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# Why a Revision of the Louisiana Trust Estates Act Is Necessary

Leonard Oppenheim\*

The Louisiana Trust Estates Act of 1938 was adopted as a result of considerable feeling that a new Trust Act should be enacted to replace the Trust Act of 1920 which had been repealed in 1935. This new act embodied provisions taken from various sources, including the American Law Institute's Restatement of the Law of Trusts, the Uniform Trust Act, the Uniform Principal and Income Act, the Uniform Trustee's Accounting Act, and the Model Spendthrift Statute which had been prepared by Dean Griswold of the Harvard Law School.<sup>1</sup> The actual drafting of the act was done by the Committee on Legislation of the Trust Section of the Louisiana Bankers' Association. Since the Trust Estates Act consisted of one hundred sections, apparently what was sought to be achieved was a Trust Code. The draftsmen of the Louisiana act made some departures from their original sources in order to conform to the constitutional provision as to duration and also to add certain provisions which were believed necessary to obtain the passage of the act. Although the Louisiana Trust Estates Act did solve some of the problems which had plagued other states, the act created new problems and left unanswered a number of others.<sup>2</sup> Some of the difficulty has been created because the trust is a creature of the common law which comprehends a dual idea of ownership of property, both in law and in equity, which is extremely difficult for the civilian to understand.<sup>3</sup> Moreover, the Trust Estates Act is not sufficiently integrated with the pertinent provisions of the Louisiana Civil Code, nor is it easily reconcilable with forced heirship, substitutions, and *fidei commissa*.

The many unsolved conflicts, as well as the number of un-

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

2. See Note, 52 HARV. L. REV. 145 (1938) (Louisiana Trust Estates Act).

3. Garrigues, *Law of Trusts*, 2 AM. J. COMP. LAW 25, 35 (1953).

answered questions, have in many instances caused lawyers to shy away from the trust device. However, lawyers should be aware of the possibilities presented by the Louisiana trust, both in regard to family situations and to tax savings. They should know the shortcomings of the Trust Estates Act and be conscious of the necessity of revamping certain of its provisions.

In 1952 certain important amendments were made to the Louisiana Trust Estates Act. Prior to that time Louisiana trusts had an extremely limited period of duration. Under the 1938 act every inter vivos or testamentary trust terminated at the expiration of ten years from the settlor's death, or ten years from the beneficiary's majority. Since the life of the beneficiary could not have been taken as the life of the trust, the ten-year limitation not only materially reduced the flexibility of the Louisiana trust, but its use as well. Moreover, such a short duration period was, in many cases, inadequate to meet the needs of the settlor. Since the limitations on the duration of trusts were included in the State Constitution,<sup>4</sup> the pertinent portion of the Constitution was also amended in 1952 to permit the creation of trusts for a longer period than was previously possible. Under the legislation which simultaneously became effective with the adoption of the constitutional amendment, the period of duration of a trust in which the beneficiary is not a natural person is ten years from the settlor's death. However, the period of duration of a trust in which the beneficiary is a natural person is ten years from the settlor's death, or until the beneficiary's death, whichever is the longer period, unless an early termination is required by the trust instrument or by the court.<sup>5</sup>

In spite of the 1952 amendments which add materially to the use of the trust in Louisiana, so many unanswered questions still exist that a thorough revision of the Trust Estates Act is necessary. That is not to suggest that Louisiana should completely adopt the common law trust. It would be a serious error and would do great violence to our fundamental civilian principles if we were to adopt fully the common law trust in order to save a few tax dollars. When the revision of the Trust Estates Act is undertaken, a number of cardinal principles must be preserved in any new act which is drafted. It is true that these factors tend to reduce the flexibility of the Louisiana trust, both from a

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4. LA. CONST. art. IV, § 16.

