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LOUISIANA TRUSTS: THE EXPERIENCE OF A CIVIL LAW JURISDICTION WITH THE TRUST

Kathryn Venturatos Lorio*

If in the field of trusts, Louisiana capitulated to the common law, it was an honorable surrender.¹

Incorporating a common law concept into a jurisdiction of the civil law tradition presents many difficulties, not only in terminology, but in basic underlying legal concepts. Not only do answers to questions vary in the two traditions, but the questions themselves are entirely different in many instances.² Such was the dilemma faced by Louisiana, a civil law island in a sea of common law jurisdictions, as it debated the acceptance of the trust concept. The trust was a flexible economic and social institution that had proven its usefulness in the surrounding states and offered participants various functional and tax advantages. Yet, coordinating a common law concept into the Louisiana mold was no easy task.

OBSTACLES TO THE TRUST

Perhaps the greatest obstacle to the adoption of the trust by any jurisdiction with a civilian legal tradition is the duality of ownership inherent in the common law trust. Initially created as a vehicle for avoiding some of the feudal incidents of ownership,³ the trust divides its interests into the legal title held by the trustee on behalf of the beneficiary, or cestui que trust, and the equitable title held by the latter.⁴

This duality of ownership appears to be in direct conflict with the civilian concept of autonomous and indivisible ownership which first appeared in Justinian's Code and, after a period of dormancy, was revived in Article 544 of the Code Napoleon⁵ which defined ownership as “the right to enjoy and dispose of things in the most unlimited...”

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1. Wisdom, Civil vs. Common Law Trusts, 96 TRUSTS & ESTATES 1194, 1196 (1957) [hereinafter cited as Wisdom].
5. Comment, Why No Trusts in the Civil Law?, 2 AM. J. COMP. L. 204, 210 (1953) [hereinafter cited as Why No Trusts].
manner provided one does not use the same in a way prohibited by the laws or ordinances." This endeavor to discard remnants of feudal burdens which restricted ownership was characteristic of post-Revolutionary France and surfaced in the Louisiana Digest of 1808, which defined absolute ownership in corresponding terms. That article was essentially retained in the subsequent Louisiana Codes of 1825 and 1870.

Yet, despite the enunciation of autonomous ownership as a primary precept of the civil law, history reveals that split ownership was not foreign to the Roman classical period. One writer observes that double ownership existed in Rome in the dos, or wife's separate property, with interests quite similar to the legal and equitable interests in trusts. Additionally, the institution of the peculium castrense allowed a son powers of administration over his separate property, subject to the rights of inheritance in the paterfamilias. Thus, it is suggested that the dichotomous nature of ownership is not an utterly alien concept to the civil law tradition.

Another proposed obstacle to the adoption of the trust concept is the doctrine of apparent ownership or publicity, which is basically designed to alleviate hidden rights in property by requiring public registration of transactions creating rights in rem in order for them to be enforceable. Yet, only those transactions specifically enumerated in a code's list of rights or its numerus clausus would be eligible for such registration. It is contended by those who view this as an obstacle to the introduction of trusts that the registry of the trustee as owner in the official record would deprive the beneficiary of an enforceable right should the trustee breach his duty. Yet, proponents of the trust suggest that the official register could merely be expanded to protect the interests of beneficiaries.

To many civilians the Anglo-American trust is considered functionally unnecessary in light of the many existing civilian mechanisms

8. La. Digest of 1808, art. 1, at 102.
12. Id.
15. Wright, supra n. 4, at 116; Why No Trusts, supra n. 5, at 212.
which may be used to accomplish the same ultimate results.\textsuperscript{17} Pierre LePaulle in his article “Civil Law Substitutes for Trusts” suggests that the real substitute for the trust is the Romanistic concept of \textit{fiduciae},\textsuperscript{18} composed of two elements—(1) the real portion, consisting of the conveyance of \textit{dominium} of the \textit{res} to the fiduciary and (2) the personal or contractual portion, consisting of the agreement by which the fiduciary assumes duties toward the beneficiary, or \textit{fideicomitente}, to use the property for the latter’s benefit under specified conditions imposed and then to return the property when the purpose is fulfilled, either to the original transferor or to a third party nominated by him.\textsuperscript{19} Although this concept appears quite similar to the common law trust, the beneficiary in the \textit{fiducia} has no enforceable action at strict law, but only an action \textit{in personam},\textsuperscript{20} the enforcement of which is left to the equitable discretion of the judge.\textsuperscript{21} Thus, the property is not segregated from that of the fiduciary and, should the latter declare bankruptcy, the settlor would be treated as a general creditor.\textsuperscript{22}

Frequently, the trust is compared to the German concept of \textit{Treuhand}, a fiduciary relationship which offers more protection for the settlor than does the \textit{fiduciae}. Under this arrangement, the settlor transfers property to the fiduciary, or \textit{Treuhand}, subject to a resolutory condition.\textsuperscript{23} If the \textit{Treuhand} breaches his duty, the property will be reconveyed to the settlor. Additionally, the property remains separate from that of the \textit{Treuhand}, thus protecting it from the fiduciary’s creditors.\textsuperscript{24} Even the \textit{Treuhand}, however, does not provide the same benefits as the trust, since protection from the creditors of the \textit{Treuhand} only applies where the settlor is the beneficiary. Otherwise, the beneficiary has only a personal right. Also, the protection against creditors generally extends only to the specific property conveyed and not to any substituted forms it may take.\textsuperscript{25} Finally, if the \textit{Treuhand} breaches his duty, the entire trust fails,\textsuperscript{26} thus defeating its original purpose.

