English Trusts v American Trusts

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Offshore jurisdictions, in general, have trust law directly or indirectly based upon English trust law.1 This means, in general, that they are based on the law of England (not the law of Scotland or Wales). In the United States we have no national trust law:2 Our trust law is based upon the individual laws of a particular state within the United States.3 For general "American" trust law principles it is possible to consult the most current Restatement of Trusts,4 prepared by the American Law Institute,5 although the Restatement itself is not substantive law until it (or portions thereof) is enacted by a particular state.6 In other jurisdictions in the world that do not recognise the trust relationship at all, there is often a perception that all trust law is the same.7 Indeed, even in the United States it is commonly thought that as with the common law legal system itself, which we inherited from England,8 we must be speaking the same legal language when we discuss trusts with English solicitors or barristers. This assumption is wrong. In this paper I will list briefly some of the major differences that seem to exist between "English trusts"9 and "American trusts",10 perhaps illustrating once again that "We are two countries divided by a common language."11

Simple vocabulary and usage

To begin with ordinary vocabulary and usage, there are a number of differences.12 We both use the word "trust" and we both use the word "settlor". But in England they talk about trust "deeds" and trust "settlements" (we talk only of trust "agreements" or "documents"). They refer to dispositions "on trust" or gifts "on trust"; we speak of dispositions "in trust".

Our documents look physically different. Traditionally they have valued a form of drafting that uses almost no punctuation; we use an abundance of punctuation.

We also talk about different kinds of trusts. In general they do not use "spendthrift" trusts;13 we assume that all trusts (unless otherwise specified) are "spendthrift" trusts. They use "secret" trusts; this term is not a clear one to us.

They use "bare" trusts; we use "standby" trusts.

We have some different basic concepts. They use "letters of wishes" to supply guidance to the trustees with respect to discretionary distributions; we include all of the distribution language in the trust agreement.14 They use "protectors" as a sort of intermediary between the settlor and the trustee; we are not generally familiar with that position.15 They have very developed law about "tracing" trust assets; this is not as familiar to us.

Now on to some substantive differences. The following subjects are not presented as an exhaustive list of those differences. The topics are intended to focus on the differences that would be encountered most often in a general practice.16 As a preface I will also include the entire language in Bogert on Trusts addressing the differences between "American" and "English" trusts, as follows:

"[I]t should be noted that English and American trust law differs in a number of important respects. For example, under English statutory law the trustee possesses the power to sell, mortgage or lease the trust assets regardless of any restrictions in the terms of the trust instrument, a trustee is not entitled to compensation unless the instrument so provides, and trustees are given the power to appoint successor trustees. These provisions are contrary to most statutes and court decisions in the United States. And, contrary to generally prevailing American law, the beneficiaries of a trust governed by English law have the power at all times to modify or terminate the trust even though one or more trust purposes have not been accomplished. Furthermore, in England the court can grant a trustee the power to make any investment or enter into any transaction not authorised by the trust provisions or by law. In most US states spendthrift restraints upon the alienation of beneficial interests are valid, but such restraints are not recognised in England. By statute a trustee in England is given broad powers to delegate discretionary decisions regarding trust property located outside the United Kingdom; statutes in the United States authorising such delegations are rare. On the other hand, an English trustee is limited to a statutory list in the

investment of trust funds, whereas the prudent man investment statutes in force in many states authorise investments of various types."17

The following are a number of the differences that seem significant. It should be noted, however, that between the English Trustee Act 2000 and the proposed "American" Uniform Trust Code, our differences may be diminishing. How much of that apparent convergence of doctrines, so helpful in an international context, actually will occur remains to be seen.

