Of Trusts, Human Dignity, Legal Science, and Taxes: Suggested Principles for a Louisiana Trust Estates Law

Robert A. Pascal
OF TRUSTS, HUMAN DIGNITY, LEGAL SCIENCE, AND TAXES

SUGGESTED PRINCIPLES FOR A LOUISIANA TRUST ESTATES LAW

Robert A. Pascal*

The legislature of the State of Louisiana has directed that a revision of the Trust Estates Law be prepared for its consideration.1 In this article the writer shall express his recommendations and the reasons which underlie them. The observations to be made fall into three categories: the substance of the trust and the uses to which it should — and should not — be put; its form or technical structure; and its tax consequences.

I. THE SUBSTANCE OF THE TRUST

What Is an Express Private Trust?

The present Trust Estates Law2 declares an express private trust is created when one person (the settlor) transfers legal title to property to another (the trustee) for his own benefit or that of a third person (the beneficiary).3 This statement conforms to both the historical origin and the present technical formulation of the express private trust in Anglo-American law. Functionally, however, as the writer has elsewhere explained,4 the express private trust is a property regime, a dismemberment of ownership, in which control and management are separated from beneficial right.5 Only the person who is at the time owner of the property or patrimonial right may create the trust. He may do so for his own benefit, transferring only the power of control and management to the trustee and retaining the bene-

*Professor of Law, Louisiana State University; Consultant, Louisiana State Law Institute, Trust Estates Law Revision Project, September 1959-March 1963.

Previous articles by the same writer on trusts in Louisiana are: Some ABC's About Trusts and Us, 13 LA. L. REV. 555 (1953), and The Trust Concept and Substitution, 19 LA. L. REV. 273 (1959).

1. The Louisiana State Law Institute received an initial appropriation for this work in 1958. See the ELEVENTH BIENNIAL REPORT OF THE LOUISIANA STATE LAW INSTITUTE (May 8, 1960).


5. See LAWSON, INTRODUCTION TO THE LAW OF PROPERTY 9, 10, 77 (1958).
ficial rights in the property; or he may create the trust for the benefit of others, transferring to them the beneficial rights in the property subject to its control and management by the trustee. It is a fiduciary institution pure and simple. The trustee in principle never has a beneficial interest in the property interest over which he has management and control. He is not a mandatory, nevertheless, for his authority and duties are dictated by the settlor within broad limits imposed by law, and not by the person who is to have the beneficial interest in the property subject to the trust.

Is the Express Private Trust Consistent With the Rest of Louisiana Property Law?

To this question the answer must be that it is not. Understood and defined functionally rather than in technical Anglo-American terms, the express private trust can be fitted into Louisiana law without formal difficulty; but the separation of control and interest, which is of the essence of the private trust, is very little favored; and when it is permitted it is always by the body social acting through general laws prescribing both the occasion and the form; never otherwise than in express private trusts is one individual allowed to deprive another individual of control of his property and dictate the rules of its administration.

Basic Louisiana property law seeks to give to the owner maximum control over his patrimony. This is the spirit and principle implicit in our law which provides for management or control of one's property by another only through law or through

6. Anglo-American law, but not Louisiana law, recognizes a third manner in which a trust may be created: the settlor may declare himself trustee of his property for another, thus transferring beneficial interests and retaining control as a fiduciary for the beneficiary.

7. See especially The Trust Concept and Substitution, 19 LA. L. REV. 273 (1959), in which this is demonstrated in connection with the supposed, but in fact unjustified, antagonism between trusts and the prohibition against substitutions.

8. Paternal authority, tutorship, curatorship of interdicts, administration of successions by administrators and executors are the most common examples. The phenomenon of separation of control from interest is also present in the business corporation, but here the question is avoided legally by treating the stock share, rather than what it represents, as the object of ownership.

9. An apparent, but unreal, exception is the custodianship of money or securities donated to minors under the Gifts to Minors Law, LA. R.S. 9:735-742 (Supp. 1962), added by La. Acts 1958, No. 195, § 1. This institution, however, is really a trust defined in modern terms, the minor being the beneficiary owner and the custodian the administrator of the property. Again, see The Trust Concept and Substitution, 19 LA. L. REV. 273, 274-75 (1959).
his consent and makes mandate essentially revocable. This is the basis of the general rule that an owner in indivision may always demand a partition. This is the spirit and principle of the prohibition against substitutions, for he who must preserve property for another is denied the powers of disposition and free use which belong to an owner. Nevertheless it is true that this principle is not applied as an absolute. It is made to give way to more important considerations under certain circumstances.

Obviously the property of minors and mental deficients must be placed under the authority of others. Control over an insolvent's assets may be denied him and given to syndics or trustees to insure the orderly discharge of his obligations to his creditors. Through the fiction of the corporate personality, or perhaps more accurately, by recognizing a stock share as a thing rather than a right to things, a group of non-owners may be given very substantial control and management of the stockholders' property and the individual stockholder denied the usual right to partition. Partition may be denied to heirs for a limited time, and it is always denied to usufructuaries as against the naked owners and vice versa. A mandate may be regarded as irrevocable if used as a security device. Indeed, even a substitution will be permitted for not longer than a lifetime, though it will then be regarded not as a substitution but as a dismemberment of ownership into naked ownership and either usufruct, use, or habitation.\(^{10}\) The question whether the trust is to be tolerated, then, is not to be answered simply by observing that the trust \textit{qua} trust seems contrary to the basic principle that the owner should have control over his property. Rather is the question to be answered in terms of the advantages and disadvantages incident to permitting this departure from the accepted basic principle and the manner in which it may be created. And this question, in turn, must be answered in the light of the legitimacy of the uses to which the device will be put.

