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## Private Law: Trusts

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## TRUSTS

*Gerald LeVan\**

## ESTATE PLANNING AND SUCCESSION OF HYDE

In *Succession of Hyde*,<sup>1</sup> decedent was survived by his second wife and two children of his first marriage. In his will he left his second spouse "the usufruct until her death of all property both separate and community owned by me at my death." His children, as forced heirs, claimed that this disposition should be reduced to a usufruct over the disposable portion.<sup>2</sup> The widow argued that article 1499<sup>3</sup> of the Civil Code compelled the forced heirs either to execute the disposition as written, or to abandon the entire disposable portion to her *in full ownership*. The widow prevailed. The Louisiana supreme court noted that article 1752 of the Civil Code had once limited dispositions to the second spouse but since 1916 had permitted the second spouse to receive whatever the testator could leave to a "stranger."<sup>4</sup> The court applied article 1499 as written, stating that "[s]uch is the price which must be paid for frustration of the testator's will in this regard."<sup>5</sup> In the course of its opinion, the court reaffirmed that the legitime can be satisfied only by a "fixed portion of the estate in property" and "must be in full ownership," but saw no violation of this principle so long as the election permitted by article 1499 was preserved.

A literal reading of article 1499 indicates the election is available only when *the value* of the usufruct exceeds the disposable portion, suggesting the necessity to appraise the usufruct either by actuarial means or otherwise. However, the court avoided the valuation issue — its test is simply whether the usufruct impinges upon the forced portion *at all*, regardless of its "value."<sup>6</sup> By effectively reading out the

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1. 292 So. 2d 693 (La. 1974).

2. The legitime of the two children was one-fourth each, and the disposable portion, one-half. LA. CIV. CODE art. 1493.

3. "If the disposition made by donation *inter vivos* or *mortis causa* be of a usufruct, or of an annuity, *the value* of which exceeds the disposable portion, the forced heirs have the option either to execute the disposition or to abandon to the donee the ownership of such portion of the estate as the donor had a right to dispose of." LA. CIV. CODE art. 1499. (Emphasis added.)

4. "A man or woman who contracts a second or subsequent marriage, having a child or children by a former marriage, can give to his wife . . . by last will and testament . . . all of that portion of his estate . . . he . . . could legally give to a stranger." LA. CIV. CODE art. 1752.

5. *Succession of Hyde*, 292 So. 2d 693, 697 (La. 1974).

6. "The Louisiana cases discussing this question have held that there is no need

requirement that the *value* of the usufruct exceed the disposable portion, the court left open the possibility that article 1499 will apply in the case of only slight impingement. Suppose the second spouse, age seventy-five, is left the usufruct on the entire estate which, by *actuarial* valuation, is worth less than ten percent of the property which it affects. According to *Hyde*, article 1499 would still apply because valuation is not a factor—the relative value of the usufruct and of the disposable portion are immaterial.

Suppose the *Hyde* disposition had been in trust with principal to the forced heirs and income to the surviving spouse. The election under article 1499 would seem to be available. If exercised, would the trust continue as to all interests? Prior to a 1974 amendment, section 1844 of the Trust Code provided that the legitime in trust may be burdened with an income interest or usufruct in favor of another "to the same extent that a usufruct of the same property could be stipulated in favor of the same person for a like period." The comments following section 1844 discuss only the article 916 usufruct of the surviving spouse or an equivalent income interest.<sup>7</sup> However, it would seem reasonable to have extended section 1844 of the Trust Code to the legitime in trust burdened with a usufruct (or equivalent income interest) in favor of a stranger, subject to the election extended under article 1499. Thus, had Mr. Hyde left his property in trust naming his wife as income beneficiary for life and his children as principal beneficiaries, in absence of an election under article 1499, the income interest of the second spouse should constitute a permissible burden on the legitime.<sup>8</sup> Had the forced heirs elected to surrender the dispo-

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to first value the usufruct. . . . This was the prevailing French view . . . and is the prevailing French view. . . ." *Id.* The court relied upon its decision in *Clarkson v. Clarkson*, 13 La. Ann. 422 (1858) and upon Professor Yiannopoulos' exposition of the French Law. One could question the reliance upon decisions handed down before the rise of modern actuarial science.

