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Jeffrey M. Gaba

Southern Methodist University, Dedman School of Law

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NEWS & ANALYSIS

ARTICLES

We Do Not Hold the Earth in Trust

by Jeffrey M. Gaba

One of the central concerns of environmental ethics is to clarify the moral relationship between present and future generations. How should we think about our ethical responsibilities to a continuing stream of unknown humanity? Virtually all commentators recognize that the future is entitled to moral consideration in evaluating our present actions.¹ We owe the future something; the questions are what and why. On these questions there is no consensus.

The debate is subtle, far-reaching, and even contentious.² Should our relationship be one that is analyzed in terms of rights and duties, and if so what rights and what duties? Should the interests of the future be included in a utilitarian assessment of present actions, and if so how can we evaluate the impact of present actions on the welfare of future humans? Should a goal of present virtue, grounded in a tradition of "virtue ethics," shape the actions of the present generation, and if so, are there limits on present actions if constrained only by concerns for virtue? The debate is significant; it has the potential to alter the actions we now take that affect future humanity.

One powerful metaphor has become a staple of this debate. For some, the relationship between the present and the future is captured in the concept of the legal trust.³ In this

view, present humanity can be seen as holding the natural world in trust for future generations. This "trust model" of present/future relationships describes the present generation as the trustee who acts to serve the interests of the beneficiaries, both present and future humanity.⁴

As discussed below, there is an intuitive appeal to the trust model. It seems to express some obligation to "pass

Her concept of a planetary trust has been influential. It is not only widely cited in the literature, *see, e.g.*, Murray Raff, *Environmental Obligations and the Western Liberal Property Concept*, 22 MELB. U. L. REV. 657 (1998); Paul A. Barresi, *Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena*, 11 TUL. ENVTL. L.J. 59 (1997); Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 VAND. U. L. REV. 267 (1993), but it is also reflected in the documents and debates on sustainable development in international law. *See, e.g.*, Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Comm. on Sustainable Development, 4th Sess., Background Paper No. 3, at 12, paras. 41-42 (1995).

One commentator has described her discussion of intergenerational obligations stemming from the trust model as "the most comprehensive and important scholarly contribution to the legal aspects of this debate." Barresi, *supra*, at 59-60. Citing her work on the planetary trust, another commentator has written that "Edith Brown Weiss' now famous rights of future generations found their way into human-centered thinking." Sudhir K. Chopra, *International Law and the Environment* by Patricia W. Birnie & Alan E. Boyle, 2 DICK. J. ENVTL. L. & POL'Y 255, 360 (1993) (book review).

4. It is worth noting that the concept of "trust" enters into the intergenerational debate in ways that have nothing to do with a legal "trust model." For example, some have analyzed present/future issues in terms of a "public trust." *See, e.g.*, Daniel T. Jenks, *The Convention on Biological Diversity—An Efficient Framework for the Preservation of Life on Earth?*, 15 NW. J. INT'L L. & BUS. 636 (1995). The "public trust," however, arises from sources distinct from and its elements are quite different from that of private legal trusts. *See* Joseph L. Sax, *Liberating the Public Trust Doctrine From Its Historic Shackles*, 14 U.C. DAVIS L. REV. 1985 (1980).

Additionally, a private legal trust is different from a guardianship for persons unable to act for themselves. Thus, Judge Weeramantry is not implicating a "trust model" of present/future relations when he stated, in dissent from a ruling of an international tribunal on an issue of nuclear testing: "This court must regard itself as a trustee of those future generation's rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself." Request for an Examination of the Situation in Accordance with Paragraph 63 of this Court's Judgement of 20 December 1974 in the Nuclear Test (New Zealand v. France), 1995 Nuclear Test, 1995 I.C.J. 288, 341 (Sept. 1995).

Lastly, claiming a trust model for present/future relationships is not the same as claiming some duty of "stewardship" toward the earth. A concept of stewardship, perhaps most closely associated with Aldo Leopold, arises from different sources and has different implications than a claim of trusteeship. *See, e.g.*, Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990).

Jeffrey Gaba is Professor of Law, Dedman School of Law, at Southern Methodist University. He received his M.P.H. at Harvard University in 1989; his J.D. from Columbia University in 1976; and his B.A. from the University of California, Santa Barbara, in 1972. He is also Of Counsel at Gardere & Wynne in Dallas, Texas. He can be reached by e-mail at jgaba@mail.smu.edu. The author would like to thank T.J., Zafer, and Martha at CiCi's Coffee Shop for their help in preparation of this Article.

