

The Anglo-American Trust is Powerful and Nimble, but not a Magician

[What follows is an excerpt from Chapter 1 of *Loring and Rounds: A Trustee's Handbook* (2012), which can be found at pages 34-38]

The trust is a complex legal organism that survives on private property. Its earlier forms predate even the Norman Conquest.²⁵⁷ The trust as we know it today is the product of centuries of evolution:

There are many landmarks, for example the development of the individual's rather than the Crown's, legal rights over land in Norman times; the first steps towards establishing equitable interests when a knight heading for the crusades would give property to a third party to hold for the benefit of the knight's spouse and children whilst he was away; and the 16th century practice of landholders transferring land to individuals, "cestuis que uses," during their lifetimes in order to prevent the land reverting to the owner of feudal rights.²⁵⁸

Professor Maitland saw the trust as "an 'institute' of great elasticity and generality; as elastic, as general as contract."²⁵⁹ One Bermuda lawyer has recently echoed those sentiments: "Commercial lawyers are coming to realise what trust lawyers have always known, that the trust is incredibly flexible."²⁶⁰ In his view, "[t]he future development of new and innovative uses of trusts in commercial applications is limited only by the imagination of the lawyers designing the commercial or tax structures."²⁶¹

In the noncommercial setting, the trust provides enlightened property owners and their lawyers with a mechanism for seeing to the needs of the young, the disabled, and the elderly far more efficiently, far more cost-effectively, far more creatively, far more flexibly, far more expeditiously, and with far more dignity than the state could ever do.²⁶² In this regard, even a public charitable trust is no match for the private trust. Only one's imagination limits the purposes

²⁵⁷See generally §8.37 of this handbook (the origin of the English trust). See also W. F. Fratcher, *Trusts*, in VI Intl. Encyclopedia of Comp. Law, ch. 11, pp. 3, 8-20 (Frederick H. Lawson ed., 1973); Avisheh Avini, Comment, *The Origins of the Modern Trust Revisited*, 70 Tul. L. Rev. 1139 (1996) (suggesting the trust has its origins in Islamic Law). For related topics, see generally §§8.12 of this handbook (where outside the United States the trust is recognized) and 8.15.1 of this handbook (statute of uses).

²⁵⁸Henry Beckwith, *The Trust—Your Flexible Friend*, Tr. & Est. L.J., No. 45, Apr. 2003, at p. i (pull-out). See generally §§8.15.1 of this handbook (statute of uses) and 8.37 of this handbook (the origin of the English trust).

²⁵⁹Maitland, *Equity* (Brunyate ed.). Quotation also may be found in 1 Scott & Ascher §1.1.

²⁶⁰Randall Krebs, *Flexible friend*, 16(2) STEP J. 17 (Feb. 2008).

²⁶¹Randall Krebs, *Flexible friend*, 16(2) STEP J. 17 (Feb. 2008).

²⁶²See, e.g., The CJP Community Trust (a pooled trust for people with disabilities that is operated under the auspices of Combined Jewish Philanthropies and Jewish Family and Children's Service). Contact: Jewish Family and Children's Service, 1340 Centre Street, Newton, MA 02459. Phone: (617) 558-1278. Fax: (617) 558-5250. Governmental entities also tend not to be particularly good common law trustees. See §9.8.2 of this handbook (the city, the state, or the United States as trustee).

for which such trusts may be created.²⁶³ To be sure, the institution of the private personal trust can never accommodate the needs of everyone. Each person in need of assistance, however, who receives proper care pursuant to the institution's terms, is one less person who has to encounter—and be a burden to—the welfare bureaucracy. On the other hand, it is also said that a trust can dull the animal spirits of one's able-bodied children if one is not careful:

Eventually, slowly, almost imperceptibly, something happened to Boston money, to its drive and daring. Fathers who doubted the mettle of their sons and heirs began tying up their fortunes in tightly drawn legacies, preserving them in the impenetrable amber of trusts. Trusteed money, in the hands of ever-so prudent conservators whose job it was to provide a sure and steady income for its beneficiaries, virtually withdrew from productive enterprise. By the 1930s, Boston money has gone to sleep, sustained by a steady 4 percent return and dreams of days long past. Once-bustling wharves and warehouses were rotting and falling into the harbor. Offices that had echoed to the springy stride of railroad builders and Canton sea captains now heard only the plodding of fiduciaries.²⁶⁴

