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Progress Report on Louisiana's Trust Estates Act

*Harriet S. Daggett**

It must have been gratifying to "believers" that Louisiana at long last and as late as 1938 wholeheartedly adopted a pure common law express trust. It has been referred to as a "comprehensive trust code."¹ In the little more than ten years of its existence, the act has attracted a minimum of attention from courts or legislature, while reports of its increasing use in the state continue. Indications point to its success as a legal device for which there must have been a practical need. Due to the youth of the statute, this brief statement must be concerned more with the lack of the device in Louisiana and events concerned with its initial appearance than with its development. Due to lack of litigation, though perhaps a good sign, everything that can or will be said here has been said and much better said, elsewhere. Many critical comments including comparative studies were published at the initial appearance of Louisiana's statute. Thus far, there is little to be added, without useless repetition.

The basic reason for the long absence of a trust device in Louisiana, a civil law state, may lie in the old difference of belief between founders of common law and civil law concerning the best interests of the state, evidenced in the law of inheritance and elsewhere. The underlying thought of the common law adherents is said to have been that the state profited most by holding fortunes intact rather than in dividing them into parts, thus preserving continuity of use and power and effecting greater stability and productivity for society. The thought of the civil law, on the contrary, was to emphasize individuality, thus encouraging widespread effort and, presumably, greater productivity. Furthering this idea, devices emerged for distributing wealth among large numbers and for keeping property in circulation rather than permitting it to be held in large units for prolonged periods of time.² Hence, France, an immediate legal

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1. Bogert, *Cases on the Law of Trusts* (2 ed. 1942) 17.

2. See *Social Meaning of Legal Concepts: 1—Inheritance of Property and the Power of Testamentary Disposition*. New York University School of Law, 1948.

parent of Louisiana, moved to rid the state of substitutions (entail) early in the days of the French Republic. Naturally, the prohibition of the Code Napoleon³ against substitutions appeared and remains in the Civil Code of Louisiana,⁴ as this device for keeping property units intact is clearly counter to the basic ideology of the civil law, illustrated by inheritance doctrines of forced heirship, representation, collation, et cetera.⁵

The legal parent of the modern trust device is said by one group of historians to be the *fidei commissa* of the Roman law; by another group, now apparently more favored, to be the *salman* of early German law.⁶ However that may be, France with her great Roman inheritance approved the *fidei commissa* and retained it even in the days of upheaval, levelling, and discard of devices inimical to individualism.⁷ Louisiana, however, prohibited it together with substitutions,⁸ a natural step in a new country imbued with French revolutionary ideas and also anxious to facilitate production, keep trade active, and hold to uncomplicated forms of ownership, notions which have continued to the present day and are found throughout the law, including that of mineral rights, recently developed.⁹ Naturally, there are two schools of thought regarding the need for the trust in civil law. The Lepaulle¹⁰ view might be interpreted to mean that civil law substitutes are adequate, while Dr. Alfaro is emphatic that there is no substitute and that there is dire need for relief.¹¹ Mr. Patton states that Dr. Lepaulle shows by inference that there is no adequate substitute.¹² Certainly the actual movement, regardless of theory, seems to be toward adoption of the device in civil law states, fully demonstrating the practical attitude in regard to the question.¹³

3. Art. 896, French Civil Code.

4. Art. 1520, La. Civil Code of 1870.

5. Daggett, General Principles of Succession on Death in Civil Law (1937) 11 Tulane L. Rev. 399.

6. Bogert, op. cit. supra note 1, at 7.

7. Comment (1941) 3 LOUISIANA LAW REVIEW 795.

8. Art. 1520, La. Civil Code of 1870.

9. Daggett, Louisiana Mineral Rights (1 ed. 1939).

10. Lepaulle, Civil Law Substitutes for Trusts (1927) 36 Yale L. J. 1126.

11. Patton, Trust Systems in the Western Hemisphere (1945) 19 Tulane L. Rev. 398.

12. Patton, Future of Trust Legislation in Latin America (1946) 20 Tulane L. Rev. 542, 552.

13. Vilella, The Problems of Trust Legislation in Civil Law Jurisdictions:—The Law of Trusts in Puerto Rico (1945) 19 Tulane L. Rev. 374. See also Wisdom, Progress in the Codification of Trusts (1940) 14 Tulane L. Rev. 165.