5. LA. R. S. 9:1794 (1950), as amended by Act 209 of 1952. See Oppenheim, *Louisiana's New Trust Law*, 92 TRUSTS AND ESTATES 362 (1953).

family standpoint and in minimizing taxes, and prevent the Louisiana trust from achieving the same results that may be achieved through the use of the trust device in the common law state. However, the abolition of these fundamental principles would cause continual problems and would be a cause for regret forever after in this state.

These principles are four in number: first, the doctrine of forced heirship; second, the fact that under civilian theory the beneficiaries must be in being and definitely ascertained; third, a limited duration period; and fourth, the prohibition of a use of powers of appointment.

So far as forced heirship is concerned, the new act should preserve the principle that a settlor can create a trust upon the forced heirs' legitime or any portion thereof.<sup>6</sup> There are many instances where the settlor has an incompetent child who must be protected and his income made secure or he doubts the business acumen of that child. However, the income from the trust should not be accumulated but should be payable to the person entitled to the legitime. This is a matter which is not entirely clear in the present Trust Estates Act but needs clarification.<sup>7</sup> Further, it should be made evident that the trust does not abolish the actions of collation nor the reduction of excessive donations by forced heirs.<sup>8</sup>

In regard to the beneficiaries in being and definitely ascertained which is now provided in Section 24 of the Trust Estates Act,<sup>9</sup> this fundamental civil law theory must be retained in the new Trust Estates Act. Although it completely eliminates the creation of the type of common law contingent remainder which is given to persons unborn and unascertained, a serious error would be made if such a concept were brought into Louisiana law. Because of the corruption of the feudal system in France, the French, at the time of the Revolution, completely abolished common law estates and returned to the simple theories of Roman law property.<sup>10</sup> These theories were taken into the Louisiana

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6. LA. R.S. 9:1793 (1950). See *United States v. Burglass*, 172 F. 2d 960 (5th Cir. 1949).

7. The pertinent language involved is as follows: "the income therefrom may not be accumulated but shall be paid not less than once a year to the person entitled thereto." Presumably the forced heir is the person entitled thereto.

8. LA. CIVIL CODE arts. 1228, 1502 (1870).

9. LA. R.S. 9:1902 (1950).

10. See Oppenheim, *The Importance of Comparative Property Law to Louisiana Lawyers*, 2 LA. B.J. 243 (1955).

Civil Code. To undo this concept and to import into Louisiana a system which is completely unknown to our civilian jurisdiction would be a serious mistake.

In regard to the limited duration, the life of the beneficiary being taken as the measuring life of the trust is entirely adequate and consonant with civilian theories. The introduction of a rule against perpetuities would lead to untold difficulties. However the section of the Trust Estates Act<sup>11</sup> which provides for its duration period needs amendment and clarification. This section provides in part as to duration: "At the expiration of ten years from the settlor's death as to a beneficiary who is a natural person, or until the death of the beneficiary, whichever is the longer period." This portion of the section is unclear for two reasons: First of all it fails to state whether the life of the income beneficiary or the life of the principal beneficiary is to be taken as the measuring life of the trust. It is generally believed that the life of the income beneficiary is intended, but, as can be readily seen, this is certainly not clear from the section itself. Second, it seems to set up a rule which requires the trust to continue for a period beyond the death of the income beneficiary, even though the settlor may have intended otherwise. For example, if one year after the settlor's death, the income beneficiary died, it would appear from the section that the trust would have to last for an additional nine years, in spite of the fact that the settlor may have intended that the trust corpus should go to the principal beneficiary upon the death of the income beneficiary.<sup>12</sup>

While the use of powers of appointment makes a substantial contribution to the flexibility of the common law trusts, the Louisiana Trust Estates Act contains no express provision concerning powers of appointment. However, such powers of appointment appear to be prohibited by Article 1573 of the Louisiana Civil Code which states that "the custom of willing by testament, by the intervention of a commissary or attorney-in-fact is abolished." While certain provisions of the Trust Estates Act might be interpreted as allowing powers of appointment; it

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11. LA. R.S. 9:1794, § 4 (1950), as amended, La. Acts 1952, No. 209. See also LA. R.S. 9:1921, § 2 (1950).