1. The obligation to award the future some moral standing is not free from doubt. *See, e.g.*, Robert L. Heilbroner, *What Has Posterity Ever Done for Me?*, in RESPONSIBILITIES TO FUTURE GENERATIONS 170 (E. Partridge ed., 1981).
2. The literature is voluminous. *But see generally* RESPONSIBILITIES TO FUTURE GENERATIONS, *supra* note 1; OBLIGATIONS TO FUTURE GENERATIONS (R.I. Sikora & Brian Barry eds., 1978); CHRISTOPHER STONE, *EARTH AND OTHER ETHICS* (1987); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); DEREK PARFIT, *REASONS AND PERSONS* (1984). With no claim to either subtlety or range, I have previously argued that the relationship of present to future is best viewed through reliance on concepts of "virtue ethics." *See* Jeffrey M. Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights/Present Virtue*, 24 COLUM. J. ENVTL. L. 249 (1999).
3. The concept has been most thoughtfully and powerfully advanced by Prof. Edith Brown Weiss. She first analyzed the issue in her classic 1984 article, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984), and she subsequently expanded on this concept in *In Fairness to Future Generations*, where she states: "The thesis of this study is that each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations." EDITH BROWN WEISS, in FAIRNESS TO FUTURE GENERATIONS 2 (1989).

on” the planet in at least as good a condition as we received it. It implies some limitations on our actions, as trustees, whose role is to serve the interests of the beneficiaries.

To be meaningful, however, the trust model must be more than a metaphor. The strength of the trust model lies in its ability to draw on the legal concept of the trust to help understand the moral relationship of present to future and to define the obligations of the present trustees toward the future beneficiaries. Although appealing, the trust model is a flawed metaphor for the relationship of present to future. Part of the problem arises from the lack of clarity that a trust model brings to evaluating the actions of the present. More troubling and far more fundamental, the trust model obscures, rather than clarifies, the issues of our moral relationship to future generations. It begs the fundamental questions of the source of the trust obligation and the purposes that such a trust serves. As discussed below, an evaluation of our moral relationship to the future is logically antecedent to and does not follow from a claim of some form of planetary trust.

The purpose of this Article is to explore the limitations of the concept of the trust in evaluating our relationship to future generations. It begins with a discussion of the legal concept of the trust and the essential elements that define a trust. It then discusses the ways in which commentators have used the trust model to define the obligations that the present owe to the future. Lastly, it discusses how the concept of a legal trust makes the trust model inappropriate for use as a model for the present/future relationship.

The Nature of the Legal Trust

The trust is a legal, not a moral, construct. In Anglo-American law it has quite definite features.⁵ A trust consists of property or assets legally owned by a “trustee” who manages the trust for the benefit of the “beneficiaries” of the trust.⁶ However, in addition to the trustee and beneficiary, there is another central figure in the creation and management of the trust. Trusts are created by “settlers” who define the “terms of the trust” and establish the “purposes of the trust.”⁷

Trust law defines the obligations that the trustee has toward the beneficiaries. The touchstone of all trustee obligations is the “purpose” or “terms” of the trust established by the settlor. The general obligation of the trustee is to act in ways that further the purpose or terms of the trust.⁸ Although the obligations of the trustee are in most respects defined by

the terms of the trust established by the settlor, there are also a number of general obligations that the trustee has toward the beneficiaries of a trust.⁹ These general obligations can, in most cases, be altered by the express or implied intent of the settlor, but they do help define the basic concepts of the legal trust.

Fiduciary Relationship

Perhaps the core of the trustee/beneficiary relationship is contained within the concept of the “fiduciary” relationship that trustees have with beneficiaries. This fiduciary relationship requires that trustees place the interests of the beneficiaries ahead of their own interests. At a minimum, this implies an obligation to act “fairly” and “solely in the interests of the beneficiaries.”¹⁰ In other words, the trustee must make decisions for the benefit of the beneficiary not the trustee.¹¹

Prudent Investor Rule

A trustee is generally required to comply with a standard of “prudent investment” of trust assets.¹² Among other things, this rule imposes an obligation to make productive use of trust assets.¹³ It is, in most cases, a breach of a trustee’s duty to beneficiaries if the trustee allows trust assets to remain unused without some income or return. In managing trust assets, trustees generally have full rights to alter or dispose of specific property within the corpus of the trust if this is undertaken consistent with prudent management of the trust.¹⁴ This prudent investment rule has also been held to impose an obligation to diversify trust assets to minimize the risks to the trust as a whole.