Louisiana has provided specifically since 1882¹⁴ for trusts for religious, educational, and literary purposes. Obviously, it was possible before that time to arrange for charitable dispositions.¹⁵ For example, a bit of color in which Louisiana abounds flares from the foundation of a dower fund for indigent brides-to-be.¹⁶ Legend has it that the donor, the renowned Julien Poydras, was frustrated in love and suffered throughout his lifetime because the girl whom he wished to marry in his youth could not produce a dowry. Later rumor suggests that at least one alert and enterprising young groom has gained bride and dowry settlement more than once. Despite the efforts of bankers and others to have a trust act passed, the chief argument being that money and business were going out of the state to found trusts in New York and elsewhere, Louisiana did not weaken her major position until 1920,¹⁷ when the first general trust act was passed. In 1921, a new constitution was adopted, and in the same section wherein the doctrine of forced heirship¹⁸ was protected appeared permission for creation of trust estates with limited terms.¹⁹

The statute of 1920 was brief, incomplete, and short lived. A member of the Supreme Court of Louisiana termed it sketchy.²⁰ Further condemnation of the statute is expressed by Justice Rogers in the following language:

“Although the effect of the adoption of Act 107 of 1920 was to introduce the institution of private trusts to the people of this State, the act itself was drafted without regard to the principles governing such trusts under the common law and without any attempt being made to correlate such trusts with the background of the civil law. It seems the principal object of the framers of the act was to enlarge the trust business conducted by the banks by making it plain that the creation of trusts was authorized for that purpose. The act contains a number of provisions wholly favorable to banks engaged in the trust business. Other than to authorize the trustee to administer the trust property in conformity to the directions contained in the instrument creating the trust,

14. La. Act 124 of 1882 [Dart's Stats. (1939) §§ 1296-1303]; Wheeler, *The Louisiana Law of Charities* (1941) 15 *Tulane L. Rev.* 177.

15. *Ibid.*

16. Note reference in La. Act 253 of 1855, § 1.

17. La. Act 107 of 1920; La. Act 167 of 1920 [Dart's Stats. (1939) §§ 9830-9835].

18. Dainow, *The Early Sources of Forced Heirship: Its History in Texas and Louisiana* (1941) 4 *LOUISIANA LAW REVIEW* 42.

19. La. Const. of 1921, Art. IV, § 16.

20. *Hagerty v. Clement*, 195 La. 230, 196 So. 330 (1940), discussed in *The Work of the Louisiana Supreme Court for the 1939-1940 Term—Successions* (1940) 3 *LOUISIANA LAW REVIEW* 267, 288, and Note (1941) 3 *LOUISIANA LAW REVIEW* 465.

and conferring upon the trustee, unless prohibited by the terms of the trust instrument, the discretionary right to alienate or encumber the trust property, no attempt is made in the act to define or limit the duties or powers of the trustee, the beneficiary, or the creator of the trust."²¹

However, the statute served two useful purposes. It accomplished first acquaintance, though brief and unsatisfactory, with the trust idea. It contained a specific clause whereby the legitime might be subjected to a trust and this provision was tested for constitutionality by the Supreme Court of the State and upheld,²² thus paving the way for the 1938 statute.

The act was repealed in 1935²³ with apparently no particularly strenuous objections. The repealing act contained a special provision whereby beneficiaries could demand "full accounting and immediate delivery"²⁴ of property. As to trusts already in existence, the repealing statute was of course held to be unconstitutional, and vested rights of trustees were protected.²⁵ The matter of trusts then rested in Louisiana until 1938²⁶ when the comprehensive and carefully worked out act presently available was passed.

Mr. John Minor Wisdom of the New Orleans Bar in a most interesting and scholarly article appearing in the *Tulane Law Review* had this to say about the act:

"On the whole it [the 1938 act] is a skillful amalgam of the Restatement, the Uniform Trusts Act, the Uniform Principal and Income Act, the Uniform Trustees' Accounting Act and Erwin P. Griswold's proposed Spendthrift Trust Law."²⁷

Professor Paul M. Hebert, Dean of the Louisiana State University Law School, and his associate in reviewing 1938 legislation for the *Louisiana Law Review* made a similar statement:

"This new Louisiana Trust Act, while sanctioning trusts, restricts their operation to conform with state constitutional requirements and to adapt it to present Louisiana law. The

21. 195 La. 230, 239, 196 So. 330, 333.

