This essay is the bones of what was intended to be an essay in the second edition of Equity & Trusts until it became clear that there was no space.

Essay – Welfare, suitability and a new equity

To paraphrase EM Forster, the trust is for the rich because the poor cannot afford it.

At one level all trusts not effected for purely commercial purposes are created for the welfare of some person. The welfare of the beneficiary is paramount in the mind of the settlor and the trustee is obliged to bear the welfare of that same beneficiary in mind throughout the operation of the trust. Those family settlements considered in relation to the rules on express trusts in Part 2 of this book were designed entirely to cater for a wide range of contingencies which could affect the welfare of members of the family both born and unborn at the time of the declaration of the trust. In consequence it is only natural that we should talk of welfare when we talk of such family trusts. And if we are to talk of welfare it is only natural that we should consider the advances made in social theory at the turn of the millennium about the precise meaning of that term "welfare". In short, with an increasing reliance on citizens providing for their own well-being with the rolling back of the welfare and an increase in social risk, the means by which private law regulates the holding of property for the welfare of individuals will become ever more important. At the time of writing the law and the social understanding of welfare have become greatly detached. This essay will attempt to make some of the connections once more.

The importance of social solidarity
Social solidarity and "trust"
Atomistic human rights
Citizen as consumer

The definition of welfare
It is usual to talk of social welfare … Personal welfare … State welfare
Epsing-Andersen
Social complexity
Risk

Sharing common goods
A survey of the structures
Tax benefits and formalities benefits

Property without property rights?
Democratic control …

Motivation: benevolence or self-interest?
Compare and contract charities (focused on communal well-being within limits) and provision for personal welfare through mutual funds (pension funds, unit trusts) or shared property (co-operatives, credit unions).

Replacement of the welfare state

Welfare uses of trusts

From their earliest beginnings trusts have been used for the welfare of individuals: whether by means of regulating the use of land or protecting the wealth of landed families down the generations. However, as considered in Parts 2 and 3, express trusts may now be used for many other purposes besides that of individual welfare. This Part 8 focuses specifically on the ways in which trusts and related structures are used to protect individual and communal welfare. So, in chapter 26 we will consider occupational pensions schemes as a tool of personal, private welfare outwith state provision which is subject to statutory regulation beyond the ordinary principles of the law of trusts. By contradistinction in chapter 27 we consider the charity: a form of public trust subject to its own code of substantive law and regulation designed to provide solely for social welfare in a limited class of contexts, again outwith state provision.

In chapter 28 we consider co-operatives, which share common roots with companies, partnerships and trusts in the form of industrial and provident societies, credit unions and friendly societies: this last being a form of subject matter already considered in chapter 4. Co-operatives use principles of contract, property and fiduciary responsibility to enable groups of individuals to provide for their mutual well-being and to achieve socially-useful goals devised by local groups. Such activity stands outwith state welfare but is currently being enthusiastically championed by government. By contradistinction in chapter 29 we consider public interest trusts in two distinct areas: first, fragments from the case law combining fiduciary duties in public office and the use of social capital and, second, bodies corporate like the statutorily-created NHS trusts which are replacing welfare state provision of certain key social services.

These disparate subjects are brought together in this Part 8 primarily to examine the ways in which trust-based structures facilitate the provision of a variety of welfare services. Further, these different approaches illustrate different approaches to the hotly contested concept of welfare provision. There is a distinction both in terms of delivery and of policy between state welfare provision, personal welfare provision and the use of social capital to provide welfare services. By definition, using private law structures like trusts indicates that the areas considered in this Part 8 are concerned primarily with private welfare – albeit large pension funds are not concerned with individual welfare but rather with group welfare. Co-operatives are built on the use of private capital but taken from members of a community, typically from those who are too poor to access ordinary financial services like bank accounts, to provide a form of group welfare. Charities and public interest trusts are public trusts, however, which are used increasingly to provide services once provided by the welfare state in a context which is neither entirely in the public sector nor is limited simply to private classes of individuals. As such the examination of these topics intrudes on the categories established between various forms of welfare capitalism[1] on the one hand, and subtle questions as to whether or not such property-based structures generate social solidarity or division.[2]

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1 Epsing-Andersen, 1990.

2 Durkheim, 1894.