*The Uniform Trust Code: Codification of the law of trusts in the United States**

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The Uniform Law Commission, which is the law revision arm of the American state governments, has completed a comprehensive codification of the law of trusts, called the Uniform Trust Code (UTC). In the present article I shall direct attention primarily to the Code's innovations and departures from the common law of trusts, but it is important to emphasise that the Code mostly restates familiar principles. As with any codification of a mature field of law, the main purpose of the UTC has been to organise and clarify the law, while making interstitial reforms in places where improvement appeared to be needed. I shall also discuss the Code's handling of two topics, trustees' powers and delegation, on which well-settled American departures from the common law may be of interest, in view of reform proposals presently under consideration in England and in Commonwealth jurisdictions.

Rather than summarise the Code's structure and contents, I reproduce its table of contents as an appendix to this article (the full text of the Code is available on the Internet and in print)[1]. In this article I concentrate on what I regard as the major innovations of the Code.

Drafting

The Code was drafted over a period of five years in close consultation with the specialist organisations of the legal profession and the trust industry[2]. The Uniform Law Commission approved the Code in 2000 and released the Official Comments (amplifying the drafters' rationale) in 2001. The Code is expected to be widely adopted among the states in the coming years. The Uniform Law Commission is composed of commissioners appointed by the governors of all the American states

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[1] The text of the Code with its official comment is available on the Internet at www.law.upenn.edu/bll/ulc, and it will be published in the multi-volume work, *Uniform laws annotated*, (West Publishing Co, 1985 edn & annual supplements), in which all current uniform laws appear. When enacted by a particular state, a uniform law also appears in the state's statutory compilation as the law of that sate.

[2] Advisors from the American Bar Association (in this instance, from the section on Real Property, Probate, and Trust Law) sit with all Uniform Law Commission drafting committees. In addition, the UTC drafters had advisors from the American Bankers' Association and the American College of Trust and Estate Counsel. The Joint Editorial Board for the Uniform Trust and Estate Acts reviewed each draft. It is composed of Uniform Law Commissioners and representatives of the above organisations (without the bankers) together with representatives from the National College of Probate Judges and the Association of American Law Schools. Study groups appointed by the bar associations in several states followed the drafting and made suggestions as the work progressed, as did the State Laws Committee of the American College of Trust and Estate Counsel.

(in a few states, the state legislature also chooses some commissioners). The Commission originates much of the trust, probate, and banking legislation that is enacted in the several states. (A similar organisation, the Uniform Law Conference of Canada, co-ordinates Canadian provincial law reform). Drafting work is normally done by a committee of commissioners who engage a reporter, typically an academic, to prepare and revise drafts. The reporter for the UTC was professor David English of the University of Missouri Law School.

The drafters of the UTC took as their starting point the American Law Institute's Restatement of Trusts (Second) of 1959, which has long been the most authoritative source for American trust law[3]. They also worked from California's partial codification of the law of trusts that was based on that Restatement, enacted in 1986[4]. The American Law Institute is presently producing a Restatement of Trusts (Third) with professor Edward C. Halbach, Jr. of the University of California at Berkeley, as the reporter, and the UTC drafting committee also co-ordinated its work with that project.

The UTC is comprehensive but not exhaustive. It provides that "the common law of trusts and principles of equity supplement" the Code, unless the Code or other legislation makes contrary provision[5]. As its regime for fiduciary investing, the Code incorporates unchanged the Uniform Prudent Investor Act of 1994[6]. (I have described the Uniform Prudent Investor Act for readers of this journal in an earlier article[7]; that Act has now been adopted in 35 states[8] and emulated in non-uniform versions in most of the rest). In order not to make the Code unwieldy, the drafters decided to leave out of the Code some special-purpose trust acts, such as the Uniform Principal and Income Act (1997), which governs the allocation of receipts and expenses between income and remainder interests. It is contemplated that jurisdictions that enact the Code will leave these statutes in place.

Because the Code intends to operate as state law, it is subject to pre-emption by federal regulatory law. Thus, ERISA, the 1974 federal pension law[9], displaces state law in the governance of pension trusts. Other federal regulatory laws speak to bond indenture trusts, investment trusts and the securities laws aspects of commercial trusts[10].

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[3] As of march 2000, the Restatement of Trusts (First, Second and Third) had been cited in 10,179 published judicial opinions; see *American Law Institute, Annual Report*, at p. 21 (2000). This figure severely understates the influence of the Restatement in the courts, as most first-instance proceedings are unreported.

[4] Codified as California Probate Code, s 15000 *et seq*.

[5] UTC, s 106. See also s 112, providing that "the rules of construction that apply… to the interpretation and disposition of property by will also apply as appropriate to" questions of trust interpretation.

[6] UTC, article 9.

[7] Langbein, John H., *The new American Trust-Investment Law*, 1994, 8 TLI 123.

[8] The list, which will be updated to reflect new adoptions, appears on the Internet at www.nccusl.org, and in the Uniform Laws Annotated pocket part, supra n° 1.

[9] Employee Retirement Income Security Act of 1974 (ERISA), 29 USC s 1000 et seq. On the law of ERISA trusts, see Langbein, John H. - Wolk, Bruce A., *Pension and employee benefit law*, 3rd edition, 2000, p. 646 *et seq*.