22. *Wilbert v. Wilbert*, 155 La. 197, 99 So. 36 (1923); *Succession of Manthey*, 159 La. 743, 106 So. 289 (1925). See also *Buck v. Haas*, 180 La. 188, 156 So. 217 (1934) and *Hart v. Mechanics & Traders Ins. Co. of Hartford*, 46 F. Supp. 166 (W.D. La., 1942).

23. La. Act 7 of 1935(3 E.S.) [Dart's Stats. (1939) §§ 9822.1; 9822.111].

24. *Id.* at § 2.

25. *Succession of Manning*, 185 La. 894, 171 So. 68 (1936); *Succession of Forstner*, 186 La. 577, 173 So. 111 (1937).

26. La. Act 81 of 1938 [Dart's Stats. (1939) §§ 9850.1-9850.101].

27. Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act (1938)* 13 *Tulane L. Rev.* 70, 87.

1938 Trust Act is primarily based upon the Restatement of the Law of Trusts, the provisions of which have been kept as nearly intact as possible. The Louisiana statute also embodies provisions taken from the Uniform Principal and Income Act, the proposed Uniform Trusts Act, and the proposed Spendthrift Trust Act. The result is a comprehensive piece of legislation which should facilitate the development of trusts in Louisiana."²⁸

Mr. Frank P. Stubbs, trust officer, also writing for the Louisiana Law Review showed even more enthusiasm. He said:

"With the enactment of Act 81 of 1938—better known as the Trust Estates Act—the Legislature placed in the hands of every Louisiana lawyer a tool which has always been a respectable and useful part of the kit of his fellow craftsmen in the forty-seven other states but which, for fairly well known historical reasons, was prohibited in Louisiana for an aggregate of one hundred and fourteen years. That tool is the private trust device."²⁹

On the other hand, Professor Eugene Nabors of the Law Faculty of Tulane University in a scholarly article appearing in the Tulane Law Review pointed out the imperfections and deficiencies of the statute. His article is entitled "The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder."³⁰ The study is carefully and critically developed to show the lack of scope of Louisiana's first real effort as compared with the full stature of the trust device as evolved in common law jurisdictions. This valuable treatise should aid draftsmen of the future as the trust idea becomes familiar to the people of the state and their use of it more general.

In a note on 1938 legislation appearing in the Harvard Law Review, the author, after an enlightening comparative discussion, concluded with the following statement:

"Perhaps the outstanding impression received from a cursory perusal of the statute is that sensible changes have been made in the common law; but there follows closely a revelation of ambiguity of language and incompleteness of treatment, much of which could easily have been remedied in the drafting, but which, if the Act is successful in bringing trusts to Louisiana, will take years of painful and costly effort to clarify in the courts. Although it is inevitable that interested groups will influence and perhaps distort sub-

28. (1938) 1 LOUISIANA LAW REVIEW 138.

29. Stubbs, Louisiana Trusts for the Louisiana Lawyer (1939) 1 LOUISIANA LAW REVIEW 774.

30. (1939) 13 Tulane L. Rev. 178.

stance, it does not follow that they must control form, for they too would be benefited by certainty. It may be neither possible nor desirable to provide in advance for every detail, but it is not unreasonable to hope that an experienced corps of draftsmen might draw upon centuries of litigious development to obviate repetition of the difficulties. This eclectic Act shows with peculiar force the weaknesses of the *ad hoc* method of drafting by interested parties."³¹

Proper efforts were made in the state to introduce the act and make its possibilities familiar to a citizenry generally unacquainted with a device so long denied. In addition to law review articles, trust departments issued neat, convenient, and well indexed booklets containing the act. Mr. George Wallace, recognized throughout the state for his thorough knowledge of constitutional history and technique and as an expert draftsman upon whom the executive and legislative branches of the state government have long relied, issued a volume of easy reference dealing with the new trust act. After commenting upon the sources, he made the following statement in regard to the use and understanding of the act:

In the Restatement full explanations and illustrations are given under every statement of a rule. These comments and examples make the Restatement extremely valuable as source material for the Trust Estates Act in that they supply lawyers and judges with a reliable guide to understanding and interpretation of the greater part of the Act. Where the wording of a provision in the Trust Estates Act is copied from or is substantially the same as the corresponding rule in the Restatement one has only to refer to the Restatement itself for an authoritative explanation. Moreover, where a provision in the Trust Estates Act differs from the rule on the same point in the Restatement and interpretation is desired, the very fact of difference may be a helpful clue."³²

Despite suggestions for improvements from informed sources,³³ only one amendment to the original act has thus far appeared. In 1944 the following *deletion* was made from Title 6 of the article dealing with transfer of the interest of the beneficiary.

