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Elegy

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Elegy

*William P. LaPiana**

I thank Prof. Brophy, Judge Radigan, and Ms. Hillman for their comments on *Social Control of Wealth*. I am especially grateful for the time and effort they have expended because taken together their observations draw from the piece support for two important messages. First, that the role of lawyers in the law reform in our nation is one of rationalizing and reforming, as Prof. Brophy puts it. Second, that the particular type of reform we call codification has the best chance of success when it looks to reform by supplementation of the existing law rather than by abolishing and trying to build completely anew, as Judge Radigan and Ms. Hillman state. I agree wholeheartedly with both these comments, even though in my heart of hearts I often wish that the Revisers had succeeded in radically reforming the law of trusts.

Both observations, in turn, are based on a profound truth about the legal system of the United States. The making of the laws is in the hands of our judges as much as it is in the hands of the legislators—not exactly a striking observation but important nonetheless, I think, at least when we come to make it because we can see an historical example of judges forcing legislation into the procrustean bed of existing general principles sanctioned by the passage of time. It is not insignificant that the courts referred to a common law of trusts, as “incorrect” as that is given the rooting of trust law in equity. We might agree with Holmes’s belief that there should be a better reason for a rule of law than its dating from the high middle ages, but we must remember that the Justice also believed that the life of the law has not been logic but experience. In the context of the rules the Revisers created, while the logic of a republican polity might lead to the conclusion that the accumulation and concentration of wealth must be limited by law, experience shows that the desire to provide the benefits of wealth for one’s descendants without giving those descendants complete control over that wealth is enormously powerful. Indeed, it sometimes seems that we could write the history of the Anglo-American legal profession as a story of lawyers finding ways to evade legislative attempts to assert society’s control over wealth, many of

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which were intended to give successors outright ownership of inherited property. Granted the origin of the Statute of Uses was Henry VIII's need for revenue, but the basic point remains: the legislature enacts a rule; the courts, with the help of the profession, mold, stretch, and modify it in ways that make the effects of legislation much less radical and, in this case as in so many others, mitigate the possible adverse effects of the new law on the accumulation and safeguarding of wealth.¹

These ruminations, however, should not make us lose sight of those parts of the Revisers' law of trusts that stuck. Their novel approach to the Rule Against Perpetuities is still part of New York law,² existing alongside the more familiar rule prohibiting too remote vesting (which became part of the State's law in the 1960s).³ The protection of the interests of income beneficiaries of trusts from creditors of the beneficiaries not only stuck, but became to a great degree the law of the land when courts began to recognize spendthrift trusts in the 1880s—more formally, to allow a privately imposed restraint on an equitable interest, although that recognition is different from a statute that makes an income interest inalienable. What didn't stick, of course, was the limit on the purposes for which a trust could be created, the provision in the Revised Statutes that had most potential for severely limiting trusts as devices for transmitting accumulated wealth while keeping it out of the control of those who benefit from it. The trusts at the heart of George Lorillard's estate plan did violate the two-life rule, but that is a limitation good drafting dealt with for many decades until the "lives in being plus 21 years" limitation became the law of New York as part of adding the remoteness of vesting rule to the statutory perpetuities regime. The prohibition on creating a trust to simply collect income and distribute it to the beneficiaries probably is not vulnerable to careful, sophisticated drafting, no matter how adept. Of course the profession never had to try because the statute was eviscerated by the Court of Appeals—and trusts violating the statute as interpreted in *Coster v. Lorillard* probably existed without challenge in the period between the decision of the Court of Errors and the decision of the new high court in *Leggett v. Perkins*.⁴

¹ I do not want to gloss over the part the less than precise drafting of the trust provisions of the Revised Statutes played in the ultimate result let alone the role of courts in general in interpreting and applying statutes to situations not sufficiently considered by the drafters—especially to situations only a super-human foresight could envision. But the generalization, I think, can stand.

² N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(a) (McKinney 2017).

³ § 9-1.1(b).

⁴ It is worth exploring the thought that by the beginning of the twentieth century attempts to assert social control of wealth shifted to the federal level with the enactment

Perhaps needless to say, I agree with Judge Radigan and Ms. Hillman that the current attempts to create a new New York Trust Code (a bill to enact the code will soon be introduced into the legislature) may succeed because the code does indeed codify much existing law and the innovations it contains have been carefully researched and explained and to a great degree are in harmony with other efforts to reform the United States law of trusts especially as embodied in the Uniform Trust Code. I think Prof. Brophy would quickly recognize it as an attempt at rationalization and (limited) reformation. (And in the interests of full disclosure I have contributed to the drafting of the new code and continue to work for its enactment.) Far from being radical, the proposal will clarify and reinforce the existing law of trusts. The code's most innovative provisions concern the modification, amendment, and even reformation of trusts, provisions which have the potential to give beneficiaries a bit more influence over the management and administration of the property held for their benefit but nevertheless remain firmly grounded in the principle that the intention of the settlor is of paramount importance. For example, the reformation provision, in accord with corresponding provision in the Uniform Trust Code, focuses on reforming language, even if unambiguous, to conform the settlor's intent so long as it can be shown by clear and convincing evidence that the language to be changed was the result of a mistake of law or fact. This is not a provision to be used to make the trust conform more closely, if at all, to what the beneficiaries want.

There is another change the enactment of the proposed code will effect: it will eliminate from New York's substantive statutory law of trusts (as opposed to the statutory perpetuities provisions) the last vestiges of the language of the Revised Statutes. So perhaps my small article is an elegy for an understanding of the law of trusts truly passed away. I hope it leads at least some to conclude that it should not go unmentioned.