The Roman \textit{fidei commissium} also performed a function similar

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\item[17.\textsuperscript{17}] K. W. Ryan, An Introduction to the Civil Law 219-20 (1962) [hereinafter cited as Ryan]; LePaulle, Civil Law Substitutes for Trusts, 35 Yale L. J. 1126 (1927) [hereinafter cited as LePaulle].
\item[18.\textsuperscript{18}] LePaulle, \textit{supra} n. 17, at 1138.
\item[19.\textsuperscript{19}] Ryan, \textit{supra} n. 17, at 224; Garrigues, Law of Trusts, 2 Am. J. Comp. L. 25 (1953) [hereinafter cited as Garrigues]; Wright, \textit{supra} n. 4, at 118.
\item[20.\textsuperscript{20}] Ryan, \textit{supra} n. 17, at 225.
\item[21.\textsuperscript{21}] Garrigues, \textit{supra} n. 19, at 26-27.
\item[22.\textsuperscript{22}] Wright, \textit{supra} n. 4, at 119.
\item[23.\textsuperscript{23}] Ryan, \textit{supra} n. 17, at 226.
\item[24.\textsuperscript{24}] Wright, \textit{supra} n. 4, at 119.
\item[25.\textsuperscript{25}] Id. at 120.
\item[26.\textsuperscript{26}] Ryan, \textit{supra} n. 17, at 229.
\end{itemize}
to the trust. Under this concept, property is given to a fiduciary who is to later turn the property over to another, the *fidei commissarius*. Although this resembles the trust in that the property may be real or personal and the second person need not be alive at the creation of the *fidei commissum*, it differs significantly from a trust in that the first grantee or beneficiary manages the property for his own interests and under no specific instructions from the transferor. The interests of the grantees are thus successive, rather than concurrent, as in a trust. Finally, the *fidei commissum* may only be created by testament and even then, only under certain conditions varying from country to country.

In addition to these concepts that are frequently compared to the trust, other civilian concepts may fulfill some of the same objectives as a trust. LePaulle points out that many of these serve the function of providing management for an incapable person's property. The concepts of tutorship and curatorship perform such a function. Yet, neither of these is quite as flexible as the trust, since each involves the management of all the property belonging to the incapable person, rather than just particular portions, and since the tutor and curator have less autonomy of operation due to the necessary court supervision. Other examples, suggested by LePaulle, of civilian concepts offering third-party management include a donation or legacy with a charge, a contract for the benefit of third persons, and a deposit or mandate coupled with a contract for the benefit of a third person. If the objective is to provide a donee with temporary enjoyment of property, while retaining an interest for oneself or one's heirs, LePaulle notes that the granting of some combination of the three elements of *usus*, *abusus*, and *fructus* is available in the civil law without resort to foreign concepts of income and principal beneficiaries.

**VARIOUS CIVILIAN APPROACHES**

Yet, despite all the possible substitutes for the trust, none seems to provide all the benefits of the trust which was deemed by Maitland

27. LePaulle, *supra* n. 17, at 1143.
28. *Id.*
29. *Id.* at 1134-35.
32. *Id.* at 1134-35.
34. LePaulle, *supra* n. 17, at 1134-35.
35. *Id.* at 1136-39.
36. *Id.* at 1140-41.
as "the most distinctive achievement of English lawyers." Thus, countries of the civilian tradition began to adopt the trust concept in their own individual ways.

One approach was to enact a trust statute using familiar civilian terms. Such was the method employed by Ricardo J. Alfaro, "the father of the Latin-American legislation on trust." His book *El Fidei Comiso* became the basis for the Panamanian trust, which is defined as "an irrevocable mandate by virtue of which property is conveyed to a person, the trustee (fiduciario), to be disposed of as ordered by the one who conveys it, the creator of a trust (fideicomitente), for the benefit of a third party, the beneficiary (fideicomisario)." The problem with that approach is that although civilians are familiar with the concept of mandate, the idea of an irrevocable mandate is itself foreign to them.

Another approach was that proposed by the Institutionalists, most notably represented by Pierre LePaulle of France and Marcel Faribault of Quebec. Under this theory, the trust itself is an institution recognized by law and given the right to hold property. It is in essence viewed as a juristic person, or as LePaulle phrased it, a *patrimonie affectée*. The trustee is a mere administrator and any claim of the beneficiary lie against the property itself.

Louisiana has taken a third approach. It decided to adopt "the traditional Anglo-American trust concept ... but to define with precision the uses of the word 'trust' within a civil law framework so far as practicable and desirable." Yet, this adoption was not easy or swift, nor was it unanimously welcomed.

