court is the only option for a powerless trust beneficiary, that beneficiary either cannot get to court, because the trust beneficiary cannot afford competent counsel, or counsel will not accept the case. Even if a powerless trust beneficiary is able to come to court, the trust beneficiary often finds that in formal litigation an uneven playing field exists favoring the trustee. Overzealous advocates[8] representing fiduciaries can confuse the issues

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[8] For some, the phrase "overzealous advocates" is an oxymoron. Is it realistic to expect advocates to temper argument and/or court tactics to benefit complaining powerless trust beneficiaries? Is it realistic to call for the legal system to specially focus on the needs of one particular group of plaintiffs? The argument suggesting that special consideration may be required for powerless trust beneficiaries grows out of the unique position of the fiduciary who has pledged proper stewardship, not only to the trust beneficiaries but also to the equity court. Thus a breach of fiduciary duty is not only a concern to the trust beneficiary, it also is of direct concern to the court. *See* Morice v.

by creating questionable counterclaims, or by building up expenses and delay.

To avoid an uneven playing field in court, so that, where necessary, trustees can be promptly ordered to properly perform,[9] the authors advocate revising court procedures. The authors discuss a recent series of cases, the Bishop Estate case,[10] as an example of high profile, big-money litigation, in which the court, on its own motion, appoints Examiners[11] who are able to investigate alleged wrongdoing.

The fairness and efficiency of court systems where ample money is available is contrasted with the inaction of many courts when the trust beneficiary complainant is a powerless trust beneficiary. The authors provide support for their findings by discussing responses to a questionnaire that was sent to courts in each state.

The authors call for: 1) the creation of more meaningful systems for settling complaining trust beneficiary concerns without the need for court action, and 2) where a matter is brought to court, the widespread implementation of a uniform informal procedural system that will effectively address trust beneficiary complaints without incurring costs that cannot be afforded. Under such informal procedures, where a complaint may, on its face, appear to have merit, the authors suggest that the system should allow for the appointment by the court, on its own motion, of an Examiner who can quickly and inexpensively inform the court as to the legitimacy of a powerless trust beneficiary's complaint. The Examiner should be empowered to demand prompt responses by the trustee and should be able to properly apportion costs between the

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Bishop of Durham, 9 Ves 399 [1803-1813], All ER Rep. 451, 32 ER 656 *aff'd* (1805), 10 Ves 521 [1803-1813]). On the other hand, doubt has been expressed regarding the idea that corporate fiduciaries actually care about excelling in service to trust beneficiaries. *See* Dobris, *supra* note 4. It is also suggested that courts are not anxious to take on added supervisory duties.

[9] Hopefully, if court intervention comes early on, trustees will be less likely to be subject to surcharges resulting from long term improper actions. One would expect that just the existence of procedures providing for more effective court interventions would itself create a strong impetus to better fiduciary administration.

[10] *See* Kamehameha Schools/Bishop Estate (KS/BE) website at http://www.ksbe.edu/estate/lands/lands.html (last visited Nov. 25, 2001). In re Estate of Bishop, Equity No. 2048 (Haw. Prob. Ct.) (1998); Roth, *Understanding the Attorney-Client and Trustee-Beneficiary Relationships in the Kamehameha Schools Bishop Estate Litigation: A Reply to Professor McCall*, 21 Haw. L.Rev. 511 (1999).

[11] For purposes of this article, the term Examiner is used to identify anyone (e.g. Special Master, Fact Finder, Guardian *ad litem*) who might be appointed by a court to investigate the situation and report to the court.

parties.

The authors argue that this power to have the court act on its own motion to provide speedy justice already exists in equity and that, rather than creating a new procedural system, the recognition and implementation of power by the court, whether by court rule or statute, is only placing into practice a function of the court system that has existed since early common law.[12]

The authors conclude that attention to the complaints of powerless trust beneficiaries is a needed requirement for the trust system to continue to grow and prosper. While in the short term creating barriers to trust beneficiaries' understanding their rights and being able to effectively assert them could seem advantageous to a misguided trustee, in the long term the use and growth of the trust system ultimately depends on trustees being able to reasonably satisfy trust beneficiaries.[13]

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[12] Resistance to the call for courts to act on their own motions may be anticipated. Some courts may find such early action to be inappropriate, because it actively places the court into a matter that the court may ultimately be required to adjudicate. This can be seen as creating an improper conflict of interest. Beyond this, questions of who will pay for the costs involved when courts act on their own motion must be addressed.

Alternately, the authors suggest the possibility of a broad-based voluntary system for trust beneficiary insurance that would give powerless trust beneficiaries early access to competent legal advice. Another possibility would be for trustees to voluntarily set up independent fact finding agencies to resolve complaints by mediation and/or arbitration.

[13] Perhaps the most important sentence in the UTC is found in § 404, providing:

> A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. *A trust and its terms must be for the benefit of its beneficiaries.*

(Emphasis added.)

One would expect that future caselaw will give expanded meaning to these words so that the establishment of standards will become necessary in order to avoid having beneficiaries resort to continuous litigation to enforce rights. Unfortunately, at present, courts often overlook clear signs of trustee belligerence, putting aside the harm done to a beneficiary who is forced into litigation because the trustee is unwilling to take reasonable action to satisfy a complaining trust beneficiary.

If reasonable trust beneficiary complaints continue to be allowed to grow unabated, one can expect continued pressure to be exerted from beneficiary groups, like Heirs, Inc., to have a radical alteration of our present system. If the public outcry becomes strong enough one could expect pressure to reform trust rules relating to trustee removal and modification and termination of trusts.