"The right of any beneficiary of a trust to receive the principal of the trust or any part of it, presently or in the future, shall be freely alienable and subject to the claims of his

31. (1938) 52 Harv. L. Rev. 145, 151.

32. Wallace, *The Trust Estates Act Handbook* (1938) x.

33. In addition to articles previously referred to, see Martin, *On the Terminability of Trusts* (1939) 13 Tulane L. Rev. 585; Comment (1948) 22 Tulane L. Rev. 637, 639.

creditors, notwithstanding any provision to the contrary in the terms of the trust."³⁴

The initial attempt at such an undertaking could scarcely hope to attain perfection. Particularly is that true when resistance to the very idea was so deep rooted and long standing. Mr. Vilella has specifically pointed out the many difficulties in his article, the "Problems of Trust Legislation in Civil Law Jurisdiction,"³⁵ as have other authors writing on the subject, cited in this resumé. One writer has said:

"To undertake the introduction of the mature institution of trusts into the civil law of Louisiana is not only to face many difficult problems of policy, but also to enter upon a task of draftsmanship at once fascinating and delicate."³⁶

What might be termed practically a bitterness against common law trusts appears in an opinion by Justice Land in 1935 where he speaks of "too much 'squinting' at common law trusts"³⁷ and quotes from many decisions of the Louisiana Supreme Court where the idea or any approach to it is emphatically negated. Judge Dawkins of the federal court subsequently refers to Justice Land's "rather forceful language used in discussing common law trusts."³⁸

In the face, then, of long tradition, strong feeling, and problems of constitutionality, particularly in regard to burdening the legitime, many adjustments and compromises must have been necessary to secure passage of the act.³⁹ It is really remarkable that the job was done so well and that the statute has thus far apparently worked successfully. The act is short, considering its distinct importance, occupying but thirty-two pages of an ordinary sized statute book using desirably large print. The act contains twelve titles and a total of one hundred and one sections. The titles and subtitles or chapters appear as follows:

1. Definitions, Distinctions, and Restrictions
2. Creation of the Trust
 - Chapter 1—Methods for Creating
 - Chapter 2—Purposes for Which a Trust Can Be Created
3. Trust Property
4. Trustee

34. La. Act 290 of 1944, amending La. Act 81 of 1938, § 28 [Dart's Stats. (1939) § 9850.28].

35. (1945) 19 Tulane L. Rev. 374.

36. Note (1938) 52 Harv. L. Rev. 145, 151.

37. *Buck v. Larcade*, 183 La. 570, 576, 164 So. 593, 595 (1935).

38. *Hart v. Mechanics & Traders Ins. Co. of Hartford*, 46 F. Supp. 166, 168 (W.D. La., 1942).

39. See discussion of action of Bar Association, Baldwin, *The Unauthorized Practice of Law* (1944) 5 LOUISIANA LAW REVIEW 599.

5. Beneficiary
6. Transfer of the Interest of the Beneficiary
7. Administration of the Trust
 - Chapter 1—General Principles
 - Chapter 2—Duties of the Trustee
 - Chapter 3—Powers of the Trustee
 - Chapter 4—Remedies of the Beneficiary and Liabilities of the Trustee
 - Chapter 5—Investment of Trust Funds
 - Chapter 6—Principal and Income—Ascertaining and Accounting
 - Chapter 7—Compensation and Indemnity of the Trustee
8. Prescription of Actions by the Beneficiary Against the Trustee
9. Recordation, Effect of
10. Termination and Modification of Trust
11. Procedure in Certain Cases
12. Miscellaneous

The text is clearly written and lacks the repetition, verbosity, poor choice of words, bad sentence structure, and indeed, poor English that are often unfortunately found in the ordinary legislative enactment. Considering the sources and the draftsmen connected therewith, this result is not surprising, but nonetheless Louisiana's draftsmen and legislators are also to be congratulated that the fine source material was so intelligently used.

