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Prioritizing Legal Services for the Poor: A Difficult Task

By James T. Shearin and Steven Eppler–Epstein

About thirty-five years ago, the federal government started a program to provide basic civil legal assistance to low-income people throughout the country. The government recognized then what is still true now: low-income families and individuals cannot afford private legal assistance. These families must grapple with many life problems, which, without legal assistance, cannot be resolved.

The legal services equation is not simple. As of 1999, there were over 250,000 Connecticut residents living in poverty. There are only eighty-five legal services lawyers available to provide representation spread around eight local full-service offices, seven satellite offices, and a hotline service. Those lawyers can represent only one out of every five people asking for full representation (the others receive more limited assistance). As a result of this shortage of resources, legal aid agencies must prioritize the needs of low-income people and make triage decisions about what kind of help will be given in response to what kind of problems.

This article describes how Connecticut Legal Services, Inc. (CLS), Connecticut's largest legal services law firm, assesses the legal needs of the poverty population and decides which of those needs it will undertake to address. The other legal services providers use a similar process. See, "The Legal Services Network in Connecticut."

Weighing Areas of Need

Connecticut's poverty population consists of children and old people, disabled people and working people, people who were born poor, people who only recently have felt the pains of poverty, and people who are only passing through a difficult period in their lives. These differences matter because while there are common poverty problems, those problems manifest themselves differently over the spectrum of the poverty population. So, for example, it is not enough to define public housing as an issue; public housing issues confronting a disabled single poor person are different than those facing a working single mother raising a family of three.

The first step in setting priorities is to identify the broad range of legal needs that make claims on our resources. CLS staff and board members solicit the views of community leaders, government agency staff, social service agency staff and clients. We pay attention to studies and media reports about issues facing low-income people. We observe the

patterns of problems that poor people bring to us. We identify groups of people facing particularly hard challenges, such as victims of domestic violence, people moving from welfare to work, children at risk, families facing homelessness or elders victimized by fraudulent lending practices.

CLS asks where it can make the most difference: whether there are other agencies available to address particular problems, what bad consequences will flow from assigning a low priority to a particular set of needs, or what good consequences might come from assigning a high priority.

In assessing claims for help, CLS pays special attention to needs that cut across fields of practice:

- I The need of low-income families to find and keep jobs that enable them to make ends meet.

- I The need of domestic violence victims and their families for safety and stability.

- I The need of poor children for a better future.

- I The need of people with disabilities for a role in the workforce, for control over their lives, and for dignity.

- I The need of people who do not speak or read English for help to access their rights in our English language legal system.

CLS also pays special attention to legal problems concerning survival needs—the need for food, shelter, medical care and safety. Most of legal services' work seeks to protect the rights of low-income people in ways which will help them meet such basic needs.

In setting priorities, CLS also thinks about what modes of assistance are appropriate to meet particular needs. Options include:

- I Educating and counseling people regarding how to access rights only accessible if they know how the system works.

- I Representing people one by one in cases, *e.g.*, cases to protect housing rights, to obtain necessary government assistance in the face of bureaucratic error, or to find freedom from an abusive spouse.

- I Representing groups of people when doing so produces efficiencies—which allows us to do more with less.

Efficiency is a key factor. There aren't many legal services lawyers when compared to the need. The situation would, in fact, be worse were it not for the significant pool of talented lawyers willing to work for legal services at substantially reduced salaries. Legal services lawyers are a particular breed of altruists, whose passion for justice overrides their interest in pecuniary gain.

Comments, Pluralism and Opposition

The final step in the legal services priority-setting process is the presentation of a plan to funders and friends for general comment. This step is important because the legal services community constantly strives to remain connected to the general society's notions of justice. But integrating public comment in priority setting is also a difficult step.

One challenge could be called pluralism: many of legal services' friends have a particular interest in a specific population or set of issues: the elderly, children, battered women, the disabled, homelessness, special education, those leaving welfare for work. The board and staff of legal services must take comments from these important viewpoints and integrate them into a general plan of action and resource-sharing.

A second difficulty in integrating public comment is that, unlike most charities, legal services has opponents in almost every case. Someone's ox is always getting gored; that's the nature of legal work. So the legal services community and its supporters must on occasion politely refuse to back off from their commitment to stand up for the legal rights of low-income families and individuals.

No Final Decisions

The needs of low-income people change constantly. The legal environment in which they live changes constantly. And so, there are no "final" determinations of legal services priorities. Evaluation is ongoing, and every few years, priorities and the system of triage are subject to a thorough review.

