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SOME INTERESTING FEATURES OF THE PROPOSED TRUST CODE*

*David W. Robertson***

INTRODUCTION

After several years of study, the Louisiana State Law Institute has produced a proposed trust code for Louisiana. The code is to be introduced in the 1964 session of the Louisiana legislature. In this article, the writer shall undertake to raise some questions about the proposed legislation, and to point out some interesting innovations it seeks to accomplish.

DURATION AND TERMINABILITY

Under the proposed trust code,¹ as under the present Trust Estates Law,² a trust would not be terminable at the will of all the parties at interest — settlors, beneficiaries, and trustees — unless the trust instrument reserved a power of revocation. This stringent provision against terminability is contrary to the laws of most other states, which permit the settlor and all the beneficiaries to terminate the trust, even in the face of active opposition by the trustee, proceeding on the theory that a trustee has no such interest in the trust as to entitle him to oppose termination. It has been strongly urged that, as a general rule, a trust should be terminable by the will of all the beneficiaries.³ As stated by Professor Nabors:

“Where alienability, voluntary and involuntary, exists, as for the non-spendthrift trust in Louisiana, a restraint on the beneficiary’s right to terminate the trust will make the beneficiary who does dispose of his interest sell at a discount, and, therefore, the rule is of questionable validity.

*The source of the proposed trust code used in this article was the Louisiana State Law Institute Exposé des Motifs of March 13, 1964.

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1. TRUST CODE art. 498 (proposed LA. R.S. 9:2028): “The consent of all settlors, trustees, and beneficiaries shall not be effective to terminate the trust or any disposition in trust, unless the trust instrument provides otherwise.”

2. LA. R.S. 9:2176 (1950): “Unless otherwise provided by the terms of the trust, and except as stated in R.S. 9:2173, 9:2174, and 9:2175, the trust shall not be terminated although the settlor and the trustee and the beneficiary so desire and consent thereto.”

3. See Pascal, *Of Trusts, Human Dignity, Legal Science, and Taxes*, 23 LA. L. REV. 639 (1963).

The motivating force back of the rule of the Trust Estates Act against termination probably was the desire of trust companies to have a rule which would tend to continue the trust in their hands." (Emphasis added.)⁴

If prohibiting termination by the beneficiaries is undesirable, then by definition a provision prohibiting termination by *all* the parties at interest is entitled to strenuous criticism. The only favorable comment about this provision which has been discovered seems unconvincing:

"The parties at interest are forbidden to break up the trust in violation of its terms by consent between or among themselves. This salutary rule against premature destruction of the trust is deeply grounded in doctrine and in reasons of public policy which have no place in this discussion."⁵

Closely related to the question of terminability are the provisions of the statutes dealing with the permissible duration of trusts. The present trust law and the proposed trust code follow the same general approach.⁶ Under both statutes, under cer-

4. Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 179, 199 (1939).

5. Stubbs, *Louisiana Trusts for the Louisiana Lawyer*, 1 LA. L. REV. 774, 778-9 (1939).

6. LA. R.S. 9:1794 (1950): "A. Unless an earlier termination is required by the trust instrument or by the proper court, every inter vivos or testamentary trust created under this Chapter, other than a trust established by an employer for the benefit of his employees, shall terminate:

"(1) At the expiration of ten years from the settlor's death, if there is no income beneficiary who is a natural person;

"(2) At the death of the last surviving income beneficiary who is a natural person, if there is one income beneficiary or two or more income beneficiaries any one of whom is a natural person; but if every income beneficiary who is a natural person dies within ten years from the settlor's death, the trust shall continue until the end of the ten year period.

"B. If the settlor provides in specific terms that a trust is to continue beyond the life of the last surviving income beneficiary 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.

"C. If the terms of the trust purport to require a period of duration longer than the maximum allowable period set forth above, but the trust is otherwise valid under this Chapter, the trust shall be enforced for the maximum allowable period, and shall then be terminated."