A trust may be created only to the extent its purposes are lawful;²⁶⁵ not contrary to public policy²⁶⁶ or detrimental to the community;²⁶⁷ and possible to achieve.²⁶⁸ “A scheme to overthrow the government or to sell dope or to operate a bordello is no more enforceable as a trust than as a contract, a corporation, or a partnership.”²⁶⁹ Nor is a trust established for the purpose of

²⁶³“Private lawyers who counsel clients and draft their deeds and settlements are constantly adapting trusts to new ends, varying conventional trust structures to promote the commercial, tax, investment, family and succession interests of those clients.” Joshua Getzler, *Legislative Incursions into Modern Trusts Doctrine in England: The Trustee Act 2000 and the Contracts (Rights of Third Parties) Act 1999*, 2 Global Jurist Topics, Issue 1, Art. 2 (2002) (noting that English trust law has always been shaped by “cautelary jurisprudence”).

²⁶⁴Russell B. Adams, Jr., *The Boston Money Tree* x, xi (1977).

²⁶⁵See Restatement (Third) of Trusts §29(a); 2 Scott & Ascher §9.2 (noting that the mere fact that a trustee employs trust funds in an illegal business purpose does not relieve the trustee of accountability for the profits if the trust purposes are legitimate).

²⁶⁶Restatement (Third) of Trusts §29(c). See generally 2 Scott & Ascher §9.3; §9.24 of this handbook (public policy in the trust context).

²⁶⁷2 Scott & Ascher §9.3.12.

²⁶⁸Uniform Trust Code §404 (available on the Internet at <www.law.upenn.edu/bll/ulc/ulc.htm>). Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. Uniform Trust Code §404 cmt. “Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious.” Uniform Trust Code §404 cmt.

²⁶⁹John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1107 (2004). See generally 2 Scott & Ascher §9.4.2. See also 2 Scott & Ascher §§9.4.3 (When the Settlor Is Not the Beneficiary), 9.5 (When the Consideration Is Illegal); 9.5.1 (When the Beneficiary Is Innocent), 9.5.2 (When the Trust Property Has Been Acquired Illegally), 9.6 (Consequences of Provisions That Are Illegal or Contrary to Public Policy).

defrauding creditors²⁷⁰ or the government.²⁷¹

The role that the private trust plays in lubricating the American capital markets has come to eclipse in significance the traditional role it has played in facilitating intrafamily wealth transfers.²⁷² On April 28, 2001, even the Peoples' Republic of China jumped on the global trust bandwagon.²⁷³ "According to Chinese drafters and scholars, the initial impetus for the legislation was the urgent need to promote China's accession to the World Trade Organization and to address China's financial sector by adopting 'an important pillar of the modern financing industry in developed countries,' the trust."²⁷⁴

The trust having come into its own in the employee benefit, charitable, and commercial areas,²⁷⁵ a relatively small number of institutional fiduciaries collectively now have the power to control much of corporate America. "This phenomenon has been labelled 'fiduciary capitalism.'"²⁷⁶ Such a high concentration of economic power²⁷⁷ carries with it a danger that these fiduciaries could either become inappropriately engaged or inappropriately disengaged in matters that relate to the exercise of that power.²⁷⁸ Some fear that this small cadre of trustees and agents might someday improperly exploit this power to control the economy in ways that are not in the interests of beneficial owners. Others fear that these fiduciaries will refrain altogether from monitoring the myriad enterprises over which they have voting control.²⁷⁹ One learned commentator has written:

Up to now, the larger pension funds have been reluctant to get...deeply involved in corporate governance; if they are unhappy with performance, they simply sell. However, the California Public Employees' Retirement

²⁷⁰2 Scott & Ascher §§9.4 (Creditors of the Settlor), 9.4.2 (Creditors of the "Trustee").

²⁷¹2 Scott & Ascher §9.4.1.

²⁷²See Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U.L. Rev., 434, 436 (1998).

²⁷³Xintuo Fa [Trust Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001).

²⁷⁴Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 Minn. L. Rev. 602, 639–640 (2010).

²⁷⁵See, e.g., §9.31 of this handbook (corporate trusts; trusts to secure creditors; the Trust Indenture Act of 1939; protecting bondholders).

²⁷⁶John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 803 (2000) (citing James P. Hawley & Andrew T. Williams, *The Emergence of Fiduciary Capitalism*, 5 Corp. Governance 206 (1997)). See generally Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U. J. L. & Bus. 473 (2007).