While CLS' current priorities are too long to reprint here, they focus on:

- I domestic violence and family law
- I housing and homelessness
- I public benefits, medical care, child care, and the needs of new and very low-income workers
- I the needs of disabled children and their families
- I the needs of disabled adults
- I the needs of the elderly

This is an ambitious agenda, but a necessary one in light of the problems facing CLS's poverty population. CL

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The Legal Services Network in Connecticut The Network

The legal services programs in Connecticut are a group of nonprofit organizations which provide legal assistance in civil matters to low-income persons. Services are free. Eligibility depends upon income, family size, assets and legal issue.

Working Together

The programs work together to advocate on a variety of issues for (and with) people who are low income. In addition to individual legal advice and representation, the legal services programs help clients, community groups, and providers through free trainings, pamphlets and other information.

How to Get Assistance

Generally, applicants should call Statewide Legal Services first to find out if they qualify for services. Call (800)453-3320 or (860)344-0380 between 9:00 a.m. and 3:00 p.m. (Monday through Friday). The following persons should call the legal services office closest to them:

- | Elder applicants (60 years and older)

- | Staff from social service or government agencies

For more information on which legal services program covers your area, see <http://www.larcc.org/common/network.htm> or call Statewide Legal Services.

The legal services system includes the following five programs: Statewide Legal Services

SLS is available by phone to clients throughout Connecticut. Generally, SLS is the entry point for accessing legal assistance. SLS may provide advice over the phone, mail information, or refer clients to a legal services office or private attorney at no cost to the client. Call (800)453-3320 or (860)344-0380 or e-mail mail@SLSCT.org.

Connecticut Legal Services, Inc.

CLS provides legal representation to low-income persons throughout the state, except those living in the greater Hartford or New Haven areas. Call (860)344-0447x100 or e-mail CLS@ConnLegalServices.org.

Greater Hartford Legal Assistance

GHLA provides legal representation to low-income persons who live in the greater Hartford area. Call (860)541-5000 or e-mail GHLA@GHLA.org.

New Haven Legal Assistance Association

LAA provides legal services to low-income persons in the greater New Haven and lower Naugatuck Valley areas. Call (203)946-4811 or e-mail mail@NHLegal.org.

Legal Assistance Resource Center of Connecticut

LARCC coordinates publications, policy advocacy and staff training for the legal services programs. In addition, LARCC sponsors the Connecticut Alliance for Basic Human Needs (CABHN), a statewide advocacy network. CABHN publishes a free monthly newsletter and conducts community outreach and education. Call (860)278-5688 or e-mail mail@LARCC.org.

How to Help Legal Services

Financial Help

The legal services programs hope that all lawyers in Connecticut will support their annual fund drives. Private attorney donations are an essential component of funding for legal services for low-income families and individuals in Connecticut.

To make a financial contribution, contact one of the legal services programs listed in "The Legal Services Network in Connecticut."

Increase IOLTA Revenues

The legal services programs depend heavily on the Interest On Lawyer's Trust Accounts (IOLTA) program, which provides over half of their funding. Provide important help to the legal services agencies at no cost to your firm by taking steps to increase the rate of return being paid on your trust account.

- 1)
Talk to your bank about whether it would pay higher IOLTA rates on your trust account. (E-mail CLS@ConnLegalServices.org if you'd like a bank-by-bank list of IOLTA interest rates.)
- 2)
Ask your bank whether it charges fees against IOLTA—and if it does, whether it would waive or reduce these fees.
- 3)
If you're not satisfied with your bank's response, think about moving your trust account to a bank paying a higher rate of return.

Pro Bono Lawyer Opportunities

Pro Bono Lawyers help over 1,000 low-income individuals and families in Connecticut each year. To volunteer, contact Dolores Grillo at *The Law Works For People*, operated by the Connecticut Bar Association, at (860)612-2003.

Other Volunteer Opportunities

Many people—not only lawyers and law students—have helped legal services staff provide direct legal services to low-income households and individuals. To find out more about

what volunteer opportunities are available near you, contact one of the legal services programs listed in "The Legal Services Network in Connecticut."

Spread the Word

Funding for the legal services programs depends on support from state and local government, the federal government, and United Ways and other private charities. It's an enormous help to the legal services programs in retaining and improving funding if the decision makers in government and at private charities have heard regularly from local lawyers about the importance of civil legal help for low-income families and individuals.