12. For other problems involving the duration period see Nabors, *Entrepreneurial Trusts: Trust of Land and Mineral Properties under the Louisiana Trust Estates Act*, 27 TUL. L. REV. 263 (1953). See also Oppenheim, *Limitations and Uses of Louisiana Trusts*, 27 TUL. L. REV. 41, 49 (1952).

is doubtful if such a result would be reached by the courts.<sup>13</sup> The attorney who at present would use a power of appointment in a trust would assume an undue risk for his client. Moreover, since the use of powers of appointment is not consonant with civilian theory, such should not be included in a revision of the Trust Estates Act.

Not only should certain sections of the Trust Estates Act be clarified and integrated more closely with civilian principles, but it is also necessary to decide whether or not certain devices which are used at common law, but are not expressly authorized by the Trust Estates Act, should be included within our law. These are many in number, but we can take a few for illustrative purposes.

Is accumulation of income possible where the beneficiary is someone other than an heir entitled to the legitime? While certain provisions of the present Trust Estates Act indicate that a clause in the trust which directs the accumulation of income would be valid, this is not entirely clear.<sup>14</sup> Since there are many instances where accumulation of income would be extremely helpful, the Trust Estates Act should make this matter certain.<sup>15</sup> While we probably would not want to incorporate in a new act provisions which would allow the trustee to "spray the income" among the various beneficiaries, nevertheless, in several types of trusts an accumulation of income can be a valuable device. For example, this may be true in the estate trust for marital deduction purposes<sup>16</sup> and in a trust where the settlor stipulates that the trust shall terminate when the beneficiary reaches a certain age.<sup>17</sup>

Some other questions which are not answered under the present Trust Estates Act relate to survivorship provisions, contingent gifts, and conditions of forfeiture. The settlor may desire that the survivor or survivors of several named beneficiaries shall receive the trust income, trust principal, or both,

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13. LA. R.S. 9:1923, § 28 (1950). See Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 182-83 (1939).

14. See LA. R.S. 9:1792(5), 63(9), 9:2092(c) (1950).

15. See Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 183 (1939).

16. Kelleher, *The Marital Deduction Under Louisiana Law*, 26 TUL. L. REV. 154 (1952).

17. See Wisdom & Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119, 136, 137 (1952).

in the event of the decease of one or more of the beneficiaries during the trust period. Thus is it possible under Louisiana law to provide that the income shall go for life to *A* and *B*, and then to the survivor of these two income beneficiaries, and, then upon the survivor's death the corpus shall go to *C*? This is a question which continues to plague Louisiana lawyers. Strong arguments have been made on both sides of the question, but there is no apparent answer under the present Trust Estates Act.<sup>18</sup> In the draft of a new act, this question should be solved both for income and principal beneficiaries.

Likewise the settlor may desire to make the gift of the trust principal contingent upon the continuance of that beneficiary's life to the end of the trust period. Should the principal beneficiary die before the termination of the trust, the settlor may desire to name the beneficiaries who will take upon the default of the principal beneficiary rather than to permit his own heirs, or those of the principal beneficiary, to take the trust property. There are no express provisions in the present Trust Estates Act covering either of the above problems; certainly as to the legitime in trust neither the survivor nor contingency provision should be permitted, but as to other beneficiaries the matter is simply not evident. Moreover, the sections of the present act which cover spendthrift trusts in some detail contain no specific provision regarding the employment of trust clauses which provide for the forfeiture of the beneficiary's interest and the transfer to another person in the event of the beneficiary's insolvency or the attempt of a creditor to seize his interest. While it may be true that the shift of a beneficiary's interest should not be permissible, this matter should be made certain in the Trust Estates Act.