\textit{Are There Advantages To Permitting Private Express Trusts?}

Again an unequivocal answer can be given. Yes, there are reasons for which a trust might be used very legitimately, and

\(^{10}\) La. Civil Code art. 1522 (1870). It is interesting to note that Bracton regarded the life estate—remainder disposition, which corresponds roughly to our usufruct-naked ownership arrangement, as a substitution. See Plucknett, \textit{A Concise History of the Common Law} 560-61 (5th ed. 1956).
therefore there is good reason to have a trust law in Louisiana. Some good uses of the trust may be mentioned. First of all the trust often may be a better solution than the ordinary usufruct-naked ownership arrangement where the purpose to be achieved is a present utilization of property by one person and its subsequent full enjoyment by another. Without the trust the naked owner often finds himself prejudiced by the usufructuary’s inadequate management or upkeep of the tangible property or his inability to return the money which he enjoyed in imperfect usufruct. The naked owner’s lot is especially difficult if the usufructuary has not been required to give security, or if the usufructuary or his representatives be persons against whom he would be reluctant to enforce his right for family or other considerations. If the property were in trust, and the beneficiaries entitled either to the usufruct and naked ownership or to the income and principal thereof subject to the trust, the naked owner or principal beneficiary might be better protected by the trustee’s lack of personal interest and his obligation to preserve and to augment the value of the property for the eventual beneficiary as well as to make it productive for the income or usufruct beneficiary.

What is said here concerning the advantage of trusts in instances of usufruct-naked ownership dispositions applies with equal, if not more, force to dispositions on suspensive or resolutory conditions or on terms. Such dispositions are relatively rare in Louisiana, but perhaps they are rare precisely because they are inconvenient to the owner pending their eventual outcome, and the trust would minimize this inconvenience.

Again, ordinarily property owned in terms of usufruct and naked ownership cannot be converted to other forms of assets or investments without the cooperation of both parties. Neither the usufructuary nor the naked owner may compel the other to consent to a conversion of assets. When property is in trust, on the other hand, the trustee can be given the power and ordinarily has the duty to convert the trust assets into property of a kind which will best protect the interests of the several beneficiaries. In the same connection it may be observed that the trust also makes practicable the avoidance of one of the consequences of imperfect usufruct, namely, the realization of all capital gains by the party presently entitled rather than by the party eventually entitled. To say the same thing in other words, whereas the
imperfect usufructuary benefits from capital gains, and not the naked owner, in a trust with income and principal beneficiaries, the capital gains belong to the principal beneficiary and not to the income beneficiary. To change the rules of imperfect usufruct to give the naked owner the same advantage would be possible in theory, but impossible in practice. In order to avoid otherwise insurmountable tracing problems it would be necessary to make the imperfect usufructuary a fiduciary of the naked owner; and this would render his position almost indistinguishable from that of a fideicommissarius. The trust device simplifies the whole matter by putting the fiduciary onus on a third disinterested party, the trustee. Of course, it is not suggested that usufruct-naked ownership interests should not be given subject to trusts; indeed trusts with usufruct-naked ownership beneficiaries have been and are yet being written in Louisiana. Much less so is it suggested that usufruct-naked ownership arrangements outside of trust, including imperfect usufruct, should be forbidden. There are times and circumstances in which only one of several possible arrangements may be satisfactory, not any one of them, and all should be permitted.

Another important use of the trust would be to facilitate a simpler and more unified management of property to be transferred to minors or interdicts and persons of full capacity as owners in indivision. Without the trust the only solution, and often a less satisfactory one, would be through incorporation.

The trust can also be used wisely to provide a management of property for minors and interdicts where it appears likely either that the prospective tutors or curators would be insufficiently capable, or that the rules on administration of property by tutors and curators would be too restrictive, to assure the best employment of the property. In this connection, however, the trust is no longer so much in need. Recent changes in the law of tutorship and curatorship, especially on investments by the tutor or curator,\textsuperscript{11} do much to make the use of trusts for the benefit of incapaclies unnecessary. Each situation must receive separate appraisal.

Not to be ignored is the possibility of providing a regime of property management for persons who may not in fact have the aptitude for such. Widows and children are the age-old ex-

\textsuperscript{11} LA. CODE OF CIVIL PROCEDURE arts. 4269, 4554 (1960) require the tutor and curator to adhere to the "prudent investor rule."
amples. Yet, as shall be developed below, it would be a crime against the dignity of man to permit such a trust to be interminable by the beneficiary or, in any event, to remain indestructible too long. A trust for this purpose should be regarded as a suggested plan of investment and management, to be rejected by the beneficiary, the actual party at interest, if he or she prefers.

Most significantly, the trust could be, and should be, used to make possible dispositions in favor of unborn persons, at least in instances in which there is a social and familial need for them. Present law, for example, makes it impossible for a person to make a legacy to grandchildren born and to be born. Anglo-American experience testifies to the troublesomeness of such donations unless made in trust. In trust, however, they cause no difficulty, for the income from the property can be paid to the grandchildren existing at any time and the final determination of the shares in the principal can be made to await the day on which the total number of grandchildren is ascertainable.