TRUST CODE art. 191 (proposed LA. R.S. 9:1831): "Unless an earlier termination is required by the trust instrument or by the proper court, a trust shall terminate at:

"(1) The death of the last surviving income beneficiary or the expiration of fifteen years from the death of the settlor last to die, whichever last occurs, if at least one settlor and one income beneficiary are natural persons;

"(2) The death of the last surviving income beneficiary or the expiration of fifteen years from the creation of the trust, whichever last occurs, if none of

tain circumstances a trust may continue beyond the lives of all beneficiaries for a number of years (ten in the present law, fifteen under the proposed code) after the settlor's death. In the opinion of this writer, there is little to be said for a provision which requires, absent contrary stipulation in the trust instrument, that a trust endure beyond the lives of all beneficiaries until ten years after the testator's death; and such a provision seems particularly objectionable under a system whereby the settlor, beneficiary, and trustees are themselves precluded from unanimously terminating the trust arrangement. The writer can only echo the speculation that the provision may have been designed "to assure a professional trustee a minimum number of years of fees from every trusteeship accepted."⁷ Its continuation in the proposed legislation seems unfortunate.

Another question regarding the duration of the trust under the new trust code is raised by an apparent conflict between two provisions of the code. The rules with regard to the maximum duration of the trust are set forth in article 191,⁸ which begins with the phrase "unless an earlier termination is required by the trust instrument" Article 193,⁹ on the other hand,

the settlors is a natural person but at least one income beneficiary is a natural person;

"(3) The expiration of fifteen years from the death of the settlor last to die, if at least one settlor is a natural person but none of the income beneficiaries is a natural person;

"(4) The expiration of fifteen years from the creation of the trust, if none of the settlors and none of the income beneficiaries is a natural person."

7. Pascal, *Of Trusts, Human Dignity, Legal Science, and Taxes*, 23 LA. L. REV. 639, 651 (1963).

8. TRUST CODE art. 191 (proposed LA. R.S. 9:1831): "Unless an earlier termination is required by the trust instrument or by the proper court, a trust shall terminate at:

"(1) The death of the last surviving income beneficiary or the expiration of fifteen years from the death of the settlor last to die, whichever last occurs, if at least one settlor and one income beneficiary are natural persons;

"(2) The death of the last surviving income beneficiary or the expiration of fifteen years from the creation of the trust, whichever last occurs, if none of the settlors is a natural person but at least one income beneficiary is a natural person;

"(3) The expiration of fifteen years from the death of the settlor last to die, if at least one settlor is a natural person but none of the income beneficiaries is a natural person;

"(4) The expiration of fifteen years from the creation of the trust, if none of the settlors and none of the income beneficiaries is a natural person."

9. TRUST CODE art. 193 (proposed LA. R.S. 9:1833): "If the trust instrument stipulates no term, the trust shall terminate:

"(1) Upon the death of the last income beneficiary who is a natural person; or

"(2) At the end of the term prescribed by [R.S. 9:1831(3) or 9:1831(4)], if the income beneficiaries do not include a natural person."

is captioned "term in absence of stipulation," and begins with the language "if the trust instrument stipulates no term." It is believed that the clash between the two prefaces is obvious — a trust instrument which "stipulates no term" certainly does not "require an earlier termination." Yet article 193 would provide for a shorter term in certain circumstances than would article 191. Read literally, article 191(1) would indicate that a trust created by a natural person settlor, with no term stated in the trust instrument, would endure beyond the death of the only income beneficiary if such death occurred within fifteen years of the death of the settlor. On the other hand, article 193(1) would require termination on the date of the income beneficiary's death. The manner in which the two provisions are captioned — article 191, "Limitations upon stipulated term," article 193, "Term in absence of stipulation" — makes clear that it is intended that article 191 control when the trust instrument specifies a term which is at least as long as that permitted by the article, and that article 193 control when nothing is said in the trust instrument about duration. But this is not clear from the text of the articles.

CONJUGAL TRUSTS — INTER VIVOS OR TESTAMENTARY?