Multiple or Successive Beneficiaries

In many cases, trusts are intended to serve several beneficiaries or “successive beneficiaries.” A trust, for example, may be intended to benefit several people within successive gen-

5. Trust law varies to a certain extent among jurisdictions, but the basic elements are codified in the *Restatement of Trusts* prepared by the group of legal experts at the American Law Institute. It is on the *Second and Third Restatements* that I largely rely in identifying the elements of trust law.

6. The *Restatement (Second) of Trusts* defines a trust as:
a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intent to create it.

RESTATEMENT (SECOND) OF TRUSTS §2 (1959). Trustees, who have obligations to beneficiaries, may themselves be beneficiaries; trustees can thus wear two hats, obligated to serve others and entitled to serve themselves. *Id.* §99.

7. See *id.* §3 (Definition of Settlor), §4 (Terms of the Trust).

8. *Id.* §164 (Duties and Powers of the Trustee).

9. In the absence of any provision in the terms of the trust, the *Restatement* defines certain rules applicable to the duties and powers of the trustee. *Id.*

10. *Id.* §170.

11. Although the trustee has a “fiduciary” obligation to beneficiaries, the position of trustee is not one of selfless service. Trustees are entitled to compensation for their efforts and payments to the trustee can come from the trust. Thus, trustees receive fair compensation for their management role in ways that directly affect the assets held for the beneficiaries. It is not a breach of a trustee’s duty to receive assets from the trust; rather, the amount of such receipts is limited by principles of reasonableness and prudence.

12. The most recent version of the *Restatement, Restatement (Third) of Trusts*, adopts a revised statement of the prudent investment rule. It states that the trustee has a duty to manage the funds in the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust; to exercise reasonable care, skill, and caution in context of the trust portfolio and as part of an overall investment strategy that should incorporate risk and return objectives suitable to the trust; and to diversify unless under the circumstances it is prudent not to do so. RESTATEMENT (THIRD) OF TRUSTS §227 (1992).

13. The *Restatement (Third) of Trusts* provides: “The trustee is under a duty to beneficiaries to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality.” *Id.*

14. *Id.* §190.

erations.¹⁵ In this case, the trustee has the duty to act “impartially” with respect to each beneficiary¹⁶ and with “due regard” for the interests for each succeeding beneficiary.¹⁷ Unless there are specific provisions in the terms of the trust on how to allocate trust assets among multiple or successive beneficiaries, the trustee has substantial discretion to make such an allocation.

Limits on Discretionary Actions by the Trustee

Management of trust assets generally involves substantial discretion by the trustee, but, for the most part, the exercise of discretion by trustees is not subject to control by courts unless the action of the trustee violates the fiduciary relationship (as by self-dealing) or if the exercise of discretion is so egregious as to rise to the level of an “abuse of discretion.”¹⁸ In other words, a trustee has committed no breach of duty to beneficiaries when the trustee exercises his or her discretion without fraud and consistent with the purposes of the trust.

Charitable Trust

The “charitable trust” is one specific class of trusts. Charitable trusts can be created to serve a range of rather vague “charitable purposes.” In most respects a charitable trust is like other trusts, but it differs in certain significant respects. Unlike other trusts, a charitable trust does not need to be created for a specific or identifiable group of beneficiaries; a charitable trust may be created to serve an undefined general group of beneficiaries. Although other trusts have limits on how long they may last, charitable trusts generally may be allowed to last for an indefinite period of time. Finally, the obligations of a charitable trust may be enforced not by the specified beneficiaries, but by public officials.

The Appeal of the Trust Model of Intergenerational Obligation

The image of the earth in trust is an appealing vision. It captures a significant element of the moral concern for the interests of future generations. Describing the present generation as trustees for future generations seems to incorporate cer-

tain duties or obligations on the present to serve the interests of the future. At a minimum, the idea of a planet held in trust by the present for the future implies that we, as trustees, must act as prudent managers to ensure that the trust assets, the planet, are preserved to serve the interests of the beneficiaries, future humanity. More specifically, the idea of the planetary trust seems to model a charitable trust. The metaphor of the charitable trust is particularly apt in this context. First, the planetary trust embodies a moral vision of service to future humanity, and thus, like a charitable trust, the planetary trust seems founded to serve public, charitable goals. Further, the details of a planetary trust fit many of the unique elements of a charitable trust; it reflects planetary assets held indefinitely by the present to serve the interests of an undefined and unknowable future humanity. Finally, and just as important, the image of the charitable trust implies that this obligation of service is “enforceable” by those serving the public interest and not by the specific beneficiaries.