Regarding removal, UTC § 706 now provides:

> (a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
> (b) The court may remove a trustee if:
> (1) the trustee has committed a serious breach of trust;
> (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
> (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interest of the beneficiaries; or
> (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries *and is not inconsistent with a material purpose of the trust*, and a suitable cotrustee or successor trustee is available. (Emphasis added.)
> (c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

Regarding modification or termination, UTC § 414 now provides:

> (a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than [$50,000] may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
> (b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.
> (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.
> (d) This section does not apply to an easement for

conservation or preservation.

A more extreme reform would be to reject the so called "Claflin doctrine" now in force in the United States in favor of the more liberal trust termination rules now in effect in England. The Claflin doctrine arose from the case of *Claflin v. Claflin*, 149 Mass. 19, 20 N.E. 454 (1889). In that case, a trust was established for a testator's son, with principal to be paid to the son at age 30. After age 21 the son sued to terminate the trust, pointing out that he was the sole beneficiary. The court refused to permit termination as this would violate the intent of the testator.

Later cases amplified the Claflin rule, so even significant "changed circumstances," like the need to settle a litigation, would not serve as grounds for trust termination. *See* Adams v. Link, 145 Conn. 634, 145 A.2d 753 (1958). *See also Family Settlement of Testator's Estate*, M.L. Cross, 29 A.L.R. 3rd 8 (1970).

In an initial UTC draft, § 706(b)(4) provided that a court may remove a trustee if:

> (4) because of unfitness, unwillingness, inability to administer the trust effectively, or substantial change of circumstances, the court determines that removal of the trustee is in the best interest of the beneficiaries;

UTC, April 14, 2000 Interim Draft.

In the finalized UTC, § 706(b)(4) now reads:

> (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and *is not inconsistent with a material purpose of the trust*, and a suitable cotrustee or successor trustee is available. (Emphasis added.)

Arguably, the addition of the Claflin-like language was unnecessary and counterproductive. Capable attorneys who draft trust instruments today insert language which empowers the beneficiaries to remove an independent trustee. Thus it is only older instruments or poorly drafted instruments that will be subjected to the more restrictive UTC removal rules. *See supra* note 8.

The theory on which the UTC rule is premised is that the settlor did not want to allow removal, even where circumstances change, because she did not say so in the instrument. The competing theory is that implied in the establishment of any trust is the notion that the settlor would not want a trust to continue if its continuation were not in the best interests of the beneficiaries as a group. Similarly implied is that a settlor would want a trustee removed if the trustee was not serving the best interests of the beneficiaries as a group. Notwithstanding the UTC's restrictive statutory removal provisions it is predictable that, in the future our law will come to allow removal and termination when it is sought by all beneficiaries and a court determines that it is in their best interests.

The argument that currently the trust drafting community has solved the problem of trustee removal by adding provisions for trustee removal in contemporary instruments is also made. Under this rationale, individuals employing inexperienced counsel or beneficiaries of older instruments are simply "out of luck". The opposite argument is that when current practices regarding the drafting of documents changes, the underlying law should also be changed in order to avoid leaving beneficiaries of documents without properly drafted clauses without an appropriate remedy. If the trust industry is to remain vital and continue to grow and expand, it is the latter viewpoint that should come to the fore.

The English law, which is also the minority American rule, reflects this thinking. The English rule was established in Saunders v. Vautief, 49 Eng. Rep. 282 (1841). Under that rule, if dissatisfied with a trust, English beneficiaries can terminate a trust at will if all are adult. If there are minors or unborn beneficiaries, a court can agree on their behalf to termination if it is in the best interests of the beneficiaries. *See also*, Spooner v. Dunlap, 180 A. 256 (N.H. 1935); Newlin v. Girard Trust Co., 174 A. 479 (N.J. Eq. 1934).

Unfortunately, in the drafting of the UTC serious consideration was not given to the adoption of the English rule. As with so many other issues presented to the UTC, members of the drafting committee entitled to vote on issues presented, the lack of first hand in depth knowledge of the subject by the voting members, the lack of independent empirical studies, pressure from lobbying groups, and the fear of creating controversy that could impede broad passage of the UTC, lead to an overwhelming bias in the UTC drafting sessions in favor of retaining the status quo. Nonetheless, if trust beneficiary dissatisfaction continues to mount and fiduciaries continue to do business as usual one can foresee in the future a wholesale rejection of the Claflin doctrine.

Based on the following comment from Shindler, the English rule appears to work perfectly well.

> (c) I always have at least one Saunders v. Vautier case on the go. My pragmatic view, not based on any form of empirical research but merely on my own recollection of cases, is that the rule tends to be relevant not before 30 years after
> the settlement is made. With a lifetime settlement by that time the settlor is usually dead so there is no embarrassment about trying to thwart his aims, and of course by definition with a will trust the testator has to be dead before the trust can come into effect. As I indicated it tends to be 30 years on when families have grown and changed, and social events have also moved on that people start to think that the settlement or will trust no longer serves its initial purpose and begin to ask whether it can be terminated.

Fax from Shindler to Professor Robert Whitman (Oct. 24, 2001) (on file with Professor Whitman).

The reality appears to be that the UTC drafters retained the Claflin rule under pressure from corporate fiduciaries who wish to be able to continue "ownership" of

A. The Scope of the Problem

There are no statistics available on the number of powerless trust beneficiaries that exist today. No empirical evidence exists regarding the frequency of trustee breaches of fiduciary duties where there are powerless beneficiaries.[14] Thus far, little has been done to gain solid evidence regarding the magnitude of the problems discussed in this article.