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40. Law 17 of 1941 of Panama, art. 1. The same definition appeared in Article 834 of the Civil Code of Puerto Rico and is retained in the laws of Puerto Rico under Section 2541 of Title 31, as enacted in 1952.
41. Vilella, supra n. 30, at 384.
42. See Mettarlin, *The Quebec Trust and the Civil Law*, 21 MCGILL L. J. 175, 211 (1975) (wherein the author refers to P. LePaulle, *Traité théorétique et pratique des trusts* (1932) [hereinafter cited as LePaulle] and M. Faribault, *La fiducie dans la province de Québec* (1936)).
43. LePaulle, supra n. 42, at 31.
44. Id. at 26-27. See also Wisdom, supra n. 1, at 1195 (wherein the author points out that Mexico abandoned Alfaro’s mandate in favor of LePaulle’s *institution fiduciaria* in 1932 and 1941).
46. Professor Joseph Dainow points out that “one of the strongest positions of antagonism to the common law trust was taken by the American State of Louisiana.” Dainow, *The Introduction of the Trust in Louisiana*, 39 CANADIAN B. REV. 396, 397 (1961).
SUBSTITUTIONS AND FIDEI COMMISSA

One of the major stumbling blocks to the acceptance of the trust in Louisiana was Louisiana's prohibition of substitutions and *fidei commissa* which appeared in the Digest of 1808 and was also included in the Civil Codes of 1825 and 1870. Whether or not this prohibition was meant to include the trust is a question which has not been consistently answered by the courts or the commentators.

In the Roman law, the term substitution included the vulgar and the pupillary substitutions. The vulgar substitution provided for a substitute to receive a legacy if the named legatee was incapable or failed to accept. This type of substitution was particularly sanctioned in Louisiana by Article 1521 of the Civil Code of 1870. The pupillary substitution was a means by which a father named an heir to substitute for his minor child in the event the child died after the father but before attaining testamentary capacity. Another substitution, the exemplary, was an outgrowth of the pupillary and allowed for a parent to name a substitute for an insane child that died without ever regaining his sanity. The pupillary and exemplary substitutions were effective in Louisiana during the Spanish regime and may have been effective during the French colonial period as well.

The *fidei commissa*, first appeared at the end of the Roman Republic. During the Republic, however, the charge, imposed by the donor on the original donee, to transfer the property at a stated time to a third person designated by the donor was not enforceable but its execution rested on the good faith of the first donee, or *heres*.

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52. See also *La. Civ. Code* art. 1508 (1825); *La. Digest of 1808*, art. 41, at 216; *Code Napoleon* art. 898 (1804).
55. Colonel Tucker notes that *Las Siete Partidas* includes these under the substitutions in Title V of Book VI. Tucker, supra n. 50, at 444.
56. Id.
57. Id. at 444-45.
During the reign of Augustus, the duty to deliver the property to the second donee was enforced by the administrative authority of the consuls. Eventually a special praetor, the praetor fidei commissarius, was appointed to regulate the relations between the heres and the fidei commissarius. Under Vespasian, it was provided that the first donee could retain one-quarter of the whole, the remainder of which he was required to deliver to the third person. During the reign of Justinian, the part retained by the first donee became known as the Trebellianic portion.

In the twelfth century, the fidei commissum was introduced in France with the revival of the Roman law and was freely used until the mid-sixteenth century in order to keep land within the family. Restrictions were later imposed, culminating in the abolition of fidei commissaria in Article 896 of the Code Napoleon. Las Siete Partidas, which derived much from Justinian's Corpus Juris Civilis, included a section on the fidei commissaria and specifically provided for the Trebellianic portion.

An analysis of Article 40 of the Louisiana Digest of 1808 demonstrates that the first two paragraphs of that article basically correspond to Article 896 of the Code Napoleon, except that Article 40 prohibits substitutions and fidei commissia whereas Article 896 speaks only of substitutions. The last paragraph of Article 40, dealing with the Trebellianic portion, corresponds to Law 14, Title V of the Sixth Partidas. Thus, it has been suggested that the prohibition contained in Article 40 of the Digest, which also appears in Article 1520 of the Louisiana Civil Code of 1870, was a prohibition against the Roman fidei commissum.

The major difficulty in the interpretation of the Louisiana prohibition is that the prohibition appearing in the Digest of 1808 and in the Codes of 1825 and 1870 is of substitutions and fidei commissia. One explanation is that the redactors used both terms out of an "abundance of caution," but really meant to prohibit the concept known in France as a substitution, which was prohibited there in 1792 and was the very same concept referred to as a "fidei commissaria" that

59. Id.
60. Tucker, supra n. 50, at 444.
61. Id.
62. Id.
63. Id.
64. LAS Siete Partidas bk. VI, tit. V, L. XIV (S. Scott trans. 1931). See also SPANISH CIV. CODE art. 781 (1889).
65. LA. DIGEST of 1808, art. 40, at 216.
66. Tucker, supra n. 50, at 463.
67. Id. at 461-62.
was permitted in Spain at the time of the drafting of the Louisiana Civil Code.\(^6\)

This theory, however, is not reflected in the Louisiana cases, which appear to find a distinction between substitutions and *fidei commissa*. One theory distinguishes the two concepts based on the first donee’s charge to preserve the property and then to transmit it to the third person. The duty to preserve is deemed the characterizing element of the prohibited substitution, rendering the entire disposition null. The *fidei commissum*, however, merely directs the first donee to later convey the property to the third person with no duty to preserve the property. Thus, the disposition to the first donee is upheld, but the charge to convey is deemed as not having been written.\(^6\)

