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TRUSTS

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EFFECT OF 1964 TRUST CODE ON PRE-EXISTING TRUSTS

R.S. 9:2252, a provision of the 1964 Trust Code, purports to validate dispositions in trust attempted before its effective date, but invalid under the legislation then in effect, if they would have been considered valid under the new Code. In *Succession of Simms*[1] it was decided that this legislation could not be given retroactive effect to the prejudice of rights acquired before the effective date of the 1964 Code. In this particular case the court, having concluded that the disposition attempted in a 1957 testamentary trust amounted to a substitution in trust prohibited by article 4, section 16, of the Louisiana Constitution (as it stood until amendment in 1962), decided that the heirs of the settlor became entitled to the assets involved immediately on her death and that to consider the disposition validated by the 1964 Trust Code would be to give that legislation the effect of "divesting" the heirs of "acquired rights" in violation of article IV, section 15, of the Louisiana Constitution. Conceding *arguendo* only that a substitution prohibited in 1957 was involved in this case, the writer submits that the conclusion of the court was correct, but that the reason given therefor may be questioned.

Heirs unquestionably have their rights *as heirs* fixed at the moment of the death of the deceased. A law which purported to have retroactive effect to change one's position or interest *as heir* would indeed "divest" an "acquired right." Thus, for example, a law purporting to change the order of succession so that ancestors would be preferred to descendants or illegitimates made to share equally with legitimates, would, if retroactive, operate to "divest acquired rights." But it is submitted that R.S. 9:2252 would have operated retroactively in this case not on the *right of heirship* as fixed under the law in effect in 1957, but on a right — that to recover assets which were the object of a donation then null for the reason that it violated a rule of declared public order — in the patrimony to which the heirs

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1. 175 So. 2d 113 (La. App. 4th Cir. 1965), reversed on certiorari on issues not discussed here; rehearing pending.

succeeded and as to which they stand in no better position than the deceased.[2] Thus, if the statute could have operated to validate the act of the donor himself and terminate his right to have its nullity declared, then it can do so to the prejudice of his heir.

Perhaps the following illustrations can serve to clarify the point just made. Had the donor attempted a substitution in an act inter vivos in 1957, he would have had the right to indicate his decision to avail himself of the assets involved by filing a suit to have the disposition declared null, by disposing of the assets anew, or perhaps in other ways; but had he not exercised his right to have the nullity declared, his 1957 act could have been validated by the legislation of 1964. One can hardly be heard to complain that the legislature has chosen to recognize the lawfulness of his previously declared and presumably yet subsisting will. Similarly, if, as in *Simms*, the donor had attempted a substitution by testamentary act in 1957, his heirs, as his successors, could have sought to have its nullity declared or otherwise have asserted their claim to the assets involved; but unless, and again as in *Simms*, the heirs had done so before 1964, the legislation of that year would have validated the once null disposition. The *Simms* decision, therefore, was correct in result because the heirs had sued before 1964 to have the nullity declared; had they not sued or otherwise asserted their right to the assets involved before 1964 the disposition would have been validated by R.S. 9:2252 without the divestiture of an "acquired right" in violation of article IV, section 15, of the Louisiana Constitution.

If the above analysis is correct, then all trusts and dispositions in trusts attempted before the effective date of the 1964 legislation, but of a kind permissible under the 1964 Trust Code, are now valid against heirs unless they alleged their nullity or otherwise asserted their claims to the assets involved before the effective date of this legislation.[3]

2. LA. CIVIL CODE arts. 943, 945.

3. For this reason trusts attempted before 1964 and incorporating the terms of other trusts by reference, dispositions adding assets to existing trusts, and attempts to provide for discretionary trusts, should now all be considered valid if not challenged before the effective date of the 1964 legislation. Such provisions were contained in the *Simms* trusts, but were not discussed by the court because of the position taken by them on the "divesting of acquired rights" contention.

