Title

Uniform Trust Code (UTC) and Uniform Voidable Transactions Act (UVTA) could be better coordinated in the Domestic Asset Protection Trust (DAPT) space

Text

In a Sept. 11, 2023 JDSUPRA posting I questioned the doctrinal and practical utility of partial legislative codifications of equity's principles-based jurisprudence, such as the UTC, the very institution of the trust being a creature not of the legislature but of the judiciary. See https://www.jdsupra.com/legalnews/to-parse-or-not-to-parse-the-uniform-tru-28235/. Nor is it particularly helpful that trust-law partial codifications in general tend to have limited shelf lives. See my Sept. 24, 2023 JDSUPRA posting https://www.jdsupra.com/legalnews/the-limited-shelf-lives-of-such-trust-la-46283/. In Chapter 1 of *Loring and Rounds: A Trustee's Handbook* (2024) we explain how trust-law partial codifications have perversely become instruments of doctrinal disuniformity. For the relevant portions of the chapter, see appendix below. In this posting, I consider the confusion being engendered by the absence of adequate textual coordination between the UTC and another codification, namely the UVTA. Specifically, UTC § 403 and UVTA §§ 4 & 10 are in apparent conflict.

UTC § 403 provides that "a trust created not by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) *a trustee* was domiciled or had a place of business; or (3) any trust property was located."

UVTA § 4 provides that "a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation…with actual intent to hinder, delay, or defraud any creditor of the debtor…" A property transfer within, or out of, a non-DAPT state to the trustee of a trust under which there has been a reserved beneficial interest would be captured by § 4, as per its official commentary. UVTA § 10 provides that a claim for relief in the nature of a claim for relief under the UVTA "is governed by the local law of the jurisdiction in which the *debtor* is located when the transfer is made or the obligation is incurred."

The textual conflict's practical relevance is in the DAPT context. So first a DAPT primer: Since time immemorial it has been a bedrock principle of law and equity that one may not impress a trust on one's own property for one's own benefit and in so doing deprive one's creditors of access to that property. See generally §5.3.3.1 of *Loring and Rounds: A Trustee's Handbook* (2024). Even in the face of a spendthrift clause and/or distributions being subject to exclusive discretion in the trustee, the maximum amount that *could* be distributed to or for the benefit of the settlor is accessible to the settlor's creditors immediately and going forward. This is the case whether or not the entrustment was fraudulent, and whether or not the trust is revocable. In 1987, however, Alaska, via a state-specific piece of legislation, authorized the establishment and administration within its borders of domestic asset protection trusts. A DAPT is a type of trust the underlying property of which is insulated by statute from the reach of the settlor's creditors,

notwithstanding the fact that the settlor is the initial and primary beneficiary. In other words, by statute a DAPT's spendthrift provision is enforceable against the settlor's future creditors. Even in a DAPT jurisdiction, however, a DAPT may not be funded via a conveyance that unlawfully harms the economic interest of the settlor's pre-existing creditors. For a survey of fraudulent-conveyance/transfer doctrine in the trust context, see §8.15.99 of the handbook. Following Alaska's lead, a number of the states, but by no means all of them, have gotten into the DAPT business. Let's call them DAPT states. Those states that have yet to get into the DAPT business we will call non-DAPT states.

Now to the textual conflict between the UTC and the UVTA. Assume a property owner is domiciled in a non-DAPT state that has enacted both the UTC and the UVTA. He endeavors to insulate his property from the reach of his future creditors by transferring the property to a trustee who is domiciled in a DAPT state. The trust is initially for the settlor's own benefit. The spendthrift clause purports to insulate the property from the reach of the settlor's future creditors. In other words, it is intended as a garden-variety DAPT. UTC § 403 provides that the trust has been validly created and that its spendthrift clause is, in fact, enforceable against the settlor's future creditors. Why? Because the *trustee* is domiciled in a DAPT state and because UTC § 403 regulates the property-transfer process as well as the trust-creation process. In other words, UTC § 403 "applies to the entire process of a trust creation." See UTC § 403, cmt.

The UVTA, on the other hand, provides that the out-of-state trust is voidable, that it is not a true DAPT. It is the fraudulent-conveyance law of the *debtor's* domicile, which in our fact pattern is a non-DAPT state, that governs whether the transfer-in-trust is voidable, that is whether the spendthrift clause would be unenforceable in the face of an attack by the settlor's future creditors. A literal reading of the UVTA's text and accompanying commentary suggests that the spendthrift clause would be unenforceable.