THE EVOLUTION OF THE TRUST

Another view, which perhaps did the most to discourage adoption of the trust in Louisiana, is that the prohibition against *fidei commissa* was nothing more than a prohibition of the Anglo-American trust.\(^7\) There is some indication that *fidei commissa* and substitutions were permitted in Louisiana to some extent prior to the Digest of 1808.\(^8\) However, with the prohibition of substitutions appearing in the Digest of 1808 and its reiteration in the later Codes, coupled with the opinion that trusts were a form of substitution, courts refused to recognize trusts in Louisiana without an enabling act. The first such act came, perhaps more than coincidentally, in 1882 when Paul Tulane wished to make a sizable donation for the establishment of an educational institution.\(^7\) In that year the legislature exempted from the laws against substitutions and *fidei commissa* all donations for educational, charitable, or literary purposes.\(^9\) In 1902 the legislature authorized banks to act as trustees,\(^10\) and in 1914 trustees were authorized to accept mortgages in their capacity as trust representatives.\(^11\)

Finally, in 1920, private trusts of a limited duration were permitted.\(^12\) Yet, the duties of the trustee, settlor, and beneficiary were not well defined. The 1920 legislation was repealed in 1935\(^13\) and was

\(^{66}\) Id. at 465-66.

\(^{69}\) Succession of Reilly, 136 La. 347, 67 So. 27 (1914).

\(^{70}\) See Nabors, Restrictions Upon the Ownership of Property in Louisiana—Trusts, *Fidei Commissa and Substitutions*, 4 TUL. L. REV. 1, 4 (1929) (wherein the author cites E. SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 305 (A. Bonomo ed. 1925)).


\(^{74}\) 1902 La. Acts, No. 45.

\(^{75}\) 1914 La. Acts, No. 72.


followed in 1938 by the Trust Estates Act, the first complete code of trust law adopted by a North American state. Its sources included the American Law Institute's Restatement of the Law of Trusts, the Uniform Trusts Act, the Uniform Principal and Income Act, the Uniform Trustees' Accounting Act, Dean Griswold's Model Spendthrift Trust Act, and common trust fund provisions from a tentative draft of the Uniform Trusts Act.8

The Trust Estates Act, however, was not satisfactory as it was not well integrated with the Louisiana Civil Code, leaving problems concerning such concepts as forced heirship and the rule against substitutions and fidei commissa. In 1952, the Louisiana Trust Estates Act was amended, extending the possible duration of the trust from the previous limit of ten years from the settlor's death or ten years from the beneficiary's majority, to a limit of ten years from the settlor's death or until the beneficiary's death, whichever was longer.82

In 1959, Professor Leonard Oppenheim was appointed by the Louisiana Law Institute as Reporter to study the Trust Estates Act and to propose possible revision.83 The study culminated in the Louisiana Trust Code of 1964. Prior to the adoption of that Code, remedial legislation was proposed in 1962, partially because of the substitution questions which arose in the cases of Succession of Guillory in 1957 and Succession of Meadors in 1961. Succession of Guillory arose as a result of the death of a Texas domiciliary possessed of Louisiana real estate which he bequeathed to a Texas bank to hold in trust “during the lifetime of Terrell Guillory.” At the time of Terrell's death, the naked ownership and possession of the property was to go “to the Baptist General Convention of the State of Louisiana” and was to be retained by it, so that revenues could be used for the benefit of the Louisiana Baptist denomination.84 Without explaining the reasoning for its decision, the Louisiana Supreme Court deemed the bequest a clear prohibited substitution.

Deeming Guillory “decisive,” the Second Circuit found a prohibited substitution in the Meadors case. This case also involved the death of an out-of-state domiciliary who owned real property in Louisiana. The will of the decedent contained a bequest that the residue of his

80. Wisdom, supra n. 1, at 1196.
81. OPPENHEIM, supra n. 45, at § 1, at 2.
83. OPPENHEIM, supra n. 45, at § 1, at 3.
84. 232 La. 213, 94 So. 2d 38 (1957).
85. 135 So. 2d 679 (La. App. 2d Cir. 1961).
86. 232 La. at 215, 94 So. 2d at 38-39.
property, after making certain particular legacies, was to go to a Tennessee bank in trust, with instructions to pay the decedent's sister $100 per month for her life and to pay the remaining income to decedent's wife for life. On the death of either the wife or sister, all income was to be paid to the survivor until her death, at which time the trust was to terminate with the property to be distributed to decedent's heirs according to the intestate succession laws of Tennessee. By finding that title to the decedent's property did not vest in the legal heirs until the trust terminated, the court found that a double disposition prohibited by Article 1520 of the Civil Code and Article 4, Section 16 of the Louisiana Constitution of 1921 had been created. Appellee asserted that, because the wife and sister merely held a beneficial interest in income, the heirs held a beneficial interest in principal which vested at the time of the creation of the trust. This theory was rejected by the court, creating much anxiety among attorneys as to whether any trust containing separate income and principal beneficiaries would be upheld in Louisiana.87

One of the remedial actions taken in 1962 was the enactment of Act No. 521 which amended Article 4, Section 16 of the Louisiana Constitution and provided in part: "Substitutions, not in trust are and remain prohibited, but trusts may contain substitutions to the extent authorized by the Legislature." Similarly, Act 45 of 1962 amended Civil Code Article 1520, indicating that substitutions in trust were permitted, and deleted any prohibition of fidei commissa. Both provisions were designed to encourage trust legislation and pave the way for the new Trust Code.88 In 1962, other changes in the Trust Estates Act were made, including clarifying the duration of the trust,89 confirming the propriety of mixed private and charitable trusts,90 and affirming the possibility of separate beneficiaries of income and principal.91 Finally in 1964 the present Louisiana Trust Code was adopted.92