Trustees: Compensation; numbers; investments in land; death of a sole trustee; delegation rights; exculpatory clauses and discharge

Compensation

In England, as a general rule trustees have had no right to charge for their services (unless that has been expressly authorised in the trust instrument). As explained by Professor Hayton:

"Trustees, unless specifically authorised, have no right to charge for their time and trouble for, otherwise, out of self-interest 'the trust estate might be loaded and made of little value'."18

This rule, centuries old, made it essential for the trust agreements to "provide otherwise" if the trustees were going to be paid. The Law Commission in 1997 recommended that the statute should reverse that presumption and permit trustees to charge for their services unless the settlor expressly provided otherwise.19 The Trustee Act 200020 now provides that (unless the trust agreement provides otherwise) a trust corporation is entitled to receive "reasonable compensation".21 It also provides that a trust corporation or a trustee acting in a professional capacity will be entitled to payment for services which could have been provided by a lay trustee.22

In the United States, Section 708 of the new Uniform Trust Code sets forth a right to "reasonable compensation." As the notes to that section indicate:

"Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance."23

The amount of "reasonable" compensation will depend on the circumstances. The note in the Uniform Trust Code explains that the actual services performed would be taken into account. A trustee who has delegated significant duties to others could have its fees reduced. On the other hand, a trustee with special skills, such as those of a real estate agent, who can perform services that might otherwise be delegated to someone else might be entitled to an increase in compensation.24

Number of trustees for land and investments in land

Under the English Trustee Act 1925 trusts of land were prohibited from having more than four trustees.25 In the United States there is generally no restriction on the number of trustees. Research found one case referring to four trustees without any objection as to the number.26

Land has been treated differently from other trust assets in England.27 As John Goldsworth describes it:

"In the absence of express authority in the trust instrument trustees of personal property do not have power either to purchase land for investment or to acquire land as a residence otherwise than for the use of the beneficiary."28

The Trustee Act 2000 adds a power to invest in land, provided that the land is located within the United Kingdom:29

"[T]he trustees may acquire freehold or leasehold land in the UK as an investment, for an occupation by a beneficiary or for any other reason."30

Death of a sole trustee

An interesting issue arises when a sole trustee dies and the trust agreement did not provide a mechanism for filling the position. In the United States the answer will depend on a particular state:

"The statutes of many states provide that the trusteeship is vacant, that title to the trust property vests in a named court of general equitable jurisdiction, and that the

court is to appoint a successor trustee. In other states the statutes provide that title and the right to possession of the trust property vest in the successor trustee named by the settlor or by the court."31

In New York, there was apparently some controversy as to whether the appointee of the court to carry out the trust duties was a successor trustee or merely an agent of the court. It was finally decided that any difference that there might be was merely formal and that for practical purposes the title by which the appointee was described was immaterial.32

In England, on the other hand, both title to the trust property and the office of trusteeship are held to pass to the heirs, devisees or personal representatives of the sole deceased trustee, and such successors may have the duty to proceed with the administration of the trust until a successor trustee has been appointed. The English Trustee Act of 1925 contains a provision to this effect.33 As Hayton notes: "[I]f the last surviving trustee does not appoint more trustees then on his death the property will be held by his personal representative who should appoint new trustees."34

Delegation rights

The traditional rule in the United States is that trustees may delegate "administrative" responsibilities, but they may not delegate their "discretionary" duties. The new Uniform Trust Code provides: "A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances."35 The comment notes that:

"This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act ...

"This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

"This section applies only to delegation to agents, not to delegation to a co-trustee. For the provision regulating delegation to a co-trustee, see Section 703(e)."

In England, under the Trustee Act 1925 the trustees have had a general power to delegate any or all of their discretions (for a period not exceeding 12 months).36 According to Hayton, the one who makes the delegation continues to be liable for the acts or defaults of the one to whom the delegation was made. This continuing (vicarious) liability did not apply, however, with respect to property that is situated outside the United Kingdom.37 Under the Trustee Act 2000 the new, uniform standard would presumably apply to all delegations as well. The standard is that "a trustee must exercise such care and skill as is reasonable in the circumstances."38

Exculpatory clauses

In the United States, it is not uncommon to find very detailed language in a trust agreement exonerating the trustees (particularly when they are individuals). In one trust agreement reviewed by the author there was a provision that completely exonerated the trustee (who had also drafted the agreement). In many agreements the trustee is excused from all but "gross negligence" or "willful" wrong acts. In the Uniform Trust Code, the ability to exonerate a trustee from all liability is limited. Section 1008 provides:

"(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor."