Similarly, but for somewhat different reasons, an inter vivos disposition to one's children born and to be born could and should be permitted if in trust. Gift and estate tax laws encourage a person to dispose of his property gradually during life rather than on death. The reason is a social one, the encouragement of the distribution of wealth. Yet outright donations to living children, for example, often would work to the prejudice of those later born or, in Louisiana, give rise to incidents for collation to satisfy the legitime of the later born children. By placing the donations inter vivos in trust for the children born and to be born the donor can satisfy his legitimate desire to treat all children equally, and incidentally avoid collation problems. Possibly it would be unwise, at least at this moment, considering Louisiana law's long prohibition against dispositions to the unborn, to permit more than these two particular kinds of class gifts; but at least these two should be permitted now.

What Abuses Ought To Be Avoided?

Primary Abuses: Indestructibility and Indivisibility.—From the preceding section it is evident that the separation of control and interest which the trust device affords can at times be of great utility and practical advantage. Yet this separation of control and interest can be abusive. In the opinion of the writer it is abusive in principle whenever the beneficiary may not termi-
nate the trust and take personal charge of the property of which he has the beneficial interest. In short, the trust established for the benefit of another than the settlor should be regarded as the establishment of an investment and management program for the property transferred to the beneficiary, which program the beneficiary may reject or modify as he chooses; and the trust established by the settlor for his own benefit should always be subject to modification or termination by him.

The general American law on trust is to the contrary, and so is the present Louisiana Trust Estates Law. Under the generally accepted American rule and under the Louisiana Trust Estates Law a trust is indestructible by the beneficiary unless the settlor has given him the power to terminate it; and under the Louisiana Trust Estates Law, though not under the rule generally prevailing in America, unless the trust instrument so provides, the trust cannot be terminated “even though the settlor, trustee, and beneficiary”—the only parties possibly at interest—“so desire and consent thereto.” Such rules, the writer submits, are abusive because they violate the dignity of the human person. Men have reason and free will. It is proper to the nature of the human person, therefore, that he should be allowed to decide for himself how he should live, and this living includes the use of wealth properly appropriated by or transferred to him for his use and benefit.

13. In American law the trust can be terminated if the settlor and all beneficiaries consent. Scott, Trusts § 338 (1939). Contra in Louisiana unless the trust instrument so provides. La. R.S. 9:2176 (1950).
14. See, for example, JOHN XXIII, Encyclical Pacem in Terris (Peace on Earth) issued April 11, 1963. The following excerpts are taken from Part I, Order between Men:

"First of all, it is necessary to speak of the order which should exist between men. Any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. By virtue of this, he has rights and duties of his own, flowing directly and simultaneously from his very nature, which are therefore universal, inviolable and inalienable.

"..."

"Human beings have the natural right to free initiative in the economic field, and the right to work."

"..."

"The right to private property, even of productive goods, also derives from the nature of man. This right, as we have elsewhere declared, is a suitable means for safeguarding the dignity of the human person and for the exercise of responsibility in all fields; it strengthens and gives serenity to family life, thereby increasing the peace and prosperity of the state."

"..."

"The dignity of the human person also requires that every man enjoy the right to act freely and responsibly. For this reason, therefore, in social relations man should exercise his rights, fulfill his obligations; and, in the countless forms
It is true, nevertheless, that application of any principle of action should be restricted to the sphere indicated by its basis and further limited so that due respect can be given other principles of action. The principle of self-determination being based on man's reason and free will, it is not applicable to persons in the degree in which they lack freedom of will or the full maturity of judgment. This consideration justifies denying minors and other incompetents authority to deal with their property and placing it under the control of parents, tutors, and curators; so too can it be justification for denying the minor or person of unsound mind the right to terminate a trust in his favor.

Yet this is not the end of the affair for the trust in favor of incapables. Though incapables may be denied some or all the control over property ordinarily given individuals possessing mature judgment and will, it is one thing to deny them that control according to a plan applicable to all in like situations according to general laws and another thing to permit the administration of their affairs to be dictated, as it may be through trusts, by other individuals. This gives too much authority to individuals over other individuals. Reason and free will give rise to a right to self-determination,¹⁵ not to a right to determine the affairs of others. The denial to men of their fundamental rights, even for their own good, as in the case of incapables, should be possible normally only through action according to law, for it is the responsibility of government, not of individual men, to provide for the common good and the regulation of the affairs of those incapable of caring for themselves. Applied to trusts in favor of incapables, the indication is that a trust scheme of management must not be allowed to interfere with the proper management of the incapable's affairs by his legal representative. Therefore the legal representative should have authority to demand that a trust be modified or terminated for the good of the incapable. Of course, the incapable's representative might be made to prove that the interests of the incapable require modifi-

¹⁵. Ibid.

"This is to be done in such a way that each one acts on his own decision, of set purpose and from a consciousness of his obligation, without being moved by force or pressure brought to bear on him externally. For any human society that is established on relations of force must be regarded as inhuman, inasmuch as the personality of its members is repressed or restricted, when in fact they should be provided with appropriate incentives and means for developing and perfecting themselves."

Those who prefer a more secularly oriented source may be referred to John Locke, Second Treatise on Civil Government (1689).
cation or termination of the trust before he be permitted to take such action, just as he must make such proof before selling or mortgaging an immovable of the incapable or compromising his claims.