Identification of the specific obligations on the present imposed by such a planetary trust is, as discussed below, somewhat problematic, but Prof. Edith Brown Weiss has identified a series of duties that may follow from the concept of the planetary trust. First, she states that the purpose of the planetary trust is “to sustain the welfare of future generations.” From this she infers two duties of “conservation” that present generations, as trustees of the planetary trust, have toward future generations. The present generation has a duty to conserve the options available to the future through preservation of biological diversity, nonrenewable assets, and cultural diversity. Additionally, the present has a duty to conserve the quality of the natural environment that, at a minimum, requires that we, the present, leave the quality of the natural environment “in no worse condition than we received it.” As Professor Brown Weiss recognizes, these duties leave considerable discretion to the present generation to balance competing interests in deciding its obligations to the future. They do, however, form a basis for analyzing the legitimacy of actions taken in the present that affect the future. All in all, this image of the planetary trust, modeled on the image of a charitable trust, neatly states a view of the relationship between present and future generations.

The Limits of the Trust Model

The trust model thus presents an appealing metaphor for the relationship between present and future generations, but the value of a trust model lies not in the metaphor. To be meaningful, a trust model must add to our understanding of the moral relationship of present to future and aid our understanding of the “obligations” or rules of conduct that govern present actions that affect future generations.¹⁹ As an aid to understanding, however, the trust model is flawed. Indeed, in most respects, reference to a trust obscures, rather than

15. Although not applicable to charitable trusts, Anglo-American law has typically placed strict limits on the duration of trusts. Thus, most trusts containing successive beneficiaries will require payment of income for a limited number of generations and then payment of the principal. Believe me; you do not want to know any more about the Rule Against Perpetuities or other limits on the duration of trusts.

16. *Id.* §183.

17. *Id.* §232.

18. *See id.* §187. In describing the role of the court in controlling abuse of discretion by trustees, a comment to the *Restatement (Third) of Trusts* provides:

If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently is not a sufficient reason for interfering with the exercise of the power by the trustee.

Id. §187 cmt. e. A similar rule is applied to the exercise of discretion by trustees of charitable trusts. *Id.* §382.

19. This is the basic claim of a trust model. As Professor Brown Weiss noted: “In fulfilling our role as planetary trustees, we can draw on the law of trusts, a body of distilled teachings concerning intergenerational cooperation and conflict, to help resolve the challenges confronting our global heritage.” *See* Brown Weiss, *Planetary Trust*, *supra* note 3, at 499. She is, however, appropriately cautious in this claim when she notes that, while the law of trusts can provide “general guidelines” for administration of a planetary trust, “it would be inappropriate to carry the minutiae of American trust law into that governing our planetary trust.” *Id.* at 524.

clarifies, the issues of the relationship between present and future generations.

Source of the Trust Model

The first problem arises in deciding why a trust model is the appropriate vehicle for describing present/future relationships. Some commentators have claimed a trust relationship arises simply by virtue of identifying some moral obligation to the future.²⁰ To recognize that the present generation has moral obligations to future generations does not, however, lead to a conclusion that we serve as trustees of the planet for the benefit of future generations. I believe that I have moral obligations to my dog, but that does not mean that I hold my assets in trust for my dog. The existence of rights and duties among humans stemming from deontological or utilitarian concepts does not require the existence of some trustee/beneficiary relationship. In other words, a conclusion that the present has moral obligations to the future does not require or imply a trust, and there can be different formulations of the moral relationship between present and future that do not involve a trust model.

A trust model may also be claimed because the basic issues of trust law, obligations of trustees toward beneficiaries, seem to address the very concerns raised by present/future generation issues.²¹ Once again, however, the trust model is only one of many that deal with these issues. Legal doctrine relating to future interests, bailments, laws of partnerships and corporations, and rules of estates and inheritance are all areas of law that involve similar questions.²² No catalogue of issues logically leads to identification of a trust model as the proper analogue or model for present/future relationships.