Author's note: The writer wishes to state that two of his colleagues have offered different opinions on the basic issue. Professor A. N. Yiannopoulos

"SUBSTITUTIONS" IN TRUSTS ATTEMPTED BEFORE 1964 TRUST CODE

The question in *Succession of Simms*[4] discussed immediately above would not have arisen, however, had not the court erroneously judged the disposition to amount to a substitution prohibited in trusts under the law as it stood before 1964.[5] What the court judged to be a prohibited substitution was a disposition under which the settlor made a residuary legacy of assets

> "in trust to [named trustees] . . . . Said properties . . . shall be held by them for . . . the natural life of my said granddaughter . . . and after her death . . . said properties shall pass to my great-grandchildren [persons living and identified at the creation of the trust]."[6]

The court construed this disposition as one containing two successive transfers of ownership, the first to the trustees (for the life of the granddaughter) and the second to the great-grandchildren. Now it is true that the essence of the substitution prohibited by article 1520 of the Louisiana Civil Code and article IV, section 16, of the Louisiana Constitution is the disposition of ownership to two or more persons in succession, either directly as a double effect of the act of the donor or indirectly through a charge imposed on the first donee;[7] but what is not tolerable technically is the construction of a disposition "in trust" to a trustee as one *of ownership* within the context of the law of substitutions.[8] If this construction were correct, then every trust would contain a prohibited substitution, for at the

suggests that under the strict theory of null acts not even the settlor could have been deprived of the right to the assets involved by attempted validating legislation. Professor Saul Litvinoff is of the opinion that subsequent legislation could have validated an inter vivos act to the prejudice of the settlor who had not yet asserted his right to the assets involved; but he also believes that the heirs should not be considered to stand in the position of their ancestor in title and that validating legislation subsequent to the time of their inheritance would operate to divest acquired rights.

4. 175 So. 2d 113 (La. App. 4th Cir. 1965).

5. LA. CONST. art. IV, § 16, as amended in 1962, permits substitutions in trusts to the extent allowed by legislation. Hence any disposition allowed by the 1964 Trust Code is to be considered valid even though it contains a substitution constitutionally forbidden until 1962. Moreover, if the 1962 constitutional amendment can be considered to ratify prospectively the provisions of the 1938 Trust Estates Act allowing substitutions in trust, then dispositions attempted under that law after the effective date of the constitutional amendment of 1962 should also be considered valid even if they would have been deemed invalid before 1962.

6. 175 So. 2d 113, 116-17 (La. App. 4th Cir. 1965).

7. See Pascal, *The Trust Concept and Substitution*, 19 LA. L. REV. 273 (1959).

8. See Pascal, *Of Trusts, Human Dignity, Legal Science, and Taxes*, 23 LA. L. REV. 639, particularly at 639-40 and 656-60 (1963).

end of every trust the trustee must transfer the assets to another person (the principal beneficiary). This point was very well made by an astute counsel in *Succession of Singlust*,[9] and the court there disposed of the contention with the very sensible observation that it could not consider all trusts invalid on that ground if the very provision of the Louisiana Constitution which forbade substitutions also specifically sanctioned trusts.[10] Thus on this basis alone the decision in *Simms* must be considered unacceptable.

The root of the difficulty in such cases is, of course, the Louisiana Supreme Court's decision in *Succession of Guillory*,[11] and that of the court of appeal in *In re Succession of Meadors*.[12] Until our bench, bar, law reform agencies, and legislature come to understand that the trustee's "title" is not "ownership" within the meaning of our basic civil law legislation, but only a term of Anglo-American legal art to indicate the trustee's authority to deal with the trust assets, our decisions and our trust legislation will continue to run contrary to our basic enacted civil law and defeat the justifiable expectations of the public.[13] There is indication, too, that the erroneous understanding of the significance of the trustee's title may be carried over into other areas of the law to work havoc. Thus, dictum in *Dunham v. Dunham*[14] asserts that assets in trust for a husband as sole beneficiary are neither his nor his to administer and therefore that the income therefrom during marriage does not form part of the community of acquets and gains. Had the court understood that the husband actually owned the assets in trust and that these assets

9. 169 So. 2d 10 (La. App. 2d Cir. 1964).