In England,
"[I]f the settlor goes too far in exempting his trustees from duties and liabilities to the beneficiaries so that the beneficiaries really have no rights to enforce, the court will characterise the trustees as trustees only for the settlor or as themselves, full legal and beneficial owners."39

The reasoning, apparently, is that if the exemption is so extensive that the beneficiaries have no "rights" then there is simply no trust.40

Discharge of a trustee

As a general rule in the United States trust agreements are drafted to permit trustees to resign whenever they wish. The proposed new rule, in Section 705 of the new Uniform Trust Code, provides two alternatives as a general rule:

"A trustee may resign:

upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all co-trustees; or with the approval of the court."

Mere resignation does not exempt the trustee from liability. There may be a court proceeding required to review their accounts, receive the consent of the beneficiaries to the release, etc. prior to being officially "discharged" from their liability.

In England, however, a trustee cannot be discharged unless there is either a trust corporation or at least two persons to act as trustee in his or her place.41

Protectors

Protectors are not part of traditional "American" trust law. Even the Restatement (Third) on Trusts, contains no "law" about protectors.42 The Reporter does add the following comment to Section 48 ("incidental benefits"):

"The subject matter of this section is treated in Restatement Second, Trusts § 126. The rules and principles in the present section are consistent with those of § 126 of the prior edition, although the discussion here in Comment c goes beyond the matters treated in the earlier section, raising and considering increasingly common questions (on which little authority exists) about trusteeships and related roles."

The text of "Comment c" is:

"Compare the situations discussed in Duckworth, "Protectors - Fish or Foul? (Part II)," 5 Journal of International Trust & Corporate Planning 18 (1996) (substantially reprinting id., Contemporary Trends in Trust Law (A. Oakley ed. 1996)), under the heading "Administrative Powers - Purpose Restrictions" (id. pp. 18-19):

"There is less case law dealing with implied purpose restrictions on administrative powers than there is for dispositive powers, but it seems that the court undertakes the same exercise of considering the purpose or purposes for which the power has been given, and preventing its use for any extraneous purpose. In practice the questions most likely to arise are: (a) For whose benefit may the administrative power be exercised? and (b) May a power to influence one aspect of the trust administration be used to influence a different aspect of it? So far as benefit is concerned the range of possibilities is that the power has been given:

(a) For the benefit of the protector himself. For example: the trust instrument designates successive income beneficiaries as protector, and gives the protector power to veto the acquisition of new investments. This may be to enable the protector to look after his own interests without regard to the interests of the other beneficiaries.

(b) For the benefit of the beneficiaries of the trust or some class of them. Obviously this is the most common situation, [and] the natural inference unless there is clear evidence to the contrary ...

"The article next recognises two other possibilities concerning the reasons for the grant of the power. These are "(c) for the benefit of persons other than trust beneficiaries;" and "(d) for other collateral purposes of the settlor," further noting that these four possibilities are not mutually exclusive and that a protector may have a dual role."

The Uniform Trust Code does address the role of a protector. Section 808 provides:

"(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise

of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty."

The Comment to that section states:

"Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts Section 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001). "Advisors" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers."

Beneficiaries' rights to change or terminate the trust

One of the most striking differences between "American" trusts and "English" trusts is the ability of beneficiaries of an English trust to terminate the trust if they all agree, even when the settlor's express purpose has not been fulfilled.43 As explained by Hayton:

"The rule in Saunders v Vautier enables beneficiaries of full capacity, where they are all ascertained and between them absolutely entitled to the trust property, to demand to have such property transferred to them and so terminate the trust: the collective absolute owner can do what a sole absolute owner can do."44

The rule in Saunders v Vautier dates back to 1841.45

In the United States there is no equivalent rule. Beneficiaries do not have a unilateral right to terminate a trust whenever they wish. This has led, not surprisingly, to numerous questions and issues. Under the new Uniform Trust Code there is a provision for a trust to be terminated with the consent of the settlor and all of the beneficiaries (usually there would be a court proceeding).46 As an example, one of the usual requirements would be that the trust no longer serves a "material purpose". In order to be material, the purpose remaining to be performed must be "of some significance". The note states that material purposes:

"... are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose. Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No 3, approved 2001)."

Spendthrift trusts

Long before "asset protection" trusts became a hot topic, trusts were (and still are) commonly created in the United States for the express purpose of "protecting" the beneficiary from his or her possible "spendthrift" habits and/or creditors resulting from the same (including an unwise choice of spouse!). Nearly every trust contains similar spendthrift clauses, prohibiting the beneficiary from assigning, selling, pledging, etc. his or her interest in the trust.