²⁷⁷"The mutual funds controlled by the 75 largest fund managers alone own \$2.9 trillion of U.S. equities, equal to 20 percent of the \$14.4 trillion market capitalization of the stock market at the beginning of 2001." John C. Bogle, *The 800-Pound Gorilla, Shareholders Arise!*, Am. Spectator, Mar./Apr. 2002, at 40.

²⁷⁸See John C. Bogle, *Individual Stockholder, R.I.P.*, Wall St. J., Oct. 3, 2005, at A16 (bemoaning the "rent-a-stock" mutual fund industry's lack of interest in how the corporations in which it invests are governed).

²⁷⁹But see Aaron Lucchetti, *A Mutual-Fund Giant Is Stalking Excessive Pay*, Wall St. J., June 12, 2002, at C1 (reporting that Fidelity mutual fund trustees may withhold votes for corporate directors who overcompensate their senior executives).

System (Calpers) recently announced that it would vote against reappointing auditors at companies including Exxon Mobil, Home Depot, and McDonald's because they pay accountants for non-audit services...The logical continuation of this trend would be for the pension funds to nominate their own directors. It's in their interest to do so; after all, the collapse of Enron cost public pension funds about \$3 billion.²⁸⁰

Despite the trust's elasticity and protean nature, its powers are not magical. There are some problems that cannot be solved, even by the employment of a trust. H.G. Wells was not so sure. In 1920, he had occasion to interview Lenin at his offices in the Kremlin.²⁸¹ He came away with the view that as brutal and as incompetent as the Bolshevik regime was, it was preferable to whatever the counter-revolutionaries would be in a position to install.²⁸² In order to constructively engage the Bolsheviks with their "invincible prejudice" against individual businessmen, the intermediary of a trust would have to be employed.²⁸³ This trust "should resemble in its general nature one of the big buying and controlling trusts that were so necessary and effectual in the European States during the Great War....This indeed is the only way in which a capitalist State can hold commerce with a Communist State."²⁸⁴ Wells observed that "[t]he larger big business grows the more it approximates Collectivism."²⁸⁵ He feared that if his trust solution were not implemented there would be a "final collapse of all that remains of modern civilization throughout what was formerly the Russian Empire."²⁸⁶ In his view, it was not beyond the realm of possibility that all modern civilization ultimately could tumble into the abyss as well.²⁸⁷ Was H. G. Wells employing the term "trust" euphemistically, as the U.S. Congress was to do later in the context of legislating its social security welfare scheme, a topic we take up in Section 9.9.3 of this handbook? We do not think that he was.

[For more on the limitations of the Anglo-American trust, the reader is referred to the postscript to Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 *The University of Toledo Law Review* 673, 700-703 (2011) [posted by C.E.R. Jr. in full on JDSUPRA]. In the postscript, not only is H.G. Wells's encounter with Vladimir Lenin discussed but also the more recent unsuccessful efforts of certain private parties to employ the Anglo-American trust as a device for shielding the Yukos Oil Company from the predations of his remote successor, Vladimir Putin. Why the Anglo-American trust would not be particularly suited to remedying the past wrongs of slavery is also discussed.]

²⁸⁰Felix G. Rohatyn, *An Agenda for Corporate Reform*, *Wall St. J.*, June 24, 2002, at A16. See also Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 *Cardozo L. Rev.* 325, 337 (2001) (confirming that when "dissatisfied with the corporate management of their investments, trustees—investment managers sell the shares, [, i.e.,] they 'exit' rather than exercise 'voice'"). But see Yuka Hayashi, *Pension Funds Put Heads Together*, *Wall St. J.*, Aug. 18, 2002, at D7 (reporting that representatives from some of the nation's largest pension funds are putting their heads together to find ways to mobilize their shareholder power); John C. Bogle, *The 800-Pound Gorilla: Shareholders Arise!*, *Am. Spectator*, Mar./Apr. 2002, at 40.

²⁸¹See H. G. Wells, *Russia in the Shadows* 128–129 (1920).

²⁸²See H. G. Wells, *Russia in the Shadows* 147–148 (1920).

²⁸³See H. G. Wells, *Russia in the Shadows* 149–153 (1920).

²⁸⁴See H. G. Wells, *Russia in the Shadows* 149–153 (1920).

²⁸⁵See H. G. Wells, *Russia in the Shadows* 149–153 (1920).

²⁸⁶See H. G. Wells, *Russia in the Shadows* 149–153 (1920).

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