The Case Against Codifying Various Aspects of the Law of Trusts

What follows is an excerpt from *Loring and Rounds: A Trustee's Handbook* (2012). The excerpt lays out the case against codifying various aspects of the law of trusts. *See* Chap. 1, pages 11-14.

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Trust-related codifications. Since 1850, Parliament has been busy comprehensively tweaking English trust law.[53] In the United States, on the other hand, the various state legislatures, with the notable exceptions of New York and California, have generally been content to allow the law of trusts to evolve judicially, at least until relatively recently.[54] The Uniform Trust Code, the first comprehensive national codification of the law of trusts in the United States,[55] still makes no attempt to restrict the traditional and broad equitable jurisdiction that the courts have over trusts, and addresses only those portions of the law of express trusts that are amenable to codification.[56] The common law of trusts and principles of equity are intended to supplement the Code's provisions. The same goes for the Uniform Probate Code.[57] This is appropriate. "The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions."[58] Or in the words of Chief Justice Lemuel Shaw, a former Chief Justice of the Massachusetts Supreme Judicial Court:

> It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of the particular cases which fall within it.[59]

Chief Justice Shaw penned those words in 1854. In 2008, Justice J.D. Heydon, of the High Court of Australia, in a paper delivered to the Sydney Branch of the Society of Trust and Estate Practitioners, similarly expressed the sentiment that codification has its limitations, at least when it comes to fine-tuning the law of trusts: "A system of judge-made law resting on principles of

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[53]Bogert, Trusts and Trustees §7.

[54]*See generally* Bogert, Trusts and Trustees §7. Probably the first model partial codification of the law of trusts was the Uniform Fiduciaries Act, which was promulgated in 1922. In 1931, the Uniform Principal and Income Act was promulgated. *Id*.

[55]The Uniform Trust Code was drafted by the National Conference of Commissioners on Uniform State Laws. It approved and recommended the Code for enactment in all the states at its Annual Conference meeting in St. Augustine, Florida, July 28–August 4, 2000.

[56]Uniform Trust Code §106 cmt.

[57]Uniform Probate Code §1-103.

[58]Uniform Trust Code §106 cmt.

[59]Norway Plains Co. v. Boston & Me. R. R., 1 Gray 263, 267 (1854).

stare decisis has a degree of stability; but it teems with life, and is inherently capable of change in the light of experience," he said.[60] In other words, the law of trusts is best fine-tuned judicially though the application of general principles to doubtful problems. "The process revivifies the general principles: it enables them to be explored, understood afresh when looked at from the new angle, modified in the light of the new problem so that the general principles in turn can have slightly different applications in future."[61] Codification tends to "deaden and stultify" that process, at least for a time.[62] Still, over the long term, "[t]he silent waters of equity run deep—often too deep for legislation to obstruct."[63]

Again, the Uniform Trust Code, available on the Internet at <http://www.law.upenn.edu/bll/ulc/ulc.htm>, is not an all-inclusive codification of the civil law variety.[64] It is a model statute. The form and substance of its provisions, however, can become the law of a particular state by an act of its legislature.[65] Or the substance of the Code can find its way piecemeal into the body of the state's decisional law.

It is becoming evident that the wholesale enactment by the states in one form or another of the Uniform Trust Code, the Uniform Probate Code, 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,[66] but less, as some had feared. The reader is referred to Frances H. Foster's *Privacy*

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[60]The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trusts law analysis?*, 6 Tr. Q. Rev., Issue 3, at 28 (2008) [a STEP publication].

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[62]The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trusts law analysis?*, 6 Tr. Q. Rev., Issue 3, at 28 (2008) [a STEP publication].

[63]The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trusts law analysis?*, 6 Tr. Q. Rev., Issue 3, at 28 (2008) [a STEP publication].

[64]Some states, most notably New York, have seen more legislative tampering with the decisional law applicable to trusts than others. Professor Scott, however, is unimpressed, particularly with the New York experience: "The provisions of the Revised Statutes of New York on uses and trusts have not worked well in many respects and have caused a great deal of litigation, and insofar as the code attempted to embody the common law, it is vague, inaccurate, and incomplete. 1 Scott on Trusts §1.10. In 1920, Louisiana legislatively incorporated the trust concept into its civil law jurisprudence. The Trust Act of 1920 was replaced by the Trust Estates Law of 1938. In 1964, a Trust Code was enacted in part to include certain important trust devices that are used at common law but were not expressly authorized by the Trust Estates Law." Leonard Oppenheim, Introductory Comments, Louisiana Trust Code, 3A La. Civ. Code Ann. 18 (West 1991). A settlor, for example, had not been able to create a trust for a class of children and grandchildren even though some of the beneficiaries might not be in being at the creation of the trust. That gap, among others, was closed by the 1964 legislation.

[65]The UTC has been enacted in twenty-one jurisdictions (Arizona, Alabama, Arkansas, the District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming). Arizona repealed its Uniform Trust Code in May 2004 but re-enacted it in May 2008. Each jurisdiction, however, has made slight modifications here or there to the text of the model statute.

[66]*See, e.g.*, Uniform Probate Code §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).

and the Elusive Quest for Uniformity in the Law of Trusts.[67] Justice Heydon is another codification skeptic: "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."[68] Massachusetts has certainly accelerated the process of reducing uniformity across the jurisdictions when in 2008 she enacted a substantially reworked version of Article VII of the Uniform Probate Code, which pertains to trusts.[69] This is odd as, "[e]xcept for its provisions on trust registration, Article VII is superseded by the Uniform Trust Code."[70] In the United States, the law of trust is descending inexorably into a state of chaos.[71]

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.[72] 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.[73] 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.[74]

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).[75] This is because UMIFA is now apparently already "out of date."[76] 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

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[67]38 Ariz. St. L.J. 713 (2007).

[68]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].

[69]*See* Mass. Gen. Laws ch. 190B.

[70]Uniform Trust Code, Prefatory Note.

[71]*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 Journal 125 (2009) (referring to J. P. Morgan Chase Bank, N.A. v. Longmeyer, 275 S.W.3d 697 (Ky. 2009)).

[72]*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, Trusts and Trustees §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.").

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

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

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

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

Commissioners on Uniform State Laws.[77] Unfortunately, "[a] culture of codification and regulation has so taken hold in the American law school that there is probably no turning back."[78]

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

[78]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).