Powerless trust beneficiaries are often simply ignored by a legal system that demands the retention of counsel in order for a trust beneficiary to be effectively heard in court. Where counsel is essential, a powerless trust beneficiary is stymied because:

the amount of the complaint is not large enough to induce an attorney to take the matter on a contingent fee basis, and

there may be a valid concern on an attorney's part about coming against a large and powerful individual or corporate fiduciary. One fear may be that a powerful fiduciary will, through counsel, mount a massive defense - including the use of a strategy that builds expenses and cause delays.

In the case of a corporate fiduciary, another real fear is that the fiduciary will remove the law firm representing the beneficiary from a favored list of attorneys who are to gain work from the fiduciary or be recommended to customers.[15]

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trust accounts. If this is in fact the case, arguably it will not be the first instance where a reasonable reform favoring beneficiaries is disregarded. *See* Robert Whitman, *Commentary: A Law Professor's Suggestions for Estate and Trust Reform*, 12 QUINNIPIAC PROB. L.J. 57 (1997) (arguing that will beneficiaries taking outright should be able to all agree on an alternative choice of executor).

It is not clear as to where the misguided notion that trustees' "own" trust accounts started, but that notion does exist. See Ludovico, New Connecticut Law Updates, The Right of Trust Beneficiaries to Change Trustee, Estates & Probate Newsletter, Connecticut Bar Association (January 2002) 4, 5. ([Restrictive removal provisions] were added to the language of [a new Connecticut Public Act dealing with trustee removal] in response to concern expressed by banking interests that the new law should not permit beneficiaries to undermine what was (before trust departments became profitable) statutorily imposed, recently is viewed by banks as a right to inherit trustee relationships developed by other banks with which they have merged.)

[14] *See supra* note 2 and accompanying text.

[15] Throughout the trust system today there are accepted practices that tie various professionals together so that one is cautious about "rocking the boat". For instance, corporate fiduciaries are named in instruments drawn by attorneys. Accordingly, where the corporate fiduciary is named as trustee, at the time of the start of the trust administration, unless exceptional circumstances are involved, the named corporate

Illustrations of cases brought to the attention of the Group[16] highlight the kinds of difficulties faced by powerless trust beneficiaries.[17]

Example 1:

This example illustrates the plight of a powerless beneficiary who complains about the stewardship of a corporate fiduciary but is unable to bring an action in court.

The corporate fiduciary is co-trustee of a testamentary trust serving with an uncle of two complaining sisters (Sisters). The trust was created by the decedent to benefit the Sisters, his daughters. The Sisters are the primary income beneficiaries of the trust. The trust principal is realty held in a closed corporation. The trust has a 50% interest in the realty and the co-trustee, the uncle of the Sisters, has a 50% interest in the realty in his own right.

According to the Sisters, over a period of twenty-five years, nothing has been done by the co-trustees to diversify the trust holdings. The corporate fiduciary has allowed the uncle, as co-trustee, to manage the properties for his own advantage.[18]

The closed corporation in which the realty is held is now in bankruptcy court. All income payments to the Sisters have ceased. For years, the Sisters complained to the very department of the corporate fiduciary they accused of wrongdoing. The corporate fiduciary has no

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fiduciary will always retain the drafting attorney as its counsel, for purposes of the administration.

This widely accepted system provides an inducement for the drafting attorney to either suggest the corporate fiduciary, or, if the client is referred by the corporate fiduciary to the drafting attorney, to approve of the naming of the corporate fiduciary. This also means that rarely will either the attorney or the corporate fiduciary question the proposed fees for the other. Widespread lack of questioning of the appropriateness of fees is in part a direct result of the lack of built-in tensions in the system. To date, attempts to break away from this mutual "back scratching" system are firmly rejected by those with vested interests.

[16] *See supra* note 1.

[17] Memorandum from Professor Robert Whitman to the State Laws Committee of the American College of Trusts & Estates Counsel 4 (July 1998) (ACTEC) (on file with author).

[18] The corporate fiduciary litigated a strikingly similar matter almost twenty years before. In that case, after a long and expensive in-court litigation, the corporate fiduciary was found to have breached its fiduciary duties.

ombudsman who could independently evaluate the matter. No formal written corporate policies are available to the Sisters that address procedures for dealing with trust beneficiary complaints.

The Sisters have been unable to obtain counsel, although several attorneys have reviewed the case. Some of these attorneys have concluded that the Sisters have a strong case. No firm that reviewed the case will take the matter on a contingency fee basis. The Sisters cannot afford to pay a retainer to a lawyer.[19] The Sisters called the Group.[20] Efforts by the Group to find an attorney who would take the case on a contingent fee basis failed. Among the reasons the case was deemed unattractive were 1) the complexity of the case, 2) the fear of angering the corporate fiduciary and 3) the likelihood of a small recovery against the time needed to deal with the matter.

Now, without admitting any wrongdoing, the corporate fiduciary has suggested a non-binding mediation and has agreed that for the mediation it will pay for the expenses of the mediator and the cost of a lawyer for the Sisters.[21] Because the Sisters are aging and seriously ill, the Sisters feel that the bank may be simply delaying, hoping to keep this matter from coming to trial until the Sisters die.

Example 2:

This example illustrates the frustration that an employee of a corporate fiduciary can cause a complaining beneficiary.