The Code itself set up the mode for its interpretation. Its provisions were to be liberally construed in favor of freedom of disposition, with resort being had to the Civil Code only when the Trust Code was silent on an issue.93

87. See also Succession of Simms, 250 La. 177, 195 So. 2d 114 (1966), cert. denied sub nom. Kitchen v. Reese, 389 U.S. 850 (1967) (which was decided on the basis of the law in effect prior to the 1964 Trust Code).
88. OPPENHEIM, supra n. 45, at § 10, at 19.
LOUISIANA TRUSTS

THE NEW CODE AND SUBSTITUTIONS

The adoption of the Trust Code did not automatically usher in total acceptance of the trust concept. Even after its adoption, trusts were closely scrutinized and some were invalidated on the grounds that they contained prohibited substitutions, as in the Louisiana Supreme Court's decision in Crichton v. Succession of Gredler. Mrs. Gredler's will created trusts in favor of her two nephews, as beneficiaries, and stated that if either nephew died before the termination of the trusts, the income and principal should be paid to his children. If the deceased nephew was not survived by children, that interest would go to the surviving beneficiary, or if the other beneficiary were also deceased, to his children. If neither the nephews nor their children were living at the termination of each trust, the income and principal were to be paid to the children of a predeceased brother of the decedent. The Court deemed the trusts null as containing prohibited substitutions, reasoning that the substitutions took effect after the trusts terminated. As they were thus not "in trust," even the Trust Code could not save them. If the Court had interpreted the trusts liberally, it could have viewed the provisions as merely unnecessary contingent alternate provisions due to the nephews' having survived the decedent, or it could have merely invalidated the illegal portions while upholding the remaining provisions of the trusts. Instead, many of the pre-1964 attitudes toward trusts seemed to permeate the majority's opinion.

A more liberal view toward substitutions arose in the 1970s. One striking example is the First Circuit case of Succession of Materiste, in which the decedent established a testamentary trust naming as income beneficiaries her mother as to one-half and her brothers and sisters as to the other half. The testatrix provided that on her mother's death certain nieces and nephews were to succeed to the mother's half interest. Should any of the nieces and nephews die, his or her share was to be divided among the survivors. On the death of the last sibling of the testatrix, the trust was to terminate, with 45% of the corpus to be divided by roots among the siblings' descendants, or should any sibling die without descendants, his or her portion would be divided by roots among the brothers and sisters leaving descendants. Another 45% was to go to certain nieces and nephews who had been named as alternate income beneficiaries at the time of the testatrix's mother's death, and 10% was to go to a particular church. The court viewed those who were to take at the termination of the

94. 256 La. 156, 235 So. 2d 411 (La. 1970).
95. OPPENHEIM, supra n. 45, at § 25, at 68.
96. 273 So. 2d 617 (La. App. 1st Cir. 1973).
trust, not as substitutes, but as principal beneficiaries. The creation of successive income beneficiaries was sanctioned, and the provision for a substitute as to the 45% of the principal for the descendants of the brothers and sisters of the decedent was viewed as an allowable vulgar substitution.

Similarly in *Succession of Stewart*, the Louisiana Supreme Court, in interpreting a trust which went into effect prior to the Trust Code of 1964, upheld the trust against a challenge that it contained a prohibited substitution, stating that "the bequest to the trustees was not made to them as owners or as beneficiaries but rather 'in trust' subject to the terms and conditions as therein set forth."

Again, in *Succession of Burgess*, the Fourth Circuit upheld a trust in which the settlor provided that, should a grandchild beneficiary die, intestate and without descendants, during the trust, his interest would vest in the settlor's surviving grandchild or grandchildren or their descendants "per stirpes." Although the court held that the trust did not meet the requirements of a class trust which would have permitted such a substitution, it still upheld the trust since the grandsons were free to leave the property to others by testament and were not controlled by the will of the original testatrix.

Currently, the Trust Code itself sanctions provisions which would previously have been viewed as substitutions. One example from the 1964 Trust Code is the possibility within class trusts of a shifting in principal to other members of a class when a child or grandchild beneficiary under a class trust dies intestate and without descendants during the terms of the trust, as long as the interests of descendant forced heirs are not prejudiced. Additionally, Section 1 of Act 160 of 1974 contained a general provision governing the shifting of interests in principal and allowing the settlor to name substitute principal beneficiaries to take in the event that the original beneficiary died intestate and without descendants during the term of the trust or at the time of its termination. The settlor's right in the latter instance is subject to the requirement that the substitute be in being and ascertainable at the creation of the trust. Not only is this shifting a form of substitution but, when Louisiana provided for ascen-

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97. 301 So. 2d 872 (La. 1974).
98. Id. at 883.
99. 359 So. 2d 1006 (La. App. 4th Cir. 1978), writ denied, 360 So. 2d 1178 (La. 1978).
dant forced heirship, it also allowed for the possibility of depriving an ascendant forced heir of his legitime.\textsuperscript{104}

**TITLE AND THE TRUSTEE**

One of the first questions addressed by the Reporter and Advisory Committee preparing the Trust Code of 1964 was whether the trustee was to have title of the trust property. The decision to retain the Anglo-American concept of trust, with the trustee as legal title holder was unanimously adopted by the Reporter and the Committee and subsequently sanctioned by the Council of the Louisiana Law Institute.\textsuperscript{105} Accordingly, Article 1781 of the Trust Code states that “a trustee is a person to whom title to the trust property is transferred to be administered by him as a fiduciary.”

