Title

The very institution of the trust being a creature of judicial precedent, not statute, Melville's caricature in Moby-Dick of precedent would seem as superficial as it is lyrical

Text

In Moby-Dick, Melville, one suspects, is letting us know what he really thinks about judicial precedent: "Nor is this the end. Desecrated as the [whale's] body is, a vengeful ghost survives and hovers over it to scare. Espied by some timid man-of-war or blundering discovery-vessel from afar, when the distance obscuring the swarming fowls, nevertheless still shows the white mass floating in the sun, and the white spray heaving high against it; straightway the whale's unharming corpse, with trembling fingers is set down in the log—shoals, rocks, and breakers hereabouts: beware! And for years afterwards, perhaps, ships shun the place; leaping over it as silly sheep leap over a vacuum, because their leader originally leaped when a stick was held. There's your law of precedents; there's your utility of traditions; there's the story of your obstinate survival of old beliefs never bottomed on the earth, and now even hovering in the air! There's orthodoxy!"

Such sentiments echo throughout Dickens' Bleak House: "On such an afternoon, some score of members of the High Court of Chancery bar ought to be—as here they are—mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horsehair warded heads against walls of words and making a pretence of equity with serious faces, as players might."

And then there is Prof. Leach: "Since 1787 these Fertile Octogenarian cases have bedeviled estate planners and destroyed perfectly sensible wills and trusts with the remorselessness of a guillotine. The acme of silliness was achieved when an English court ruled that it was conclusively presumed that a widow of 67 could have a child and that the child could in turn have a child before the age of five!…" Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent, 48 A.B.A. J. 942 (1962).

I do not share this intensity of impatience with traditions and doctrines of earlier times and other eras. The fertile-octogenarian doctrine, "law French" and other such curiosities remind us that the law of trusts has been a work-in-progress for centuries. If nothing else, they provide valuable clues as to the course of its evolution to date. In the trust context particularly there is nothing "efficient" or "reforming" about fossilizing viable equity doctrine or repeating some failed legislative experiment of long ago. In 2008, Justice J.D. Heydon (Australia) weighed in: "A system of judge-made law resting on principles of stare decisis has a degree of stability; but it teems with life, and is inherently capable of change in the light of experience." The law of trusts particularly is best fine-tuned judicially through 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." Codification tends to "deaden and stultify" that process.

Daniel Hannan's perspective encompasses the full spectrum of the common law, presumably as it has come to be enhanced by equity: "Common law is an anomaly, a beautiful, miraculous anomaly. In the rest of the world, laws are written down from first principles and then applied to specific disputes, but the common law grows like a coral, case by case, each judgment serving as the starting point for the next dispute." Magna Carta: Eight Centuries of Liberty, Wall St. J. (May 29, 2015), at C2.

We consider in Chap. 1 of *Loring and Rounds: A Trustee's Handbook* (2022) why the plethora of partial codifications of equity doctrine in the trust space are not particularly helpful as a practical matter (more complexity, less uniformity), the relevant portion of which chapter is set forth in the appendix below. The Handbook is available for purchase at: https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP.

Appendix

CHAPTER 1 **Introduction** [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

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Trust-related codifications. Since 1850, Parliament has been busy comprehensively tweaking English trust law.[57] 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.[58]

The Uniform Trust Code merely tweaks the law of trusts. The Uniform Trust Code (UTC), the first comprehensive national codification of the law of trusts in the United States,[59] 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.[60] The common law of trusts and principles of equity are intended to supplement the provisions of the Uniform *Probate* Code.[61] As to the Uniform *Trust* Code, however, notwithstanding the

[57]Bogert §7.

[58]*See generally* Bogert §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*.

[59]The UTC 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.

[60]UTC §106 cmt.

