

# **Preface to the 2007 Edition**

## ***(108 Years Serving the Trust Community)***

The contents of Sections 82 through 89 of the Restatement (Third) of Trusts, recently adopted and promulgated by the American Law Institute, have been woven into the fabric of Loring 2007. These sections address the trustee's specific duties to furnish information, keep records and provide reports, and segregate and identify trust property; the extent of the trustee's powers; the fiduciary duties of the trustee generally and the exercise of trustee powers; judicial control of discretionary powers; the trustee's power to incur and pay expenses; and the trustee's powers and duties on termination.

Prof. Prof. Mark L. Ascher's revision of the 4<sup>th</sup> edition of Scott on Trusts is well underway. Volumes 1 & 2 of the Fifth Edition, covering the history of the trust, the nature of a trust, the creation of a trust and the elements of a trust, however, were published long after Loring 2006 went to press. Their contents, as well, have been woven into the fabric of Loring 2007.

The 2007 revision process has brought 10 additional sections into the Handbook. The new sections are listed below:

- 8.15.53 Harmless-error Rule [the trust application]
- 8.15.54 Ademption by Extinction [the trust application]
- 8.15.55 Antilapse [the trust application]
- 8.15.56 120-Hour Survival Requirement [the trust application]
- 8.15.57 Novation
- 8.15.58 Precatory Words
- 8.15.59 Constructive Fraud
  
- 9.8.9 The Uniform Custodial Trust Act
  
- 9.9.11 A Contract to Convey Is Not a Trust
- 8.15.60 The Privity Barrier (Scrivener Malpractice)

Loring 2007 contains new and expanded discussions of topics vital to the trustee, resulting in substantial additions to text and footnotes. There is even more cross-referencing than there was in Loring 2006. With the introduction of 10 new sections, we continue the process of filling in gaps in our presentation of the substantive material. And we continue to comb the text and footnotes for errors. Finally, the Handbook's index continues to be refined and expanded.

Besides the substantial addition of text to the body of Loring, approximately 60 pages worth, there are 619 new footnotes; 58 new case references, five of which are 2006 cases; 34 new article and law review references; and 4 new treatise references. More than 155 pre-existing footnotes have been corrected, updated, and/or revised. Our readers should understand, however, that in spite of all this new material, Loring continues to be lean and mean. We continue to stay away from frivolous footnoting and the mindless stringing of citations. Each footnote is either itself a wealth of useful information or the gateway to it

For the past 15 years or so, the law of trusts has been the subject of considerable and sustained non-judicial intervention here in the United States. We have the Uniform Prudent Investor Act, the sections of the Uniform Probate Code applicable to trusts, the sections of the Restatement (Third) of Property applicable to trusts, the Uniform Trust Code, and the Restatement (Third) of Trusts, which is well underway, but still a work in progress. Now that the end appears in sight, at least for now, we felt it was time to take stock, to make sure that Loring was doing more than merely keeping her readers current on the status of the various works in progress. It was time to make sure that nothing important had fallen between the cracks, and that all the important divergences--whether in nomenclature, nuance, or the fundamentals--were being flagged. Loring 2007 is in part a product of that effort.

Perhaps the most dramatic divergence in nomenclature is the designation of the class of trust beneficiaries who are entitled on an ongoing basis to be kept informed of important matters pertaining to the trust. The Uniform Trust Code refers to them as "qualified beneficiaries"; the Restatement (Third) of Trusts refers to them as "fairly representative" beneficiaries. In the years to come, the trust community will surely be pondering what if anything is connoted by this divergence in nomenclature.

In numerous areas, there is a fundamental lack of accord between and among the Uniform Codes and Restatements. The Restatement (Third) of Trusts, for example, creates an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to a beneficiary, and possibly also for tort claimants. In neither case does the Uniform Trust Code.

The Uniform Probate Code provides that with respect to a trust under which the settlor has reserved a right of revocation, any provisions in favor of settlor's spouse are revoked upon their divorce or marriage annulment. This includes any provisions designating the ex-spouse as a fiduciary. The Restatement (Third) of Property is generally in accord. Under the Code, however, the property passes as if the settlor's ex-spouse had disclaimed the beneficial interest. Under the Restatement, the property passes as if the settlor's ex-spouse had predeceased the settlor. Time will tell whether this is a distinction without a difference. What is clearly a difference, however, is that under the Code, divorce

extinguishes not only the equitable interests of the ex-spouse but also those of the ex-spouse's relatives.

And then there is antilapse as it applies to trusts. Some courts by analogy are applying antilapse principles to will substitutes such as revocable inter vivos trusts. The Restatement (Third) of Property is fully in accord with these decisions. The Uniform Probate Code is as well, but goes much, much further, applying the antilapse concept to future interests in irrevocable as well as revocable trusts.

Needless to say, this imperfect coordination and harmonization among the Uniform Codes and the Restatements; the understandable unwillingness of state legislatures to enact model statutes without modification; and the constant churning out of decisions by state courts that are either tweaking some aspect of the common law of trusts, much of which has *not* been abrogated, or placing idiosyncratic glosses on the provisions of the uniform codes are making the law of trusts fiendishly complicated for trust practitioners and litigators operating on the line, not to mention the trustees who have found themselves, some by choice, in the eye of the storm. It is time that the law of trusts be given some time to stabilize. In the meantime, it is hoped that those out on the line will find Loring 2007 of some help in navigating these now imperfectly charted—perhaps overly-chartered is a better word—waters.

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