Another extremely important question involves the usufruct in trust. One of the tax advantages of the common law trust is the ability of the settlor to skip at least one generation for federal estate tax purposes. Thus the trust permits a settlor to vest property in the remainderman free from taxation as part of the estate of the life beneficiary. Even though a trust with separate income and principal beneficiaries may be used to achieve federal estate tax savings, the importance of the usufruct as a family device, under Louisiana law, gives it primary signifi-

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18. For an excellent discussion of this problem, see Pascal, *Some ABC's About Trusts and Us*, 13 LOUISIANA LAW REVIEW 555 (1953). See also O'Quin, *Our Trust Estates and their Limitations*, 22 TUL. L. REV. 585 (1948).

cance. When the usufruct is vested in one person and the naked ownership in another, only one tax will be paid even though there are two deaths. It is important to note that both usufructuary and the naked owner must be in being or conceived and definitely ascertained at the time of the setting up of the usufruct, and the beneficiaries of both interests must be carefully indicated by the donor.<sup>19</sup> The usufruct in the trust can serve a useful function for a settlor who wants to give the income from his half of the community to his widow, and the principal to his children. The prohibition against depriving forced heirs of the income from the legitime would apparently prevent use of an income-principal disposition of the legitime to the widow and children to accomplish the same result.

Since the forced heirship rules do not deprive a spouse of testamentary power to confirm the surviving spouse's legal usufruct, a testamentary trust of the community property which grants the usufruct to the surviving spouse and the naked ownership to the children makes the income available to the widow, preserves the principal for the children, and saves taxes.

The major short-comings of the usufruct itself is the failure to separate effectively administration from enjoyment. Since the imperfect usufruct gives the legal usufructuary title without the necessity of giving a bond, he or she may dispose of the property and dissipate the proceeds. Thus the naked owner will not be protected against improvident acts on the part of the usufructuary. Protection of both parties can be achieved by the disposition of the usufruct in trust. By placing the property subject to the usufruct with the surviving spouse in trust, maximum benefits can be achieved from the standpoint of the protection of the family. The surviving spouse, as usufructuary, will receive the income during lifetime without the responsibilities and risks of management, and the naked owner will be more likely to receive the principal intact at the usufructuary's demise. Furthermore, maximum tax savings will also be realized.

The validity of the disposition of a usufruct in trust has never been litigated by the Louisiana courts. An examination of both the Civil Code articles as to usufruct and the pertinent sections of the Trust Estates Act indicate that the usufruct in

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19. See Note, 18 TUL. L. REV. 338 (1943). See also Oppenheim, *The Usufruct of the Surviving Spouse*, 18 TUL. L. REV. 181 (1943).

trust may be permissible if liberally construed.<sup>20</sup> The objections which are raised are based on the theory that civilian types of ownership cannot be fused with the common law trust device. Such an argument ignores the purpose of the Trust Estates Act and fails to use the civilian devices in a manner which protects the family and obtains tax savings. This matter however is certainly not evident from the Trust Estates Act. Since the usufruct in trust is a highly desirable device, it should be expressly provided for in the new Trust Estates Act.

One final situation should be considered and that is the problem covering invasion of principal clauses. The opinion has been expressed to the effect that an invasion of principal provision would be valid where the beneficiary owns both income and principal.<sup>21</sup> However, an argument can be made for the position that an invasion of principal clause may be permissible even where income and principal beneficiaries are different parties,<sup>22</sup> provided first that a proper safeguard is used to guide the trustee, and second, the interest of a forced heir is not impaired thereby. Again clarification is necessary to settle this matter.

Of course only a few of the many problems and situations that need to be gone into in the drafting of a new Trust Estates Act have been discussed.<sup>23</sup> However, a sufficient number of problems have been indicated which, in themselves, make a re-examination of the present act highly desirable, and a redrafting an absolute necessity.