7. See LA. R.S. 9:1844 (Supp. 1964) comment (b); *Id.* comment (c): "An income interest in a trust is an alternative to a usufruct. While the rights of an income beneficiary may not be precisely the same as the rights of a usufructuary because the nature of the property and consequent rules of administration and apportionment . . . may differ, the vesting of an income interest in a trust as the substantial equivalent of a usufruct complies with the requirements of this section, provided the trust instrument creates no greater rights in the income beneficiary than the rights that would exist under this Code if the trust instrument contained no provisions with respect to administration, contribution of expenses, or apportionment of income." An extensive comparison of the rights of usufructuaries and income beneficiaries is contained in Hunter, *Planning for the Surviving Spouse Under Forced Heirship*, 1 COMMUNITY PROPERTY J. 195 (1974).

8. LA. R.S. 9:1844 (Supp. 1964) originally provided: "The legitime in trust may be burdened with an income interest or with a usufruct in favor of a person other than

able portion of the income from their forced portions, the trust would probably have remained intact. Sections 1724 and 1737<sup>9</sup> of the Trust Code together with its general legislative history suggest liberal construction in favor of maintaining the trust and it seems reasonable to assume that the settlor would not intend exercise of the election to defeat the trust as to any interest. Thus, upon the forced heirs' election, the second spouse would become principal beneficiary as to the disposable portion and the forced heirs income beneficiaries as to their legitime.

For federal estate tax purposes, the disposition in *Hyde* would not qualify for marital deduction under article 2056 of the Internal Revenue Code, since the usufruct is a "terminable interest." However, section 2056(d)(2) would seem to qualify the disposable portion for the marital deduction if the election were made by the forced heirs before the estate tax return was due and before accepting their interests in the succession.<sup>10</sup> For this reason, forced heirs will want to consider the effect of the marital deduction in deciding whether or not to exercise the article 1499 election.

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*the forced heir* to the same extent that a usufruct of the same property could be stipulated in favor of the same person for a like period." (Emphasis added.) La. Acts 1974, No. 126 substitutes the words "surviving spouse" for "person other than the forced heir." The new language would not have changed the result, had the *Hyde* disposition been in trust, since Mrs. Hyde was a surviving spouse.

LA. CIV. CODE art. 1499 applies to *any person* who is named as usufructuary over the forced portion, and permits him to retain the usufruct if the forced heirs so elect. By contrast, LA. R.S. 9:1844 (Supp. 1964), *as amended* by La. Acts 1974, No. 126, would seem to limit those whose usufructs or income interests may burden the legitime in trust, to the settlor's surviving spouse. In light of *Hyde*, perhaps the original language of section 1844 should be restored.

9. LA. R.S. 9:1724 (Supp. 1964): "The provisions of this Code shall be accorded a liberal construction in favor of freedom of disposition. . . . [N]either the Civil Code nor any other law shall be invoked to defeat a disposition sanctioned expressly or impliedly by this Code."

LA. R.S. 9:1737 (Supp. 1964): "A settlor may dispose of property in trust to the same extent that he may dispose of that property free of trust and to any other extent authorized by this Code. . . ."

10. INT. REV. CODE OF 1954, § 2056(d)(2): "If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then — (A) if the disclaimer of such interest is made by such person before the date prescribed for the filing of the estate tax return and if such person does not accept such interest before making the disclaimer, such interest shall, for the purposes of this section, be considered as passing from the decedent to the surviving spouse. . . ."

## PROHIBITED SUBSTITUTIONS

In *Succession of Stewart*,<sup>11</sup> a bank co-trustee sought instructions as to interpretation of several provisions of a testamentary trust created in 1956, before the enactment of the Trust Code. The validity of the trust itself was subsequently placed at issue. The trust was to extend for the maximum term permitted by existing law. The trustees were authorized to make "charitable bequests" of income at their discretion, to make "loans or donations" at their discretion to "my many nieces and nephews both of the whole and of the half blood as well as their descendants," and were empowered to accumulate income until *the beneficiary*, a named nephew, reached age sixty-five, at which time the trust would terminate. The testator's stated intention was "to provide for my family, subject to the discretion of said trustees, as I am confident the trustees can increase my said estate."

The bank trustee argued for an interpretation vesting income and principal *per stirpes* in as many shares as there were nieces and nephews of the decedent alive at his death and allocating each distribution against the vested interest of each beneficiary. The trustee further argued that substantial distribution of the trust estate was to be accomplished by the time the named beneficiary reached the age of sixty-five but in such manner as to preclude the total value of the property from being diminished, if possible. The will was admittedly ambiguous and considerable evidence of the testator's intention was introduced, including the testimony of the attorney who drafted the will and who largely supported the trustee's position. The supreme court held the trust valid and the bank trustee's interpretation was largely sustained. The maximum duration of the trust as provided by section 1794(2) of the Trust Estates Act as to a trust created prior to the 1962 amendment thereto was until the death of the last surviving income beneficiary (here possibly foreshortened by the named beneficiary reaching age sixty-five). The instruction as to "charitable bequests" by the trustees was viewed as merely precatory and without binding effect. After a lengthy review of the jurisprudence, the court concluded that none of the dispositions constituted prohibited substitutions nor *fidei commissa* under article 1520 of the Civil Code as it read at the testator's death in 1956,<sup>12</sup> since each of the beneficiaries

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11. 301 So. 2d 872 (La. 1974).