[10] Discussed in Langbein, John H., *The secret life of the trust: The trust as an instrument of commerce*, 1997, 107 Yale Law Journal 165.

I) Charitable trusts

Although overwhelmingly concerned with private trusts, the Code provides a skeletal statutory structure for charitable trusts, by codifying the charitable purpose[11] and *cy près* doctrines[12].

Settlor enforcement

The Code provides that the settlor of a charitable-trust may maintain enforcement proceedings[13], reversing the common law rule precluding enforcement by "the settlor, or his heirs, personal representatives, or next of kin"[14]. In the American setting, the primary responsibility[15] for supervision and enforcement of charitable trusts rests with the state attorney-general, who is usually an elected official who aspires to higher office and who sometimes does not display much interest in enforcing charitable trusts. The Code's provision is not likely to make much difference, however, since charitable trusts commonly arise on the settlor's death[16].

Enhancing the reach of cy près

The Code makes a notable revision in *cy près*, the doctrine that allows courts to apply the trust property to another charitable purpose when the settlor's particular charitable purpose fails. The common law rule required the court to make a determination on the facts of each case that the settlor had formed a more general charitable intent before the court could invoke *cy près*[17]. The UTC, by contrast, effectively presumes the settlor's general charitable intent, thereby shifting to any contestant the burden of showing that the settlor lacked it[18].

Purpose trusts

The Code retains the tradicional rule *a*) that a trust must have definite beneficiaries[19], but *b*) that charitable trusts are excused from this rule[20]. The Code

[11] UTC, s 405(a).
[12] UTC, s 413.
[13] UTC, s 405(c).
[14] Restatement of Trusts (Second), s 391 (1959).
[15] The Internal Revenue Service also polices charitable trusts, in connection with the exemptions and deductions allowed to qualifying charitable entities. See Internal Revenue Code, s 4944 *et seq*.
[16] But see "Carl J. Herzog Foundation, Inc. v. University of Bridgeport", 243 Conn 1, 699 A 2d 995 (1997), refusing to recognise a donor's standing to enforce the terms of a gift to a charitable institution.
[17] The Restatement version applies "if the settlor manifested a more general intention to devote the property to charitable purposes", Rest 2d, s 399.
[18] UTC, s 413(a), which follows Restatement of Trusts (Third), s 67 (Tentative Draft n° 3, 2000).
[19] UTC, s 402(a)(3).
[20] UTC, s 402(2)(3)(A).

also excuses from the definiteness-of-beneficiary requirement so-called purpose trusts, which are defined as having “a non-charitable but otherwise valid purpose to be selected by the trustee”[21]. This provision means to cure those sad cases in which a settlor does not satisfy the charitable purpose standard, for example, when a testator leaves money “to be distributed to such objects of benevolence as [my] trustees might select”[22]. Such a trust may not endure for more than 21 years. The Code contains a further provision facilitating one variety of purpose trust, for the care of pets and other animals[23].

II) Modification and termination

Abridging trust terms

In the nineteenth century, American trust law departed from the rule in “Saunders v. Vautier”[24], which allows the beneficiaries of a trust to terminate it at any time, regardless of the terms of the trust, if the beneficiaries are all ascertained, *sui juris*, and in accord. American law, by contrast, enforces the settlor’s restrictions on distribution when they serve a “material purpose”[25]. Accordingly, there can be difficulty in obtaining judicial modification or termination of a trust, even when changed circumstances would make deviation wise.

The Code contains several initiatives designed to make it easier to modify or terminate a trust before the trust would by its terms expire. Consistent with the rationale of the “material purpose” doctrine, which is to defer to the interests and intention of the settlor, the Code authorises modification or termination when the settlor joins the beneficiaries in requesting the change, “even if the modification or termination is inconsistent with a material purpose of the trust”[26]. (It will be recalled that the Code allows the settlor to enforce a charitable trust[27]. The Code also allows the settlor of an irrevocable trust the right to petition for removal of the trustee[28].

[21] UTC, s 410(1).

[22] UTC, s 409, Official Comment.

[23] UTC, s 408(a) provides “A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal”.

[24] (1841) 4 Beav 115.

[25] The American rule was formulated in “Claflin v. Claflin”, 149 Mass 19, 20 NE 5454 (1889), and is still known as the *Claflin* doctrine. It is preserved in the Restatement of Trusts (Second), s 337(a) (1959) and codified in UTC, s 410(a).

[26] UTC, s 411(a). The Code also clarifies that “a spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust”: ibid s 411(c). American spendthrift trusts, in which the settlor restrains the beneficiary from alienating his or her interest under the trust, and refuses creditors of the beneficiary, conflict with the rule in “Brandon v. Robinson” (1811), 18 Ves Jr. 429, and are not enforced in England, although English trust law allows much the same result to be achieved with an aptly drafted discretionary trust.

[27] Supra n° 13.

[28] UTC, s 706 (a).

These provisions exemplify a strand of thought found in the scholarly literature which advocates greater recognition of the interests of the settlor of the trust[29]).