It is "unclear" how a court is expected to "reconcile" the conflicting statutory approaches to DAPT creation. See Thomas P. Gallanis, *Trusts and the Choice of Law: What Role for the Settlor's Choice and the Place of Administration?*, 97 Tul. L. Rev. 805, 820-821 (2023).

Appendix

CHAPTER 1 **Introduction** [from *Loring and Rounds: A Trustee's Handbook* (2024)]

***

Trusts that are regulated by the UTC. What trusts, then, are partially regulated by the UTC? It depends. The "scope" section of the *model* UTC (§102) and its official commentary captures almost any express trust, subject to appropriate coordination with other trust-related statutes, e.g., ERISA. Only involuntary trusts, such as the resulting trust and the constructive trust,[76] are outside the UTC's scope. Massachusetts' version of §102, on the other hand, is narrowly drawn: The MUTC regulates only express trusts of a "donative nature."[77] In addition, Massachusetts' legislature intentionally declined to adopt any of the model

[76]*See* §3.3 of this handbook (covering the resulting trust and the constructive trust).

[77]The MUTC does not capture business trusts; nor, presumably, would it capture nondonative nominee trusts whose shares of beneficial interest vest *ab initio*, the express trust that terminates in favor

UTC's official comments.[78] Arizona's UTC is somewhere between the model's and the MUTC's in expansiveness of scope: It, for example, expressly excludes from its purview "security arrangements, liquidation trusts and trusts for the primary purposes of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind."[79]

Trust-related partial codifications are perversely fostering less jurisdictional uniformity. Trust doctrine is "a field where much depends on certainty and consistency as to the applicable rules of law."[80] Thus, it is regrettable that the wholesale enactment by the states in one form or another of the UTC, the UPC, the Uniform Prudent Investor Act, and other such codifications is not causing the law of trusts to become more uniform nationally, as many had hoped,[81] but less, as some had feared.[82] The reader is referred to Frances H. Foster's *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*[83] and Trent S. Kiziah's *Remaining Heterogeneity in Trust Investment Law After Twenty-Five Years of Reform*.[84] This lack of uniformity is attributable to the simple fact that "Uniform acts in trusts and estates rarely are enacted verbatim ….The modifications range from the helpful—for example, adjusting uniform provisions to conform to the particular state's law or practice—to the pernicious."[85] Australia's Justice Heydon has expressed a more generalized skepticism when it comes to codification of equitable doctrine: "While the general principles of equity operated with substantial uniformity across all jurisdictions in periods where the role of statute was very limited, more general statutory development in some places but not others tends to reduce uniformity, not increase it."[86]

In the United States what then is the back story? What are the politics behind trust law's inexorable descent into a state of legislatively induced incoherence?[87] It is simply this: "Uniform acts are more prone

---

of the settlor's probate estate, the revocable inter vivos trust whose sole purpose is property management, the noncommercial trust whose purpose is to secure property rights, and the noncommercial trust whose purpose is to securitize property rights.

[78]*See* the Report of the Ad Hoc Massachusetts Uniform Trust Code Committee, *available at* https://www.mass.gov/files/documents/2016/08/ny/mutc-ad-hoc-report.pdf (last accessed Aug. 18, 2022).

[79]*See generally* Owner-Operator Indep. Drivers Ass'n v. Pac. Fin. Ass'n, 241 Ariz. 406 (Ct. App. 2017).

[80]Beals v. State St. Bank & Tr. Co., 326 N.E.2d 896 (Mass. 1975).

[81]*See, e.g.*, UPC §1-102(b)(5) (confirming that one underlying purpose and policy of the Code is "to make uniform the law among the various jurisdictions"). *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2007).

[82]*See* Thomas P. Gallanis, *The Dark Side of Codification*, 45 ACTEC L.J. 31 (Fall 2019); Courtney J. Maloney & Charles E. Rounds, Jr., *The Massachusetts Uniform Trust Code: Context, Content, and Critique*, 96 Mass. L. Rev. 27 (Dec. 2014) [No. 2] (discussing the Massachusetts Uniform Trust Code's myriad idiosyncrasies).

[83]38 Ariz. St. L.J. 713 (2007).

[84]37 ACTEC L.J. 317 (Fall 2011).