Prior to the Trust Estates Act, vesting of legal title in the trustee was viewed by the courts as a common law concept prohibited by Louisiana law.\textsuperscript{106} Later cases, however, repeatedly recognized the trustee as the legal title holder for the benefit of himself or another.\textsuperscript{107} With that recognition came the right of the trustee, to whom succession property had been left in trust, to be placed in possession without an administration\textsuperscript{108} and the right of a trustee-executor to be recognized as the particular legatee of property left in trust by the settlor, thus alleviating any need for the trustee to make a demand on himself as executor in order to claim the interest on any stocks held in trust.\textsuperscript{109} Even where a beneficiary of a usufruct in trust had the naked ownership of part of the burdened property, no confusion of interests was found to exist, since the trustee was deemed to be the holder of “title” of the usufruct.\textsuperscript{110}

Yet, is the trustee as title holder also the owner of the property? If so, is that ownership absolute and indivisible as required by civilian tradition? These questions were posed in the case of *Reynolds v. Reynolds*.\textsuperscript{111} Mrs. Reynolds had been designated as one of four

\begin{footnotesize}
\begin{enumerate}
\item[105.] Oppenheim, supra n. 45, at § 11, at 20.
\item[106.] Buck v. Larcade, 183 La. 570, 578, 164 So. 593, 595 (1938).
\item[107.] Succession of Carriere, 216 So. 2d 616 (La. App. 4th Cir. 1968), writ denied, 253 La. 639, 219 So. 2d 175 (1969); Succession of Hines, 341 So. 2d 42 (La. App. 3d Cir. 1976).
\item[108.] Succession of Carriere, 216 So. 2d 616 (La. App. 4th Cir. 1968), writ denied, 253 La. 639, 219 So. 2d 175 (1969).
\item[109.] Succession of Hines, 341 So. 2d 42 (La. App. 3d Cir. 1976).
\item[110.] Succession of Harper, 147 So. 2d 425 (La. App. 2d Cir. 1962), application not considered, 243 La. 1012, 149 So. 2d 766 (1963).
\item[111.] 388 So. 2d 1135 (La. 1980).
\end{enumerate}
\end{footnotesize}
beneficiaries of a testamentary trust created on the death of her grandmother, which occurred prior to Mrs. Reynolds's marriage. During the Reynoldses' marriage, part of the trust income had been distributed to the wife and kept in a bank account under her exclusive control, while another portion remained undistributed and was retained by the trustee pursuant to the discretionary powers outlined in the trust. Because Mrs. Reynolds had not recorded a declaration of paraphernality indicating that she would administer her separate property, any income from her separate property would be deemed community property.

Upon divorce, Mr. Reynolds therefore sought to characterize all the trust income accruing during the marriage as community property. This assertion was supported by a case decided by the United States Fifth Circuit Court of Appeals in 1949, United States v. Burglass, which was decided under the Louisiana Trust Estates Act of 1938. In Burglass, the Fifth Circuit found the beneficiary's interest in trust income to be community property and recognized the trustee as legal title holder and the beneficiaries as "owners in indivision" of the property. In contrast, Mrs. Reynolds claimed that the trust income was all separate property, relying on the case of Dunham v. Dunham, which held as separate property the income from a trust of which one of the spouses was a beneficiary. The income had accrued during the marriage of the parties. Under the terms of the Dunham trust, none of the trust income was actually distributed to the beneficiary spouse during the term of the trust. Yet, the court used the opportunity to repudiate the Burglass conclusion that ownership of the corpus rested in the beneficiary and title vested in the trustee. The Dunham court stated that "the intent of our trust laws as expressed in the language employed therein by the legislature is to clearly and unmistakably vest both title and ownership of the trust corpus in the trustee."

In Reynolds, the Supreme Court on original hearing held that all the income, both distributed and undistributed, was the separate property of the beneficiary spouse. Approving of Dunham, the Court equated the trustee's title with ownership. However, on rehearing, a plurality of the Supreme Court held that the distributed income was community property and that the undistributed income remained the separate property of the beneficiary spouse. The Court, citing Loui-

113. 172 F. 2d 960 (5th Cir. 1949).
114. Id. at 963.
115. 174 So. 2d 898 (La. App. 1st Cir. 1968).
116. Id. at 907.
The Court characterized the beneficial interest as an incorporeal right and the distributed revenues from that incorporeal right were deemed civil fruits.\footnote{19}

Chief Justice Dixon dissented to the characterization of the distributed income as community property, pointing to the distinction between a beneficiary's right to receive the corpus itself and a beneficiary's right to receive the income produced by that corpus. Justice Dixon viewed Mrs. Reynolds's income interest, which was subject to spendthrift provisions, as an annuity or alimentary pension, rather than a usufruct, or right to fruits.\footnote{20} Additionally, since Mrs. Reynolds's interest in the corpus was less than full "ownership" of separate property, the income from it could not be deemed fruits from separate property and therefore was not subject to community property designation. Thus, "the trust agreement conferred upon her, as a donation mortis causa, an independent interest in receiving those funds," and therefore the funds were her separate property.\footnote{21} Reynolds thus illustrates some of the fundamental problems that exist in determining the ownership interests in trust. The Supreme Court itself rendered only a plurality decision, leaving the characterization of interests rather tenuously defined.\footnote{22}