A series of provisions in the proposed trust code would provide for the conjugal trust, heretofore unknown to Louisiana law.¹⁰ A conjugal trust is an arrangement entered into by the husband and wife under which one-half or more of the net income from the community is payable to the surviving spouse for the rest of his or her life, or for a shorter term if agreed upon.¹¹

Both the present Trust Estates Law¹² and the proposed trust code¹³ require for a testamentary trust the same formalities as

10. TRUST CODE arts. 241 through 251 (proposed LA. R.S. 9:1861 through 9:1871).

11. TRUST CODE art. 241 (proposed LA. R.S. 9:1861): "A conjugal trust is a trust affecting community property conferred by husband and wife under which one-half or more of the net income is payable to the surviving spouse for the rest of the life of that spouse, or for a shorter term, beginning with the death of the spouse first to die. Upon the death of the spouse first to die an undivided one-half interest in principal vests in the heirs or legatees of the deceased spouse subject to the conjugal trust, and subject to any other trust that may be provided for by that spouse. Upon the death of the surviving spouse, the other one-half interest in principal vests in the heirs or legatees of the surviving spouse. The trust must terminate upon the death of the surviving spouse unless the trust instrument stipulates a shorter term."

12. LA. R.S. 9:1813 (1950).

13. TRUST CODE art. 51 (proposed LA. R.S. 9:1751).

are necessary to the validity of a will under Louisiana law.¹⁴ However, the only formality which would be required under the proposed trust code for the conjugal trust is that the instrument or instrument of creation be in authentic form.¹⁵ The intention is that the conjugal trust be considered an inter vivos trust, and therefore free from the necessity for any of the formalities required for the creation of a testamentary arrangement. But the conjugal trust is an arrangement which is not intended to have any effect whatsoever until the death of the spouse first to die. It would be revocable by either spouse until the death of the spouse first to die, notwithstanding any provision in the agreement to the contrary,¹⁶ and dissolution of the community prior to the death of the spouse first to die would work a revocation.¹⁷ For many purposes the law tends to regard arrangements which are intended to take effect only upon death as testamentary arrangements, notwithstanding any attempt to denominate them inter vivos. Thus, for example, the possibility is open for an argument that a conjugal trust must conform to one of the forms required for a will under Louisiana law. A conjugal trust agreement entered into by both the spouses in the same authentic act could well fail to meet the requirements of law for a will for either spouse.

FILLING VACANT TRUSTEESHIP

Present law: La. R.S. 9:1875: "If a trust is created and there is no trustee, or if the trustee or one of two or more trustees ceases for any reason to be trustee, and if the trust instrument provides no method of filling the vacancy, a trustee can be appointed by the proper court, provided, however, that under such circumstances no judge shall appoint as trustee:

"A. his or his spouse's relative, employer, employee, partner, or other business associate, or the relative, em-

14. These requirements are set out in articles 1570-1595, 1597-1604 of the Louisiana Civil Code, and in LA. R.S. 9:2442.

15. TRUST CODE art. 244 (proposed LA. R.S. 9:1864): "A husband and wife may execute a conjugal trust agreement in the same instrument or in separate instruments. The instrument or instruments shall be in authentic form."

16. TRUST CODE art. 246 (proposed LA. R.S. 9:1866): "A conjugal trust agreement may be modified or revoked by the concurrence of both spouses, or revoked by one spouse during the lives of the spouses, notwithstanding a contrary provision."

17. TRUST CODE art. 248 (proposed LA. R.S. 9:1868): "Dissolution of the community of acquets and gains while both spouses are living revokes the conjugal trust agreement."

ployer, employee, partner, or other business associate of any other judge of the same court or of his spouse; or

"B. any bank or trust company of which he or his spouse, or any other judge of the same court or his spouse is, or has been, within the twelve months next preceding such appointment, an officer or director or attorney; or

"C. any individual, or such individual's spouse, who is or has been within the twelve months next preceding such appointment, and with regard to the same court, a district attorney, assistant district attorney, clerk of court, deputy clerk of court, sheriff, deputy sheriff, bailiff, crier, minute clerk, reporter, stenographer, or other court attache or employee."

Proposed trust code: No general provision

The provisions of R.S. 9:1875, providing for court appointment of successor trustees, have been praised as constituting "an excellent check on the court's power of appointment to fill a vacancy."¹⁸ That section provides a general method for filling all vacancies, however arising, and imposes limitations upon the judge's power to appoint. On the other hand, the proposed trust code contains no general provision dealing with filling a vacant trusteeship. The only pertinent article of the proposed code reads:

Art. 115 (proposed R.S. 9:1785) "*Manner in which trustee chosen*

"An original trustee, an alternate trustee, or a successor trustee may be designated in the trust instrument or chosen by the use of a method provided in the trust instrument, but neither failure of the trust instrument to so provide nor incompetence or unwillingness to act of the person so designated or chosen shall invalidate the trust. In such a case, the proper court shall appoint one or more trustees."