American courts have been willing to alter investment directions and other administrative provisions, when "owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust"[30]. The UTC extends that rule to permit the court to modify or terminate the "dispositive terms of a trust" in such circumstances[31].

The Code contains a provision allowing a court to grant a request to modify a trust for the purpose of achieving the settlor's tax objectives[32]. Another measure permits a court to terminate a trust when the amount or value of property under administration becomes so small that continuation of the trust would be uneconomic[33].

Reformation for mistake

The Code strongly endorses the power of a court to rectify mistaken terms (rectification is called "reformation" in American parlance). Section 415 of the UTC permits a court to "reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement"[34].

The requirement of a higher-than-normal standard of proof ("clear and convincing evidence") is a safeguard short of the criminal law standard of beyond reasonable doubt, but more onerous for the proponent to carry than the mere preponderance standard ordinarily applied in civil litigation[35].

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[29] E.g. Langbein, John H., *The contractarian basis of the law of trusts*, 1995, 105 Yale Law Journal 625, 664.

[30] Restatement of Trusts (Second), s 167(1) (1959).

[31] UTC, s 412(a); this provision also eliminates the requirement of the Restatement rule, quoted above in text, that the changed circumstances be "not known to the settlor".

[32] UTC, s 416. This measure implements Restatement of Property (Third): Wills and Other Donative Transfers, s 12.2 (Tentative Draft n° 1, 1995), whose Reporter's Note collects extensive case law supporting the power.

[33] UTC, s 414. The Code also empowers the trustee, on notice to certain beneficiaries, to combine two or more trusts or to divide a trust into two or more separate trusts.

[34] UTC, s 415. This measure follows the reformation doctrine for wills and all other donative transactions articulated in Restatement of Property (Third): Wills and Other Donative Transfers s 12.1 (Tentative Draft n° 1, 1995).

[35] I have discussed the rationale for using the clear and convincing evidence standard in American trust and estate law in Langbein, John H., *Excusing harmless errors in the execution of wills: A report on Australia's tranquil revolution in probate law*, 1987, 87 Columbia Law Review 1, 35-7. The clear and convincing evidence requirement appears elsewhere in the UTC in situations in which the drafters wanted to import the safeguard of the higher standard of proof. For example, the Code allows oral trusts, but requires that "the creation of an oral trust and its terms may be established only by clear and convincing evidence": UTC, s 407. Another instance is the revocation provision for revocable trusts in UTC, s 602(c)(2)(B), discussed below.

III) Revocable trusts

Over the past half-century or so, it has become increasingly common in American succession practice to use the revocable trust rather than the will as the main vehicle for transmitting wealth to the decedent's beneficiaries. The revocable trust avoids court administration of the estate (called "probate" in American usage, both for testate and for intestate estates). The probate process has earned a reputation in some jurisdictions for expense, delay, incompetent administration and even corruption. Popular dissatisfaction with probate has given rise to what has been called the non-probate revolution[36]; financial intermediaries have developed the practice of allowing customers to hold property in account forms that provide for the intermediary, on death, to transfer the property to the beneficiaries whom the account owner has designated without probate administration. Especially for persons of moderate means, most wealth today passes through these non-probate channels, for example, life insurance; pension accounts; pay-on-death bank accounts; joint tenancies of personalty; and transfer-on-death securities registration accounts with brokerage houses, investment companies (mutual funds) and issuers of securities.

The revocable trust in which the settlor retains the life estate also serves as a non-probate mode of transfer. When such a trust takes the form of a declaration of trust, it effectively replicates the functions of a will using a different form (and different formalities, since the Wills Act does not apply). The settlor retains complete dominion over the covered property until death.

Because the revocable trust is now widely used as a will substitute, the UTC makes several changes that are designed to achieve consistency with the law of wills.

Capacity

The Code changes the standard of capacity required of the settlor of a revocable trust from the higher standard that is required for an irrevocable trust (or an outright gift or other lifetime transfer) to the lower standard that is allowed for a testator making a will[37].

Revocation

The Code makes two striking changes in the rules governing the revocability of trusts. Reversing the default rule of the common law, the Code presumes that a trust is revocable unless made irrevocable by its terms[38]. This change will be of no

[36] Langbein, John H., *The non-probate revolution and the future of the law of succession*, 1984, 97 Harvard Law Review 1108.

[37] UTC, s 601. This measure tracks comparable provisions in the new Restatements of Property and Trusts. See Restatement of Property (Third): Wills and Donative Transfers, s 8.1(b) (Tentative Draft n° 3, 2000); Restatement of Trusts (Third), s 11(2) (Tentative Draft n° 1, 1996).

[38] UTC, s 602(a) provides: "Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust".

practical importance in the world of professionally drafted trust instruments, because no competent drafter ever leaves that question to default law. Rather, a well-drafted trust spells out that the trust is revocable or irrevocable. Accordingly, the change made by the Code will be of importance primarily for “kitchen table trusts”, that is, for instruments drafted by non-lawyers (or dreadful lawyers). In such cases, the Code’s intuition is that the settlor’s intention is mostly to use the trust as a will substitute, and that, accordingly, the trust was meant to be revocable. The rule presuming the revocability of trusts has been in force for some considerable time in two populous jurisdictions, California and Texas, where it appears to have caused no difficulty.