10. LA. CONST. art. IV, § 16, as it was before amendment in 1962.

11. 232 La. 213, 94 So. 2d 38 (1957).

12. 135 So. 2d 679 (La. App. 2d Cir. 1961).

13. The basis of difficulty could have been eliminated had the Louisiana State Law Institute, in drafting the 1964 Trust Code, followed the writer's suggestion to define the trust in functional terms consistent with Louisiana's legal system. The trustee then would have been envisioned as an agent or administrator with special powers rather than one with "title" — the term so confusing to Louisianians — and "ownership" would have been envisioned as belonging to the beneficiaries. The matter was presented to the Institute's Reporter for the Trust Code and his advisors constantly from 1959 to 1963, to the Institute's Council in two separate memoranda in 1960 and 1963, from the floor at the annual meeting of the Institute in 1960, and finally in the article, *Of Trusts, Human Dignity, Legal Science, and Taxes*, 23 LA. L. REV. 639 (1963). It was also one of the topics discussed before Louisiana Senate Judiciary Committee C in July 1964 when the writer appeared briefly at the request of its chairman to voice the reasons for his objection to the Institute's draft of the Trust Code. All these utterances, however, fell on deaf ears.

14. 174 So. 2d 898 (La. App. 1st Cir. 1965).

were being administered for his benefit by the trustee, this statement could not have been made.

TRUSTS TO BEGIN IN THE FUTURE

May a trust be created to begin as of a future date, either after a term or on a suspensive condition? This is a question which would have been presented in *Succession of Simms*[15] had not the court ruled invalid the entire attempt to create a trust, all as discussed above. After providing for a trust in favor of her granddaughter as income beneficiary and her named great-grandchildren as principal beneficiaries, the settlor directed that should any of those principal beneficiaries be a minor at the termination of the trust his interest should be subject to a second trust in his favor. Clearly a settlor can provide for the *continuation* of a trust as to each principal beneficiary until his majority or for any portion of his life, and here even under terms which would come into effect only after the termination of the trust as to other beneficiaries. Should there be a distinction, then, between *continuing a trust* as such and *having a second trust take effect on the termination of the first trust?* Any distinction would have to be based on literal applications of the legislation without regard for the purposes and objectives of the rules. Thus under the 1964 Trust Code the interest of the principal beneficiary must be acquired immediately on creation of the trust, whether inter vivos or testamentary,[16] and if the beneficiary is envisioned as "acquiring" anew under the second trust, at a date later than the effective date of the act setting up the trust, then that rule is violated and the second trust is invalid. On the other hand, if it is understood, as it should be, that the interest of the principal beneficiary was transferred to him as of the date of the inter vivos act or testament providing for the trusts, and that his interests will simply be subject to one or more successive *trust administrations*, then no difficulty will be found. Here again a definition of the trust in functional civilian terms would have helped avoid confusion of thought and paved the way for a better appreciation of what might be done lawfully through the trust device. This subject deserves more extensive consideration, but this observation will serve at least to indicate that we should be most careful to understand our legislation radically and not superficially.

15. 175 So. 2d 113 (La. App. 4th Cir. 1965).
16. LA. R.S. 9:1971 (1964).