Mrs. B, along with aging relatives, is the beneficiary of an estate. Some of the relatives desperately need financial assistance. Mrs. B asked for help from the trust officer of the corporate fiduciary. Trust officer A first told Mrs. B that it would not be lawful for him to pay out any money to a beneficiary before the estate administration was completed. Mrs. B called the Group. The Group suggested that Mrs. B speak to the trust officer about the possibility of an advance distribution.

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[19] Memorandum Regarding Powerless Beneficiaries from Professor Robert Whitman to the State Laws Committee of the ACTEC, Subcommittee on Beneficiary Rights 4 (July 1998) (on file with author).

[20] *See supra* note 1 and accompanying text.

[21] The question of fees and the source of their payment can dramatically affect the cooperation of a trustee. Where fees can be drawn from the trust funds, a trustee has less of an incentive to settle a dispute.

UTC § 1004 provides: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

This was done by Mrs. B. The trust officer said he would check it out. Several weeks passed. Mrs. B again called. The trust officer said he found out that he could make an advance distribution. He promised that he would have checks in the mail by the end of the week.

Three weeks later, Mrs. B again called the trust officer because no checks had arrived. When asked what had happened, the trust officer responded, "I did not have time to send the checks. Don't you understand–I am busy!"

While most trusts administered in the United States today may be working well,[22] it is clear that, at least in some cases, serious problems do exist.[23]

There are cases reported to the Group where there appears to be reasonable cause for a trust beneficiary to assume the worst. Trustees who fail to respond to requests for information, fail to bring forward records and explanations, and who appear disinterested in performing their tasks raise reasonable suspicions in the minds of trust beneficiaries. Add to this trustees who fail to diversify or earmark assets, continuously raise fees in the face of poor investment performance, corporate trustees who convert common trust funds into mutual funds at a tax cost to trust beneficiaries, trustees who fail to manage trust accounts, and trustees who are also trust beneficiaries who allegedly favor their own interests. In each of these reported cases, a powerless trust beneficiary can reasonably become convinced that it is essential to ask a court to examine the actions of the trustee.

III. CAN A POWERLESS TRUST BENEFICIARY TURN TO A COURT FOR HELP?

Who can a powerless beneficiary turn to to gain clarification regarding concerns as to whether a trustee has acted properly? Equity courts have supervisory authority over trustees at common law.[24] If an equity court having jurisdiction over a trust is willing, on its own motion, after petition from a beneficiary, to appoint a Special Master or a Special Fact Finder to provide the court with a judicial finding of fact, the concerns of a powerless beneficiary can be promptly settled, one way or another.

Without some early judicial finding of fact, one cannot be sure if

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[22] *See supra* note 2.
[23] *See supra* note 6.
[24] *See supra* note 2 and accompanying text

the trustee being complained about is breaching a fiduciary duty, being subjected to harassment by a unreasonable complaining trust beneficiary, or something in between.

The facts of the Bishop Estate controversy[25] illustrate how the

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[25] *See* http://www.ksbe.edu/estate/lands/lands.html.

In the Kamehameha School/Bishop Estate case (KS/BE or Bishop Estate), the court was concerned with a charitable trust established in 1884 upon the death of Ke Ali, a Bernice Pauahi Bishop (Ke Ali), the last direct descendant of King Kamehameha I, and sole heir to the Kamehameha crown land. *Id.* It was Ke Ali's last wish that her estate exist in perpetuity to provide for the creation and support of the Kamehaameha Schools (one school for boys and one for girls). *Id.*

To realize her vision, Ke Ali established her estate as a charitable landed trust supporting the Kamehameha Schools. As such, the Bishop Estate differs from other private landed trusts. *Id.* The entitlement of the estate as a perpetual trust means that its trustees are required to provide competent management of the lands to ensure that the educational mission of Kamehameha Schools is supported forever. *See Id.*

The KS/BE corpus today is estimated to be worth approximately $10 billion, including a 10% interest in Goldman Sachs. Deborah Barayuga, *Isle Leaders urge state to probe Bishop Estate*, HONOLULU STAR-BULLETIN, August 9, 1997, available at http://starbulletin.com/specials/bishop/index.html. Ke Ali's will directs the trust's five trustees to expend trust income primarily to establish the Kamehameha Schools. *Id.* Despite the $10 billion corpus and a governing instrument requirement that income be applied each year, the most ever directly spent in one year on the school was about $70 million (0.7%). *Id.*

Ke Ali's will directs that justices of the Supreme Court of Hawaii, which at the time of Ke Ali's death was the Supreme Court of the Kingdom of Hawaii, would choose the trustees. *Id.* Justices of the Supreme Court of Hawaii continued to make the selections while Hawaii was a republic, territory, and then a state. *Id*. Late in 1997, four of the five Hawaii Supreme Court justices, bowing to public pressure, agreed not to participate in future trustee selections. *Id*.

The one dissenting justice has suggested privately that he perhaps has authority to make future selections of trustees as a majority of one. *Id*. Prior to 2000, the trustees have been parties in front of the court an average of at least once a year. *Id*.