The simplicity and flexibility⁴⁰ of the act within the pattern is particularly desirable in a jurisdiction where neither the bar nor the layman has great familiarity or experience with carrying out the desires of clients who wish this type of security. For example, in creating the trust "no particular form of words or conduct shall be necessary for the manifestation of intention to create a trust."⁴¹ Again, the "maximum allowable period" is ten years or in case of a minor, ten years from the majority of the beneficiary. Should a longer period have been indicated by the instrument, the trust is not invalidated for this cause but is unenforceable beyond the legal term.⁴²

The clause of the 1920 act,⁴³ dealing with the burdening of

40. Suggestion for possible evolution. See Note (1942) 16 Tulane L. Rev. 299.

41. La. Act 81 of 1938, tit. 2, § 9 [Dart's Stats. (1939) § 9850.9]. For examples of use of Act 81 of 1938, see Succession of Butterworth, 195 La. 115, 120, 196 So. 39, 40 (1940); *United States v. Burglass*, 172 F.(2d) 960 (C.C.A. 5th, 1949).

42. La. Act 81 of 1938, tit. 1, § 4 [Dart's Stats. (1939) § 9850.4].

43. La. Act 107 of 1920.

the revered "forced share," which stood the test of constitutionality,⁴⁴ appeared as follows:

"Be it further enacted, etc., That the provisions contained in the Revised Civil Code, and the laws of this State relative to substitutions, Fidei Commissa, or trust dispositions, and the legitime shall not be deemed to apply to, or in any manner affect donations of the character and made in the manner provided by this Act; and all laws or parts of laws conflicting with the provisions of this Act are repealed insofar as regards the purposes of this Act, but not otherwise."⁴⁵

The clause of the new act dealing with this delicate matter states that:

"Nothing in this Act shall be construed as affecting the law in regard to forced heirship, save that it shall be permissible under this Act for a settlor to create a trust upon the legitime or any portion thereof of his forced heir. The legitime or any portion thereof in trust shall be fully subject to the applicable provisions of this Act, provided that the income therefrom may not be accumulated but shall be paid not less than once a year to the person entitled thereto, notwithstanding any provision to the contrary in the terms of the trust."⁴⁶

Favorable decisions under the first act need not be followed under the second. Moreover, in 1944⁴⁷ the section of the constitution containing permission for trusts and protection for the doctrine of forced heirship was amended to protect adopted persons, and while there was no change in the language dealing with the two matters under consideration, the arrangement of the sentences was changed by insertion of the new material and doubt has again been expressed regarding constitutionality of the trust insofar as burdening the legitime is concerned.⁴⁸

Care was taken to save the rest of the act in case the court found a portion invalid. The divisibility clause found in the last section of the act appears as follows:

"If any part of this Act shall be found to be unconstitutional the other parts thereof shall not be affected provided such invalid or unconstitutional part or parts may be separable from the valid or constitutional part or parts. The Legislature hereby declares that it would have passed this Act, and

44. See cases cited note 22, *supra*.

45. La. Act 107 of 1920, § 8.

46. La. Act 81 of 1938, tit. 1, § 3 [Dart's Stats. (1939) § 9850.3].

47. La. Const. of 1921, Art. IV, § 16.

48. O'Quin, *Our Trust Estates and their Limitations* (1948) 22 *Tulane L. Rev.* 585.

such part thereof, irrespective of the fact that some parts might be declared unconstitutional.”

Louisiana has always honored the usufruct, a civil law “substitute.” Donations of usufruct are frequent. Several legal usufructs are provided.⁴⁹ The device is in constant use under Article 916 of the Civil Code which deliberately places the burden upon the share of the children of the marriage, forced heirs, in favor of the surviving spouse in intestate successions, as to the deceased spouse’s half of the community property. The supreme court may be said to have actually extended this doctrine.⁵⁰ A sympathetic carry-over of this attitude to the trust act is not too much to expect. Furthermore, since a favorable view was taken to the legitime provision of the trust act of 1920 and mere rearrangement of constitutional clauses has subsequently occurred, it would appear that no grave danger now exists, barring a catastrophe which would unduly influence the court and the people of the state.

49. Daggett, *The Community Property System of Louisiana* (reprint, 1945) 275 et seq.

50. *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1888).