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## TRUSTS — THE USUFRUCT IN TRUST

Deceased by will left property in trust to be administered for the benefit of plaintiff "as if [the trustee] were the usufructuary thereof" and the naked ownership to certain collateral relations. Upon their deaths plaintiff inherited the naked ownership and brought suit against the trustee to declare the trust terminated. The district court rendered judgment for defendant and plaintiff appealed. The Court of Appeal for the Second Circuit, one judge concurring, affirmed. *Held*, unity of the naked ownership and beneficial interest of a usufruct in trust does not extinguish the usufruct by confusion. *Succession of Harper*, 147 So. 2d 425 (La. App. 2d Cir. 1963), *cert. denied*, 243 La. 1012, 149 So. 2d 766 (1963).<sup>1</sup>

The trust is a conception of Anglo-American law; the usufruct of civilian theory.<sup>2</sup> From a functional standpoint the Louisiana usufruct-naked ownership device is similar to a trust which contains both a principal and an income beneficiary: the usufructuary is analogous to the trust's income beneficiary; the naked owner, to its principal beneficiary.<sup>3</sup> With the usufruct, however, the administration of the property is not divorced from its enjoyment. The usufructuary retains physical control over the property,<sup>4</sup> leaving him no safeguards against his own lack of business acumen. In addition, the naked owner may be

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and thus cannot serve as a basis for ten-year acquisitive prescription. *Tyson v. Spearman*, 190 La. 871, 183 So. 201 (1938); *Martin v. Carroll*, 59 So. 2d 158, 162 (La. App. 1st Cir. 1952). At least as to the interests represented in the partition, these cases are clearly abrogated by the statute.

1. The application for certiorari to the Louisiana Supreme Court was not considered as it was not filed within thirty days after rehearing was denied by the court of appeal.

2. Trust law in Louisiana today is based on La. Acts 1938, No. 81, now LA. R.S. 9:1791-2212 (Supp. 1962). On the Private Trust Estates Law in general, see Daggett, *Comments by Harriet S. Daggett*, 3 WEST'S LA. REVISED STATUTES ANNOTATED 352 (1950); Pascal, *Some ABC's About Trusts and Us*, 13 LA. L. REV. 555 (1953); Stone, *Trusts in Louisiana*, 1 INT'L & COMP. L.Q. 368 (1952); Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trusts Estates Act*, 13 TUL. L. REV. 70 (1938).

3. See LePaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126, 1140 (1927); Comment, 5 LA. L. REV. 609, 611 (1943). The most striking similarities are (1) the split in ownership; (2) possibility of application to all types of assets; (3) the reception of all the advantages of the trust res by the beneficiary; (4) free disposition of the beneficial interest by the beneficiary; (5) that both can be created either mortis causa or inter vivos; and (6) that the grantor may reserve the beneficial interest in movable property for himself. For a discussion of how common law trusts can be integrated harmoniously with Louisiana's civil law, see Pascal, *The Trust Concept and Substitution*, 19 LA. L. REV. 273 (1959).

4. LA. CIVIL CODE art. 533 (1870): "Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantages which it may produce. . . ."

insufficiently protected from dissipation of the property by an inept or larcenous usufructuary, especially when he is relieved from giving security by law<sup>5</sup> or convention,<sup>6</sup> or has the power to alienate the property, as with imperfect usufructs.<sup>7</sup> These deficiencies may be alleviated<sup>8</sup> by placing the usufruct in trust, thereby taking control of the property from the usufructuary while retaining all advantages of a usufruct-naked ownership disposition.<sup>9</sup>

5. The law gives the surviving spouse a usufruct over the deceased's share of the community passing in intestacy. LA. CIVIL CODE art. 916 (1870). This usufruct applies only to issue of the marriage. Parents, during their marriage, have a usufruct over the estate of their children until their majority or emancipation. LA. CIVIL CODE art. 223 (1870). The usufructuary under either article of the Code is relieved of the obligation to give security. LA. CIVIL CODE art. 560 (1870). See Oppenheim, *Why a Revision of the Louisiana Trusts Estates Act is Necessary*, 18 LA. L. REV. 599, 604 (1958); Oppenheim, *One Hundred Fifty Years of Succession Law*, 33 TUL. L. REV. 43, 44-48 (1958).

6. LA. CIVIL CODE art. 559 (1870): "[The obligation to give security] may be dispensed with in favor of the usufructuary, by the act by which the usufruct is established."

7. LA. CIVIL CODE art. 534 (1870): "[I]mperfect or quasi usufruct . . . is of things which would be useless to the usufructuary, if he did not consume or expend them, or change the substance of them, as money, grain, liquors." LA. CIVIL CODE art. 536 (1870): "Imperfect usufruct . . . transfers to the usufructuary the ownership of the things subject to the usufruct, so that he may consume, sell or dispose of them, as he thinks proper . . ." See O'Quin, *Our Trust Estates and Their Limitations*, 22 TUL. L. REV. 585, 590 (1948).