Other provisions of the proposed code would provide that a trustee may resign¹⁹ or be removed;²⁰ set out the effect of a resig-

18. 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, 89 (1938).

19. TRUST CODE art. 118 (proposed LA. R.S. 9:1788): "A trustee may resign at any time by giving written notice of resignation to each of the beneficiaries or by mailing written notice to each at his last known address. The trust instrument may provide another method of resignation and notice."

20. TRUST CODE art. 119 (proposed LA. R.S. 9:1789): "A trustee may be re-

nation or removal;²¹ and mention an appeal from a judgment appointing or removing a trustee.²² But there is no language in the code setting forth a method of replacing trustees who have resigned or been removed. The objection to this omission is two-fold: it raises the problem of a possible lapse in the power of the court to supervise the administration of the trust, and it removes the safeguards on the judge's power of appointment set out in the present law.

PURPOSES FOR WHICH A TRUST MAY BE CREATED

The present Trust Estates Law contains four provisions dealing with the trust purposes. R.S. 9:1841 states the general rule to the effect that the settlor may create a trust subject to any conditions not denied to him in the Trusts Estate Law. R.S. 9:1842 follows with a list of specific grounds of invalidity of a trust or a provision in a trust, stating that such a trust or provision is invalid if illegal, or if its performance involves the commission of a crime or a tort by the trustee, or if its enforcement is against public policy, or if created for an illegal consideration. R.S. 9:1843 provides that the invalidity of a provision in a trust will invalidate the entire trust only if it is not severable. R.S. 9:1844 makes clear that trusts for mixed private and charitable purposes are lawful. The only provisions found in the proposed trust code dealing with this subject are article 26,²³ which states that "a trust or a disposition in trust may be made subject to any condition not forbidden in this code and not against public order or good morals," and article 881,²⁴ providing for severability. It is probable that the authors of the proposed code felt that the matters set out in R.S. 9:1842 are self-evident, and perhaps they are. However, it is interesting to

moved in accordance with the provisions of the trust instrument or by the proper court for sufficient cause shown."

21. TRUST CODE art. 120 (proposed LA. R.S. 9:1790): "A trustee who has resigned or who has been removed has no further authority with respect to the trust. His resignation or removal does not affect his liability for actions occurring before his resignation or removal."

22. TRUST CODE art. 121 (proposed LA. R.S. 9:1791): "A judgment or an order of court appointing or removing a trustee shall be executed provisionally. An appeal from an order or judgment appointing or removing a trustee must be taken and the security therefor furnished within thirty days from the date of the order or judgment notwithstanding the filing of an application for a rehearing or a new trial. The appeal shall be docketed and heard by preference."

23. Proposed LA. R.S. 9:1736.

24. Proposed LA. R.S. 9:2251.

note that provisions similar to the present R.S. 9:1841 through 9:1843 are included in the laws of most other states.

SETTLOR OR BENEFICIARY AS TRUSTEE

Present law: La. R.S. 9:1873: "The settlor of a trust, other than such as may be established by employers for the benefit of their employees, shall not be a trustee of that trust; but either spouse may be the trustee of a trust of which the other spouse is the settlor."

La. R.S. 9:1874: "A beneficiary of a trust shall not be the sole trustee or one of two trustees of a trust; but beneficiaries may be trustees so long as they are outnumbered by trustees who are not beneficiaries."

Proposed trust code: Art. 114 (proposed R.S. 9:1784): "There must always be one trustee who is neither a settlor nor a beneficiary, but if there are two or more trustees the others may be settlors or beneficiaries of the trust."

