Title

The national decades-long campaign to pedagogically starve the law of trusts and trustees: Is Prof. Beyer's valiant push-back out of Texas too little too late?

Text

Cambridge Univ. Prof. Frederic Maitland (1850-1906) considered the trust the greatest achievement of English jurisprudence and Equity's most important exploit, more important even than the injunction and specific-performance decrees. The trust is ubiquitous as an instrument of commerce and largesse. Most mutual funds are trusts. Contractual rights incident to bond issues are secured via trusts. Trust law generally governs the administration of a charity, whether structured as trust or corporation. Property rights incident to a qualified defined-benefit pension plan are generally secured via a funded trust. Numerous corporations are trustee-controlled. The trust's outsized role in estate planning pales before its myriad commercial applications. The discretionary agency also is in equity's fiduciary bailiwick. Think of the employer-employee and attorney-client relationships.

By the 1960s, the required Equity, Agency and Trust courses were going elective. Today equity-based required courses are few. No worries. There's still the bar exam. Fast forward to 2026 when trusts no longer are to be tested on the multi-state exam, this so as to make room for more testing of the experiential/practical/clinical (hereinafter "practical"). Expect yet more equity-based elective courses to be starved into oblivion. There is talk of doing away with bar exams altogether.

In some states, e.g., Mass., knowledge of local law, including trust law, is already being "tested" for bar-licensing purposes via an on-line, untimed, multiple-choice, open-book, pass-fail exam taken in the privacy of one's home/office. Texas applicants merely view twelve hours of self-study videos covering a wide range of Texas-specific topics. Just one hour is devoted to "Wills, Trusts, & Probate." There are some "hurdle" questions to answer between segments. Prof. Gerry W. Beyer, Texas Tech University School of Law, is sounding the alarm: "This is, of course, a poor substitute for students learning the basics and demonstrating proficiency on an actual exam." Law firms can expect yet more difficulty finding newly-minted lawyers with "even a basic understanding of Texas wills and trusts concepts." His message to seasoned Texas practitioners is to get involved before it is too late. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4328640.

My concern is that the Anglo-American legal tradition itself is not being well-served by all this misguided pedagogy, a product in part of the competition between the doctrinal and the practical law-school constituencies for students, faculty, funding, facilities, credit-hours, publicity, and institutional mission emphasis generally. A medical analogy: A sentient being whose biology is unlike ours arrives from another galaxy to study our anatomy (doctrinal) and medicine (practical). By anatomy I mean the circulatory system, the skeletal system, etc. and how the systems interrelate and interact. By medicine I mean pharmacology, surgery, etc. If our visitor were to eschew the doctrinal in favor of the practical, it would depart unenlightened.

The 1L arrives clueless as to the basic anatomy of the Anglo-American legal tradition, particularly the agency, contract, and trust relationships and the rights bundle known as property. How these systems interact is of critical practical importance. Transferable *contractual* rights, for example, are intangible personal *property* that may be the subject of a *trust*. Think of a bond mutual fund. The glue holding a contraption of rights and duties together is common law, as enhanced by equity and adjusted by statute. The corporation is such an adjustment. Students are eschewing doctrinal offerings to make room for practical offerings, such as in-house negotiation, arbitration, and litigation role playing and the clinics.

No wonder practitioners are lamenting that all too many recent law grads are terrible writers, hopeless issue-spotters, and still clueless about contractual rights. Sorry, a checking account is neither a bailment nor an agency. Sorry, a life-insurance policy is not a trust. See my *Bricks Without Straw* essay, available via my JDSUPRA 4/28/2011 posting on the list below. Or click on to https://www.jdsupra.com/legalnews/bricks-without-straw-the-sorry-state-of-58384/.

For decades, I "taught" law students document drafting via a hands-on practicum. Working with the doctrinally challenged among them was, frankly, a waste of time. JD programs and the bar exam need to get back to delivering and assessing doctrinal proficiency. As for helping lawyers over time develop practice proficiency, that is what CLE faculties do.