On August 9, 1997, four prominent members of the native Hawaiian community and a University of Hawaii trust law professor, Randell Roth, co-authored the Broken Trust essay. *See* Samuel King et al., *Broken Trust*, HONOLULU STAR-BULLETIN, August 9, 1997, available at http://starbulletin.com/specials/bishop/story2.html. It was highly critical of the trustees and the justices. *Id.* There were allegations that all or some of the trustees breached their fiduciary duty of trust in a number of instances. *Id.* Examples of such violations reported in the Honolulu Star-Bulletin article were: (1) Trustees personally invested $2 million in a Texas methane gas deal in which the estate also invested $85 million. *Id.* The deal can only hope for a recovery of $20 million according to the estate's Texas lawyer, who called the investment a disaster. *Id.* (2) Trustee Peters negotiated for the other party in a million dollar golf course deal involving the Bishop Estate. *Id.* Within days, the Governor asked his Attorney General to launch an investigation of KS/BE. *Id.*

appointment of a Special Fact Finder or Special Master can facilitate the need to determine facts that may be in dispute. The case clarifies that it is not unheard of for a court having jurisdiction to appoint a Special Master or a Special Fact Finder in order to expedite court proceedings.

In the Bishop Estate, a Special Fact Finder and a Special Master were appointed to investigate the alleged abuses of the trustees of the Bishop Estate.

A. Appointment of a Special Master

In her will, Princess Ke Ali, a Bernice Pauahi Bishop (Ke Ali), in her will prescribed a procedure for accountability by her Trustees by directing that:

> [M]y said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said schools to the chief justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some Newspaper published in said Honolulu…[26]

In the Bishops Estate case, in accordance with the express direction of Ke Ali and the jurisdiction conferred by Hawaii Revised Statutes (HRS) 560:7-201(a) and the Hawaii Probate Court Rules, the trustees of the trust estate submitted to the Probate Court their petition, on January 18, 1996, for approval of their one hundred ninth annual account, concerning the period from July 1, 1993, to and including June 30, 1994 (1994 Account).[27]

Pursuant to Rule 28 of the Hawaii Probate Court Rules, by an Order of Reference filed on January 18, 1996, the Probate Court appointed special master Colbert Matsumoto (the Special Master) to review the 1994 Account. Rule 29 of the Hawaii Probate Court Rules

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On September 10, 1998, the Attorney General petitioned the probate court, asking that all five trustees be removed immediately, pending the outcome of an October hearing on permanent removal. *Id*. She also has asked the court to levy substantial surcharges and to deny compensation. *Id.*

[26] *Master's Report On The One Hundred Ninth Annual Account of the Trustees*, Honolulu Star-Bulletin, November 20, 1997, at 7.

[27] *Id*.

describes the role of the Court's Master as follows:

Unless otherwise ordered by the Court, the master shall review the operations of the fiduciary in light of the terms of the controlling document, as well as the financial transactions of the trust or estate. The fiduciary shall supply to the master a copy of the accountings and any master's reports for the prior three accounting periods and shall make available for the master's inspection all accounting records for the current accounting period. The master shall have unlimited access to the books and records of the fiduciary with respect to the trust or estate that are not protected by privilege, including minutes of all meetings, and may interview any employee of the fiduciary regarding the trust or estate as the master deems appropriate. The master shall submit a written report of the master's findings to the court and serve a copy on all interested persons.[28]

It was pursuant to this direction that the Special Master had undertaken to review the annual accounts of the Bishop Estate and to provide his findings and recommendations. The Special Master in this case discovered what had been known for years about the Bishop Estate trustees: that the trustees had engaged in improper practices.[29]

According to the Special Master, the trustees failed to comply with the basic tenets of Ke Ali's will by withholding some $350 million in income from the estate-run Kamehameha Schools.[30] The Special Master also concluded that the trustees intentionally tried to conceal the magnitude of the estate's accumulated income, which could grow to as much as $1.5 billion by the year 2006.[31] There is no question that the appointment of the Special Master aided the judicial process in its effort to protect the beneficiaries of the Bishop Estate trust.

In the Bishop Estate case a special fact finder (the Fact Finder) was also appointed. On May 14, 1997, Kamehameha Schools Bishop Estate's General Counsel, Nathan Aipa, first inquired as to the availability of Judge Patrick K.S.L. Yim to serve as the Fact Finder.[32] On May 14, 1997, the trustees filed a Petition for Instructions. This was granted on July 10, 1997.[33] Upon receiving a copy of the Court's

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[28] *Id.* at 8.
[29] *Id.*
[30] Rick Daysog, *Master: Estate shorted schools*, HONOLULU STAR-BULLETIN, September 30, 1998, available at http://starbulletin.com/98/09/30/news/story1.html.
[31] *Id.*
[32] *Final Report of Bishop Estate Fact Finder Judge Patrick K.S.L. Yim*, Honolulu Star-Bulletin, Dec. 19, 1997, at 2.
[33] *Id.*

appointing order, the Fact Finder immediately began to develop a strategy to address his assignment, arrange for a site at which to headquarter his activities, conduct the fact finding process, and to address personnel and logistical needs.[34] The Fact Finder was authorized and empowered by the court order:

- to inquire of and meet with any person or group of persons who have or may claim to have relevant information concerning the Controversy, including, but not limited to, trustees, retired trustees, staff, employees, parents, students, alumni, teachers, retired teachers, administrators, retired administrators, friends and supporters of the Kamehameha Schools;[35]
- to receive statements, testimony and information from witnesses with such assurances to them of confidentiality as he reasonably deems appropriate;[36]
- to establish and make known such rules and procedures for the receipt of information from witnesses as he reasonably deems appropriate;[37]
- to maintain a dedicated post office box address, facsimile machine and telephone if he deems it appropriate to do so;[38]
- to meet at the Kamehameha Schools or elsewhere in the State of Hawaii with witnesses;[39]
- to meet with such witnesses as may be absent from the State of Hawaii in such circumstances, at such times and in such manner as he reasonably deems appropriate;[40]
- to retain the services of such independent professionals as the Fact Finder reasonably shall deem necessary or appropriate to assist him;[41]
- to retain the services or otherwise to involve national educational and scholastic accrediting services, institutes or associations as he reasonably deems appropriate.[42]

