

Provisional Preface to the 2010 Edition of Loring A Trustee's Handbook (111 Years Serving the Trust Community) [December 2009]

Loring 2010 has over 130 pages of new text and 774 new footnotes. 185 old footnotes have been re-worked. There are citations to 45 new cases. There are 30 new law review citations and five new treatise citations.

Prof. Mark L. Ascher's revision of the 4th edition of Scott on Trusts continues. Volume 6 of the 5th Edition (Scott & Ascher) has now been published. It covers the nature of charitable purposes; the failure of charitable trusts-cy pres; resulting trusts: general principles; when an express trust fails; when express trust does not exhaust trust estate; and purchase-money resulting trusts. We have combed Volume 6 looking for material readers of *Loring* would find useful. What we found, and we found a lot, has been woven into the fabric of *Loring 2010*.

While numerous Uniform Probate Code (UPC) references have been added to *Loring* over the years, it was done more or less on an ad hoc basis. This time around we have systematically combed the entire UPC, as we had done the entire Uniform Trust Code and Restatement (Third) of Trusts a number of years ago, looking for neglected trust-related provisions that might be of interest to our readers. Although *Loring* already has thousands of references to Professor Bogert's multi-volume treatise, in the years to come we intend to subject that fine work to the same systematic combing process. Now more than ever *Loring* should be every serious trustee's gateway to the Codes, Restatements, and treatises.

In the Preface to the last edition we noted how difficult it must be for the busy trust practitioner to keep up with all the conflicting, intersecting, and sometimes fleeting codifications that have recently been inflicted on the law of trusts, or are in the works. We are doing our best to highlight the statutory conflicts and ambiguities that are baked into the model codes and statutes. But as to the versions that actually end up being enacted in a particular state, not to mention the isolated packets of trust-related legislation that remain on that state's books from pre-codification days, there is only so much that we can do. Last year we held up an ancient Colorado statute that may or may not have domestic asset protection attributes as an example.

This time around we have had occasion to parse Massachusetts' version of the Uniform Probate Code (UPC), which has just been enacted into law.¹ It is a strange hodgepodge of selected but modified sections from the model statute and selected sections of certain statutes that were already on the books. Massachusetts' gutted version of the UPC, for example, imposes no duty on the trustee to register inter vivos trusts, a requirement that gives the model code its logic and internal coherence, whatever one may think of the Code's overall social utility. It is not entirely clear why Massachusetts would enact a gutted version of the UPC in lieu of adopting the Uniform Trust Code. After all, the Uniform Trust Code is intended to supersede Article VII of the UPC, except for the UPC's trust registration provisions!² For what it is worth, when we have cited to a section of the model UPC, we have tacked on a reference to its Massachusetts counterpart, when there is one.

New Hampshire too has contributed to a lack of uniformity across the jurisdictions, but in a

¹ See Mass. Gen. Laws ch. 190B.

² See Uniform Trust Code, Prefatory Note.

different way. Unlike Massachusetts' buffet approach to trust codification, New Hampshire adopted almost verbatim the entire model Uniform Trust Code. In 2008, however, its legislature tacked on by amendment at the very end five additional rather complicated sections that address the rights, duties, and obligations of trust advisors and trust protectors in their interactions with trustees.³ This has already proved to be a trap for the unwary trust litigator.

And then there is Section 404 of the model Uniform Trust Code which provides as follows: "A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries." It has been suggested in some quarters that this facially plain vanilla codification of long-standing principles of trust law actually has, or should have, an "intent-defeating" gloss.⁴ Professor Jeffrey A Cooper disagrees: "This approach would render the UTC a fundamentally incomprehensible piece of trust legislation, requiring a reader seeking to understand the UTC's meaning to look to the pages of law reviews rather than the UTC's own text."⁵

Is there any further proof required that the law of trusts is descending inexorably into a state of codification-induced chaos? At one time the trust was a simple and elegant principles-based concept; no longer. Things are getting ever more complicated and expensive. The first edition of *Loring* was 191 pages, index included. *Loring* has now ballooned to more than 1300 pages of text, without the front and end matter, largely due to all this non-judicial intervention into Equity's prerogatives.