The trust model may be claimed just because it seems so apt. The resources of the earth are perfect for identification as the corpus of the trust. Trustees (us) and beneficiaries (the future us) are also neatly at hand. But identification of assets and actors does not a trust make. There are many relation-

ships between humans that involve things that do not involve a trust. The whole area of distributional justice implies an assessment of the relative claims of persons to things, and issues of distributional justice can (and usually are) evaluated without resort to a trust model.

Indeed, the very thing that distinguishes a trust from other relationships between people and things is the very thing that makes a trust an inappropriate image of present/future relationships. The core of the trust concept is an intentional act that places items in trust for the benefit of others.²³ In other words, a trust implies a settlor.

There is, however, no obvious settlor who has created and defined the purposes of a planetary trust. This is not a quibble. The very legitimacy of a trust model requires identification of a settlor. Without the intentional act of creation of a trust, there is no basis for claiming a trust model as opposed to other metaphor. Without a settlor, there is no purpose or terms of the trust that define the scope of the obligations of the trustee.

It may be possible to ground the existence of a planetary trust through an identification of possible settlers. There are, for example, theological theories that claim obligations to the future arising from some God-based conceptions of the relationships of humans to the natural world.²⁴ Some imply that the trust arises from the commitment of the present generation that is ratified by each succeeding generation.²⁵

The process of identifying these settlers, however, reveals the weakness of a trust model. To claim that a trust arises from theological views obviously requires a rather contentious assessment of theology. To claim that a trust arises from some implied agreement among the present generation is to take us into Rawlsian or other contractarian analysis that identifies a source of moral obligations to the future.²⁶ But it is this theological or contractarian analysis that leads to the normative statement of our duties to the future. The trust model follows from and does not precede an identification of these obligations to the future.

20. Professor Brown Weiss, for example, finds a basis for a fiduciary duty among generations from various sources including sociobiological theory, the need for the present to relate to the future, a "primordial social value" necessary for survival of human communities, and the various tools societies use to recognize and protect the interests of future generations. *Id.* at 499-501. In *IN FAIRNESS TO FUTURE GENERATIONS*, *supra* note 3, Professor Brown Weiss further discusses the cross-cultural basis for inferring a fundamental human regard for future generations. Finding such a universal concern, even characterizing the concern as "fiduciary," does not, of course, directly translate into a trustee/beneficiary relationship.

Another commentator reaches a trust model through a somewhat similar process. From an identification of sources for our concern for future generations, Prof. Robin Attfield would find a continuing intergenerational compact of inherited benefits and burdens. Thus, Professor Attfield concludes that:

[w]ith regard to the environment, this suggests (if it is true) that we are entrusted by our forebears (whether or not they intended this) with care of the planet and its systems, and that we perforce share this task with our successors, who will be among the beneficiaries if we play our part. In other words, we are trustees of the planet.

ROBIN ATTFIELD, *THE ETHICS OF THE GLOBAL ENVIRONMENT* 44-45 (1999).

21. See Brown Weiss, *Planetary Trust*, *supra* note 3, at 504.

22. The *Restatement* distinguishes a trust from a variety of other legal relationships that have similar elements. See *RESTATEMENT (SECOND) OF TRUSTS* §§5-16C (1959).

23. The *Restatement's* definition of a trust provides that it "arises as a result of a manifestation of an intention to create it." *Id.* §§2, 348.

24. There is a whole body of theologically based theories of environmental ethics that may ground obligations through reference to some divinely inspired conceptions. See, e.g., *JUDAISM AND ENVIRONMENTAL ETHICS* (M. Jaffe ed. 2001); M. OELSCHLAEGGER, *CARING FOR CREATION: AN ECUMENICAL APPROACH TO ENVIRONMENTAL ETHICS* (1996).

25. Professor Brown Weiss has stated:

The planetary trust is an inter vivos trust between generations of the human species. Its existence is implicit in the nature of the relationship between generations. It derives from an implied declaration by each generation that it holds the resources of the planet in trust for future generations. This intention is universally reflected in diverse human cultural and religious traditions.

Brown Weiss, *Planetary Trust*, *supra* note 3, at 504.

26. In his classic *A Theory of Justice*, John Rawls sketches a method for defining the elements of justice between generations. *RAWLS*, *supra* note 2, at 284-93 (chapter entitled The Problem of Justice Between Generations). In this chapter he applies his basic concept of bargaining behind a "veil of secrecy" to define elements of justice that would apply among succeeding generations. Barresi posits obligations arising from an agreement among members of the present generation in which future generations stand as third-party beneficiaries. See, e.g., Barresi, *supra* note 3, at 59. If a trust arises from such an agreement, then the source and scope of our duties to the future arises from the agreement not the trust, and the proper focus for debate is on the legitimacy and content of a claimed agreement.