While litigation regarding the Trust Estates Act has not been prolific, a recent case which has caused great confusion among lawyers who do trust estate work is *Succession of Guillory*.<sup>24</sup> In this case the Citizens National Bank of Waco, Texas, as executor and trustee under the will of Mrs. A. T. Guillory, a resident of

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20. LA. R.S. 9:1861(14) (1950); LA. CIVIL CODE arts. 555, 619, 620 (1870); Wisdom & Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119, 207 (1952).

21. Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 207 (1939).

22. See LA. R.S. 9:1943(31), (83), 9:2135 (1950).

23. Some other problems involve class gifts, the legal list, separability clauses, community property, private trusts where the local beneficiary is not a natural person, etc. See Nabors, *Entrepreneurial Trusts: Trusts of Land and Mineral Properties Under the Louisiana Trust Estates Act*, 27 TUL. L. REV. 263 (1953); Nabors, *Louisiana Trusts as Business Operating Devices*, 29 TUL. L. REV. 1 (1954).

24. 232 La. 213, 94 So.2d 38 (1957). For a complete discussion of the *Guillory* case, see Jackson & Jeter, *The Guillory Case: What Are Its Implications for Private and Charitable Trusts*, 32 TUL. L. REV. 415 (1958).

Waco, filed a petition in the District Court for Winn Parish seeking to have this will, which had previously been probated and approved in Texas, recognized in Louisiana. The will provided that certain property had been bequeathed to the bank to be held in trust "during the lifetime of Terrell Guillory, and at his death, the naked ownership as well as the possession being bequeathed 'to the . . . Baptist General Convention of the State of Louisiana'" and not to be sold, but kept so that the revenue derived therefrom might be used for the benefit of the Baptist denomination of the State of Louisiana.

It is important to note that counsel representing the non-resident son, Terrell Guillory, excepted to the petition on the ground that it had disclosed neither a cause nor a right of action, inasmuch as (1) the bank was not qualified to act as trustee; (2) the will attempted to establish a trust for a period longer than ten years from decedent's death, and, for that reason, was null; (3) that it was null because it contained a prohibited substitution bequeathing the property to one legatee to be held in trust by it for the benefit of decedent's son, and, at his death, bequeathing this same property to another legatee; and (4) that it contravened the public policy of Louisiana by barring any alienation of the property by the second beneficiary under the will and thus forever removing it from commerce.

The trial judge rendered judgment sustaining the objections and dismissed the suit.

The Supreme Court in its holding stated as follows:

"The bequest is clearly a prohibitive substitution, and, as such, violative of the public policy of this State as expressed in our basic and statutory law, Sec. 16 of the 4th Article of the Constitution of 1921; Art. 1520 of the Revised Civil Code; R.S. 9; 1791, and even though such bequest may be valid in Texas, where the will was made, it will not be enforced insofar as it affects property in this State [citation of authority]. Consequently, the Trial Judge properly maintained the exceptions of no cause and no right of action."

The matter which disturbs attorneys is trying to ascertain exactly what is the meaning of the case. If it is carried to the extremes which some lawyers suggest, it will completely destroy

the Trust Estates Act in Louisiana.<sup>25</sup> If it stands for the proposition that this is a prohibitive substitution because of the way the will is written, i.e., in common law terminology and not consonant with our concept of trusts, then the case of itself will do no damage. Finally, if it means that a mixed trust, i.e., one which has a private income beneficiary and a charitable principal beneficiary, is not permitted, then this is a matter which should be straightened out in the new Trust Estates Act.

At any rate this case again clearly illustrates the necessity for a revision of the present Trust Estates Act which will solve many of the unanswered questions such as are raised in the *Guillory* case.

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25. Jackson & Jeter, *supra* note 24, at 423: "The most dangerous implication to be drawn from the *Guillory* case is that any trust may create a substitution if the gift is to trustees to hold, manage and invest (preserve), and distribute (return) to someone else at the termination of the trust. While this is an unlikely reason for the decision, it is certainly a possibility."