[61]UTC §1-103.

language of its §106, it is actually the other way around, the drafters having intentionally refrained from defining the trust relationship.[62] 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."[63] 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."[64] 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 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.[65] In other words, the law of trusts is best fine-tuned judicially through 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."[66] Codification tends to "deaden and stultify" that process, at least for a time.[67] The "unwieldy" Revised Uniform Principal and Income Act 1962 comes to mind, which had been preceded by the Uniform Principal and Income Act (1931) and which has been superseded by the Uniform Principal and Income Act (1997), which in turn has been superseded by the Uniform Fiduciary Income and Principal Act

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[62]*See* UTC §102, cmt. ("The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties.") Thus, §106 of the UTC has it backward when it suggests that the common law of trusts and principles of equity *supplement* the Code. It is the other way around. *See, e.g.*, De Prins v. Michaeles, 486 Mass. 41, 154 N.E.3d 921 (2020) (Noting that Massachusetts' version of the UTC was not intended to replace the common law of trust "except where the [MUTC] modifies it."). "It is clear, then, that the common law continues to apply where the MUTC does not address the situation at issue, and that the court may apply 'principles of equity' to such cases." *Id*.

[63]UTC §106 cmt.

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

[65]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].

[66]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].

[67]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].

(2018) (UFIPA).[68] All four Acts are merely detailed codifications of the equitable, principles-based Massachusetts Rule of Allocation. The Rule, which had been articulated in 1868 in *Minot v. Paine*, is taken up generally in §8.15.14 of this handbook.[69] Still, over the long term, "[t]he silent waters of equity run deep—often too deep for legislation to obstruct."[70]

Again, the UTC is not an all-inclusive codification of the civil law variety.[71] 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. Or the substance of the UTC can find its way piecemeal into the body of the state's decisional law. To the extent any provisions of the UTC are in derogation of the common law or the principles of equity, they must be strictly construed.[72] Not all states have enacted the UTC either verbatim or in some form; some are unlikely ever to do so.[73] In any case, "asking a state legislature to enact, at a single stroke, a complete overhaul of the state's trust law, 15,000 words codifying and/or supplanting hundreds of years of common law, much of which the lawyers serving on an ad hoc drafting committee do not themselves understand, is a rather heavy lift."[1]

Trusts that are regulated by the UTC. What trusts, then, are partially regulated by the UTC? It

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[68]*See* UFIPA §401 cmt. ("The 1962 Act described a number of types of property that would be principal if distributed by a corporation. This became unwieldly in a section…that applied to both corporations and all other entities. By stating that the distribution of any property other than money is generally allocated to principal, subsection (d)(1)…[of UFIPA §401]…embraces all of the items enumerated in Section 6 of the 1962 Act as well as any other form of nonmonetary distribution not specifically mentioned in that act."). The trustee's duty to separate income from principal is taken up generally in §6.2.4 of this handbook.

[69]Minot v. Paine, 99 Mass. 101 (1868).

[70]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].

[71]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.

[72]Ladysmith Rescue Squad, Inc. v. Newlin, 694 S.E.2d 604, n.5 (Va. 2010).

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

[1] Russell A. Willis, *Section 112: The Problem Child of the Uniform Trust Code*, 46 Est. Plan. 32, 39 (July 2019).

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,[74] 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."[75] In addition, Massachusetts' legislature intentionally declined to adopt any of the model UTC's official comments.[76] 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."[77]

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."[78] 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,[79] but less, as some had feared.[80] The reader is referred to Frances H. Foster's *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*[81] and Trent S. Kiziah's *Remaining Heterogeneity in Trust Investment Law After Twenty-Five Years of Reform*.[82] 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

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

[75]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 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.

[76]*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, 2020).

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

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

[79]*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).

[80]*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).

[81]38 Ariz. St. L.J. 713 (2007).

[82]37 ACTEC L.J. 317 (Fall 2011).

practice—to the pernicious."[83] 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."[84]

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?[85] It is simply this: "Uniform acts are more prone 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."[86] 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."[87] 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.[88] Certainty

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[83]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.

[84]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].

[85]*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)).

[86]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.").

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

[88]*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.").

is being sacrificed on the altar of flexibility.[89] 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.[90] 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.[91]

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).[92] This is because UMIFA is now apparently already "out of date."[93] 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.[94] Unfortunately, "[a] culture of codification and regulation has so taken hold in the American law school that there is probably no turning back."[95]

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

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

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

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

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

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

[95]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).