**THE LEGITIME IN TRUST**

Since a settlor may wish to establish a trust naming his children as beneficiaries, and since the latter are descendant forced heirs, some accommodation of these two concepts was necessary in Louisiana. The Louisiana Trust Estates Act of 1938 specifically permitted the placing of the legitime in trust.\footnote{193} In *Succession of Earhart*,\footnote{194} the Louisiana Supreme Court upheld the placing of the legitime in trust over the appellant's challenge that this conflicted with Article 4, Section

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\footnote{117. Reynolds, 388 So. 2d at 1141.}

\footnote{118. Id. at 1142.}

\footnote{119. Id. The holding in this case appears somewhat incongruous with the earlier case of *St. Charles Land Trust v. St. Amant*, 253 La. 243, 217 So. 2d 385 (1968), in which a beneficiary's interest in a trust corpus comprised of a mineral interest was characterized as an immovable for inheritance tax purposes.}

\footnote{120. Reynolds, 388 So. 2d at 1146.}

\footnote{121. Id. at 1148.}

\footnote{122. See Le Van, *Forum Juridicum—Louisiana Counterparts to Legal and Equitable Title*, 41 LA. L. REV. 1177, 1185 (1981) (wherein the author notes the "air of instability" of Reynolds).}

\footnote{123. LA. R.S. 9:1793 (1950) (repealed 1964).}

\footnote{124. 220 La. 817, 57 So. 2d 695 (1952).}
16 of the Louisiana Constitution of 1921, which prohibited the abolition of forced heirship. The Court noted that, although the legislature could not abolish forced heirship, it could regulate it. 125

Article 1841 of the Louisiana Trust Code of 1964 specifies that the legitime may be placed in trust, provided: (1) the income accruing to the forced heir be paid to him at least once a year, (2) there be no charges or conditions on the forced heir’s interest other than those dealing with spendthrift provisions, with a legally sanctioned usufruct burdening the legitime, and with conditions imposed in the class trust, 126 (3) the term of the trust as it affects the legitime not exceed the life of the forced heir, except where the legitime is burdened with a legal usufruct held by the settlor’s surviving spouse, and (4) the principal be delivered to the forced heir, his heirs, legatees or assignees at the termination of the part of the trust affecting the legitime. Article 12, Section 5 of the Louisiana Constitution of 1974 also expressly permits the legitime to be placed in trust, and subsequent cases have sanctioned the placing of the entire legitime 127 or any heir’s individual forced portion 128 in trust.

Article 1844 of the Trust Code, as amended in 1974, 129 allows a legitime in trust to be burdened with an income interest or usufruct in favor of the settlor’s surviving spouse to the same extent as such is possible out of trust. With the legislative changes made in 1981, however, there is some question as to how extensive the burden on a legitime may be. Act 911 of 1981 amends Louisiana Civil Code Article 916, dealing with the usufruct of the surviving spouse. Additionally, Act 919 of the same legislative session provides that a new Article 890 replace previous Article 916. Both the provisions in Act 911 and in Act 919 provide that if a person dies intestate, the surviving spouse shall have a legal usufruct over the decedent’s share of community property inherited by his or her descendants, that the usufruct will end on the surviving spouse’s remarriage unless confirmed by testa-

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125. See also Succession of Singlust, 169 So. 2d 10 (La. App. 2d Cir. 1964), writ refused, 247 La. 282, 170 So. 2d 512 (1965).

126. The amendment of Section 1841 of the 1964 Trust Code (La. R.S. 9:1941) by Act 160 in 1979 resulted in the possibility that an ascendant forced heir might be deprived of his legitime if the person from whom he would inherit was a principal beneficiary of a trust and had died intestate without descendants. In such a case, the settlor of the trust could name a substitute principal beneficiary, completely bypassing any ascendant forced heirs of the initial beneficiary. See 1981 La. Acts, No. 442 (abolishing ascendant forced heirship).


ment for life, or a shorter period, and that the usufruct will not be an impingement on the legitime of the descendants. However, the two acts differ as to whether the deceased may, by testament, grant to the surviving spouse a usufruct for life or a shorter period over separate property composing the legitime of any non-issue of the marriage. 130 Act 911 allows a testator to bequeath to the surviving spouse a usufruct over separate property composing the legitime of any descendants and allows those who are non-issue of the marriage the possibility of requesting security to protect their interests. 131 However, the decedent’s ability to grant to the surviving spouse a non-impinging usufruct over separate property is limited by Act 919 to the situations in which the legitime in question belongs to the issue of the marriage or to any illegitimate children, subject to the ability of the illegitimate children to request security. Thus, according to Act 919, the granting of a usufruct to a surviving spouse over separate property that composes the legitime inherited by legitimate children of a previous marriage would be an impingement on that legitime. This raises the question of the extent to which a usufruct may burden the legitime held in trust for descendants. Presumably, a resolution of the conflict between Act 911 and Act 919 by the courts would provide an answer for the legitime in trust as well. 132

However, the forced heir’s interest may not be satisfied by an income interest in trust, 133 anymore than a usufruct could satisfy that

130. The original version of Act 919 was introduced in the Louisiana House of Representatives as Bill 817 and allowed the granting of a non-impinging usufruct over separate property inherited by any descendants. A Senate amendment on July 31, 1981 resulted in the altered version which was passed that day limiting non-impingement to separate property inherited by issue of the marriage or illegitimate children. Included in the Act was the statement: “In the event of any conflict between the provisions of this Act and those of any other Act adopted by the legislature at its Regular Session of 1981, regardless of which Act is adopted later or signed later by the governor, the provisions of this Act shall apply.” Act 919 stated it was applicable as to persons dying after December 31, 1982.