The authority given to the Fact Finder in the Bishop Estate case clearly was appropriately broad given the amount of assets and

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[34] *Id.*
[35] *Id.* at 5.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 6.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

individuals encompassed in the workings of the trust. In contrast, where a powerless trust beneficiary complains to a court, the appointment of a fact finder or a special master by the court rarely happens, even though such appointments can promptly and inexpensively settle reasonable questions raised by a powerless beneficiary involved in a simple case.[43]

IV. COURTS CAN ACT ON THEIR OWN MOTION

As seen above, courts acting on their own motion can aid complaining trust beneficiaries and will not hesitate to do so in cases where the dollars involved are large. Is our rule of law to be that help from courts will only be offered to wealthy litigants? The authors argue that where the circumstances are appropriate, court action should be taken even if a relatively small amount is involved.[44] The question still open in many jurisdictions is whether powerless trust beneficiaries are able, in a simple case, to receive help from a court in order to settle their concerns regarding actions of the trustee before taking steps to begin formal court litigation.

V. RESPONSES TO QUESTIONNAIRE

In order to attempt to understand the extent to which courts with appropriate jurisdiction are willing to appoint special masters or special fact finders in cases involving trusts and proper trustee performance, the authors created a questionnaire which was sent to the clerks of state courts.[45]

Responses to the questionnaire make it clear that powerless trust beneficiaries rarely gain the advantages that the beneficiaries of the

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[43] The Bishop Estate beneficiaries also had the assistance of state Attorney General Margery Bronster, who launched a full separate investigation of the matter. *Bronster Releases Preliminary Report,* Honolulu Star-Bulletin, Sept. 10, 1997, at 5.

[44] Richard Kiger, Master in Chancery, State of Delaware, in a letter addressed to the authors of this article, on November 2, 1998, pointed out that the attorney general's office is regularly involved in small cases of consumer fraud.

[45] The questionnaire was sent to the court clerks of each state. It posed four questions: (1) Are there any procedures for a court to act on behalf of its own motion? (2) If there are procedures for a court to act on behalf of its own motion, does it appoint a fact finder or a special master? (3) How can beneficiaries learn of the possibility of a court acting on its own motion? and (4) Are there any provisions made by the court or by the state to help individuals who cannot afford an attorney to provide competent representation in court on behalf of a complaining beneficiary?

Bishop Estate received. Responses to the questionnaire were received from eighteen clerks.[46]

Only in South Carolina, Delaware, Tennessee, New Jersey and Hawaii did clerks say that they knew that their courts had the power to make appointments of special masters and/or special fact finders on the court's own motion. The other respondents were unaware of such power.

For example, the clerk of the Maine courts responded, "I doubt that any other state has a situation analogous to that of Hawaii and the Bishop Estate."[47] Alexander Cummings, the clerk of the Maryland courts, wrote, "In nearly sixteen years with the Court, I have not encountered situations described in your letter in which the Court has acted on its own motion to consider the rights of trust beneficiaries."

Responses from clerks of four states--New Jersey, Hawaii, South Carolina and Delaware--indicated their courts did appoint fact finders for cases. Specific instances regarding the courts' appointment of fact finders were not given.

Richard Kiger, the Master in Chancery of the State of Delaware, wrote:

> A court may act *sua sponte* in a number of ways. For example, it is always appropriate for the court to dismiss a case *sua sponte* if it determines there is a lack of jurisdiction.
>
> There are also times when a court may decide that a case may best be handled in an innovative fashion. One such approach might be to appoint a special master to serve as a fact finder. The special master may be referred to by that title, or perhaps some other title such as referee. The submission will present her findings to the appointing court. It may also discuss points of law and propose a resolution, if the order of appointment so requires.

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[46] Responses were received from Alaska, Arizona, Delaware, Hawaii, Illinois, Indiana, Maine, Maryland, New Jersey, New York, South Carolina, Tennessee, and West Virginia. Other questionnaires were returned without answers to the questions posed, or were sent back without any information. Ten responses were received by mail and the rest by phone calls to Kumar Paturi.

[47] Undated response to questionnaire by James Chute, Clerk of the Law Court, Supreme Judicial Court, Portland, Maine.

> Generally speaking, I do not believe a court would make such an appointment from the Bar without first obtaining the concurrence of the parties before it, for the very simple reason that the person appointed is entitled to be paid, and payment very likely will have to come from the parties. If the person to be appointed is already a government employee, this consideration may not apply.
>
> My understanding of these matters is that it is appropriate to appoint a special master in those instances where a case is fact intensive and will require extensive amounts of time. In addition, at least in corporation law matters, there may be a wish to delegate the case in this fashion to a neutral party who is recognized as an expert in the field of law in question.
>
> Without speaking for anyone else, it is my view of these matters that a court has fairly wide discretion to act sua sponte and to do whatever it believes justice requires it to do to carry out its plan of action. This may be done by specific rules of court (for appointment of special masters and referees and trustees) or by exercise of the inherent power of the court to do what is necessary and permitted under the laws of the nation and of the particular state to render justice.