In England, however, spendthrift trusts are simply not allowed. As Hayton explains:

"In English law it is not possible to make property inalienable by directing that a beneficiary's equitable interest shall not be assigned, whether voluntarily or involuntarily, nor is it possible to flout a course of devolution prescribed by law by giving B an

interest in property on condition that if he becomes bankrupt it shall pass to C instead of to B's trustees in bankruptcy."47

This means that if a parent wanted to create a trust for a child to be held until age thirty-five, the settlor's intent would not have to be followed in England. Upon reaching legal age the beneficiary could terminate the trust. The practical solution in England appears to be the use of a "protective" trust. The trust would state that it would continue for the life of the beneficiary, for example, until one or more certain events (bankruptcy, claims, etc.) might occur, at which time the beneficiary would be replaced by another beneficiary.48

"Secret" trusts

In the United States we do not have "secret" trusts.49 In England, however, there are not only "secret" trusts, there are also "half-secret" trusts. As explained here by Hayton:

"Secret trusts may be fully secret, as in the above example [an outright bequest to B in a will "having obtained B's agreement secretly" that B would hold it for the mistress and illegitimate child] or half-secret, as where B takes as trustee on the face of the will, though the terms of the trust are not directly revealed, for example 'to B to hold as I have directed him'."50

Estate administration as a trust

In England if a person dies without a will, there is a "statutory" trust. Hayton again:

"Under the Administration of Estates Act 1925 on a person's death intestate, those who take out letters of administration to his estate hold the estate on trust with power to sell it, to use the proceeds for paying his debts, expenses and other liabilities and, then, to distribute the estate amongst those entitled under the intestacy rules."51

Even though we may refer to executors and personal representatives as "fiduciaries" we would not think of them as trustees.

As Goldsworth notes, these are somewhat unusual trustees since their obligation is to distribute, as soon as possible, the trust assets (the estate) rather than holding it and enhancing it which would be the normal duty of trustees.52

Two-year trusts in a will

There is a surprising practice in English trusts (and tax law) that will allow a testator, in effect, to defer the entire disposition of his estate by creating a very discretionary short-term trust and leaving all those decisions to his trustees. As described by Hayton:

"[D]iscretionary trusts expressed to last no more than two years may often be found in wills where a testator cannot be sure what the needs of his relatives and dependants will be after his death and what will be the most tax-efficient way of dealing with such needs. It is advantageous for inheritance tax purposes that the trustees' dispositions in the two-year period are treated as if effected by the testator."53

The flexibility offered by this "two-year" trust seems amazing to a US lawyer. There is no common practice in the United States that corresponds to this practice, and it is interesting to think about the response the Internal Revenue Service would have.54

Letter of wishes

Hayton has been reported (in minutes from a STEP meeting in the Bahamas)55 as stating that a letter of wishes, in certain circumstances,56 may be part of the trust arrangement and so, far from non-binding and merely advisory, form a part of the trust documentation proper. His suggestion was that the letter of wishes be dated on a different date to the trust deed so as clearly to separate the trust arrangements and the letter of wishes and in the letter of wishes there was no point in having an opening paragraph referring to the non-binding element of the letter if the rest of the document was mandatory in form. The question was asked, on the basis that every argument has its reverse side, may not a letter of wishes dated later than the settlement be regarded as no more than a contrivance to overcome this problem?

Tracing

There is a right, generally, in the United States for a beneficiary to "trace" and attempt to reclaim trust assets. As described in Bogert on Trusts:

"The remedies in rem and in personam are

mutually exclusive. Thus the beneficiary must elect between damages and the recovery of specific property. It would be unjust to compel a trustee to restore funds unlawfully invested and at the same time to take from him the securities in which he had placed the funds. This would be double recovery; it would do more than restore the beneficiary to his former position. Where a beneficiary is in doubt whether he will be able to trace the product of a breach, he may bring a bill for declaration of his rights, so that he may later make an election if one is possible. Where the extent of the trust property is in doubt, the court can order an accounting to establish the amount and location of the trust property, after which the complainant can trace and recover such identifiable trust property as he elects and obtain money damages for the other property. Or he may seek to trace but request a money judgment in the alternative, if the trust property or its product cannot be found. In considering whether a beneficiary has made an election which bars tracing, or which bars an effort to obtain a money judgment, it should be borne in mind that election is a choice between two inconsistent methods of redressing the same wrong. In order that his election be deemed final and binding, it must be made with full appreciation of the facts of the situation and not under mistake."57

It may be fair to comment that the remedy most often chosen by a beneficiary in the United States is a claim against the trustee directly, and not to trace the assets.58

Living trusts

"Living" trusts are so common in the United States that a search of recent state cases results primarily in a significant number of suits brought by local bar associations against banks and other commercial enterprises for the "unauthorised" practice of law in their implementation of living trusts.

