ACTEC Law Journal

Volume 45 | Number 1 Article 7

9-1-2019

The Dark Side of Codification

Thomas P. Gallanis

The Dark Side of Codification

*Thomas P. Gallanis**

The twentieth anniversary of the promulgation of the Uniform Trust Code (UTC) is an occasion for celebration and reflection. The time is right for celebration because the UTC is one of the successes of the Uniform Law Commission (ULC). Thirty-four states and the District of Columbia have enacted enough of the UTC to be counted by the ULC as enacting jurisdictions.[1] By comparison, the Uniform Probate Code, parts of which have influenced virtually every state in the nation,[2] has only eighteen enacting jurisdictions.[3] The time also is right for re-

* Allan D. Vestal Chair in Law and Associate Dean for Research, University of Iowa; Visiting Professor of Law (2017-2022), University of Chicago Law School; Visiting Professor of Law (2019-2022), KoGuan Law School, Shanghai Jiao Tong University. Many thanks to David English and Benjamin Orzeske for helpful comments.
Disclaimer: I serve as the executive director of the Uniform Law Commission's Joint Editorial Board for Uniform Trust and Estate Acts and have served as a reporter or co-reporter for the Uniform Real Property Transfer on Death Act (2009), the Uniform Powers of Appointment Act (2013), and the 2019 Amendments to the Uniform Probate Code. I have also served as an associate reporter for the American Law Institute's Restatement (Third) of Trusts. Nothing in this essay is intended to represent the views of the Uniform Law Commission or the American Law Institute. I speak in my individual capacity only.

1 The enacting jurisdictions listed on the Uniform Law Commision's website are Alabama, Arizona, Arkansas, Colorado, Connecticut, D.C., Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Trust Code,* UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d (last visited Nov. 2, 2019). 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.

2 *See* Benjamin Orzeske & Thomas P. Gallanis, *The Uniform Probate Code at 50*, 33 PROB. & PROP., Sept./Oct. 2019, at 10.

3 The enacting jurisdictions listed on the ULC's website are Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah. *Probate Code*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8 (last visited Nov. 2, 2019).

flection. Prior to the UTC, the law of trusts in the U.S. was primarily common law, albeit with specific uniform statutes such as the Uniform Principal and Income Act (originally promulgated in 1931), the Uniform Trustees' Powers Act (1964), and the Uniform Prudent Investor Act (1994).[4] Has the UTC's comprehensive codification of trust law been a force for good or for ill? On balance, the UTC's achievement is remarkable and generally a force for good. The harmonization, modernization, and codification of trust law in so many U.S. states facilitates multi-jurisdictional trust activity and provides each enacting jurisdiction with a comprehensive law of trusts, whereas previously only the questions of trust law litigated in the state would have produced answers in the state's case law. But the promulgation of the UTC has not been an unqualified good. This essay offers a reminder that the codification of trust law in the U.S. has a dark side.

The dark side of codification arises between promulgation and enactment. After the ULC promulgates a uniform act, the act is considered for enactment by the states. With respect to a uniform act in the field of trusts and estates, the consideration typically begins in the section of the state bar association—or, in a major city, the committee of the city bar association—concerned with estate planning. In Iowa, for example, the state bar association has a Section on Probate, Trust, and Estate Planning. In Illinois, the state bar association has a Section on Trusts and Estates, and the Chicago Bar Association has a Trust Law Committee. Nomenclature aside, the bar association's section or committee plays a key role in determining whether and in what form a uniform act in the field of trusts and estates will become law. A bill in the area of trusts and estates supported by the bar association is likely to be approved by the legislature and signed by the governor. A uniform act on trusts and estates—or a provision within the uniform act—opposed by the bar association is unlikely to see the light of day. 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. Uniform acts in trusts and estates rarely are enacted verbatim. More commonly, and especially with large acts such as the UTC, the act is modified to a lesser or greater degree by the enacting state. This often means it is modified during the process of study by the bar and other associations, prior to the bill's introduction in the legislature. The modifications range from the helpful—for example, adjusting uniform provisions to conform to the particular state's law or practice—to the pernicious.

---

[4] For discussion, see John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1069-82 (2007).

Pernicious modifications of the UTC have been enacted into law. These arise not with respect to the default rules of trust law, which in any event will yield to an expression of contrary intention in the terms of the trust and which lawyers can alter or avoid by drafting, but with respect to the mandatory rules of trust law, which purposefully disregard a contrary provision in the terms of the trust in order to achieve overriding goals of policy.[5] For example, the official text of the UTC follows the common law in providing that a settlor may not eliminate the trustee's duty to provide some information about an irrevocable trust to some of the trust's beneficiaries.[6] The reason for this rule is straightforward: the trustee has a mandatory duty to provide information to at least some of the beneficiaries because only the beneficiaries have both the legal authority and the economic incentive to monitor and enforce the trustee's performance.[7] Yet of the thirty-five jurisdictions enacting the UTC, seventeen have eliminated this mandatory rule,[8] and many others have weakened it.[9] Another example concerns the fundamental requirement that a trust and its terms be for the benefit of the beneficiaries.[10] The

---

5 For a discussion of the mandatory rules, see John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105-28 (2004).

6 *See* UNIF. TRUST CODE § 105(b)(8) (UNIF. LAW COMM'N 2000, amended 2004) ("the duty . . . to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports"); *see also id.* § 105(b)(9) ("the duty . . . to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of the trust"). In 2004, these provisions were placed in brackets to indicate that uniformity no longer was expected. *See id.* § 105 cmt. On the common law, see RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (AM. LAW INST. 1959) ("Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.").