The Purpose of the Trust

The second problem is, thus, an extension of the first. A trust implies a purpose. It is the purposes and terms of the trust that define the essential obligations between the trustee and beneficiaries. A trust model requires an identification of its purpose.

It is possible, of course, to define a purpose in a “trust model.” Professor Brown Weiss, for example, states that the purpose of her planetary trust is “to sustain the welfare of future generations.” From this purpose, she has developed a series of obligations relating to maintaining the quality of the natural and cultural environment.²⁷ She has formulated these obligations in a variety of ways, but all have the components of passing on the natural environment in as good a quality as we received it and ensuring an equality of access and choice through an obligation to conserve scarce resources.

All of these obligations are interesting and morally defensible. It is perfectly reasonable to argue that moral principles of beneficence or nonmaleficence require us to take actions that promote or, at a minimum, do not impair the quality of life for future generations. It is also perfectly credible to ground a concern for preservation of scarce resources in a concern for protection of the autonomy of future humans to express their preferences.²⁸ Professor Brown Weiss has constructed an important catalogue of duties that can be grounded in traditional Western ethical tradition.

What they do not do is follow from the concept of a trust. The trust may embody, but it does not create, those commitments. Nothing in a trust model requires us to sustain the welfare of future generations. Nothing in the trust model inherently defines actions we must take for the sake of the future. Claiming that the moral relationship stems from the trust simply begs the question. At its worst, a trust model leads to a tautology: the rights of the future arise from the trust, but the purpose of the trust is to protect the rights of the future.

By focusing on the trust rather than the underlying questions of our obligations to the future, the trust model obscures rather than clarifies the important issues of our moral responsibility to the future.

General Obligations of Trustee to Beneficiaries

In the absence of specific “terms” or “purposes” of a trust, there are certain general obligations that are implied on a trustee. Perhaps these general obligations provide some content to an appeal to a trust model. There are, however, difficulties in relying on general trust law. First, these general duties can be altered by specific terms of the trust. Thus, to assume that general obligations apply assumes that they reflect the unexpressed intent of the settlor.

Further, even granting the existence of these general obligations, they provide no meaningful guidance on the important issues of our obligations to the future. This can be seen with respect to two fundamental questions about the limits on the actions of the present. First, how much are we, the present, entitled to alter the earth’s natural resources in ways that affect the future? Second, how much may the present consume existing resources at the expense of the future?

Altering the Corpus of the Trust

Consider perhaps the most basic issue in defining the moral relationship between the present and the future—determining how much we, in the present, may alter the natural environment in ways that will affect the quality of the environment received in the future. What does a trust model tell us, for example, about the limits of our authority to consume finite petroleum resources or take actions that result in the loss of species?

The answer is: very little. In the absence of an express prohibition contained in the term of the trust, the trustee generally has full discretion to sell or alter the assets held in trust as long as that sale serves the purposes of the trust. Thus, the trust model implies that the natural environment can be modified by the present—natural assets can be sold or exploited—as long as that modification serves the purposes of the trust.

Indeed, a trustee generally has an obligation of “prudent investment,” and a trustee is thus required to develop trust assets in order to provide a return to the beneficiaries and to conserve the value of the assets. In the absence of a contrary intent of the settlor reflected in the terms of the trust, it is a breach of a trustee’s duties if she or he fails to exploit trust assets by leaving them “unproductive.”

Most decisions to exploit resources are investment decisions; we exploit petroleum or we destroy habitat to invest in economic development. The future benefits from these decisions through the transfer of wealth to the future. The effect of our decisions is not to destroy the corpus of the trust, but to alter it. Our actions trade one set of options that future generations may have had for a different set of options. Thus, permanent loss of resources cannot necessarily be characterized as a violation of a duty to conserve options. Our actions expand some options available to the future while at the same time limiting others.

With respect to “wasting assets,” assets such as oil and gas reserves that will decline with time, the trustee has an affirmative obligation either to amortize the assets so that beneficiaries each receive a share or to sell the assets in order to convert the wasting asset into a nonwasting asset that will continue to be productive. Neither trust law generally nor charitable trust specifically requires that a trustee preserve specific assets in the trust for future beneficiaries.