What has been said above concerning termination of trusts by beneficiaries applies with equal force to partial termination and even to partition of the trust where the property in trust is partitionable. Thus, to give a simple example, if there are two beneficiaries, each of whom has a fractional interest as beneficiary of income as well as of principal, and the trust property is partitionable, either should be allowed to demand the partition of the trust into two trusts, or to terminate the trust as to his fractional interest. If, for any reason, however, partition or partial termination would prejudice the other seriously, as might be the case, for example, if one is income beneficiary and the other principal beneficiary, then the partition or partial termination should not be allowed except by mutual consent, for this in itself would be forcing one beneficiary to abide by the will of another. This will be discussed further below.

The settlor who creates a trust for his own benefit cannot be said to suffer the indignity of having to accept a property management scheme imposed on him by another. Nevertheless the trust which he establishes in his favor must be subject to his modification or termination at all times, for the right to use one’s mind and will to work out one’s life must itself be regarded as inalienable. One may, and often must, limit his freedom to the extent necessary to achieve the kind of cooperation which life in society demands; but he may not ethically limit his own freedom without social need. A law which permits him to do so is as morally wrong as that which permits another to impose his will on him.

There are, nevertheless, instances in which the principle of self-determination, though applicable, must be applied in such a manner as to give a due respect for the application of other principles as well. Thus it is that there are instances in which the sphere of application of the principle should be reduced. By way of example, an income or usufruct beneficiary in trust should not be allowed to demand a termination of the trust against the opposition of the principal or naked ownership beneficiary, or

---

16. Ibid.
vice versa. If the income and naked ownership beneficiaries could demand the trust's termination by unilateral act, the principal and usufruct beneficiaries would be compelled to assume fiduciary responsibilities toward the others. Similarly, if the usufruct and principal beneficiaries could demand termination of the trust, the naked ownership and income beneficiaries would be obliged to accept an administration of the property by the former. In any of these four situations the principle of self-determination would be violated by permitting termination of the trust.

Similarly, if class dispositions are to be permitted, it may be better normally — though not necessarily always\(^\text{17}\) — to forbid termination even with the consent of all living beneficiaries until all beneficiaries are ascertained. The living always being the greatest concern of the law, should the good of all or any of the living beneficiaries stand to suffer more from the continuance of the trust than the others would from its termination, then termination should be permitted. Of course, where termination is to be allowed, partition should be allowed where practicable, as mentioned before.

If a trust is destructible, it matters not how long it lasts; the beneficiaries can always put an end to it. But the moral wrong inherent in the indestructibility of trusts is increased in direct proportion to the term for which the trust is to last. Under the Louisiana Trust Estates Law a trust may endure for as long as any income beneficiary alive at the creation of the trust continues to live.\(^\text{18}\) Thus the trust may continue indestructible for a very long lifetime if one of the beneficiaries is an infant at the time of its creation. To add insult to injury, the Louisiana Trust Estates Law also provides that the trust shall last for the longest period of time allowed by law unless an earlier termination date is provided in the trust instrument.\(^\text{19}\) Nonetheless, there is some merit to permitting a settlor to specify indestructibility for a very short time, probably not more than five years. Often a trust will provide a program of investment and management the value of which the beneficiary may not appreciate immediately, and a few years of indestructibility may afford him time to gain the proper perspective. The opportunity to weigh

\(^{17}\text{See the reference to the English Variations of Trusts Act, 1958, at page 652 infra.}\)


\(^{19}\text{Ibid.}\)
the advantages of the trust as created may justify the short period of indestructibility.

Related But Aggravated Abuses: Trusts Over the Legitime; Accumulations; Spendthrift Trusts; Duration Beyond Death of Beneficiaries

If an indestructible trust is morally wrong because it denies the beneficiary whosoever he be his natural right as a person to administer his own affairs, then it is even more wrong morally to permit an indestructible trust over the legitime, or forced share of an inheritance, to be indestructible. The legitime has its origin in the recognition of every man's right to a share in the world’s goods which he can use as he judges best. It is especially reprehensible to permit this share to be unalterably under the control of another. Yet the present Trust Estates Law and the Louisiana Constitution permit this. The new Trust Estates Law need not forbid the placing of the legitime in trust; but under no circumstances should it permit the trust over the legitime to be indestructible or unmodifiable by the forced heir.

Similarly, if it is morally wrong to permit indestructible trusts, then it is even more wrong to permit directions for the accumulation of income contrary to the wishes of the beneficiary. Indeed, whereas the indestructibility of trusts denies to the beneficiary the possibility of gaining control and management of his capital, the accumulation of income denies to him even its revenues. Under the present Trust Estates Law the settlor may direct the accumulation of income—except that derived from the legitime in trust—for as long as the trust will last. Thus it is that a beneficiary might be denied the use of all or a substantial portion of the income from the trust during his entire life. But the law is not heartless: if the trust is not of the spendthrift variety he will be able to assign his interest in the income, and always he will have the right to let it pass to his heirs by inheritance or to dispose of it by will. Actually in either case the beneficiary’s interest is reduced to a power or capacity to dispose of it at death, for eventual interests in trusts

22. LA. R.S. 9:2092(c) (1950) permits accumulations. The only limitations are from the provision as to income derived from the legitime in trust, id. 9:1793, and from that on the duration of the trust itself, id. 9:1794, as amended, La. Acts 1962, No. 74, § 1.
usually are not readily assignable. This is hardly great satisfaction. Through the device of accumulating the income, therefore, the first generation can be substantially prejudiced to the advantage of the second. It is no defense to argue that inasmuch as the income to be accumulated is that on property outside the legitime, that is to say, property which could have been given to another, the beneficiary cannot be heard to complain. The root of the objection is that one is given property but permitted neither control nor enjoyment of it. In effect, the beneficiary of income accumulated for life is not a beneficiary at all; he is a human conduit of an asset, a person in a much worse position than the *fideicommissarius* of former times. The latter at least had substantial control and enjoyment during his lifetime even though he was obliged to transfer the property to a second donee at a later date.23 Again, however, the writer wishes to emphasize that even a direction for accumulation is not objectionable if the beneficiary is entitled to terminate it or modify it. The direction to accumulate is then part of the plan for investment and employment of the trust funds suggested to the beneficiary but not forced upon him.