Daniel E. Shearhouse, Clerk of Court for South Carolina, stated that "Under S.C. Code Ann. §14-340 (1976), the Supreme Court may appoint a circuit court judge or a referee to take evidence and report thereon. This is occasionally done in cases that are brought in the original jurisdiction of the Court without first going through a trial court."[48]

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[48] Letter from Daniel Shearhouse, Clerk of Court, Supreme Court of South Carolina, to Kumar Paturi and Robert Whitman (Dec. 22, 1998) (on file with Professor Whitman). The letter included a copy of Rule 53 of the South Carolina Rules of Civil Procedure. Rule 53 states:

> **(a) Appointment and Compensation**. The court in which any action is pending may appoint a special master for that action; but where practicable the master appointed by statute for that county, or for that court, or for the particular type of action involved shall act. The court

A response from Stephen W. Townsend, the Clerk of the New Jersey Supreme Court indicated that broad court powers existed in New Jersey.[49] Reference was made to New Jersey Court Rule 4:26-2(b),[50] respecting appointments of guardians ad litem and 4:26-3, relating to virtual representation of future interests. Rule 4:41 et seq., deals with the appointment by the court of special masters. The New Jersey rules codify how compensation is to be made, [51] the powers of the master,[52]

> may in its discretion appoint as a special master a person agreed upon by the parties. Where the compensation for a master is not fixed by statute, the compensation to be allowed shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject-matter of the action, which is in the custody and control of the court, as the court may direct.
>
> **(b) Reference**. In an action where the parties consent or in a default case, any and all issues, whether of law or fact, may be referred to a master by order of a judge or the clerk of court. In actions to be tried before a jury, a reference shall be made only when the issues are complicated, and the findings of the master as to matters of fact shall be received as evidence only, in accordance with these rules. In all other actions the court may upon application of any party or upon its own motion direct a reference of all or any of the issues, whether of fact or law.

[49] Letter from Stephen W. Townsend, Clerk of the Court, Supreme Court of New Jersey to Kumar Paturi and Robert Whitman (Dec. 29, 1998) (on file with Professor Whitman). The letter also attached a copy of New Jersey Court Rule 4:26-2(b), respecting appointments of guardians ad litem and Rule 4:26-3, relating to virtual representation of future interest. Also attached was a copy of Rule 4:41 et seq., the rule governing the appointment by the court of special masters.

[50] New Jersey Court Rule 4:26-2(b)(2), Appointment on Petition, provides in relevant part: "In an action in which the fiduciary seeks to have the account settled or has a personal interest in the matter, the petition shall state whether or not the guardian ad *litem* therein nominated was proposed by the fiduciary or the fiduciary's attorney. Each petition shall be accompanied by the sworn consent of the proposed gaurdian *ad litem*, stating his or her relationship to the minor or alleged incompetent person and certifying that he or she has no interest in the litigation, or if such interest exists, setting forth the nature thereof, and that he or she will with undivided fidelity perform the duties of guardian *ad litem*, if appointed. The court shall appoint a guardian *ad litem* so proposed unless it finds good cause for not doing so, in which case it shall afford the petitioner opportunity to file a new petition seeking the appointment of another person within 10 days of the rejection."

[51] New Jersey Court Rules 4:41-2, Compensation, provides in relevant part: "The master's compensation shall be fixed by the court and charged upon such of the parties or paid out of any fund or property as the court directs."

[52] New Jersey Court Rule 4:41-3, Powers, provides in relevant part: **"**The order of reference may specify or limit the master's powers and may direct the master to

the proceedings,[53] and his final report.[54] Rule 4:41-1 states:

> The reference for the hearing of a matter by a judge of the Superior Court shall be made to a master only upon approval by the Assignment Judge, and then only when all parties consent or under extraordinary circumstances. The order of reference shall state whether the reference is consensual and, if not, shall recite the extraordinary circumstances justifying the referee.

What appears clear from the responses received from the questionnaire, is that the majority of the clerks of state courts in the United States are not aware of any inherent court power to appoint Special Masters and Fact Finders for powerless trust beneficiaries.[55]

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report only upon particular issues or to do particular acts or to receive and report evidence only. Subject to such specifications and limitations, the master has and shall exercise the power to regulate all proceedings in every hearing, to pass upon the admissibility of the evidence and to do all acts necessary or proper for the efficient performance of the duties directed by the order. The master may require the production of testimonial and documentary evidence upon all matters within the scope of the reference and shall have authority to put witnesses on oath and call the parties to the action and examine them on oath."

[53] New Jersey Court Rule 4:41-4, Proceedings, and 4:41-4(a), Meetings, provide in relevant part: "Upon the entry of an order of reference the court shall forthwith transmit a copy thereof to the master who shall, unless the order otherwise provides, forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 10 days after the date of the order and notify the parties or their attorneys thereof. The hearings shall thereafter be held continuously on all regular court days unless otherwise ordered by the court due to unusual circumstances stated at length in the order." New Jersey Court Rule 4:41-4(b), Witnesses, provides: "The parties may compel the attendance of witnesses before the master by the issuance and service of subpoenas as provided by R. 1:9."

[54] New Jersey Court Rule 4:41-5, Report, provides: "(a) Contents and Filing. The master shall prepare a report upon the matters submitted including any findings of fact and conclusions of law required by the order. The master shall file the report with the court within 10 days after the conclusion of the hearings, unless the court extends the time within such 10-day period by order reciting the unusual circumstances requiring such extensions. The court shall forthwith notify all parties by mail of the filing of the report. Unless otherwise ordered, the master shall file the original transcript of the proceedings and the original exhibits with the deputy clerk of the Superior Court in the county where the case is to be tried.