[85]Thomas P. Gallanis, *The Dark Side of Codification*, 45 ACTEC L.J. 31 (Fall 2019). One of the "modifications" that the author finds particularly "pernicious" is the erosion of equity's (and the official UTC's) requirement that the trustee shall keep the beneficiaries fully informed of relevant information pertaining to the trust and its administration even in the face of an express term of the trust that would relieve the trustee of some aspects of this duty-to-inform, only the beneficiaries have "both the legal authority and the economic incentive to monitor and enforce the trustee's performance." *Id.* at 33.

[86]The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trusts law analysis?*, 6 Tr. Q. Rev., Issue 3, at 27 (2008) [a STEP publication].

[87]*See, e.g.*, Turney P. Berry, David M. English & Dana G. Fitzsimons, *Longmeyer* Exposes (or Creates) Uncertainty About the Duty to Inform Remainder Beneficiaries of a Revocable Trust, 35 ACTEC L.J. 125 (2009) (referring to J. P. Morgan Chase Bank, N.A. v. Longmeyer, 275 S.W.3d 697 (Ky. 2009)).

to interest-group capture than the Restatements of the Law produced by the American Law Institute (ALI) because uniform laws need to be enacted by a state legislature."[88] Moreover it turns out that achieving *substantive* uniformity actually is not a priority of the Uniform Law Commission (ULC) itself: "The ULC does not have a fixed rule for determining how much of the approved text of a uniform act must be enacted by a state in order for the ULC to count that state as an enacting jurisdiction; it is a matter of judgment. In exercising that judgment, the ULC is not disinterested; the ULC's reputation and influence are enhanced by more enactments, and the ULC has an interest in counting as many enacting jurisdictions as it reasonably can."[89] Another case of form trumping substance.

Partial codifications are perversely fostering more complexity and ambiguity in the law of trusts. Another unintended consequence of codification in a common law environment is that it can foster more complexity and ambiguity in the law, and thus more litigation, not less.[90] Certainty is being sacrificed on the altar of flexibility.[91] A good example of how codification can fuel litigation is the New York legislature's well-intentioned but misguided meddling back in 1828 with the rule against perpetuities.[92] Prof. John Chipman Gray explains:

> Before the year 1828, the forty or fifty volumes of the New York Reports disclose but one case involving a question of remoteness. In that year the reviewers (clever men they were, too) undertook to remodel the Rule against Perpetuities, and what a mess they made of it! Between four and five hundred cases [as of 1886] have come before the New York Courts under the statute as to remoteness, an impressive warning on the danger of meddling with the subject.[93]

The limited shelf life of trust-related partial codifications. In any case, Chief Justice Shaw seems to have had it right in at least one respect: Codifications do tend to have a limited shelf life. After only thirty-five years, for example, the Uniform Management of Institutional Funds Act (UMIFA), which has been enacted in forty-seven jurisdictions, has now been superseded by the Uniform Prudent Management of Institutional Funds Act (UPMIFA).[94] This is because UMIFA is now apparently already "out of date."[95] While the prudence standards in UMIFA may have provided some "useful guidance," still "prudence norms evolve over time." These are the words of the National Conference of Commissioners on Uniform State Laws.[96] Unfortunately, "[a] culture of codification and regulation has so taken hold in the American law school that there is probably no turning back."[97]

***

[88]Thomas P. Gallanis, *The Dark Side of Codification*, 45 ACTEC L.J. 31, 34 (Fall 2019) ("Also influential are national or regional associations of corporate fiduciaries and bankers: examples include the American Bankers Association and the Corporate Fiduciaries Association of Illinois.").

[89]Thomas P. Gallanis, *The Dark Side of Codification*, 45 ACTEC L.J. 31 n.1 (Fall 2019).

[90]*See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2007). *See also* Bogert §7 ("In some states, the law governing trusts is not collected in a single title of the state code and finding all of the provisions that are relevant to trusts can be quite difficult.").

[91]*See* Charles A. Redd, *Flexibility vs. Certainty—Has the Pendulum Swung Too Far?*, Trusts & Estates (Feb. 23, 2015).

[92]*See generally* §8.2.1 of this handbook (the rule against perpetuities).

[93]John Chipman Gray, The Rule Against Perpetuities, Appendix G, §871 (4th ed. 1942).

[94]Unif. Prudent Management Inst. Funds Act, Prefatory Note.

[95]Unif. Prudent Management Inst. Funds Act, Prefatory Note.

[96]Unif. Prudent Management Inst. Funds Act, Prefatory Note.

[97]Charles E. Rounds, Jr., *Lawyer Codes Are Just about Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771, 780 (2008).