The rules embodied in R.S. 9:1873 and R.S. 9:1874 have generally been regarded as distinctive features of the present Trust Estates Law. The rule of R.S. 9:1873 means, of course, that the settled rule of the common law to the effect that a trust can be created by a declaration by the owner of the property that he holds it as trustee has not obtained in Louisiana. Shortly after enactment of the 1938 Trust Estates Act, one writer explained this provision in terms of the conceptual difficulties of providing that a person may transfer legal title "from himself to himself, even if one of the selves is a new and separate person."²⁵ This explanation, while not entirely satisfactory, is apparently the only one extant. The authors of the new trust code have not seen fit to follow the rule of R.S. 9:1873, but have instead provided in article 114²⁶ that as long as there is one trustee who is neither a settlor nor a beneficiary of the trust, the other trustees may be settlors or beneficiaries.

The fact that article 114 would place no limitation on the number of trustees who may also be beneficiaries of the trust is potentially productive of confusion. The present R.S. 9:1874

25. 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, 89 (1938).

26. Proposed LA. R.S. 9:1784.

provides that non-beneficiary trustees must outnumber beneficiary trustees. The inclusion of such a provision in the Trust Estates Act has received no published explanation which the writer has been able to discover. It is obvious that if the same person is both sole trustee and sole beneficiary, the doctrine of merger will destroy the trust, and that person will become perfect owner, but this doctrine does not explain the provision of 9:1874. Despite the lack of doctrinal writing explaining the present provision, it is possible to regard it as furnishing a sensible complement to the present R.S. 9:1994,²⁷ which dispenses with the traditional rule requiring unanimity in order for plural trustees to act, and provides that in the case of three or more trustees, a majority can act. There is a certain logic to the speculation that allowing a majority of the trustees to act requires the added safeguard that non-beneficiary trustees outnumber beneficiary trustees, in order to assure completely dispassionate and fair administration. Apparently the logic of that speculation did not appeal to the authors of the proposed statute, for they have altered the rule of 9:1874, while retaining²⁸ the rule of 9:1994 permitting a majority of trustees to act.

STANDARD TO WHICH TRUSTEE IS HELD

Present Law: La. R.S. 9:1962(6): "Upon acceptance of a trust by the trustee he shall be under a duty to the beneficiary . . . in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. . . ."

27. LA. R.S. 9:1994 (1950): "Unless the trust instrument expressly provides otherwise, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of such joinder. Nothing in this Section shall excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust."

28. In article 634 (proposed LA. R.S. 9:2114), which provides: "A power vested in three or more trustees may be exercised by a majority of the trustees, unless the trust instrument provides otherwise. A trustee who has not joined in exercising a power shall not be liable to the beneficiaries or to others for the consequences of that exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority of trustees, if he expresses his dissent in writing to his co-trustees at or before the time of the joinder. Nothing in this article shall excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust."

Proposed trust code: Art. 600 (proposed R.S. 9:2090): "Prudent Man Rule. A trustee in administering a trust shall exercise such skill and care as a man of ordinary prudence would exercise in dealing with his own property."

The provisions of the present law were based upon section 174 of the Restatement of Trusts, and the proposed code is based upon the same section of the Restatement of Trusts II. The new Restatement goes beyond the prior version by providing that a trustee who procures his appointment by holding himself out as having greater skill than a man of ordinary prudence is required to possess such skill. The present Louisiana Trust Estates Law, having followed the former Restatement, does not contain this additional provision. The proposed trust code does not follow the new Restatement, but instead retains the formulation of the present Trust Estates Law.

According to Professor Scott, some cases have held the corporate or professional trustee to a higher standard than the individual trustee.²⁹ The rationale of such holdings is that the professional trustee has procured appointment by representing himself as having a greater degree of skill than the average prudent administrator, and ought to be held to the skill he has professed to possess. The rejection by the proposed Louisiana trust code of the position taken in the Restatement of Trusts II on this subject apparently is evidence of a desire to provide that the corporate trustee is to be held to the same standard as the individual trustee. This rule is perhaps subject to some question when considered in connection with the rule that dispenses with the necessity of security furnished by the corporate trustee unless the trust instrument expressly requires it.³⁰

CLASS TRUSTS — FORMALITIES FOR CREATING

A series of provisions in the proposed trust code would permit a settlor to create a trust for a class of persons consisting of some or all of his children or grandchildren.³¹ The effect of these provisions would be to introduce a certain type of future interests into Louisiana law. That this would be a great innovation has been recognized by the authors of the proposed code.