PRIVATE TRUST FOR A PURPOSE

Another most important trust issue was raised in *Lelong v. Succession of Lelong*,[17] but its determination was avoided because of the interpretation of the facts of the case adopted by the court. In a testamentary trust the settlor had declared:

> "I want the balance of my estate put in trust like it is for ten years — not wishing my real estate to be divided or sold and neither the securities inherited or bought and hardly accumulated dispersed for lesser values. . . . I want [my trustees] to consider first, the development of my properties, their exploitation, in a rational way, and for these expenses and reserves for the future, 2/3 (two-thirds) of the income . . . should be kept every year which means . . . the balance 1/3 could be distributed to my heirs, if conditions allow it. . . .
>
> "This trust should last ten years after the day of my death."[18]

Showing that the condition of the settlor's succession and its tax liability would make it impossible to preserve intact the residue of his assets placed in trust, and arguing that it was the settlor's principal purpose in creating the trust to maintain those assets intact, the heirs contended that the trust should be terminated as being "impossible of fulfillment," citing La. R.S. 9:2174 of the Trust Estates Law of 1938.[19] The court, however, construed the settlor's will to create the trust absolutely and to do no more than suggest that his assets be kept intact. To reach this result the court cited Corpus Juris Secundum to affirm that "that construction of a trust instrument will be favored which upholds the validity of the trust and renders the trust effective."[20] The writer, while admitting that the rule just quoted is applicable when there is doubt as to the settlor's purpose in creating the trust,[21] would not have entertained a

17. 164 So. 2d 671 (La. App. 3d Cir. 1964).

18. *Id.* at 673.

19. La. Acts 1938, No. 81, § 90, once LA. R.S. 9:2174, now repealed by La. Acts 1964, No. 338, §§ 1, 3. La. Acts 1938, No. 81, § 13, once LA. R.S. 9:1843, now repealed by La. Acts 1964, No. 338, §§ 1, 3, might also have been cited.

20. A better source would have been article 1713 of the Louisiana Civil Code, one of the rules for the interpretation of legacies, which is to the same effect.

21. Thus under the Louisiana Civil Code the *first rule* on the interpretation

doubt in this case. The writer is of the opinion that the settlor's language indicated his *purpose* to be the preservation of his assets intact. Evidently he had little if any concern for his "beneficiaries," for even though they "could" be paid as much as one-third of the trust income, they were to be so paid, and apparently at the discretion of the trustees, only "if conditions allow"; that is to say, presumably, if such payment could be made without prejudice to his announced purpose of developing and exploiting his beloved assets.

By concluding that the trust had not been established simply or primarily to keep the settlor's assets intact the court avoided having to decide whether such a purpose would be lawful. The dictum of the court, however, indicates that it would not have declared the trust invalid on that ground.[22] Again the writer would disagree. According to both the Trust Estates Law of 1938, under which the trust was created, and the Trust Code of 1964, a private express trust is one established *for a person*.[23] There is no legislative basis for a trust established for a *purpose* rather than for *persons*, unless it is a trust for "charitable," that is to say, social, purposes. Thus, in the writer's opinion, the entire trust should have been declared unlawful. Tending toward a contrary solution is the implication of the provisions of the former and present trust laws permitting a trust to *continue* beyond the lives of the named beneficiaries,[24] but these provisions do not amount to an affirmation that a trust may be *created* for a private purpose rather than for beneficiaries. Moreover, the validity of such provisions may well be questioned, for they are contrary to the whole purpose of private law, the good of *living* individuals and, therefore, to use the positivist term in our trust legislation, contrary to "public policy."

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of legacies is that the intention of the testator must be ascertained (art. 1712); only secondly, in the writer's opinion (under article 1713 mentioned in note 20 *supra*), is consideration to be given to the interpretation which can have effect rather than to that which can have none.

22. 164 So. 2d 671, 675 (La. App. 3d Cir. 1964).

23. La. Acts 1938, No. 81, § 2 (16), once LA. R.S. 9:1792 (16), now repealed by La. Acts 1964, No. 338, §§ 1, 3; LA. R.S. 9:1731, enacted by La. Acts 1964, No. 338, § 2.

24. La. Acts 1938, No. 81, § 4, once LA. R.S. 9:1794, now repealed by La. Acts 1964, No. 338, §§ 1, 3; LA. R.S. 9:1831 and 9:1833 as enacted by La. Acts 1964, No. 338, § 2.