The traditional revocable trust in the United States is created for the primary purpose of eliminating a probate proceeding upon death of the settlor with respect to any assets as to which the title has been properly transferred to the trustee of the revocable trust. A secondary use is to provide out-of-court management of the assets in the event of the subsequent incapacity of the settlor. The final, and usually less important, benefit of a revocable trust is that it is often (but not always) private, unlike wills which are of public record. There is no US tax benefit purpose (or asset protection benefit) of the traditional revocable trust.

As provided in Section 602 of the new Uniform Trust Code: "Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust." This is a change in the previous default principles, which are still in effect in most states.59 A comment to Section 602 perhaps also illustrates a practice that may be less common in England - settlors who write their own living trusts without benefit of lawyers.60 Under the most recent Restatement, a trust is presumed revocable if the settlor retained a beneficial interest.61

On some of the finer points in the United States relating to living trusts, we find in Bogert on Trusts a comment on the applicable state law:

"The validity of the pourover bequest itself is governed by the law of the testator's domicile, but administration of the assets bequeathed to the living trust will normally be pursuant to the law governing administration of the living trust. However, laws of both states should first be reviewed; for example, as heretofore discussed in Section 295, at least one of the testator's objectives may be frustrated if the trustee of the living trust must first qualify in the court of the testator's domicile or in the court of the trustee's domicile before administering the pour-over assets, or if the trust remains or becomes subject to continuing court supervision."62

In England, on the other hand, "living" trusts seem to be used rarely and generate a number of issues. Beginning with the most basic question of all, Hayton reportedly has questioned whether the traditional living trust, as used in the United States, would be considered to be a trust at all:

"Professor Hayton has suggested that many of the trust arrangements that lead to problems were because what had been established was a revocable trust with capital and income available to the settlor at his behest during his lifetime and then with a gift over on death. Was this in fact no more than a nomineeship arrangement to which was added a Will? If so then the Will aspect may not have been properly executed and this would be another way in which the arrangement could fail."63

In the relevant section of his one volume on trusts, which section is worth repeating in full, Hayton writes:

"To avoid the need for a grant of probate and publicity, a settlor, S, can keep his cash in a joint bank account with W, so that W will take the balance on his death, and can create an immediate inter vivos trust of his other property by transferring it to trustees (of whom he could be one) to hold for S for life, remainder to W or such other persons as S might in his life notify in writing to the trustees, with S reserving in his lifetime wither a power to revoke the trust in whole or in part or a power to appoint capital to anyone including himself, so that W only has a defeasible vested interest in remainder. Such a position where the trustees in effect hold the property to S's order if he orders it, is crucially different from the case where the trustees simply hold to S's order as where they hold on trust as to capital and income for S absolutely, with whatever remains on S's death passing to W, when there is a bare trust for S combined with a testamentary disposition in favour of W requiring compliance with the Will Act 1837. However, the former situation would be treated as a sham if S controlled the trustees ..."64

This is one instance in which the English lawyers may not understand our US use of revocable trusts in the first instance. For example, in Misplaced Trust,65 we find the following in the chapter on "Setting Aside by Creditors and "Asset Protection" Trusts:

"The point on irrevocability is important inasmuch that the vast majority of trusts established within the USA are likely to be revocable - whilst the opposite would be true for those setting up trusts from the other side of the Atlantic. This distinction arose primarily as a result of different applications of the same sort of tax concept - "reservation of benefit"- between the USA and the UK."66

The author goes on to explain our common use as being based on our tax rules, as follows:

"To obtain the maximum benefit under the IRS Code it would generally be the case that the settlor would want the trust to be subject to the so-called "grantor" rules. A "grantor trust" is not a type of trust, but rather shorthand for a normal trust which is going to be subject to certain provisions of that Code; it is easy to be within those provisions if the settlor retains the right to revoke the trusts, for then the ownership of the trust assets is still considered for tax purposes to be the settlor's. On the other side of the Atlantic, the provisions of the UK tax laws were once such that if the settlor retained any benefit from the trust assets the least favourable tax consequences would result."67

The different views of revocable living trusts can also have tax consequences. For example, in "Planning Implications: The Deadly Discretionary Grantor Trust" the authors state that a transfer:

"to a grantor trust under which the settlor does not retain an interest in possession, although harmless from a US tax standpoint, will produce an immediate charge to inheritance tax. Further ... many US-style grantor trusts are likely to be classified as discretionary trusts for UK inheritance tax purposes."68

It is not clear whether the authors fully appreciate that our standard revocable trusts are used solely for the purposes described earlier, wholly apart from any US tax provisions, and that in the general case we assume that all of the trust assets would be included in the settlor's estate for all U.S. tax purposes.69 In the same section quoted above, the authors continue, under the heading "Revocable Trusts" as follows:

"As described above, for US tax planning, it is often desirable for a trust to be a "revocable trust" within the meaning of the relevant US legislation. Achieving this by giving the grantor of the trust certain rights to revoke the trust, may have adverse inheritance tax implications under the reservation of benefit rules, or, possibly, because the right of revocation is itself a valuable asset for inheritance tax purposes."70

Jurisdictional issues - conflict of laws

Since we probably have two jurisdictions (at least) involved, we can close this list of differences with a few comments about which would be the applicable law. This will depend, in turn, on which issue needs to be resolved.

Beginning with the actual validity of a trust, we find that according to a leading English authority on conflict of laws, the law that will determine the validity of a trust will depend upon

whether it is a trust created in a Will or an inter vivos trust. Under English law, the validity of a trust created in a Will should be governed by its "proper law".71 That is explained as referring usually to "the law of the place of administration."72 With respect to an inter vivos trust, on the other hand, which is also governed by its "proper law" under English conflict rules, the proper law is "the system of law with which it has its closest and most real connection."73 It should also be noted that as the United Kingdom has ratified the Hague Convention on Trusts the choice of law provisions of the Convention would apply, at least with respect to other countries that had also ratified the Convention (which the United States has not).

Summary

It is not the fact that US and UK trust law may or may not use the same language, but that many of the trust concepts are surprisingly different on the two sides of the Atlantic. As stated at the beginning, whether those differences will diminish remains to be seen.

Endnotes

1. As one example, when the United Kingdom ratified the Hague Convention (No 30) on the Law Applicable to Trusts and on their Recognition (excluding the second paragraph of Article 16), it did so on behalf of "the United Kingdom of Great Britain and Northern Ireland, the Isle of Man, Bermuda, British Antarctic Territory, British Virgin Islands, Falkland Islands, Gibraltar, Saint Helena, Saint Helena Dependencies, South Georgia and the South Sandwich Islands, United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus" which it later extended to include Montserrat, the Bailiwick of Jersey, the Island of Guernsey (but not the Islands of Alderney and Sark) and the Turks and Caicos.
2. There is a recently drafted "Uniform Trust Code (2000)" that was prepared by the National Conference of Commissioners on Uniform State Laws (www.nccusl.org) and is intended to be "the first national codification of the law of trusts." The drafters noted that the increased use of trusts has led to a recognition that "the trust law in many States is thin." Uniform Trust Code, prefatory note. Exceptions noted, as states with comprehensive trust law, are: California, Georgia, Indiana, Texas and Washington. (There was also a Uniform Trusts Act of 1937, that was enacted in only six states and addressed a limited number of topics). The Uniform Trust Code has already been adopted by Kansas and has been introduced this year in Connecticut, the District of Columbia, Minnesota, Nebraska, Oklahoma, Tennessee, Utah, and West Virginia.
3. The most recently publicised differences among our states' trust laws have been variations in the rule against perpetuities (or lack thereof). Interestingly, the Uniform Trust Code (2000) leaves that issue to the individual states.
4. Currently that would be the Restatement (Third) of Trusts.
5. The American Law Institute (ALI) was established in 1923 to define, summarise, or restate existing common law. See www.ali.org.
6. For general statements of current trust law in the United States I will rely primarily upon Bogert, Law on Trusts and Trustees, as updated through its 2001 pocket parts (referred to hereinafter as "Bogert on Trusts").
7. The Hague Conference on Private Law has attempted to "unify" portions of trust law. The only non-common law states to ratify the Hague Convention (No 30) on the Law Applicable to Trusts and on their Recognition are Italy and the Netherlands. Although the United Kingdom has ratified the Convention, the United States has not.
8. See, for example: "The term 'common law' refers to the system of law developed in England and transferred to most of the English-speaking world." Historical Introduction to Anglo-American Law (West Publishing 1996), p13.
9. For descriptions of "English trusts" in this paper I will refer to, and rely upon, The Law of Trusts (3rd edition 1998), by Professor David Hayton, a recognised authority in the field (the book will hereinafter be referred to as "Hayton"), keeping in mind that the Trustee Act 2000 was passed after that book was written.
10. Please note that this brief paper is not intended to be a technical analysis of any particular laws, but only to provide a helpful background reference.
11. This quote is usually attributed to Winston Churchill, but that may not be accurate. According to Nigel Rees, for the BBC, who addresses the source of 'Two nations separated by a common language': "Sometimes the inquirer asks, 'Was it Wilde or Shaw?' The answer appears to be: both. In The Canterville Ghost (1887), Wilde wrote: 'We have really everything in common with America nowadays except, of course, language'. However, the 1951 Treasury of Humorous Quotations (Esar & Bentley) quotes Shaw