The Code also eliminates another trap that has arisen, for lay persons, in the relations between the revocable trust and any subsequent will. When a testator attempts to revoke some or all of the trust by a later will, courts have often refused to enforce the attempted revocation. The reasoning has been that since the revocable trust is a lifetime transfer, the assets subject to the trust pass *inter vivos*, hence do not enter the estate, and thus cannot be subject to the decedent’s will[39]. The Code reverses this intent-defeating rule and permits a trust to be amended or revoked by “a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust”[40]. This measure accords with the new Restatements Third both of Trusts and of Property: Wills and Donative Transfers; the latter allows the will to amend all manner of will substitutes[41].

IV) Trustees’ powers

In England, the Trustee Act 2000 has liberalised the scope of some trustees’ powers. American trust law has for decades been dominated by a philosophy of maximum empowerment of trustees. Whereas the common law disempowered trustees to transact with trust property in order to protect beneficiaries against misbehaviour by trustees, the tendency of American legislation across the twentieth century has been to empower trustees, to enhance their ability to transact with trust property for the benefit of the beneficiaries. Under this system of maximum trustee empowerment, the task of protecting beneficiaries belongs not to powers law, but to fiduciary law, which places the trustees under duties of loyalty and prudence in the exercise of their powers[42].

The UTC exemplifies this strategy of maximum empowerment of trustees. Section 815(a) grants the trustee, in addition to any powers conferred by the terms of the trust, “all powers over the trust property which an unmarried competent owner

[39] E.g. “Cook v. Equitable Life Assurance Society” 428 NE 2d 110 (Indiana App 1981) (refusing to enforce later will against former insurance beneficiary designation). Case law on the point is collected in Annotation, 25 ALR 4th 1153 (1981 & later supplements).

[40] UTC, s 602(c)(2)(A).

[41] Restatement of Trusts (Third), s 63, Comment h (Tentative Draft n° 3, 2000); Restatement of Property (Third): Wills and Other Donative Transfers, s 7.2, Comment e (Tentative Draft n° 3, 2000).

[42] On the evolution of American trust law away from the common law system of trustee disempowerment and towards reliance on fiduciary law, see Langbein, John H., *Contractarian basis*, supra n° 29, at pp 632-43.

has over individually owned property [and] ... any other powers appropriate to achieve the proper investment, management, and distribution of the trust property".

Although it is hard to imagine language that is broader or more inclusive than this, section 816 then enumerates several pages' worth of detailed transactional powers (for example: to buy, sell, lease, deposit, borrow, pledge, vote, litigate, insure, pay, distribute), all of which are redundant in view of the breadth of section 815. The UTC's detailed schedule of powers derives from the Uniform Trustee Powers Act of 1964, lightly revised and supplemented. The question arises, of course, why the Code perpetuates a lengthy list of itemised transactional powers in section 816 when the broad language of section 815 makes the list redundant. The answer is that the trustee dealing with trust property often finds it easier to obtain the co-operation of transactional parties when the trustee can point to specific statutory authority that does not require any thought or interpretation in the application.

V) Delegation of duties

The Code confirms a significant change that has occurred in American trust law across recent decades[43], the abrogation of the non-delegation doctrine. The American experience with this topic may be relevant in view of the recent reform of the non-delegation doctrine in England[44].

As late as the 1959 Restatement[45], the non-delegation rule was still widely accepted, but the growing use of pooled investment vehicles and outside money managers, as well as the need for pension trusts to devolve important functions on actuaries and other outside specialists, brought the rule into increasing tension with good practice. It became common for well-drafted trust instruments to dispense with the rule. In 1964, the Uniform Trustee Powers Act[46] overturned the rule. The Uniform Management of Institucional Funds Act, promulgated in 1972 and now in force in virtually all the states, authorises the governing boards of eleemosynary institutions, who are trustee-like fiduciaries, to delegate investment matters[47]. Congress eliminated the non-delegation rule for pension and employee benefit trusts in the 1974 ERISA law[48].

In 1992, the Restatement of Trusts underwent a partial revision devoted primarily to investment matters, in which the American Law Institute overturned the non-delegation doctrine[49]. Indeed, the 1992 Restatement takes the position not

[43] For detail see Langbein, John H., *Reversing the nondelegation rule of trust-investment law*, (1994) 59 Missouri Law Review 104.

[44] By the Trustee Act 2000, ss 11 27.

[45] The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform. Restatement of Trusts (Second), s 171 (1959).

[46] Uniform Trustees' Powers Act, s 3(24) (1964).

[47] Uniform Management of Institutional Funds Act, s 5 (1972). The statute authorises this delegation either to a committee of the board or to outside specialists.

[48] ERISA, s 403(a)(2), 29 USC, s 1103(a)(2).

[49] Restatement of Trusts (Third) Prudent Investor Rule, ss 171, 227(c)(2) (1992); see also ibid, s 227, Comment j.

simply that the trustee has the power to delegate, but that in some circumstances the trustee may have a *duty* to delegate[50]. The 1992 Restatement leaves the shell of the old non-delegation tale in place, but effectively reduces it to a sub-principle of the general duty of prudent administration. It says: "A trustee has a duty personally to perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities to others"[51]. In 1994 the Uniform Prudent Investor Act codified the pro-delegation rule of the 1992 Restatement[52].

