<u>Title</u>

The limited shelf lives of such trust-law partial codifications as the uniform principal and income acts

<u>Text</u>

Guido Calabresi in *A Common Law for the Age of Statutes* (1982) asserts that the "slow, unsystematic and organic quality of common law change made it clearly unsuitable to many legal demands of the welfare state. At the same time, the speed which perceived economic crises have followed upon economic crises has brought forth legislative responses even in areas where the common law might have been capable of making the necessary adjustments." The unintended consequence of this "orgy of statute making" is "legal obsolescence," the result of a statute being "hard to revise once it is passed." Thus, "laws are governing that would not and could not be enacted today, and that *some* of these laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape." Calabresi recommends treating "statutes as if they were no more and no less than the common law." Courts should be empowered to either tweak a statute as appropriate in light of changed circumstances or force legislatures to step up and rescue obsolete statutes from being judicially euthanized. So much for the legislative process being nimble. The common law as enhanced by equity to the rescue. In Calabresi's book, however, there is nothing about the law of trusts. One can see why.

In the case of an ostensibly obsolete statute regulating some aspect of the trust relationship, legislative promiscuity, not legislative reticence, is what is complicating and muddling the jurisprudence. Recall that the trust relationship is a principles-based invention of equity, not statute. Take the critical duty of a trustee to properly allocate/apportion receipts between income and principal, and the related duty to properly allocate/apportion the burden of the trust estate's financial obligations. Before the "age of statutes," principals-based custom and practice, as clarified or supplemented by the occasional judicial decision, generally sufficed. *See, e.g*., Minot v. Paine, 99 Mass. 101 (1868). But now, almost every state (U.S.) has enacted its version of one of the Uniform Law Commission's (ULC's) four model principal and income statutes. So much for jurisprudential uniformity and simplification. First, there was the Uniform Principal and Income Act (1931). Then the Revised Uniform Principal and Income Act (1962). Then, the Uniform Principal and Income Act (1997). The 1997 Act purported to break new ground. It

allowed trustees authorized and inclined to pursue total return investment strategies to make appropriate reallocations or adjustments between the income and principal accounts in furtherance of these strategies, provided three conditions were met: "(1) The trustee in carrying out the duty to invest is regulated by the prudent investor rule; (2) the terms of the trust call for mandatory payments of net trust accounting income, and (3) the trustee is unable to comply with the duty to administer the trust impartially without making adjustments between the income and principal accounts." Now comes the Uniform Fiduciary Income and Principal Act (2018). It would authorize the trustee to adjust if the trustee determines that doing so will *assist* the fiduciary in administering the trust impartially. This "standard of assistance" is intended as a "relaxation" of the "standard of impossibility" that had been imposed by the 1997 Act.

It remains to be seen what the shelf life will be of a principal and income statute tailored to facilitate implementation by trustees of a particular investment strategy, one that happened to be in vogue when the statute was on the drawing board. In any case, that the 3rd trust restatement and ULC's 4th principal and income act are not always in accord suggests that the orgy of statute-making in the trust space has by no means run its course. See §6.2.4 of *Loring and Rounds: A Trustee's Handbook* (2024). The relevant portion of the section is reproduced in the appendix below.

Appendix

§6.2.4 *Duty to Separate Income from Principal and the Right to Income* [from *Loring and Rounds: A Trustee's Handbook* (2024)].

***

The Restatement (Third) of Trusts, specifically §111, would impose an *affirmative* duty on the trustee to exercise a statutory adjustment power (or statutory unitrust election) if such an exercise would enable the trustee to better carry out his duty of impartiality to the various classes of beneficiary, assuming under the particular trust there are various classes and he has such a duty of impartiality. The Uniform Fiduciary Income and Principal Act is not in accord.[532] Absent such statutory authority, the Restatement provides that the trustee nonetheless would have what amounts to a common law/equitable duty to equitably adjust the income and principal accounts as appropriate. Section 111 has no counterpart in the Restatement (Second) of Trusts. Here is the official rationale for breaking all this new doctrinal ground:

---

[532]*See* UFIPA §203(b) ("This section does not create a duty to exercise or consider the power to adjust under subsection (a) or to inform a beneficiary about the applicability of this section.").

> It is normally advantageous to beneficiaries collectively and therefore prudent for the trustee to seek a total return that is optimal in light of the trust's purposes and circumstances, especially the risk tolerance of the trust and its beneficiaries. But a significant aspect of the duty of impartiality in many trusts is the requirement … of suitable income productivity. The ideal way of reconciling these potentially conflicting responsibilities … is to invest for optimal total return and, if necessary, to adjust principal and income … or to make a unitrust election … in order to achieve an appropriate level of income productivity.[533]

In other words, this is all about fashioning a trust accounting regime that can comfortably accommodate the prudent investor rule: "The 'prudent investor rule' *encourages* trustees to invest for optimal total return (i.e., to make a reasonable effort to invest the highest total return that is suitable to the trust's purposes and the circumstances of the trust and its beneficiaries, especially risk tolerance)."[534] Time will tell whether a regime of trust accounting that is so profoundly total-return focused is capable of comfortably adapting to the ongoing and inexorable evolution in trust-investment doctrine.[535]

English sources. For a discussion of the English rules governing the allocation and apportionment of capital (principal) and income receipts, the reader is referred to chapter 25 of Lewin on Trusts. Also addressed in the chapter are the rules pertaining to the allocation and apportionment of trust expenses.

***

---

[533]Rest. (Third) of Trusts §111 cmt. a.

[534]Rest. (Third) of Trusts, Ch. 23, Introductory Note (accounting for principal and income) (emphasis added).

[535]*See generally* §6.2.2.1 of this handbook (whether the prudent investor rule is already passing into obsolescence).