as saying: 'England and America are two countries separated by the same language', but without giving a source. The quote had earlier been attributed to Shaw in Reader's Digest (November 1942). Much the same idea occurred to Bertrand Russell (Saturday Evening Post, 3rd June 1944): 'It is a misfortune for Anglo-American friendship that the two countries are supposed to have a common language', and in a radio talk prepared by Dylan Thomas shortly before his death (and published after it in The Listener, April 1954) - European writers and scholars in America were, he said, 'up against the barrier of a common language'. Inevitably this sort of dubious attribution has also been seen: 'Winston Churchill said our two countries were divided by a common language' (The Times, 26th January 1987; European, 22nd November 1991.) www.Btwebworld.com.

12. For ease of reference, in this paper I will say "we" referring to lawyers trained in the United States and "they" to refer to English solicitors or barristers.

13. More on this later.

14. Interestingly, a search of Bogert on Trusts for "letter of wishes" finds no reference at all. Even the very "modern" Uniform Trust Code has no reference to "letter of wishes".

15. There does seem to be a growing interest in the United States in the concept of a protector, and they are beginning to appear in a number of "American" trusts. See, for example: National Bank of Detroit v Sheldon, C.A.6, 1984, 730 F.2d 421; Shelden v Trust Co. of Virgin Island, Limited, D.C.P.R.1982, 535 F.Supp. 667; and Detroit Bank and Trust Co. of Detroit v Trust Company of Virgin Islands, Ltd., D.C.D.P.R.1985, 644 F.Supp. 444 (as discussed in Bogert on Trusts).

16. Those who specialise in offshore trusts presumably will be familiar with most of these differences. In some areas, such as asset protection, the trust law differences among jurisdictions that are of more interest are those affecting the enforcement of creditors' claims ie, the time period within which claims must be brought, etc.

17. Bogert on Trusts Section 9 (omitted, the only footnote, which is a list of secondary sources relied upon).

18. Hayton, p140 (citing Robinson v Pett (1734) 3 P. Wms. 249 at 251.

19. Hayton, p140.

20. Effective 1st February 2001.

21. Trustee Act 2000, Section 28(1).

22. Trustee Act 2000, Section 28(2).

23. See Restatement (Third) of Trusts Section 38 comment c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 comment b (1959).

24. See Restatement (Third) of Trusts Section 38 comment d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 comment d (1959).

25. Hayton, p151 (citing Section 34 of the Act).

26, See In re Thomas' Will, 1930, 172 N.E. 513, 254 N.Y. 292, 297 (where settlor directs shall be four trustees at all times, "Neither the remaining trustees nor the court might exercise any discretion as to the number of trustees or as to their powers").

