

Preface to the 2009 Edition of Loring A Trustee's Handbook
(110 Years Serving the Trust Community)

Loring 2009 has over 143 pages of new text and 894 new footnotes. 180 old footnotes have been re-worked. There are citations to 54 new cases. 13 of those cases were decided in 2008. There are citations to 17 law reviews and two treatises that were not in Loring before.

Prof. Mark L. Ascher's revision of the 4th edition of Scott on Trusts continues. Volume 5 of the 5th Edition (Scott & Ascher) has now been published. It covers parties acting adversely to the trustee; transferees of trust property; participation in breach of trust other than by receiving transfer; effect of laches and statutes of limitations; discharge by beneficiary and set-off of claim against beneficiary; termination and modification (general principles); termination and modification by consent; termination and modification pursuant to settlor's power to revoke or modify; administration after termination; and charitable trusts (general principles). We have combed Volume 5 looking for material that we felt the readers of Loring would find useful. What we found, and we found a lot, has been woven into the fabric of Loring 2009. The Handbook is better for it.

In the mainstream trust literature, the commercial applications of the trust relationship generally get short shrift. The Handbook is a notable exception. There was much new material in the last edition on trustee and incorporated mutual funds. In this edition we have beefed up the Handbook's coverage of The Trust Indenture Act of 1939, which regulates the administration of property collateralized to secure bond issues.

In the Preface to the last edition we had bemoaned the fact that after only 35 years, the Uniform Management of Institutional Funds Act (UMIFA) has been superseded by the Uniform Prudent Management of Institutional Funds Act (UPMIFA), which covers charitable corporations as well as charitable trusts. The process of revising Loring to reflect this development had reminded us once again of how difficult it must be for the busy trust practitioner to keep up with all this trust-related codification, some of which is conflicting, some of which is intersecting, some of which is fleeting, and all of which is ultra-nuanced and ultra-technical.

This time around, a letter to us from James R. Wade, a distinguished former judge and now practicing lawyer, caused us to reflect on yet another, though related, burden of the trust practitioner, namely identifying, corraling, parsing, and keeping track of the small isolated packets of trust-related legislation that have found their way over the years into the nooks and crannies of the annotated laws. In Loring 2008, we had listed Colorado as a domestic asset protection jurisdiction based on a reading of a section of an 1861 Colorado statute (C.R.S. § 38-10-111). In his letter, he advised us that a "strong majority" of the Colorado trust bar felt that we and others were reading too much into the statute, that Colorado is, in all likelihood, not a domestic asset protection jurisdiction. We, of course, have duly communicated this consensus to our readers via Loring 2009.

Judge Wade's letter is a reminder that there is only so much that the Loring Project can do to assist the practitioner in keeping track of such isolated packets of legislation. It is difficult enough trying to keep up with the trust-related model statutes and restatements that are now out there, or are incubating in one or another American law school. The Uniform Statutory Trust Entity Act project, the Principles of the Law of Nonprofit Organizations project, and the Powers of Appointment sections of the Restatement

(Third) of Property: Wills and Other Donative Transfers are three current works-in-progress that immediately come to mind. With respect to the last item, one learned commentator has echoed our concerns that codification may actually be working against the goal of achieving uniformity across the jurisdictions: “Unfortunately, if experience is any guide, even a Uniform Powers of Appointment Law will not succeed in the enactment of principled rules in all states as too many states in a relentless race to the bottom are more interested in securing trust business.”¹

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. J.D. Heydon, an Australian jurist, explains the concerns that some of us are now having:

A primary goal of judicial development of the law is to achieve coherence but to combine that goal with vitality. 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. Doubtful problems can often be solved by applying principles operative generally in the law. 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 the future. If the legislature adopts ad hoc solutions for particular problems (however well intentioned the reform and however convenient its results in the specific area may be), it tends to deaden and stultify the process described above, at least for a time. A question remains whether legislation can maintain that effect in the longer run. The silent waters of equity run deep—often too deep for legislation to obstruct.²

It is suggested that we largely have the American law school to blame for trust law’s growing state of incoherence, at least on this Continent. While on the one hand its denizens are feverishly codifying or restating this or that aspect or application of agency law, trust law, or fiduciary law, on the other hand they have been very busy for some time now purging Agency, Trusts, and Equity from the core 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 we hear more and more complaints that when it comes to equitable matters, “the Court sometimes seems to be administering a sort of palm-tree justice, without any properly reasoned explanation of why relief is being granted or refused—or of the nature and quantum of the remedy when relief is granted.”³ Thus, we ought not to expect the law of trusts to return to a state of coherence until both

¹ Ira Mark Bloom, Powers of Appointment under the Restatement (Third) of Property, 33 Ohio Northern Univ. L. Rev. 755, 805 (2007).

² The Honourable Justice J.D. Heydon, AC, Does statutory reform stultify trusts law analysis?, 6 Trust Quarterly Review, Issue 3, pg. 28 (2008) [a STEP publication].

³ The Right Honourable Lord Walker of Gestingthorpe, Which side “*ought to win*”? Discretion and certainty in property law, 6 Trust Quarterly Review, Issue 3, pg. 5 (2008) [a STEP publication] (the author suggesting that the doctrine of proprietary estoppel is “a particularly appropriate context in which to examine the struggle between principle and discretion”).

problems, that is the codification one and the palm-tree justice one, are addressed.

Apart from keeping up with Prof. Ascher's work-in-progress, we have brought ten additional sections into the Handbook. We also have substantially re-worked Section 8.2.2.1, which covers exceptional circumstances that warrant mid-course modification, reformation, or rectification of the terms of an irrevocable trusts, or the mid-course avoidance, rescission, revocation, or termination of the trust relationship itself. The new sections are listed below:

§3.6 External In-Bound Liabilities of Third Parties to the Trustee and the Beneficiaries

§8.3.6 Negotiable Instruments and the Duty of Third Parties to Inquire into the Trustee's Authority

§8.3.7 The Duty of Stockbrokers to Inquire into the Trustee's Authority to Transact

§8.3.8 The Trust Safe-Deposit Box: The Duty of the Lessor to Ascertain One's Equitable Authority to Gain Access

§8.15.68 Holder in Due Course (Trust Application)

§8.15.69 Third Party Liability for Trustee's Misapplication of Payments to Trustee: The Purchaser's Duty to Monitor the Trustee's Application of the Purchase Price

§8.15.70 Doctrine of Laches

§8.45 What is the Difference Between a Good Faith Purchaser for Value (BFP) and a Holder in Due Course

§9.9.14 The Administrative Trust (U.S.)

§9.31 Corporate Trusts; Trusts to Secure Creditors; The Trust Indenture Act of 1939; Protecting Bondholders.

There is even more cross-referencing in Loring 2009 than there was in Loring 2008. With the introduction of ten 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.

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