Delegation to agents under the Code

Against this background, it is hardly surprising to find that the Uniform Trust Code adheres to the new consensus. Section 807(2) provides: "A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances". This language tracks the Uniform Prudent Investor Act, but the UTA extends the new standard to all facets of trust administration. The Code also follows the 1992 Restatement and the Uniform Prudent Investor Act in imposing alternative safeguards to address the dangers to which the old non-delegation rule was directed.

The Code requires that when delegating trust powers to an agent, the trustee must "exercise reasonable care, skill, and caution" in selecting, instructing, and monitoring the agent[53]. In this regime we see once again the tendency to substitute fiduciary duties in place of disempowerment.

Tracking the Uniform Prudent Investor Act, the Code provides that when a trustee has complied with these standards of prudent selection and oversight, the trustee "is not liable to the beneficiaries for an action of the agent to whom the function was delegated"[54].

Delegation among co-trustees

The Code is much less tolerant of delegation among co-trustees. Unlike delegation of a trust power or function to an agent, where the purpose is typically to take advantage of specialist expertise or economies of scale, delegation among co-trustees undercuts the governance structure of the trust. Normally, the settlor designs a regime of co-trusteeship in order to obtain the advantages of collective decision-making and multiparty oversight. The Code insists, therefore, that "a trustee may not delegate to a co-trustee the performance of a function the settlor reasonably expected the trustees to perform jointly"[55]. The Code backs up this

[50] The implication from the requirement that "the trustee must ... act with prudence in deciding whether ... to delegate", Restatement of Trusts (Third) Prudent Investor Rule, s 227(c)(2) (1992).
[51] Restatement of Trusts (Third) Prudent Investor Rule, s 171 (1992).
[52] UPIA, s 9.
[53] UTC, s 807(a)(1)(3).
[54] UTC, s 807(c). The Law Commission pointed to the comparable provisions of the Uniform Prudent Investor Act when recommending a delegation regime for fiduciary investing for England and Wales. See Law Commission, supra n° 42, s 3.19.
[55] UTC, s 703(c).

standard by articulating the duty of each trustee to "prevent a co-trustee from committing a serious breach of trust", if necessary, by taking legal action to "compel a co-trustee to redress" such a breach[56].

The Code departs from the common law rule that co-trustees must act unanimously. Following the Uniform Trustee Powers Act of 1964[57], the Code provides for majority rule[58].

VI) Fiduciary law

All trust fiduciary law derives from two fundamental principles: the duties of loyalty and prudence. Loyalty is the requirement, codified as section 802 of the UTC, that the trustee "administer the trust solely in the interests of the beneficiaries"[59]. The loyalty norm forbids the trustee both from self-dealing with trust assets and from engaging in conflict-of-interest transactions potentially adverse to the beneficiaries.

The duty of prudent administration is a standard-of-care norm, comparable to the reasonable person rule of tort law. The UTC's version, section 804, requires the trustee to "administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution"[60]. Sub-rules of prudent administration abound in the Code, for example, the duties to keep and render accounts, to furnish information to beneficiaries, to segregate trust assets, to preserve trust assets and make them productive, to enforce and defend legal claims and to be moderate in incurring expenses[61].

The Code's treatment of fiduciary law will strike any Anglo-American lawyer as broadly familiar, but there are a few refinements that reflect recent developments in the law.

Disclosure

The Code endorses the trend of the American case law to enhance the disclosure obligations of trustees regarding major transactions. The federal courts have been extending the fiduciary disclosure duties of trustees under

[56] UTC, s 703(g).
[57] Uniform Trustee Powers Act, s 6(a).
[58] UTC, s 703(a).
[59] UTC, s 802(a), following Restatement of Trusts (Second), s 170(1) (1959), continued in Restatement of Trusts (Third): Prudent Investor Rule, s 170(1) (1992).
[60] UTC, s 804, following Uniform Prudent Investor Act, s 2(a) (994), which is patterned on Restatement of Trusts (Third): Prudent Investor Rule, s 170(1) (1992), and Restatement of Trusts (Second), s 170(1) (1959).
[61] UTC, ss 809-813, UPIA, s 3, foreshadowed in Restatement of Trusts (Third): Prudent Investor Rule, s 227 (1992); Restatement of Trusts (Second), ss 172 78, 188 (1959).

ERISA-governed pension and employee benefit trusts[62]. In the law of private trusts, the leading case, "Allard v. Pacific National Bank"[63], held that the trustee has a duty to inform the beneficiaries in advance "of material facts in connection with a non-routine transaction which significantly affects the trust estate"[64]. The Code effectively codifies "Allard", requiring the trustee to inform the beneficiaries in advance "about the administration of the trust and of the material facts necessary for them to protect their interests"[65].

Trust-owned enterprises

The Code undertakes to clarify the overlap of trust and company law that occurs when trust assets are held in the form of a corporation or other mode of business organisation, insisting that trust law prevails. Section 804(g) says: "In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries"[66].