29. See SCOTT'S ABRIDGEMENT OF THE LAW OF TRUSTS § 174.1 (1960).

30. LA. R.S. 9:1878 (1950), and art. 711 (proposed LA. R.S. 9:2171).

31. TRUST CODE arts. 291 through 306 (proposed LA. R.S. 9:1891 through 9:1906).

No provision in the proposed trust code has been discovered which specifies the formalities or language necessary for the creation of a class trust. Apparently, therefore, the general provisions of the code with regard to the formalities necessary for the creation of a trust are to be controlling. One such provision states that no special form of words is necessary to create a trust.³² In the common law, the question has fairly frequently arisen in litigation as to whether particular language in a disposition creates a class trust. For example, in *Folk v. Hughes*,³³ a father made an inter vivos conveyance of land to his son, "for his uses and benefits, and for the maintenance and support of the children of the said [son] during the term of his natural life." The court construed this disposition as a trust for the benefit of the grandchildren of the settlor as well as for the son. Under the proposed trust code, similar questions could arise. The class trust would be an innovation in the law of Louisiana, and it is likely to be questioned by those who feel that the civilian philosophy requires that property be maintained free from undue restraints. Thus, it is probable that a disposition of the sort made in *Folk v. Hughes* would not be counted as a class trust in Louisiana. If not valid as a class trust, the disposition would be invalid as attempting to provide for beneficiaries who are not yet in being.

REQUIREMENT THAT BENEFICIARIES ARE IN BEING

Both the present law³⁴ and the proposed trust code³⁵ state that the beneficiary of a trust must be in being at the time of creation of the trust. The proposed trust code would make an exception for the class trust, but otherwise would adhere to the general rule of the present law. The present R.S. 9:1902 states that a beneficiary is to be counted as in being within the mean-

32. TRUST CODE art. 53 (proposed LA. R.S. 9:1753): "No particular language is required to create a trust, but it must clearly appear that the creation of a trust is intended."

"A trust instrument shall be given an interpretation that will sustain the effectiveness of its provisions if the trust instrument is susceptible of such an interpretation."

33. 100 S.C. 220, 84 S.E. 713 (1915).

34. LA. R.S. 9:1902 (1950): "A person who is not in being and definitely ascertained at the time of the creation of the trust shall not be a beneficiary of the trust, provided, however, that where the beneficiary is a natural person he shall be deemed to be in being and definitely ascertained, within the meaning of this Section, if he be conceived at the time the trust is created and if he be born alive, and provided further that the provisions of this Section shall not be applicable to trusts established by employers for the benefit of their employees."

35. TRUST CODE art. 143 (proposed LA. R.S. 9:1803): "A beneficiary must

ing of the law "if he be conceived at the time the trust is created and if he be born alive." It seems apparent that the proposed trust code in article 143 is attempting to formulate the same rule when it states: "An unborn child is deemed a person in being and ascertainable, if he is born alive." However, the quoted language of article 143 of the proposed trust code does not achieve the same effect as the quoted language of R.S. 9:1902. Under the literal meaning of the language quoted from article 143, it appears that a beneficiary would be counted as having been in being and ascertainable within the meaning of the law if he were ever born alive. The language of article 143 makes no mention of the requirement that the beneficiary be conceived at the time of creation of the trust, although the comment and the general thrust of the law make clear that such was the intention.

DISCRETIONARY AND SPENDTHRIFT TRUSTS

Both the present law³⁶ and the proposed trust code³⁷ make provision for the creation of spendthrift trusts. A spendthrift trust is a trust which forbids voluntary assignment by an income or principal beneficiary of his interest under the trust, and which likewise prohibits seizure of that interest by creditors of the beneficiary. The term "spendthrift trust" specifically refers to an arrangement making the restraints on alienation direct. At the common law, much the same purpose is often sought to be achieved by the creation of a discretionary trust, under which the trustee is given discretion as to the extent to which payment is to be made to the beneficiary. Under such a trust, the interest of the beneficiary does not come into fruition until the trustee decides how much is to be paid him; prior to that time, the beneficiary is counted as having no vested interest, so that alienation is prohibited. The present R.S. 9:1923 contains language which is construed as permitting the creation of a discretionary trust.³⁸ No similar language appears in the new trust code.

be in being and ascertainable on the date of the creation of the trust, except as otherwise provided in this Code. An unborn child is deemed a person in being and ascertainable, if he is born alive."