The Uniform Trust Code: Establishing Clear Rules on Trust Law

By Suzanne B. Walsh

The General Assembly has a tremendous opportunity to establish clear rules on trust law by enacting the Connecticut Uniform Trust Code in the 2003 regular legislative session that began last month. The proposed Connecticut UTC would provide certainty for many substantive and administrative issues involving trusts and would give corporate fiduciaries a consistent framework for administering trusts in various jurisdictions.

Essentially, the Connecticut Uniform Trust Code would establish clear rules on trust law by codifying the common law and filling in the gaps that exist between the statutes and reported cases. All attorneys, particularly general practitioners, would benefit from the clarity and precision it would provide in a readily available source. And, as with all uniform laws, practitioners and judges in enacting jurisdictions would be able to rely upon appellate decisions in other states, greatly reducing the time and expense that would be required to address the issues anew.

By way of background, the proposed Connecticut Uniform Trust Code is based upon the model Uniform Trust Code (UTC) that was approved by the National Conference of Commissioners on Uniform State Laws in August, 2000. It was drafted to provide the states with a comprehensive model for codifying their law on trusts.

A subcommittee consisting of experienced estates and probate law practitioners in Connecticut spent several years thoroughly reviewing and conforming the UTC to Connecticut probate law and practice. Working in conjunction with family and elder law practitioners, probate court judges, representatives of bank trust departments and financial institutions, the subcommittee addressed numerous policy considerations and developed legislation that has broad, diverse support.

The UTC covers most topics relating to trusts. Structurally, the proposed legislation is organized into eleven articles. (Two UTC Articles have already been enacted in Connecticut: Article 3, Virtual Representation, which is in Public Act 01-69, and Article 9, the Uniform Prudent Investor Act, which is at C.G.S. §§ 45a-541 to 5411 and is *not* being merged into the UTC for logistical reasons.)

Default and Mandatory Rules

Most of American trust law consists of rules that may be overridden by the settlor of the trust. The UTC changes this by compiling the principles of law that the settlor cannot control or waive. These mandatory rules are now in Article 1 of the UTC.

Notice Requirements

Absent an overriding provision in the trust, the UTC generally requires trustees, in Section 813, to keep trust beneficiaries reasonably informed about the trust's administration. Section 105(b) identifies notice provisions (known as nonmandatory or default provisions) that may be waived by the settlor in the trust instrument. However, certain notice provisions are mandatory and nonwaivable. Thus, both sections must be read together to determine whether a UTC-imposed notice obligation exists in a given situation, or whether it may be waived in the instrument.

Most of the notice provisions in the proposed Connecticut UTC are waivable or nonmandatory, with important exceptions. For example, for public policy reasons, a revocable trust that has become irrevocable as a result of its settlor's death is treated as, and subject to the same standards as, a testamentary trust.

Finality of Trustee's Actions

A trustee who requests and receives judicial approval of a trustee's report forecloses claims by beneficiaries who receive notice of the hearing. Of course, the beneficiaries have a thirty-day period in which to appeal a probate court's approval of a trustee's report.

Article 8 of the UTC also provides that upon termination or partial termination of an *inter vivos* trust, its trustee may send a proposal for distribution to the trust's beneficiaries. If a beneficiary does not object within thirty days (and the trustee informed the beneficiary of the right and time allowed to object), the beneficiary's right to object to the trustee's distribution proposal terminates. Finally, trustees wishing to distribute the assets of terminating trusts may do so before the limitations period on contests expires, without liability, after sending notice to the qualified beneficiaries.

Modification and Termination

Long-term trusts are becoming more common; and the problems associated with trusts drafted many years ago are becoming more apparent. New rules are needed to allow for a trust's termination or modification, even if neither one is provided in the trust instrument itself. The UTC provides increased flexibility without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent. The UTC permits modification and termination of a trust, with court approval required in most cases.

Revocable Trusts

Article 6 of the UTC is entirely devoted to revocable (or living) trusts. The revocable trust is often used as a substitute for a will. The UTC generally treats the revocable trust as the functional equivalent of a will, at least while the settlor is alive.

Article 6 would significantly improve Connecticut law by clarifying several issues regarding revocable trusts. First, it reverses the common law presumption that trusts are irrevocable,

by providing that a trust is revocable unless the terms of the trust expressly provide that the trust is irrevocable. Second, the capacity required of the settlor for creating a trust is made the same as that for a will. While the settlor has capacity, all of the rights of the beneficiaries are controlled exclusively by the settlor. Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and the settlor is authorized to give binding consents on a beneficiary's behalf. Access to the trust document is also within the settlor's control.