Bank-operated mutual funds

Following the trend of legislation in virtually all the American states, the Code authorises banks and other financial institutions that serve as trustees to invest trust funds in mutual funds that the institution operates or sponsors. This measure takes the form of an amelioration of the duty of loyalty, which would otherwise prohibit such transactions on the ground of self-dealing. The Code provides that such an investment "is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies" with the prudence norms of the Uniform Prudent Investor Act[67]. Although this measure has the effect of curing what would otherwise be an automatic violation of the rule against self-dealing, it still requires the trustee to meet the ordinary standards of prudent investing. This provision resembles earlier changes in the law that facilitate benign acts of trust administration that would otherwise breach the loyalty norm, for example, the rule allowing trustees to charge reasonable compensation[68], or the statutes and regulations that allow bank trustees to maintain bank accounts in-house[69].

[62] E.g. "Fischer v. Philadelphia Electric Co" (II*)* 96 F 3d 1533 (3d Cir 1996) (holding that an employer-fiduciary has a duty to disclose to affected beneficiaries as soon as changes in early retirement benefits come under "serious consideration").

[63] 99 Wash 2d 394, 404-5, 663 P 2d 104, 110 (1983).

[64] 99 Wash 2d 394 at 405, 663 P 2d at 110 (1983).

[65] UTC, s 813(a).

[66] This measure builds upon Restatement of Trusts (Second), s 193, Comment a (1959).

[67] UTC, s 802(f).

[68] Restatement of Trusts (Second), s 242 (1959); accord, UTC, s 708(a).

[69] Discussed in Scott, Austin W. - Fratcher, William F., *The law of trusts*, s 170.18, at 394-96 (4th ed., 1987-91).

VII) Exculpation clauses

Clause inserted by abuse

Although the UTC carries forward the traditional American rule limiting the enforcement of exculpation clauses in trust instruments, it adds an important refinement for the case in which the trustee or its agent drafted the clause.

The core rule, section 1008(a), is modelled on the Restatement rule[70], for which there is considerable authority in the case law. Section 1008(a) permits trust terms to relieve a trustee of liability for breach of trust, but not for a breach "committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries", and not in the case in which the exculpation clause "was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settler"[71].

The Code's refinement, section 1008(b), speaks to the situation of the wrongfully inserted exculpation clause. Section 1008(b) provides: "An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor". This measure effectively presumes abuse and shifts the burden of disproof to the trustee[72].

Limits on breadth of discretion

A nominally unrelated provision of the Code, limiting the scope of grants of discretion to the trustee, has a function that is quite similar to the familiar rule limiting the enforcement of exculpation clauses. Section 814(a) of the Code provides that "notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as 'absolute', 'sole', or 'uncontrolled', the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries".

VIII) Remedies

The Code carries forward the customary armoury of equitable remedies for breach of trust[73], but makes two important adjustments.

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[70] Restatement of Trusts (Second), s 222 (1959).

[71] UTA, s 1008(a).

[72] Section 1008(b) was the drafters' response to "Marsman v. Nasca" 573 NE 2d 1025 (Mass App Ct, 1991), which the section would overrule: see UTC, s 1008, Official Comment. The Comment emphasises that section 1008(b) "does not apply if the settlor was represented by independent counsel".

[73] See especially UTC, ss 1001-1002.

Mistaken payment

The Code rejects the traditional rule of strict liability in cases of mistaken payment[74], recognising instead a defence of reasonable care. Section 1007 provides: "If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge". (This change does not impair the trust's restitutionary cause of action against the mistaken payee).

Grounds for trustee removal

The Code expands the grounds upon which a court may remove a trustee. Alongside such familiar grounds as committing "a serious breach of trust", "lack of co-operation among co-trustees substantially impair[ing] the administration of the trust", and "unfitness [or] unwillingness" to serve[75], the Code adds the further ground of "persistent failure of the trustee to administer the trust effectively"[76].

This measure responds to the concern that under traditional law beneficiaries have had little recourse when trustee performance has been indifferent, but not so egregious as to be in breach of trust. The Official Comment says: "'A persistent failure to administer the trust effectively' might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts"[77].

IX) Mandatory law

An important trend of academic legal analysis over the past generation, which has begun to seep into legislation and case law in the United States, is the sensitivity to distinguishing between default and mandatory law. Default rules are those that the parties may alter or negate, in contrast to mandatory rules, which are withdrawn from party autonomy.

The Uniform Trust Code contains an innovative measure –section 105, captioned "Default and Mandatory Rules"– that subjects the law of trusts to this scheme of classification. Section 105(a) makes clear that trust law is in principle default law. It provides that "the terms of the trust" prevail over the rules of the Code, except for the relatively few rules of mandatory law identified in section 105(b)[78]. Section 105(b) undertakes to schedule all the rules of trust law that are mandatory, crossreferring to the detailed proscriptions elsewhere in the Code. This

[74] For the former rule, see Restatement of Truts (Second), s 226 (1959).

[75] UTC, s 706(b)(1)(3).

[76] UTC, s 706(b)(3).

[77] UTC, s 706(b)(3), Official Comment.