8. Malefaction by the trustee is possible but the Trust Estates Act renders it difficult. See LA. R.S. 9:1962 (1950) requiring the trustee to "administer the trust solely in the interest of the beneficiary; and . . . in dealing with the beneficiary on the trustee's own account, to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know; and . . . not to delegate to others the doing of acts which the trustee can reasonably be required to perform; and . . . in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and . . . to take reasonable steps to take and keep control of the trust property; and . . . to use reasonable care and skill to preserve the trust property; and . . . to take reasonable steps to realize on claims which he holds in trust; and . . . to use reasonable care and skill to make the trust property productive; and . . . to participate in the administration of the trust when there are two or more trustees and to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust." The trustee also has a duty to keep, render and file accounts. *Id.* 9:1963. The beneficiary is given the power to sue to compel the trustee to perform his duties, to enjoin him from committing a breach of trust or to redress a breach of trust, and to have the trustee removed. *Id.* 9:2031. If the trustee commits a breach of trust the law charges him with any loss or depreciation in value of the trust estate resulting from the breach of trust, any profit made by him through the breach of trust and any profit which would have accrued to the trust estate if there had been no breach of trust. *Id.* 9:2034. Note that while the usufructuary is expressly empowered to apply the property to his personal use, such conduct by the trustee constitutes an immediate breach of trust.

9. Nabors, *The Shortcomings of the Louisiana Trust Estates Act and some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 204 (1939); Oppenheim, *Limitations and Uses of Louisiana Trusts*, 27 TUL. L. REV. 41, 50, 51 (1952); Pascal, *Some ABC's About Trusts and Us*, 13 LA. L. REV. 555, 567 (1953); Wisdom & Pigman, *Testamentary Dispositions in Louisiana*.

According to the Trust Estates Act the trustee is given legal title to the trust property.<sup>10</sup> In the usufruct in trust the property is the usufruct; thus the trustee is, analytically the usufructuary. Since the death of the usufructuary terminates a usufruct,<sup>11</sup> it may be argued that the usufruct which is placed in trust ends with the death of the trustee; and if this be so the trust would end for lack of any trust property.<sup>12</sup> Refutation of this argument requires resort to the recognized dual ownership theory of trusts. If legal title is in the trustee and beneficial ownership in the beneficiary,<sup>13</sup> the usufruct should survive the death of the trustee, since beneficial title to the usufruct is still vested in a living person (the beneficiary of the trust). This argument could not be advanced to continue the trust after the beneficiary dies, since death of the beneficiary terminates the trust,<sup>14</sup> thus depriving the trustee of his legal title to the property. The usufruct then passes to the naked owner, whose title becomes complete. In most circumstances, these interpretations would seem to accord with the settlor's intention.

In the instant case plaintiff contended the trust was terminated by confusion because he held both the beneficial interest

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*Estate Planning*, 26 TUL. L. REV. 119, 133-39 (1952). The chief advantage of the trust lies in its tax-saving aspect. See Wisdom & Pigman, *supra*. The usufruct device permits alienation of the naked ownership, thus allowing some degree of marketability of the property.

10. LA. R.S. 9:1811 (1950), as amended, La. Acts 1952, No. 209, § 2: "A trust shall be created when a person (as that term is defined in R.S. 9:1792(8)) in compliance with the provisions of this Chapter transfers the legal title to property to a trustee in trust for the benefit of himself or a third person."

11. LA. CIVIL CODE art. 606 (1870). The usufruct may exist for only 30 years if the usufructuary be a corporation. *Id.* art. 612.

12. It is not the property that is the subject matter of the trust but the usufruct itself. The trustee is given the usufruct; his right to the property is only that of a usufructuary.

13. See Oppenheim, *A New Trust Code for Louisiana: Some Basic Policy Considerations*, 23 LA. L. REV. 621, 622 (1963). The author is presently reporter for the current revision of the Louisiana Trust Estates Act.

14. LA. R.S. 9:1794 (1950), as amended, La. Acts 1962, No. 74, § 1: "A. Unless an earlier termination is required by the trust instrument . . . every . . . trust created under this chapter . . . shall terminate: . . . *At the death of the last surviving income beneficiary who is a natural person . . .* B. If the settlor provides in specific terms that a trust is to continue beyond the life of the last surviving income beneficiaries in favor of one or more principal beneficiaries then such principal beneficiaries shall be considered income beneficiaries for the purpose of measuring the maximum allowable period. . . ." (Emphasis added.) See *Louisiana Legislation of 1962—Trusts*, 23 LA. L. REV. 48, 49 (1963); Oppenheim, *A New Trust Code for Louisiana—Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169 (1963). For a discussion and criticism of the former R.S. 9:1794, see Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 204 (1939); Wisdom & Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119, 133 (1952).

and naked ownership of the property. The court met this argument by declaring that since by statute the trustee held legal title to the usufruct<sup>15</sup> the merger of the naked ownership and mere beneficial title could not give plaintiff full ownership of the usufruct.