As we have noted in the prefaces to prior editions, we lay the blame for this mess squarely at the door of the ivory tower. While on the one hand its denizens are feverishly codifying or restating this or that aspect or application of agency law, trust law, property law, the law of powers of appointment, and fiduciary law generally, on the other hand they have been very busy for some time now purging Agency, Trusts, and Equity from the core law school curriculum, a topic we take up in Section 8.25 of the Handbook. This process of marginalizing Equity in the American law school curriculum is now all but complete. And yet, the common law (which encompasses the equity-based relationships of agency and trust) is the bedrock upon which all our statutory and regulatory edifices are constructed, the point of departure for all statutory initiatives. No wonder American courts are losing sight of the forest for the trees when it comes to trust matters. Now we academics have turned our sites on "reforming" once and for all the law of future interests.⁶ It is only going to get worse. Some assert that England's long history of effortlessly and successfully tweaking the law of trusts would suggest otherwise. It is suggested that the English experience, whether or not it has actually been painless, is not that translatable. The United Kingdom is not the United States, all unruly fifty of them plus the District of Columbia.

Perhaps it is time to rethink whether all this interference in Equity's affairs is a good thing. Is it too heretical to suggest that perhaps we should be leaving Equity alone to do its job at its own pace? While there was much social utility in codifying the corner of the common law of contracts that regulates commercial activity, reducing transaction costs perhaps being the most obvious, intrusive codifications and the instantaneous restating of large swaths of agency law and trust law are another matter, agency, of course, being enforceable in Equity, trusts being actually one of Equity's creatures

³ RSA 564-B:12-1201-1205.

⁴ John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105 (2004).

⁵ Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, The Uniform Trust Code, and the Future of Trust Investment Law*, 88 Boston Univ. L. Rev. 1165, 1179 (2008).

⁶ See Restatement (Third) of Property: Wills and Other Donative Transfers §§25.2, 25.3, and 26.1-26.10 (P.D. No. 13, 2008).

.. Apart from keeping up with Prof. Ascher's work-in-progress, we have brought eight additional sections into the Handbook. We also have substantially re-worked Sections 3.3 and 4.1.1.1, which cover the resulting the trust. The new sections are listed below:

- §8.15.71 The Constitutional Impediment to Retroactively Applying New Trust Law
- §8.15.73 “All-or-Nothing” Rule with Respect to Class Gifts and Its “Specific Sum” and “Sub-Class” Exceptions [The Rule Against Perpetuities]
- §8.15.74 The Principle that Money Paid to an Innocent Non-BFP Under a Mistake of Law is Not Recoverable
- §8.15.75 The Nonassignability of a Debt at Early Common Law
- §8.24 Standards of Proof
- §8.46 Proof of Facts in Trust Litigation
- §9.8.10 The STAR Trust [Cayman Islands]
- §9.9.15 The Civil Law Foundation

There is even more cross-referencing in *Loring 2010* than there was in *Loring 2009*. With the introduction of eight new sections, we continue the process of filling in gaps in our presentation of the substantive material and culling the text and footnotes for errors. Finally, with each edition, there has been a further refinement and expansion of the index.

Our readers should understand, however, that in spite of all this new material, *Loring* remains lean and mean. We have assiduously avoided frivolous footnoting and the mindless stringing of citations. Each footnote is either itself a wealth of useful information or the gateway to it.

A gratuitous invitation to our readers

Still, we must acknowledge that this codification-driven ballooning of *Loring* is making it increasingly difficult for the student or busy trust practitioner to immediately extract from the handbook information that is readily exploitable. In recent years we have received numerous email and telephone communications from our readers requesting assistance. “We can’t find it in *Loring*” is the typical refrain. In almost every case we have managed to steer the reader to a paragraph or footnote that is directly on point. Accordingly, we are gratuitously and on an experimental basis only inviting any *Loring* reader who is unable readily to locate that silver bullet to email us for assistance at this address: CRoundsJr@aol.com. The text of the email should be brief, complete, and self-contained. While we ask that the identity, address and contact telephone number of the sender be fully disclosed, the email should contain absolutely no confidential information whatsoever. While we do not guarantee that *Loring* will be helpful in every case, we expect that it will be in most. We intend to conduct this experiment until the publication of the next edition. We reserve the right, however, to revoke this gratuitous offer of assistance at any time before then. Under no circumstances should the offer be construed as part of the consideration for the purchase price of the 2010 Edition of *Loring a Trustee’s Handbook*. Nor should it be

construed as practicing law. The offer is limited merely to informing the reader whether or not this handbook may have information of use to the reader, and if we believe it does, to alerting the reader as to where in *Loring* such information might be found.

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