[78] Likewise, the Uniform Prudent Investor Act (incorporated as UTC, article 9) expressly labels itself a default rule. The Act says: "The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust". UPIA, s 1(b).

comprehensive catalogue allows us to see the extent of mandatory law, and it invites us to explore the purposes of these rules.

I divide the Code's rules of mandatory law into eight sets. Two of these groups of rules –those preventing the trust terms from prejudicing the rights of third parties[79], and those preserving core powers of judicial administrations[80]– rest on self-evident principles of legal process not distinctive to the law of trusts. I discuss below the remaining six sets, rules that: *1*) protect the integrity of juridical categories; *2*) require good faith performance; *3*) require disclosure of the trust and its terms to the beneficiary; *4*) protect the settlor against deception or imposition; *5*) relieve against dead-hand restraints, and *6*) forbid illegal purposes.

Categorisation

Section 105(b)(1) of the Code removes "the requirements for creating a trust"[81] from party autonomy. Those familiar requirements are identified in sections 401 and 402: trust property; capacity; intent to create a trust; definite beneficiaries; and enforceable duties.

The question of whether something is or is not a trust, like all rules of categorisation, is a determination that is reserved to positive law, and hence to the legislature and the courts. Rules of categorisation keep order among basic juridical concepts. By removing these definitional requirements from party autonomy, section 105(b)(1) underscores that private parties may not force the law to treat as a trust an arrangement that lacks the requisites of a trust.

Good faith

UTC section 105(b)(2) provides that trust terms may not overcome "the duty of a trustee to act in good faith and in accordance with the purposes of the trust". Similar language is found in the provision (discussed above) that allows a trust to contain an exculpation clause, but not if that clause "relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries"[82].

The mandatory nature of the good faith requirement is closely related to the policy that removes issues of categorisation from party control. A trust whose terms authorise bad faith performance is not a trust; it is illusory, because it undercuts the requirement that there be enforceable duties, and that the trust be for the benefit of the beneficiaries.

Like the rule of correct categorisation, the good faith requirement may serve a truth-in-labelling policy. The settlor may get the result that the settlor wants, but not

[79] UTC, s 105(b)(5) (creditor rights); s 105(b)(11) (rights of a person other than trustee or beneficiary).
[80] E.g. UTC, s 105(b)(4) (court's power to modify or terminate); s 105(b)(6) (court's power to require or waive bond); s 105(B)(12) (limitations periods): s 105(b)(14) (jurisdiction and venue).
[81] UTC, s 105(b)(1).
[82] UTC, s 1008(a)(1).

by misdescription. The settlor may grant the trustee a general power of appointment, which allows the trustee to appoint some or all of the trust property to the trustee personally[83], but only by identifying the interest as a power of appointment, and not by dispensing with good faith administration of the trust[84]. This insistence on correct labelling, in addition to its implications for efficient judicial administration, also has a cautionary function. Forcing clarification of the true character of proposed trust terms serves to warn a settlor who might otherwise not understand the effect of dispensing with good faith.

Disclosure

With the good faith and categorisation requirements we can link a further group of mandatory rules, those that require the trustee to communicate to the beneficiary the information that is needed to enforce the trust. The UTC makes non-waivable both the trustee's duty to disclose the existence of the trust[85] and the trustee's duty to respond to a beneficiary's request for "trustee's reports and other information reasonably related to the administration of the trust"[86]. Like terms that purport to authorise a trustee to act in bad faith, or that mischaracterise a non-trust as a trust, an arrangement that purports to create a trust but prevents the beneficiary from obtaining the information needed to enforce the trust risks making the trust illusory. An unenforceable trust is not a trust.

Deception

The danger that the settlor may not understand the effect of exculpatory language motivates both the role refusing the enforcement of an exculpation clause that "was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor"[87], and the Code's rebuttable presumption, discussed above, that invalidates "an exculpatory term drafted or caused to be drafted by the trustee"[88].

This concern to protect against deception of the settlor may also underlie the mandatory rules, previously discussed, that forbid trust terms authorising bad faith trusteeship. Because such terms risk harming the beneficiary with little or no corresponding gain, the suspicion arises that such terms may not have been properly disclosed to the settlor, or that the settlor may not have understood the effect of such terms. Although that question is one of fact, such a question would often be difficult to resolve as relevant evidence of the settlor's actual intent is often hard to obtain. In personal as opposed to commercial trust settings, the question would commonly arise after the settlor's death, when the settlor is no longer available to testify as to what he understood the terms to mean. The mandatory rule

[83] Restatement of Property (Second): Donative Transfers, s 11.1, comment d, s 11.4(1) (1986).
[84] Restatement of Property (Second): Donative Transfers, s 12.1 (1986).
[85] UTC, s 105(b)(8).
[86] UTC, s 105(b)(9).
[87] UTC, s 1008(a)(2).
[88] UTC, s 1008(a)(2), following Restatement of Trusts (Second), s 222(3) (1959).

against bad faith trusteeship can be understood to operate as a conclusive presumption that trust terms authorising bad faith must have been improperly concealed from the settlor or otherwise misunderstood by him at the time he agreed to them, since no settlor seeking to advance the interests of the beneficiary would expose the beneficiary to the hazards of bad faith trusteeship.