Connecticut currently has no limitation period on contests of a revocable trust. Section 604 (a) gives a potential contestant the earlier of 150 days following receipt of a notice or two years following the settlor's death to file a contest. To encourage expeditious distribution of trust assets, a trustee who has not been notified that a contest has or will be filed is absolved from liability for making distributions before the contest period has expired, after the trustee so notifies the qualified beneficiaries.

Spendthrift Provisions, Discretionary Trusts and Creditors' Claims

A spendthrift provision prohibits a beneficiary's creditor from attaching the beneficiary's interest in a trust, until the trustee actually distributes assets to the beneficiary, thereby preserving the trust for the beneficiary. Even with that "spendthrift" protection, the creditor or assignee may make a claim when a distribution is made from a trust. The utility of spendthrift provisions is limited in Connecticut. Under C.G.S. § 52-321, protection from creditors is obtained only with a discretionary trust where income is expressly given for the beneficiary or for the family's support.

In summary, the UTC rules on creditors' rights and spendthrift protection, are:

- a. A trust instrument must expressly state that the trust is a spendthrift trust for spendthrift protection to apply to the trust.
- b. A restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary's interest.
- c. A settlor cannot create a trust, retain a beneficial interest, yet deny the settlor's creditors the right to reach the trust. Consequently, the UTC rejects the approach taken in the asset protection legislation enacted in Alaska and Delaware and, more recently, Rhode Island and Nevada. A creditor of the settlor may attach the corpus of a self-settled revocable trust or the amount that can be distributed to the settlor out of an irrevocable trust.
- d. A beneficiary's interest in a spendthrift trust created by a third party can still be attached by a spouse, former spouse or a child holding an enforceable court order. However, if the beneficiary's interest in a trust is discretionary, the child, spouse or former spouse can collect only to the extent the trustee has abused its discretion. Therefore, if the trustee has absolute discretion to withhold distributions to the beneficiary for any reason, a child, spouse or former spouse may be barred from collecting from the trust. Creditors without special status are not allowed to collect from a discretionary trust.

The UTC does not change existing law on whether and to what extent the government can pierce a trust to collect for the costs of institutionalized care.

The proposed Connecticut UTC contains a simplified procedure for claims made against revocable trusts at the settlor's death. It also incorporates the provisions of C.G.S. § 45a-365 concerning the order of payment (or abatement) of claims, expenses and taxes. While these simplified claims procedures will be sufficient in many cases, trustees dealing with contested claims or a potentially insolvent estate or trust will want to open a probate proceeding in order to use the more comprehensive claims law that is available for estates.

Nonjudicial Settlements

The UTC's nonjudicial settlement provision allows parties to enter into a settlement agreement concerning any matter involving an *inter vivos* trust, except where court approval is required to modify or terminate an irrevocable trust. The settlement agreement may contain any term or condition that a court could properly approve. Among the issues that can be resolved by a nonjudicial settlement agreement are: the interpretation or construction of the terms of the trust; approval of a trustee's report or accounting; direction to a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; resignation or appointment of a trustee and determination of a trustee's compensation; transfer of a trust's principal place of administration; and liability of a trustee for an action relating to the trust.

Charitable Trusts

The UTC liberalizes the doctrine of *cy pres* in a way more likely to carry out the typical settlor's intent. First, Section 413(a) expands the opportunities for the court to apply *cy pres*. (The *cy pres* doctrine allows a court, under its equitable powers, to construe a trust instrument to meet the settlor's intent.) Under Section 412(b), the court may apply *cy pres* not only if the original plan becomes impossible or unlawful, but also if it becomes impracticable or wasteful. Second, the UTC creates a presumption in favor of general charitable intent. In applying *cy pres*, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide.

Animal Trusts (Section 408)

Presently, trusts for animals are simply honorary, because animal beneficiaries cannot enforce them. The UTC validates animal trusts, by allowing the settlor or a court to appoint a person to enforce the trust. The trust may benefit only an animal or animals that are alive or in gestation at the settlor's death.

Trustees

The UTC provides rules relating to a change in trustee, where the trust instrument fails to anticipate and address a particular circumstance, such as the appointment of successor trustees, resignation and removal, and delegation among co-trustees.