Again, if a trust is objectionable if indestructible by the beneficiary, it is even more objectionable if the beneficiary cannot assign or transfer his interest subject to the trust. Yet the Louisiana Trust Estates Law provides that a settlor may specify that the beneficiary's interest shall be inalienable by him.24 In addition, the settlor may even provide that creditors may not reach any of the principal of the trust or any more than a certain portion of the income not to exceed the limits established by law.25 This last provision, therefore, not only interferes with the beneficiary's obligation to discharge his debts, but violates the principle that the property of a debtor is the common pledge of his creditors.26

Every indestructible express private trust is to some extent an interdiction by private act as to the property in trust; but the spendthrift trust is the extreme form. The argument for spendthrift trusts is usually that some persons must be saved from

23. Indeed, he had a right to retain for himself a portion of the property of which he was *fideicommissarius*. This was the trebellianic portion mentioned in Article 1520 of the Louisiana Civil Code as it stood before amendment by La. Acts 1962, No. 45.
26. LA. CIVIL CODE art. 3183 (1870).
their own folly. The answer to that is that men cannot be saved from their own folly without being subject to the indignity of a kind of paternalistic solicitation that finds a fair parallel in so-called beneficial colonialism among nations. The price, a failure to recognize the right of another to self-determination, is too high. Yet it is not to be denied that sometimes there are persons who should be interdicted and are not, and therefore it would be understandable to allow the settlor to impose a spendthrift trust if the beneficiary would then be given the opportunity to modify the trust on showing he is capable of managing the property in trust. If the representative of society, and not the settlor, can make the final decision, then a spendthrift trust will be tolerable. Thus the spendthrift clause—or clause against voluntary or involuntary alienation—can be permitted if a reasonable procedure is established through which the beneficiary—or even his creditors—can demonstrate his capacity and be allowed to alienate his interest in the trust or to terminate the trust itself. Certainly standards for determining whether the non-interdicted person should be allowed to sell his interest in a trust or terminate it can be worked out, and if there is fear of mistake here great latitude of discretion can be left to the judge until our experience grows.

Last in the list of abuses which might be mentioned here is the provision in the Louisiana Trust Estates Law as a result of which, unless the settlor stipulates the contrary, a trust may endure beyond the lives of all beneficiaries until ten years after the testator's death.27 The writer fails to see the reason for such a provision, unless it be to flatter a settlor's vanity by assuring him this projection of will shall not be totally defeated even if the beneficiaries are not there to enjoy it, or unless it be to assure a professional trustee a minimum number of years of fees from every trusteeship accepted. Certainly amicable trustees would not want such a provision. If professional trustees need such economic protection, then the writer suggests that some measure be taken to insure it, but otherwise than through the device of continuing the trust without other purpose.

Further Remarks on the Uses and Abuses of Express Private Trusts

In summary, most of the abuses tolerated under the present

Trust Estates Law stem from the fact that the beneficiary may be—and in practice usually is—denied authority to modify, partition, or terminate the trust. Were the beneficiary given, in principle at least, the right to modify, partition, or terminate the trust he would be master of his property, and there could be no objection of a moral nature.

The indestructibility of express private trusts is an American invention. The English have never tolerated it, and have always permitted the termination or modification of the trust by agreement of all beneficiaries sui juris, provided their interests were absolute. Thus according to Underhill's Law of Trusts and Trustees, a trust may be terminated

"... even where the settlor has contemplated and intended that the trustee shall have the control of the property, if the sole party beneficially interested, or the parties collectively if there are several of them, are unanimously in favour of 'breaking the trust,' and all are sui juris. For a trust is the equitable equivalent of a common law gift, and, when once declared, the settlor, like the donor of a gift, has no further rights over the property . . . ."29

This rule is applied to successive as well as to simultaneous beneficiaries. Just as they may terminate the trust they may modify it, though they may not compel a trustee to accept new duties involving an exercise of discretion. Even a mortgagee of the beneficiary's interest may demand a termination if the mortgage absorbs all equity in the property, for then the beneficiary has no interest to be protected.

Ordinarily in English law a trust may not be terminated where there are future interests yet unvested, but even here there are exceptions. Thus a class entitled in the discretion of a trustee may act together, though not individually, to terminate the trust; and one of several beneficiaries may terminate the trust as to him if no one is injured by his action. Thus a trust to apply income for a beneficiary's maintenance entitles the beneficiary to the income absolutely, though, not having an in-

30. Id. at 448.
31. Id. at 450.
32. Id. at 449.
33. Id. at 445.
interest in the remainder, he would not be entitled to modify the
trust in other respects. More significantly, under the recent
Variation of Trusts Act, 1958, the English have moved sub-
stantially in the direction of permitting a judicial modification
or variation of trusts in the interests of beneficiaries not sui
juris, and this whether their interests be direct or indirect,
vested or contingent. The act allows the court to approve of
any plan "varying or revoking all or any of the trusts or enlarg-
ing the powers of the trustee of managing or administering any
of the property subject to the trusts," submitted by co-benefi-
ciaries or any other persons, if it be to the incapable's advan-
tage. Today, therefore, even a trust in which an incapable is
a beneficiary may be modified or varied if it is to the benefit of
such a beneficiary to do so.