The trust model thus confers substantial discretion on the present to alter and exploit natural resources through economic development, and, under general trust concepts, the trustee is generally immune from suit for the exercise of discretion except where the trustee’s actions constitute an abuse of discretion. As long as our decisions, no matter how flawed, can be seen as a judgment to develop resources in ways that either preserve or increase the wealth of future generations, they would seem to be actions authorized under some generalized trust standard. We may have limited fu-

27. Even accepting a purpose of “sustaining the welfare of the future,” it is problematic for the present to base its actions on sustaining the welfare of an undefined and perpetual class of humans when the preferences of the future are unknown and the actual impact of our present actions are unknowable. See Gaba, *supra* note 2.

28. Such an analysis would be credible but not free from controversy. Grounding an obligation to the future in rights-based analysis requires, among other things, the contentious step of identifying contingent future humans as rights-holders equivalent to present humans.

ture generation's access to irreplaceable natural resources. We may be exposing future generations to the risks that arise from limiting some available options they might otherwise have had. Nonetheless, these choices are ones that we, the present trustee, are entitled to make under a trust model.

The only way to constrain this discretion to alter the corpus is to define purposes or terms of the trust that limit our discretion. These purposes or terms, however, precede the trust model; they do not arise from the trust model.

Benefits to the Trustee

Consider a related question. What are the limits on the present generation's ability to exploit planetary assets in ways that clearly "consume," rather than "invest," the natural environment? In other words, what does a trust model tell us about our ability to exploit resources in ways that confer no benefit on the future and that cannot be justified as an exercise of our discretion to manage trust assets?²⁹

Again the answer to this latter question is: very little. Under a trust model, we, the present, are entitled to consume

resources on two different grounds. First, as trustee, we are entitled to compensation. We get to withdraw assets from the trust in payment for our management of the resources for the future.

More importantly, however, we, the present, are not simply trustees; we are also beneficiaries. Thus, we are just as entitled to benefit from the trust assets as are future generations. We, the present, and each future generation constitute "successive" beneficiaries who each are entitled to the benefits of the trust. The trust model provides little guidance on the proper allocation of trust assets between multiple beneficiaries. The *Restatement of Trusts* provides that where there are multiple or "successive" beneficiaries, the trustee is required to act "impartially" and to exercise "due regard" for the interests of each successive beneficiary. Thus, we may give "due regard" to our interests as well as the interests of future generations. To reduce the trust model to the statement that we must give "due regard" to the interests of the future is to rob it of any content. Worse, the trust model again risks becoming a tautology: the trust model arises because we recognize a duty to give due regard for the interests of future generations; we must give due regard for the future because of the trust model.

Conclusion

An understanding of the moral relationship of the present to the future is central to the field of environmental ethics. Every action we take alters the earth that future generations will receive. Every action we forego alters the benefits received by the present. There is, however, no obvious or universally accepted approach to understanding duties, rights, or ethical imperatives that define the moral relationship between present and future.

A claim that the present generation holds the earth in trust for future generations has great appeal as a way of capturing an image or metaphor of the relationship of the present to the future. It fails, however, in providing a conceptual basis for understanding these obligations. Worse, by focusing on the trust rather than the source of obligations, the trust model obscures rather than clarifies this relationship.

29. One can argue that a trustee has an obligation, at a minimum, to preserve the value of the corpus of the trust and thus, in some sense, to pass on the trust in at least as good a condition as the trustee received it. There are at least three problems with the concept as applied to an intergenerational planetary trust. First, any obligation to conserve the corpus of the trust is ultimately a reflection of the intention of the settler. It is an identification of the purpose of the trust, not identification of a trust, which creates this obligation. Second, the present is also a beneficiary as well as a trustee and is, as noted, thus entitled, although acting impartially and with due regard to other beneficiaries, to consume the assets of the trust. Finally, the ethical obligation to "pass on" as much and as good as we received requires much deeper analysis than a simple recitation to trust law. Farber and Hemmersbaugh have noted the problem in characterizing our moral relationship in terms of trust obligations. They dispute any claim that the present generation has an obligation:

to ensure future income levels equal to their own; we would not necessarily consider it irresponsible for extremely rich parents to leave their children only moderately rich. For this reason, the current generation is not truly a trustee with a moral obligation to preserve the entire corpus for future generations.

Farber & Hemmersbaugh, *supra* note 3, at 295.