Duties and Powers of Trustee

The basic duties of a trustee are found in Article 8, although many are already part of the Connecticut Uniform Prudent Investor Act (C.G.S. §§ 45a-541, *et seq.*). Among the basic duties is the duty of loyalty. The proposed Connecticut UTC contains a list of transactions that are deemed to be appropriate and are not affected by a conflict of interest. These rules will help corporate fiduciaries doing business with affiliates, which often occurs in the modern business environment.

Article 8 contains a specific list of powers, including coverage of such topics as authority to manage environmental hazards. It supplements, but does not replace, Connecticut's existing Fiduciary Powers Act, found in C.G.S. §§ 45a-434 and 45a-235.

Remedies and Limitations on Liability

The UTC contains comprehensive remedies for breach of trust. The measure of damages for breach of trust is designed to restore the beneficiaries to the position they would have been in had the breach not occurred. But it also serves the purpose of preventing the trustee from profiting from the breach. Consequently, the trustee is liable for the greater of the profit made by the trustee or harm caused to the beneficiaries. Also provided are a series of nonmonetary remedies, including recovery of trust assets misappropriated by a trustee. Unlike the model UTC, the proposed Connecticut UTC does not change the American rule that each litigant bears the cost of his or her own fees in lawsuits involving trusts.

The UTC contains a series of provisions limiting a trustee's exposure to liability. After a trustee provides the annual or other report, a beneficiary must commence an action for breach of trust within one year if the report adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time limit. A beneficiary who has consented to a trustee's action is also precluded from suing for breach of trust unless the trustee's improper conduct caused the beneficiary to consent or the beneficiary was unaware of the beneficiary's rights or the material facts. In addition, a settlor may absolve a trustee from potential liability in some circumstances. Further, to protect the privacy of the trust, the UTC authorizes trustees to provide, and permits third persons to rely on, written certifications by the trustee concerning his or her authority. The trustee need not provide the third person with a complete copy of the trust instrument

Effective date

In general, the proposed Connecticut UTC will apply to all trusts, including those created and funded prior to the effective date. In fairness to settlors, some of whom created and funded irrevocable trusts based on existing law, some of the proposed Connecticut UTC rules and provisions that would change that law will be prospective.

Conclusion

The UTC has already been enacted in Iowa and Kansas and is being studied in approximately thirty other states, with enactment expected this year in several of those. The result of numerous enactments will be one uniform approach to trust law in the United States. CL

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Trust Litigation under the UTC

If approved, the UTC will bring two dramatic changes to trust litigation in the probate courts of Connecticut: expanded jurisdiction and broader remedies. In addition, the UTC will clarify the liabilities of a trustee.

The probate courts will have exclusive jurisdiction over all "administrative matters" regarding trusts (Section 203(a)). That means issues of relations among the trustees and beneficiaries must be heard in the first instance in the probate courts. For example, disputes over trustee compensation, distributions, investments and accountings, will be part of the exclusive jurisdiction of the probate courts. As to all other proceedings, the probate courts will have concurrent jurisdiction with the superior courts, thus giving the party initiating a proceeding the option of which court system to use. Therefore, a party suing the trustee under a contract, or a tort claim by a person injured on trust property, could be commenced either in the probate court or in any other court of competent jurisdiction.

The UTC also will clarify venue for proceedings, providing a ranking of criteria to determine what probate court district shall hear a matter regarding a trust (Section 204). The first of those criteria is the "principal place of administration" of the trust, a new concept under the UTC by which the trustee may choose where the trust is situated.

The broader remedies available under the UTC are set out in Sections 1001–03. They will allow every form of relief that would be available in the superior court for actions under the common law, including several specific forms of equitable relief. Depending on the final form of the legislation, this will bring about significant change in the probate courts, since at present probate courts are quite limited in the relief they may grant.

The UTC also addresses the liability of trustees. It allows for limited exculpatory clauses so long as they are not inserted by abuse, and gives effect to releases by beneficiaries when given knowingly and without improper inducement by the trustee (Section 1007). The UTC protects a trustee from personal liability under a contract entered into in his or her fiduciary capacity (Section 1009), while also protecting third parties' expectations when they deal in good faith with a trustee, not knowing that the trustee is exceeding his or her authority (Section 1011). Finally, the UTC establishes statutes of limitations for beneficiary claims against trustees (Section 1004). It provides a one-year limitation period when the beneficiary receives a report disclosing the claim and informing the beneficiary of the one-year limitation period. Absent such a report, the limitation period is six years from the termination of the trustee's fiduciary relationship with the beneficiary.

Timothy S. Fisher