Plaintiff also argued that the trust failed for lack of a principal beneficiary in that the death of the principal beneficiary — the original naked owner named in the will — left the trust with no ultimate named beneficiary to whom the property could pass. Relying on the Trust Estates Act, the court held that when no principal beneficiary is named, he is to be ascertained by the operation of law.<sup>16</sup> The naked owner would be the principal beneficiary within the statutory definition of that term,<sup>17</sup> as he is the person ultimately entitled to ownership of the property.<sup>18</sup> Thus in the instant case plaintiff, by inheritance the naked owner, had become the principal beneficiary by operation of law.

Plaintiff's final contention — that a usufruct in trust was a prohibited substitution<sup>19</sup> — was not advanced at the trial level; consequently the court declined to rule on the question. It did, however, indicate that a usufruct could be the subject matter of a trust under the statutory provision that "any interest in property . . . can be held in trust."<sup>20</sup> The concurring judge, wary lest the opinion be taken to uphold the validity of the usufruct in trust, warned that any statements made by the majority indicating that a usufruct in trust is not a prohibited substitution were dicta.<sup>21</sup> Furthermore, the concurring judge seemed to suggest that such a disposition might well conflict with the jurispru-

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15. LA. R.S. 9:1811 (1950), as amended, La. Acts 1952, No. 209, § 2.

16. LA. R.S. 9:1792 (10) (1950); "Principal beneficiary" means the beneficiary ultimately entitled to the principal, whether named or designated by the terms of the trust or determined by operation of law."

17. *Ibid.*

18. LA. CIVIL CODE art. 625 (1870): "When the usufruct has expired it returns to and becomes again incorporated with the ownership; and from that time the person who had only the naked ownership, begins to enter into a full and entire ownership of the thing."

19. Plaintiff relied on Succession of Guillory, 232 La. 213, 94 So.2d 38 (1957) and Succession of Meadors, 135 So.2d 679 (La. App. 2d Cir. 1961). For a detailed discussion of these cases see Note, 22 LA. L. REV. 889 (1962). See also Jackson & Jeter, *The Guillory Case: What Are Its Implications for Private and Charitable Trusts*, 32 TUL. L. REV. 415 (1958); Oppenheim, *A New Trust Code for Louisiana — Some Steps Toward its Achievement*, 37 TUL. L. REV. 169 (1963).

20. LA. R.S. 9:1861 (1950).

21. 147 So.2d at 430.

dential pronouncements against prohibited substitutions.<sup>22</sup> It is difficult to discover any basis for this argument, as the Civil Code specifically provides a usufruct is not a prohibited substitution.<sup>23</sup> Placing the usufruct in trust should not withdraw it from the scope of that provision. Recent legislation<sup>24</sup> and constitutional amendments<sup>25</sup> may have made this point moot.<sup>26</sup> It appears under this legislation that one is permitted to place property in trust for an income beneficiary, to be given to a principal beneficiary upon his death.<sup>27</sup>

The decision in the instant case has put to rest some problems involving the usufruct in trust, and has provided some guidelines for future settlers desiring to make use of this type of disposition. When construing unique modes of donation such as a usufruct in trust, courts should accord primary significance to the intention of the settlor. When this intention can be readily found, it should be given full legal effect unless contrary to some positive law or public policy. When the intention of the settlor cannot be so readily ascertained, as in the instant case, the court should construe the ambiguous disposition on the basis of the probable intention of settlers generally in making such dispositions. It is submitted that this process would allow optimum use of the trust without ensnaring it with too many technical and static rules of law.

In the usufruct in trust Louisiana has a device familiar to no other legal system. There should be no question as to its validity and in fact usufructs in trust are being drawn today. It is submitted that this unique hybrid be nurtured and maintained.

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22. See note 19 *supra*.

23. LA. CIVIL CODE art. 1521 (1870): "The deposition (disposition), by which a third person is called to take the gift, the inheritance or the legacy, in case the donee, the heir or the legatee does not take it, shall not be considered a substitution and shall be valid." *Id.* art. 1522: "The same shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked ownership to another."

24. LA. CIVIL CODE art. 1520 (1870), as amended, La. Acts 1962, No. 45, § 1; LA. R.S. 1791 (1950), as amended, La. Acts 1962, No. 44, § 1.

25. LA. CONST. art. IV, § 16, as amended, La. Acts 1962, No. 521.

26. The legislation was designed to overrule the cases, *Succession of Guillory*, 232 La. 213, 94 So. 2d 38 (1957) and *Succession of Meadors*, 135 So. 2d 679 (La. App. 2d Cir. 1961). However, as the courts have not yet met this legislation, it is possible that it may be construed to authorize only the types of trusts attempted in the two cases.

27. See Oppenheim, *A New Trust Code for Louisiana—Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169 (1963); "[Remedial legislation concerning the trust code should make it clear that the specters raised by Guillory and