[55] Questionnaire responses from: Alaska, Arizona, Illinois, Indiana, Maine, Maryland, New York, and West Virginia.

VI. FOREIGN JURISDICTIONS

Powerless trust beneficiaries in other countries face similar problems to those faced in the United States. According to Terry Harris, a barrister and solicitor of the High Court of New Zealand, no court is designated a "probate court." Rather, claims are normally dealt with by the Family Court, a division of the District Court. The judges of this court must be lawyers of at least seven years experience and after nomination by their local law society, must be approved and appointed by the Minister of Justice for New Zealand. Judges of the Family Court work full-time in the position, get paid close to $200,000 a year with a handsome pension to compensate for the fact that they may become unemployable.

By contrast to Connecticut[56] and other states, in New Zealand it is not possible to contact a probate judge informally by telephone or in person in order to obtain some assistance. A judge in New Zealand will not speak to any party or any attorney in any medium without pleadings having already been filed and the other party and their attorney being also present. Great formality is practised so that a judge will not even see a file unless formal pleadings have been filed. Even the judge will concentrate on case-managing the file in a procedural sense until it is ready for a substantive hearing. When and only when the substantive hearing occurs (at which time the court will have had the opportunity to hear all of the evidence and the submissions of both sides) will the court provide its decision as to the questions at issue. Even in the case of a settlement or an arrangement entered into with the consent of all of the concerned parties, the court will not consider endorsing either unless formal pleadings have been previously filed.

The result of this procedure is that while a member of the public is permitted to present their own claim, they would be at a great

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[56] The Connecticut Probate Court system, a decentralized system, may be able to serve as a model for developing more effective systems in the United States. In Connecticut, a trust beneficiary can merely send the probate court a letter voicing a complaint against a trustee. If it appears to the court that the complaint might be meritorious, the probate judge will promptly resolve the problem. In a larger probate district a guardian *ad litem* might be appointed to investigate and report. In a smaller court the probate judge may simply order the fiduciary to appear in order to explain to the court what is happening and whether the beneficiary's report to the court is accurate. Where necessary, the court will remove the fiduciary on its own motion without the need for any formal litigation. *See* Conn. Gen. Stat. §45a-175; *see also* §§45a-98 through 45a-104, and 45a-199 through 45a-249 (2002).

disadvantage in not knowing how to draft the documents and negotiate the procedural minefield on the way to and at court.

There is some hope for a limited class of poor disgruntled claimants, however. Unlike in the United States, where Legal Aid offices do not deal with trusts and estates matters, in New Zealand the government provides a civil legal aid system which in some instances will fund a court challenge to a will or an action to censure or remove an executor. There are, however, a number of restrictions before access to such a scheme is available. The first is that you are only eligible to apply if your income is at a low level and your expenses are high (such as having dependents). The most successful applicants are those that already qualify to receive some form of government assistance or are in a low-paying job.

Lawyers may refer low-income clients to the legal aid committee of their geographical area. The committees are made up of experienced lawyers working voluntarily, who will then assess the possibility of success of the client's case. The referring lawyer is required to outline the claim to enable the committee to make such a decision.

The next difficulty is that it often takes a number of months to process the claim, and bills rendered often take a number of months to be paid. The committee will also stipulate the maximum fee and hourly rate to be charged, both of which are always well below the referring lawyer's normal fee. If the applicant has any assets such as a house or recovers money as a result of the claim, then any grant of aid is treated as a loan and will need to be repaid immediately upon receipt of funds or a lien will be placed on the applicant's real property. Being designated a "legal aid lawyer" in New Zealand carries the burden of protecting the legal aid committee's position as to repayment at all times.

As a result of the above complications, legal aid work in this field in New Zealand is largely done by inexperienced or not well-regarded lawyers who cannot provide the level of representation that a private, paying client can obtain.

VII. CONCLUSION

The Bishop Estate controversy illustrates the way the courts of Hawaii were able to effectively deal with trust beneficiary complaints in a case involving large sums of money. The case represents an example of efficient judicial administration in a high profile big money case. If our trust system is to continue to grow and become accepted globally, powerless complaining trust beneficiaries with relatively insignificant

assets must also receive court attention and, where appropriate, court help.

If, as suggested above, the court system presents an uneven playing field to complaining powerless trust beneficiaries, and if through litigation, costs are allowed to build up, delays are permitted, and questionable counterclaims can be used to overwhelm powerless trust beneficiaries, then trustees will enjoy short-term victories but, over the long-term, our trust system will falter.

Evidence of the need to fashion more informal court procedures and employ special masters and fact finders where appropriate exists. While unwanted court interference is counter-productive, where a complaining powerless trust beneficiary seeks help from the court, the inability to easily gain assistance from the court is equally detrimental to the health of our trust system.

Ideally, national uniform guidelines for court reaction to complaints of powerless trust beneficiaries should be created. In preparing Uniform Guidelines, attention will have to be paid to conserving court time, preventing unreasonable petitions from trust beneficiaries and funding the costs of special master or special fact finder appointments. It would seem reasonable to charge all costs personally to a trustee who is found to have improperly acted. Where a trustee is found to have been blameless, the beneficiary seeking the appointment of the master or fact finder should likewise face responsibility for all costs.

If costs can be charged against a trustee, or a trust beneficiary, depending on the independent findings made, the problem of uncooperative trustees might significantly diminish and complaining trust beneficiaries might think twice before requesting court assistance regarding questionable complaints.