36. See LA. R.S. 9:1923 (1950).

37. TRUST CODE arts. 462 through 467 (proposed LA. R.S. 9:2002 through 9:2007).

38. LA. R.S. 9:1923(C) (1950): "Where the interest of the beneficiary is subject to the exercise of discretion by the trustee or by another, the provisions of this Section as to the rights of creditors and assignees shall apply with respect to any sums which the trustee or such other person determines shall be paid to or for the beneficiary."

Either the discretionary trust is to be considered as no longer possible in Louisiana, or the authors of the proposed code felt that an authorization of direct restraints on alienation is to be read as permitting also indirect restraints of the sort accomplished in the discretionary trust.

COMMON TRUST FUNDS

Under the present trust estates law, investment by a trustee in a common trust fund is permitted.³⁹ According to one author, the common trust fund provision of Louisiana accords with most of the recent legislation and is designed to remove difficulties of administration presented by small trust estates.⁴⁰ The pro-

39. LA. R.S. 9:2063 (1950): "A trustee may establish common trust funds for the investment of trust funds of which he is trustee or co-trustee and may invest in such common trust funds, if such investment is not prohibited by the instrument, and if the trustee procures the consent of his co-trustees to such investment; provided, that:

"(1) Such securities or other property are kept separate from all other trust or other property of the trustee;

"(2) Such securities or other property are clearly marked as the property of the common trust fund;

"(3) The records, reports and accounts of each trust having an interest in such fund clearly show the extent of such interests;

"(4) The trustee himself has no interest in such fund;

"(5) Certificates of interest are issued to each trust, the funds of which are invested in such common trust fund;

"(6) The certificates of interest are retained by the trustee and not sold to any one or delivered to the interested beneficiaries;

"(7) The trustee does not make any special charge to any of the trusts having interest in the common trust fund or retain any of the income or capital of such common trust fund as compensation for the operation of such fund;

"(8) The fund is maintained under a written plan which shall be on file at the office of the trustee and be available for inspection during business hours by any interested party;

"(9) The trustee has prepared annually by a public accountant, and delivered to each beneficiary interested in the common trust fund, and placed on file with the trustee, a statement of the investment changes, income, disbursements, and a list of the current investments with a notation as to defaults, for the period since the last such statement;

"(10) Entrances into, and withdrawals from, such common trust fund are permitted only on fixed days at quarterly intervals;

"(11) No funds are admitted to the common trust fund at a time when less than forty per centum of the value of the common trust fund is composed of cash or marketable investments for which quotations are readily available;

"(12) The fund is managed in accordance with any regulations pertaining thereto issued from time to time by the state banking department.

"(13) On the termination of a trust interested in the common trust fund, the trustee shall cancel the certificate of interest of that trust, and shall pay from cash in the common trust fund to the person or persons then entitled to the trust capital the then market value of the interest of such trust in the common trust fund. Certificates of interest in such a common trust fund shall not be deemed to be 'securities' within the meaning of any blue sky law or other statute regulating the issuance and sale of securities. If the trustee is restricted to investments from the legal list, then he may invest only in common trust funds containing only investments from the legal list."

40. See Comment, 52 HARV. L. REV. 145 (1938).

posed trust code in article 648⁴¹ likewise would permit the common trust fund, in language virtually identical to that of the present provision.

One question with regard to the common trust fund arises from considering the interaction of article 604⁴² of the proposed trust code with article 648. Article 604 is a general provision requiring the trustee to keep the trust property separate from his individual property and from property of others not subject to the trust. It states: "A trustee shall keep the trust property separate from his individual property, and, *so far as reasonable* keep it separate from other property not subject to the trust, and see that the property is designated as property under the trust, unless the trust instrument provides otherwise." (Emphasis added.) In light of the detailed provisions of article 648 authorizing the common trust fund, some question arises as to the intent of the italicized language of article 604. The language in question was probably designed with the common trust fund in mind. The provision may be productive of confusion, and might even be read as permitting the trustee to mingle trust properties with other properties in situations where such mingling ought not to be permitted.