Dead hand

It sometimes happens that a settlor will attempt to use the trust to perpetuate his or her views about how the trustee should administer the trust property or about how a beneficiary should be allowed to use or consume the property. The courts have refused to allow settlors to impose manifestly wasteful restrictions on the use of trust property. For example, in a well-known Connecticut case the settlor placed in trust a piece of land located in the business district of his city. The terms of the trust directed the trustees not to construct on the land any building higher than three stories, nor to allow long-term leases of the land. By interfering with the development of the land, these restrictions impaired its economic value, with no offsetting advantage to the beneficiaries. The court refused to enforce the settlor's direction, saying that these trust terms "are opposed to the interests of the beneficiaries of the trust"[89].

Although American trust law allows the settlor to impose some conditions restricting the beneficiaries' enjoyment of trust property, the courts have determined that other interests should limit the settlor's power in this regard. For example, although some cases have allowed the settlor to require that his children marry within their particular religious faith in order to qualify as beneficiaries under a trust[90], the courts refuse to enforce conditions that a beneficiary should never marry, or should divorce his present spouse, because such terms violate the public policy favouring marriage[91].

The Uniform Trust Code generalises about these cases in section 404, which says: "A trust and its terms must be for the benefit of its beneficiaries"[92]. Section 105(b)(3) includes this measure in the schedule of mandatory rules. I have elsewhere explained why –in the setting of the greater understanding of the nature of the investment process associated with the rise of Modern Portfolio Theory– the articulation of this standard will provide the courts with the basis for refusing to defer to uneconomic administrative and investment restrictions in trust instruments[93].

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[89] "Colonial Trust Co v. Brown" 105 Conn 261, 135 A 555, 564 (Conn, 1926).

[90] E.g. "Shapira v. Union National Bank" 315 NE 2d 825 (Ohio Com Pl 1974). Contra: "Maddox v. Maddox" 52 Va (11 Gratan's) 804 (1854), holding that the religious community specified in the particular case was so tiny that the condition would effectively prohibit the beneficiary from marrying and was therefore void.

[91] Restatement of Property (Second): Donative Transfers, ss 6.2, 7.1 (1983); accord, Restatement of Trusts (Third), s 29 (Tentative Draft n° 2, March 1999).

[92] The UTC tracks Restatement of Trusts (Third), s 27 (Tentative Draft n° 2, March 1999), which provides that "a private trust, its terms, and its administration must be for the benefit of its beneficiaries".

[93] Langbein, John H., *The uniform prudent investor act and the future of trust investing*, 1996, 81 Iowa LR 641, 663-5.

Illegality

The most familiar of all rules of mandatory law is the rule against illegal purposes[94], which the Code, of course, codifies[95].

Overview on the scope of mandatory law

The lesson that one takes from the UTC's compilation of mandatory law is how little it really restricts party autonomy. Even the rule against trustee self-dealing may be excluded by a properly drafted trust instrument[96]. The basic fiduciary norms of loyalty and prudence loom so large in American trust law not because the parties cannot escape these standards, but because the parties to most trusts welcome these standards, or would welcome them if they had thought about them. These standards capture the intent of the settlor, or, in a commercial trust, the intent of the commercial parties. In the familiar insight of the law-and-economics literature, good default law expresses the standards that the parties would have chosen had they been able to foresee the circumstances in advance. Trust law is in this sense, as I have elsewhere argued, fundamentally contractarian[97].

X) Conclusion

The emphasis in this article on the reforms undertaken in the Uniform Trust Code should not obscure the Code's principal achievement, which is to render the law of trusts in a comprehensive statute. A large body of doctrine has been organised, and sometimes clarified, and expressed as positive law.

The impetus for drafting the Uniform Trust Code originally came from relatively sparsely populated states, mainly in the upper Midwest and the Mountain West. Because the case law on trusts in these jurisdictions is thin, planners have been troubled by the lack of authoritative guidance on what the trust law of the state is. The Code was meant to serve that need. As the drafting progressed, however, the Code began to attract considerable interest from advisory groups in states that have a mature trust law, as they discovered how often the comprehensiveness of the Code exposed gaps or could help cure defects in the local law.

Codification necessarily puts matters of law reform in issue, because the drafters are loathe to reinvigorate in statute what they regard as shortcomings in the existing law. In this way, a project of comprehensive and authoritative restatement came also to formulate the reform agenda that I have reviewed in this article.

[94] Restatement of Trusts (Second), ss 60-65 (1959).

[95] "A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve" (UTC, s 404).

[96] UTC, s 802(b)(1) allows self-dealing or conflict-tainted transactions that are "authorized by the terms of the trust". Accord, Restatement of Trusts (Second), s 170(1), comment t (1959). Prominent decisional authority on the point includes "In re Estate of Halas" 309 Ill App 3d 333, 568 NE 2d 170, 178 (1991); "Estate of McCredy" 470 A 2d 585, 596-601 (Pa Super 1983); "In re Krause's Estate", 19 Mich App 155, 172 NW 2d 468 (1969).

[97] Langbein, John H., supra n° 29.

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