Later on July 31, the legislature passed Act 911 which permits the testator to grant a non-impinging usufruct over separate property inherited by any descendants. This Act, which became effective on September 11, 1981, contains the following language: “All laws or parts of laws in conflict herewith are hereby repealed. To the extent that the provisions of House Bill No. 817 by Mr. Fernandez, introduced at the 1981 Regular Session of the Legislature of Louisiana, are inconsistent with the provisions of this Act, those provisions of House Bill No. 817 are hereby repealed.”

131. Act 911 of 1981 provides for the enactment of Article 3154.1 of the Louisiana Code of Civil Procedure which states that security may be requested by non-issue.

132. By allowing a testator to place a greater burden on the legitime of illegitimate children, as opposed to legitimate non-issue of a marriage. Article 919 is subject to constitutional challenge on equal protection grounds. Cf. Succession of Sidney Brown, Jr., 388 So. 2d 1151 (La. 1980).

interest out of trust. An interesting question thus arises when a settlor places the legitime in trust and when the corpus consists only of non-income producing property. In *Succession of Burgess* the Fourth Circuit held that, absent a situation where the legitime was subject to a sanctioned legal usufruct of the surviving spouse, a legitime could not be satisfied by an interest in a trust when insufficient income was generated. The income, to be adequate, would have to correspond to the present value of the future income which the forced heir could expect on the basis of his present life expectancy. Without that necessary income, the trust would have to be reformed, allowing for the sale of enough of the corpus and its conversion into income-producing property sufficient to satisfy the legitime.

**DISTINGUISHING FEATURES OF THE LOUISIANA TRUST**

In addition to the policy decisions concerning title, substitutions, and legitime, other provisions of the Trust Code render it uniquely a product of Louisiana. For example, rejecting any duration period based on the common law Rule against Perpetuities, the Committee adopted a time period for the trust based on the lifetime of an income beneficiary. By affirmative stipulation in the trust, the settlor could provide for a duration of fifteen years, now amended to twenty years from the death of the settlor when he is a natural person or from the creation of the trust if the settlor is not.

Related to the question of duration was that of termination of the trust. Following the American rule first established by the 1889 case of *Claflin v. Claflin*, the Committee adopted a policy of indestructibility of trusts even if all parties consented to terminating the trust and even if a legitime were involved.

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134. *See* LA. R.S. 9:1845 (Supp. 1965); *Succession of Williams*, 184 So. 2d 70 (La. App. 4th Cir. 1966), cert. denied sub nom. State in Interest of Bolds, 250 La. 748, 199 So. 2d 183 (1967). After *Williams*, Section 1845 was deemed obsolete and was repealed by 1979 La. Acts, No. 160.

135. 359 So. 2d 1006 (La. App. 4th Cir. 1978), writ denied, 360 So. 2d 1178 (La. 1978).

136. *Id.* at 1020.


139. LA. R.S. 9:1831, as amended by 1968 La. Acts, No. 132, § 1. The possibility of a trust surviving beyond the lives of the income beneficiaries has been criticized on the grounds that such could result in the continuation of a trust only for the benefit of the trustee. Robertson, *Some Interesting Features of the Proposed Trust Code*, 24 LA. L. REV. 712, 713 (1964).

140. 149 Mass. 19, 20 N.E. 454 (1889).

141. *See* McLendon v. First National Bank of Shreveport, 299 So. 2d 407, 410 (La. App. 2d Cir. 1974) (which was decided under the terms of the Trust Estates Act, but which noted that “the concept of indestructibility has been carried over in the new trust code”).
A few other policy determinations give the Louisiana trust a civilian perspective. One is the requirement that all beneficiaries be in being and definitely ascertainable at the time of the creation of the trust, thus rejecting the notion of common law contingent remainders. The only exceptions are class trusts where only one member of the class need be in being at the creation of the trust (and members of the class are limited to children and grandchildren), trust for employees, and trusts for mixed private and charitable purposes.

Another concept that is foreign to civilian theory, and basically rejected in Louisiana, is recognizing powers of appointment. However, the Trust Code does allow for the invasion of principal by the trustee for the benefit of the income beneficiary even when income and principal beneficiaries are not identical. By requiring “objective standards” for such invasion, the drafters attempted to gain favorable federal tax treatment and to maintain a consistency with the Louisiana Civil Code which prohibits powers of appointment.

CONCLUSION

Louisiana, with its civilian tradition, has adopted the Anglo-American trust. As a corollary, however, it has experienced difficulties in integrating some of the trust characteristics with the civilian tradition.

Questions of title still exist, as illustrated in the Reynolds case. Although the Louisiana courts have been more liberal recently in their interpretation of trusts, drafters should still use caution in order to avoid the possibility of including substitutions that are not sanctioned by the Trust Code. Additionally, when placing the legitime in trust, care must be taken to assure the production of adequate annual income for payment to the forced heirs. Despite its limitations, the trust does indeed function in Louisiana. If used with caution, it offers a valuable tool for tax and estate planning to the Louisiana domiciliary.

148. LA. CIV. CODE art. 1573 (1870).