Thus it is that in the native home of the trust the benefi-
ciaries may in principle always terminate or modify it. Never-
theless the English permit of some devices in trusts which have
some of the obnoxious features of indestructible trusts and most
of those of spendthrift trusts. Thus the English, while insisting
that every absolutely vested interest be subject to the control of
its owner, have nevertheless tolerated gifts over in the event of
bankruptcy or the attempt to alienate and dispositions in which
the interests of a beneficiary are determined by the trustee in
his discretion. It seems to the writer that it is little consolation
to the beneficiary that he may not control his interest because
it is not vested absolutely, when the purpose for not giving it to
him absolutely is to deprive him of control. The one is as ob-
noxious as the other.

Why has American law generally, and Louisiana law in par-
ticular, permitted indestructible trusts and its dependent devices,
indestructible directions to accumulate income and spendthrift
trusts? And why has English law permitted some of the same
effects through other devices? The only persons pleased by such
devices are settlors and trustees. And yet, what is their claim

34. Id. at 452.
35. Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53. This legislation, the
general American law, and the very strict Louisiana law are compared in Camp,
The Variation of Trusts Act, 1958: A Departure from Traditional Principles of
36. Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53, § 1(1).
37. Camp, The Variation of Trusts Act, 1958: A Departure from Traditional
38. See generally Underhill, Law Relating to Trusts and Trustees 85-90
of right? Certainly the trustee should have none. And should settlors have a claim of right? It is no argument that the property placed in trust is that which at the time of the creation of the trust belongs to them. Property ceases to be that of a transferor — or should — immediately upon his transfer of it to another, whether absolutely or subject to a trust. Indeed, the most vocal proponents of trusts insist that the trust property should not be subject to the settlors' control after the creation of the trust, so that the trust capital will not continue to be considered theirs under the gift and estate tax laws. But does it not really remain theirs in part if their schemes for its administration, investment, and employment — products of their wills — remain fixed for long periods after they have divested themselves of any personal benefit, even for long periods after their deaths? Very obviously through such trusts the law has permitted individual persons to be placed in partial and private economic dictatorships by other individual persons.

We in Louisiana, so long free of this insult through law to human dignity, finally succumbed to it in increasing doses. The very general trust legislation of 1920 was severely but insufficiently restricted by Article IV, Section 16, of the Constitution of 1921. Under that section the trust could not last longer, as to a natural person beneficiary, than ten years after the death of the settlor unless that beneficiary were a minor at the time of the creation of the trust; in that event the trust could last, as to that person, until ten years after his majority. The maximum duration period specified in the 1938 Trust Estates Act as originally enacted adhered to this limitation. In 1952 the permissible duration of the trust as to any natural person beneficiary was increased to his death or ten years after that of the settlor, whichever was the longer period. And in 1962 the law was changed to the effect that the trust could last as to all beneficiaries until the death of the last surviving income beneficiary, or if the settlor specifically so provided, for ten years after the settlor's death, whichever was the longer period. Similarly, spendthrift trusts, or prohibitions against voluntary or involunt-

39. The tax implications of the proposals made in this article are considered briefly at page 660 infra.
tary alienations by the beneficiary, originally were allowable only as to the income, and not as to the principal, of a trust.\textsuperscript{44} In 1944, however, the permissibility of such prohibitions was extended to cover the principal as well as the income interest of a beneficiary.\textsuperscript{45} There was no specific amendatory legislation on accumulations, but with each extension of the duration of the trust the evil of accumulations was extended.

Strangely, few voices have been raised against all this, either in America generally or in Louisiana in particular. Perhaps it is because beneficiaries do not have a lobby, but settlors and professional trustees in effect do. Those who wish to project their wills over their property — and over their transferees — after they have given up beneficial interests in it of course want "liberal" trust legislation. Attorneys' naturally want to satisfy the desires of their clients, and in practice this means the desires of would-be settlors and professional trustees, not of those who become beneficiaries. Settlors tend to like, and professional trustees stand to gain, from "liberal" trust legislation, legislation which will give the settlor the opportunity to do what he wishes. Professional trustees, too, over the nation, have long had well-organized advertising or "public relations" programs. And there is no doubt most of these persons and entities are of the utmost good faith, seeing only the good they do and failing to notice the harm. The harm is, after all, mostly of a kind which is not readily apparent: injury to personal dignity; lost opportunities for self expression and development of the individual beneficiary; and, as will be mentioned below, unwholesome economic effects.

There are murmurs against all this and, though they be few, they shall probably increase. Thus in the February 1963 issue of Trusts and Estates, one trust officer complained that beneficiaries often suffered from unalterable schemes of settlors, well intentioned though they might have been.\textsuperscript{46} And in December 1962, at the annual meeting of American law professors, the subject of a round table on property law was the adverse economic effect of the control of property by persons without

\textsuperscript{46} Barclay, Should a Trust be Indestructible?, TRUSTS & ESTATES 138-39 (February 1963).
beneficial interest, and much of the discussion was related to or applied to express private trusts as well as to other forms of trusts.\textsuperscript{47} Certainly it does not take a trained economist to understand that an extensive use of trusts will shift much capital to investments in Grade A common stocks and away from investments in smaller enterprises and consumer spending. One possible effect which Louisiana should consider is that much capital will be placed in investments which will produce most of their economic good outside this state. Unfortunately, the writer knows of no studies which might supply accurate data on such economic conditions and effects attributable to private trusts.