7 For discussion, see Thomas P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1621 (2007).

8 ARK. CODE ANN. § 28-73-105(b) (2019); H.B. 1471, 101st Gen. Assemb., 1st Reg. Sess. § 105(b) (Ill. 2019); KAN. STAT. ANN. § 58a-105(b) (2019); MASS. GEN. LAWS ch. 203E, § 105(b) (2019); MINN. STAT. § 501C.0105(b) (2019); MONT. CODE ANN. § 72-38-105(2) (2019); N.H. REV. STAT. ANN. § 564-B:1-105(b) (2019); N.C. GEN. STAT. § 36C-1-105(b) (2018); N.D. CENT. CODE § 59-09-05(2) (2019); S.C. CODE ANN. § 62-7-105(b) (2019); TENN. CODE ANN. § 35-15-105(b) (2019); UTAH CODE ANN. § 75-7-105(2) (LexisNexis 2019); VT. STAT. ANN. tit. 14A, § 105(b) (2019); VA. CODE ANN. § 64.2-703(B) (2019); W. VA. CODE § 44D-1-105(b) (2019); WIS. STAT. § 701.0105(2) (2019); WYO. STAT. ANN. § 4-10-105(b) (2019).

9 *See*, *e.g.*, D.C. CODE § 19-1301.05(c) (2019); KY. REV. STAT. ANN. §§ 386B.1-030(2)(h), 386B.8-130(2) (West 2019); ME. STAT. tit. 18-B § 105(3) (2019); MISS. CODE ANN. § 91-8-105(d) (2019); N.M. STAT. ANN. § 46A-8-813(F) (2019); OHIO REV. CODE ANN. § 5801.04(C) (LexisNexis 2019); OR. REV. STAT. § 130.020(3) (2019).

10 For a disagreement about whether the benefit-the-beneficiaries rule should be mandatory, compare Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform*

official text of the UTC follows the common law in framing the requirement as mandatory.[11] Yet eight of the jurisdictions enacting the UTC have deleted this provision,[12] and two have weakened it.[13] The process of codifying trust law created the opportunity to capture the legislative process and eliminate or weaken these as mandatory rules.

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. In many respects, the organizations producing uniform acts and Restatements are similar: the ULC and the ALI are dedicated to stating and improving the law, and both consist of lawyers, judges, and professors. The ALI is explicit that "members should speak, write, and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest;"[14] similarly, the ULC is explicit that commissioners "are expected to leave personal and client interests at the door . . . [and to] exercise their judgment . . . without regard to self-interest or client interest."[15] At plenary meetings of each organization, the ALI members and the ULC commissioners endorsed the mandatory rules described above. But the uniform-law process does not end when a uniform act is promulgated; the uniform act remains to be considered by each state. The bar associations and other associations exert substantial influence over whether and in what form the act may be enacted by the state legislature, and the legislative process is subject to capture from these and other interest groups. The phenomenon is not

---

Trust Code, and the Future of Trust Investment Law, 88 B.U. L. REV. 1165 (2008) (criticizing the rule), with John H. Langbein, *Burn the Rembrandt?: Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375 (2010) (defending the rule).

11 *See* UNIF. TRUST CODE § 105(b)(3) ("the requirement that a trust and its terms be for the benefit of its beneficiaries"). The benefit-the-beneficiaries rule expresses the rationale of the longstanding mandatory rule against capricious purposes. *See* RESTATEMENT (SECOND) OF TRUSTS § 62 cmt. w ("if a house is devised with a direction to block it up for twenty years, or if money is bequeathed with a direction to throw it into the sea, the direction is against public policy").

12 H.B. 7104, Gen. Assemb., Jan. Sess. § 5(b)(3) (Conn. 2019); FLA. STAT. § 736.0105(2)(c) (2019); H.B. 1471, 101st Gen. Assemb., 1st Reg. Sess. § 105(b)(3) (Ill. 2019); MASS. GEN. LAWS ch. 203E, § 105(b)(3); MICH. COMP. LAWS § 700.7105(2)(c) (2019); 20 PA. CONS. STAT. §§ 7705(b)(3), 7734 (2019); OHIO REV. CODE ANN. § 5801.04(B)(3); W.VA. CODE § 44D-1-105(b)(3).

13 MISS. CODE ANN. § 91-8-105(b)(3); TENN. CODE ANN. § 35-15-105(b)(3) (both providing for "the requirement that a trust and its terms be for the benefit of the beneficiaries as the interests of such beneficiaries are defined under the terms of the trust . . . .").

14 *Procedures*, AM. LAW INST., https://www.ali.org/annual-meeting-2019/procedures/ (citing RULES OF THE COUNCIL r. 4.03 (AM. LAW INST. 2007)).

15 *Conflict of Interest Policy*, UNIF. LAW COMM'N, http://www.uniformlaws.org/aboutulc/policies/conflictofinterestpolicy (last updated Dec. 6, 2018).

unique to the UTC nor to uniform laws. The statutes in U.S. states authorizing self-settled asset protection trusts[16] and repealing or eviscerating the Rule Against Perpetuities also are examples.[17]

The UTC was and is a great achievement—but on this twentieth anniversary, we must be clear-sighted not only about the benefits but also about the harms. Codification has a dark side.

---

16 In most of the UTC states that also authorize the self-settled asset protection trust (APT), the APT legislation was enacted years after the state's enactment of the UTC.

17 For a recent critique of such statutes, see Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 IOWA L. REV. 2155, 2155-74 (2018).