MISCELLANEOUS

A number of provisions of the proposed trust code contain language which is confusing to this author. Some of these provisions will be briefly noted.

The proposed trust code is much more elaborate than the present Trust Estates Law with respect to the matter of the legitime in trust. Article 214⁴³ of the proposed trust code states: "The legitime in trust may be burdened with an income interest or with a usufruct in favor of a person other than the forced heir to the same extent that the usufruct of the same property could be stipulated in favor of the same person for a like period." The comments following this article indicate that its purpose is to make clear that a trust of the legitime may be burdened with an income interest or with a usufruct in trust to the same extent that the legitime interest outside of trust could be burdened with a usufruct. It seems fairly clear that

41. Proposed LA. R.S. 9:2128.

42. Proposed LA. R.S. 9:2094.

43. Proposed LA. R.S. 9:1844.

under the present law, the only usufruct which may burden the legitime outside of trust is the usufruct of the surviving spouse under article 916 of the Civil Code.⁴⁴ However, it seems evident that the wording of article 214 does not accomplish the purpose indicated. The phrase "in favor of the same person" in article 214 is productive of confusion. Perhaps a substitute provision could be constructed somewhat along the following lines: "The legitime in trust may be burdened with an income interest or with a usufruct to the same extent that the legitime outside of trust may be burdened with a usufruct."

Mention has already been made of the sections in the proposed trust code which would permit the conjugal trust. Article 243⁴⁵ reads as follows: "A conjugal trust takes effect upon the death of the spouse first to die. The nature and extent of *the trust* of the trust property shall be determined when the trust takes effect." It appears obvious that the italicized language in the above section should be omitted, or that it should be followed by the conjunctive "and," whichever was the intention of the framers.

The proposed trust code, like the present law, would permit a beneficiary to refuse the interest given him under a trust, but is more specific as to the manner and effect of such a refusal. Article 438⁴⁶ provides: "A beneficiary cannot refuse a part of an interest or refuse income or principal alone if he is a beneficiary of both income and principal. He must refuse all interest in the trust. *The designation of the person in whose favor the refusal is to operate constitutes acceptance. . . .*" (Emphasis added.) The italicized language should be read in connection with a portion of article 435⁴⁷ of the proposed trust code: "Conditions attached to the refusal [of his interest by the beneficiary] shall be reputed not written." In light of the quoted language from article 435, there is substantial question as to the meaning of the italicized language from article 438. Some clarification would appear to be in order.

44. LA. CIVIL CODE art. 916 (1870) : "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a [in] usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage."

45. Proposed LA. R.S. 9:1863.

46. Proposed LA. R.S. 9:1988.

47. Proposed LA. R.S. 9:1985.

Many of the provisions in the portion of the proposed trust code dealing with administration of the trust are broader than the present law. The new trust code would permit the trust instrument to dispense with many facets of the trustee's duty of loyalty not susceptible of alteration by the trust instrument under the present law. Only two such provisions will be discussed here. Article 640⁴⁸ provides: "A trustee may mortgage or pledge trust property, or borrow money on the credit of the trust estate and charge the trust estate therefor, unless the trust instrument provides otherwise." The comments under this section points out that this provision is contrary to the present law and to the law of most other states. The trustee under the present law cannot mortgage, pledge, or borrow money on the trust property unless expressly authorized to do so by the trust instrument. Perhaps in light of the fact that this article is an innovation in the law of Louisiana, and goes beyond the law of most other states, it would be appropriate to insert within the provision some language making clear that the trustee may exercise these powers only pursuant to a proper trust purpose. Even with such a safeguard, the advisability of permitting such action by the trustee is questionable.

Article 643⁴⁹ provides: "A trustee may acquire and subscribe for corporate shares, act as an incorporator, or become a member of a partnership or joint venture, unless the trust instrument provides otherwise." This article would go beyond the present Trust Estates Law and is contrary to the law of most other states. The theory of prohibiting the trustee from participating in a partnership, joint venture, or corporation at the common law is that potential conflicts of loyalty would result.

48. Proposed LA. R.S. 9:2120.

49. Proposed LA. R.S. 9:2123.