It would be well, therefore, for those revising our trust legislation to solicit not only the aid of lawyers, but also that of moralists (philosophers and theologians), economists, and sociologists, before deciding on the proper content of a Trust Estates Law for Louisiana. Legal experts must be relied upon to supply advice regarding the \textit{form} of the trust legislation once a decision is made as to its proper content or substance; and whereas legal experts no doubt will be able to offer much even as to the substance of the law, they are not, by reason of legal training at least, equipped to do the whole job.

\section*{II. The Technical Formulation of the Trust}

In the terms of its historical derivation, the Anglo-American private trust is an institution in which the owner at law of property is obliged \textit{in equity} to deal with it for the benefit of another. The almost complete disappearance of separate courts of law and equity leads to the rephrasing of that definition to read that the trust is an institution in which one with \textit{legal} title to property is obliged \textit{equitably} (or in accordance with the principles developed in equity) to deal with it for the benefit of another. There is no reason to quarrel with this historically oriented definition, even though the trustee's "legal title" in Anglo-American law now means nothing more than that he is a person endowed with well-defined duties and powers to deal with the trust property for the benefit of another. The trustee has no rights, only duties

toward others. Over the centuries the trustee's "legal title" has been transformed from an ownership at law (which itself gave him the powers which equity required him to use for another rather than for himself) to a fiduciary capacity with obligations and responsibilities. The Anglo-American lawyer now reads "fiduciary" where his forebears read "legal owner" or "owner at law," and he is not confused.

The English comparatist Lawson, for example, in his *Introduction to the [English] Law of Property*, recognizes all this in very clear language:

"Fragmentation [of ownership] takes place in several different ways . . . through the operation of tenure between landlord and tenant, by co-ownership, by a peculiar way of looking at rights to successive enjoyment, by the creation of rent charges, by the detachment of powers of alienation or appointment from enjoyment, and by the use of trusts as a means of divorcing the management from the enjoyment of property."48 (Emphasis added.)

"...."

"If property is given to trustees to hold in trust for beneficiaries the trustees are said, now mainly for historical reasons, to have the legal estate, and the beneficiaries the equitable interest. The former is merely a way of explaining that the trustees are the managers of the property and can act commercially as owners of it, enjoying wide powers of alienating it in the market; while the latter means that the beneficiaries have the beneficial ownership, which implies that they can enjoy the use and possession of it and draw an income from it."49 (Emphasis added.)

Again,

"[T]here must be some personal relation between the manager and the beneficiary, under which the former may be made liable to the latter if he wrongfully mismanages the property. That relation is in English law called a trust. The manager is trustee for the beneficiary. But the question still remains, what are the relations of trustee and beneficiary to the thing held in trust? It would have been possible to say either that the trustee owns the property but is under a duty

49. Id. at 10.
to manage it for the benefit of the beneficiary, who has nothing more than a correlative personal right against the trustee, or on the contrary that the beneficiary owns the property but gives full powers of management to the trustee, who stands in no direct relation to the property but acts merely by delegation of property rights vested in the beneficiary. English law has taken neither course, but has in effect said that both trustee and beneficiary own the property in different ways, or, more accurately, that neither owns the property in the strict Roman sense of the term ownership, but each owns a different interest in it, called respectively the legal estate and the equitable interest. It says that to ask in such a situation who owns the physical object is an improper question, just as it would be improper to ask whether a tenant for life or a person entitled to the land after his death owned the land itself.50 (Emphasis added.)

Thus English legal science recognizes the difference between the substantive nature of the trust and its historical and technical formulation or definition. At the same time it recognizes that there is no need to depart from that formula in English law, and what is said of English law may equally well be said of American law. But justification and excuse for the retention of that formula for the trust in Anglo-American jurisdictions is not of itself justification for its use in Louisiana law. Thus the question is whether the new trust legislation should retain that formula. Admittedly several arguments for its retention might be made. It is already in our law, and it has been in our law at least since 1938. The Anglo-American literature which Louisiana lawyers no doubt will use reflects this concept of the trust. Anglo-American lawyers would be able to understand our trust law more easily if it were written in terms already familiar to them. Conflict-of-laws trust problems might be minimized. Each of these arguments has some merit in fact, but the writer submits that it would be both possible and wiser to avoid the Anglo-American trust formula.

It is not difficult to define the trust in functional rather than traditional Anglo-American terms.51 If the trustee is only a fiduciary, why not simply say so? In the private trust it is the beneficiaries who have the real present and future interests in

50. Id. at 77.
51. Ample support of this is to be found in the writer's previous articles which are referred to in the note at the beginning of this article, identifying the writer.
the property in trust. Why not recognize them as owners of the present and future interests in the property subject to the trustee's administration, management, and control under the terms of the trust?