27. We have a hard time understanding "The common law never concerned itself with ownership of land since all land was - and still is - owned by the Crown!" Hayton, p10.

28. "UK Trustee Bill Introduces Management Challenges for Trustees" by John Goldsworth, in Trusts & Trustees, April 2000, p22 (hereinafter "Goldsworth").

29. A minister also may extend investment powers to places outside England and Wales as may seem appropriate to him. Goldsworth, p22.

30. Goldsworth, p22.

31. Bogert on Trusts Section 529. (footnotes omitted).

32. Bogert on Trusts Section 529.

33. Bogert on Trusts Section 529.

34. Hayton, p3.

35. Section 807.

36. Hayton, p145. See, however, Goldsworth: "[T]he Trustee Act 1925 confused the issue with provisions absolving trustees of liability for any loss resulting from the appointment of agents, provided the trustees had acted in good faith." Goldsworth, pp20-21.

37. Hayton, p145.

38. Section 1.

39. Hayton, p32.

40. As Goldsworth added in his comments on a draft of this paper: "The inner core of obligations must be retained."

41. Hayton, p151.

42. Alexander Bove has written an extensively researched and detailed paper on this subject. It was presented at the 2002 Northeast Region ACTEC meeting (18th May 2002) and should be available shortly at www.actec.org.

43. Alexander Bove has raised an interesting point: if the beneficiaries change the terms of the trust, instead of terminating it, would they be treated as the settlors of the changed trust?

44. Hayton, p93.

45. Saunders v Vautier (1841) Cr. & Ph. 240.

46. See eg, Section 410 of the Uniform Trust Code.
47. Hayton, p51.
48. Hayton, p50. Another alternative, raised by Alexander Bove, is the use of a "discretionary" trust in England, which would enable the trustee to refrain from making discretionary distributions during times in which the beneficiary might have claims against him or her.
49. Testators desiring privacy in the United States can usually (but not always) achieve that by including the confidential terms in a living (or other) trust to which a distribution "over" is made in the will.
50. Hayton, p52.
51. Hayton, p39.
52. In a comment on a prior draft of this paper.
53. Hayton, p48.
54. It is easy to imagine, for example, that the Service would treat the trustees as having received ownership of the estate assets.
55. Notes by Geoffrey A. Shindler about the Offshore Trust Services Conference in the Bahamas in November 1997. (This report also appeared in Trusts and Trustees Volume 4 December 1997/January 1998.)
56. Presumably these would be "circumstances" in which it appeared to be clear that the trustee understood the language as stating directions and requirements.
57. Bogert on Trusts Section 867 (footnotes omitted).
58. In the UK the law seems to have been more complex. Goldsworth noted, in a comment on a draft of this paper, that the modern concept is to make tracing a part of the developing law on restitution.
59. As noted in the comment to Section 602, in most states a trust is presumed irrevocable unless there is evidence of a contrary intent. See Restatement (Second) of Trusts Section 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) is thought to have limited application.
60. The drafters note that: "This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute."
61. See Restatement (Third) of Trusts Section 63 comment c (Tentative Draft No. 3, approved 2001).
62. Bogert on Trusts Section 301.
63. As reported by Geoffrey A. Shindler in his notes about the Offshore Trust Services Conference in the Bahamas in November 1997. (This report also appeared in Trusts and Trustees Volume 4 December 1997/January 1998.)
64. Hayton, pp53-54.
65. 2nd ed., James Wadham (Gostick Hall Publications).
66. Id. at 156.
67. Ibid.
68. This section title is part of Chapter 18 "Navigating the Treacherous Tax North Atlantic: Aspects of Anglo-American Estate Planning" by Barry McCutcheon, Richard Cassell and Dyke Davies, in A Guide to International Estate Planning (Jeffrey Schoenblum, ed. ABA Section of Real Property, Probate & Trust) pp693-694.
69. See, for example, Rev. Rul. 85-13 in which the Service states: "Because A is treated as the owner of the entire trust, A is considered to be the owner of the trust assets for federal income tax purposes."
70. Chapter 18, referenced above, at p694.
71. This reference to "proper" law could be another vocabulary difference!
72. J.H.C. Morris, The Conflict of Laws (3rd ed. 1984) at 420. (hereinafter "Morris")
73. Morris at 421.