The absence in our law of separate divisions known as law and equity is sufficient reason to avoid the Anglo-American trust formula. Louisiana legal science should be knowledgable enough, and brave enough, to do it. Our "laboratory of comparative law" can continue to be an object of pride only if it is productive. It is not a work of legal science to import an institution into our law in such a form that its components cannot be absorbed into the existing legal structure. But admittedly this is a plea largely for the sake of our as yet justifiable pride as bi-cultural jurists. Probably we could get along with the Anglo-American definition of trusts, but we would sacrifice our right to consider ourselves astute in legal technology. We would, too, miss an opportunity to offer an example to other civil law jurisdictions who as yet have difficulties introducing the trust in such a form as to avail themselves of its beneficial uses without sacrificing the coherence of their legal systems.

Beyond the interest of legal science, or legal technology, there is also the practical interest in facilitating the understanding of the trust by our own practitioners and judges. Admittedly we will be able to get along with the Anglo-American definition, but getting along is not the same as living well. Admittedly, too, the greatest difficulty which Louisiana lawyers have had with the Anglo-American trust definition has been in connection with our former constitutional prohibitions against fidei commissa and substitutions. Some members of the bench and bar were inclined to think of any trust as a fideicommissary substitution because the trustee was given "title" (which they mistakenly equated with "ownership") subject to the obligation to transfer the property to another at the end of the trust. Since 1962 substitutions may be contained in trusts to the extent authorized by the legislature, and hence no longer can a trust permissible under the legislation be objectionable because it is thought, rightly or wrongly, to contain a fideicommissary substitution.

52. LA. CONST. art. IV, § 16.
53. See Succession of Guillory, 232 LA. 213, 94 So. 2d 38 (1957) and Succession of Meadors, 135 So. 2d 679 (La. App. 2d Cir. 1962), both of which are sufficiently discussed in the Note, 22 LA. L. REV. 889 (1962).
But rendering a situation lawful does not in itself insure understanding of the nature of that situation, and in the future there may arise further instances of confusion not connected with fideicommissary substitutions. Some Louisiana lawyers, too, find it preferable to avoid the Anglo-American formula in creating trusts and transfer property to one person *subject to* a trust of which a certain person is named trustee. This practice, after all, not only is more realistic, but makes the trust more understandable to both the civilian-oriented lawyers and their laymen clients. And this in itself is a factor not to be ignored, for many Louisiana lawyers admit to being baffled by the Anglo-American concept. Perhaps this in itself is a reason why the trust has not been used more widely in Louisiana.

III. A Word about Taxation

What would be the tax consequences of a trust estates law based on the principles espoused in this article? First, neither defining the trust in functional rather than traditional Anglo-American terms, nor giving the beneficiaries the power to terminate it, would deprive the settlor of estate tax savings presently achievable through trusts. Those savings would be lost, then as now, only when the settlor retained control of the trust or of the property placed in trust.\(^5\) Secondly, defining the trust in functional terms compatible with our property law would not of itself result in the income from the trust being taxed to the beneficiaries. Not "legal title," but economic power, or substantial control, is the principle according to which the tax laws and regulations are written, interpreted, and applied.\(^6\) A trust indestructible by the beneficiaries, therefore, though defined in functional terms, would produce the same tax consequences as one defined in Anglo-American terms.

But what of the trust, whether defined in functional or Anglo-American terms, which might be terminated, or the income therefrom demanded, by the beneficiaries? Here, appar-

---

\(^5\) [Int. Rev. Code of 1954, § 2038(a)(1)]

\(^6\) See, for example, Rev. Rul. 154, 1959-1 Cum. Bull. 160, which emphasizes that not legal title under local law, but control, determines the taxable entity.

The Internal Revenue Code of 1954 itself clearly implies this principle in § 678, discussed hereafter in the text, when it taxes the beneficiaries of an Anglo-American trust if they in fact have control over the property or its income, and also in §§ 671-677, in which the settlor is taxed if he retains control over the trust or the property subject to it.
ently, it is necessary to take Section 678 of the Internal Revenue Code into account. That section reads in part:

"(a) General rule. A person other than the grantor shall be treated as the owner of any portions of a trust with respect to which:

“(1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself. . . ."57

Inasmuch as the principles espoused in this article would lead to a rule permitting each ascertained income or usufruct beneficiary to demand his share of the trust income even if the settlor has stipulated it should be accumulated, the income from all trusts would, in the writer’s opinion, be taxed to the beneficiaries. Thus the income tax savings presently available to beneficiaries58 of indestructible trusts would disappear. But this, after all, is exactly as it should be. No one with the same income in fact as another should be permitted to enjoy preferential tax treatment.59

57. INT. REV. CODE of 1954, § 678. Under another provision of the Internal Revenue Code, § 622, trust income is not taxable to the beneficiary unless “paid, credited, or required to be distributed” and “whether distributed or not.” In the light of § 678, however, this provision must not be available to the beneficiary who can terminate the trust or demand the accumulated income.

58. One income tax advantage, nevertheless, would result from the creation of a trust even though the beneficiaries could terminate it or demand the income. By shifting revenue-producing property from the settlor’s patrimony to that of another, the combined income taxes of the settlor on his remaining income and of the beneficiary on his income might be less than that which would otherwise be payable by the settlor. This facet of the income tax laws, like the estate tax laws, encourages the distribution of wealth.

59. Indeed, present tax laws permit the separate taxation of the income from a trust not distributed, credited, or required to be distributed to a beneficiary precisely because such a beneficiary does not in fact enjoy the benefits of his alleged right to it. But this well-intentioned rule encourages those who would effect tax savings to create indestructible trusts with directions to accumulate income, and thus to deprive their beneficiaries of fundamental human rights.