12. LA. CIV. CODE art. 1520: "Substitutions and *fidei commissa* are and remain prohibited. . . ." La. Acts 1962, No. 45 changed the language to read: "Substitutions are and remain prohibited, except as permitted by the laws relating to trust." Substitutions were prohibited by La. Const. art. IV, §16 (1921). However, the 1974 Constitution does not contain such prohibition. See LA. CONST. art. XII, §5.

was immediately vested with his interest at the creation of the trust. Nor did the powers granted to the trustees allow them to choose beneficiaries or to define their interests in violation of article 1573 of the Civil Code which prohibits donations committed to the choice of a third person.<sup>13</sup> On this point, the court noted that section 2522 of the Trust Code, as amended, provides that the Trust Code shall govern “*administrative and procedural matters*” as to trusts created *prior to its enactment* (unless otherwise stipulated in the trust instrument); that the distributions to beneficiaries contemplated by the Stewart trust (1956) were “*purely administrative*” and thus approved and controlled by the subsequent enactment of section 2068 of the Trust Code. Accordingly, although there may have been doubt whether such distributions were authorized by the Trust Estates Act, such authority was granted by section 2068 of the Trust Code.<sup>14</sup>

*Stewart* is an important case in at least two respects. First, it represents *by far* the most liberal construction of a trust instrument yet handed down by the Louisiana supreme court. The trust was created under the Trust Estates Act and could have easily been declared invalid as containing numerous prohibited substitutions under the negative approach taken by the court in *Successions of Guillory*,<sup>15</sup> *Meadors*<sup>16</sup> and *Simms*.<sup>17</sup> If *Stewart* represents the *attitude* of the majority of the supreme court towards trusts generally, then liberal construction in favor of validity (as mandated by section 1724 of the Trust Code) may be expected in subsequent decisions. Secondly, the court has spoken favorably and for the first time about section 2252 of the Trust Code which applies its “*administrative and procedural*” provisions to trusts created under prior law.<sup>18</sup>

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13. LA. CIV. CODE art. 1573: “The custom of willing by testament, by the intervention of a commissary or attorney in fact is abolished. Thus the institution of an heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator.”

14. LA. R.S. 9:2068 (Supp. 1964) provides generally for invasion of an interest in principal or income under objective standards provided in the trust instrument and for anticipatory distribution to sole beneficiaries.

15. Succession of Guillory, 232 La. 213, 94 So. 2d 38 (1957).

16. Succession of Meadors, 135 So. 2d 679 (La. App. 2d Cir. 1961).

17. Succession of Simms, 250 La. 177, 195 So. 2d 114 (1965).

18. LA. R.S. 9:2252 (Supp. 1964), *as amended by* La. Acts 1968, No. 137 §1 provides in part: “Unless otherwise provided in the trust instrument, trusts created prior to the effective date of this Code shall be governed *in all administrative and procedural matters* by the provisions of *this Code* and not by laws in effect at the time of creation of such trusts, and trusts created prior to the adoption of *any amendment* to this Code shall be governed in *administrative and procedural matters* by the provisions of *the amendment*.” (Emphasis supplied.) The comment following the 1968 amendment in-

## EX PARTE INSTRUCTIONS TO TRUSTEES

In *In re Gulf Oxygen Welders Supply Profit Sharing Plan and Trust Agreement*,<sup>19</sup> trustees of a qualified profit sharing plan applied to the district court "for instructions concerning the trust instrument, interpretation of the instrument, or administration of the trust" pursuant to section 2233(B) of the Trust Code, with regard to the year in which the plan had terminated.<sup>20</sup> The district court viewed this as a request for an advisory opinion and held section 2233(B) unconstitutional. The supreme court in an opinion by Justice Tate, saw the apparent intent of section 2233(B) as enabling the trustee to deal efficiently with third persons pursuant to court instructions obtained *ex parte*, but without prejudice to the rights of the settlor or a beneficiary to hold the trustee liable for breach of his trust in that regard.

A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust. He is entitled to instructions of the court as a protection.<sup>21</sup>

However, he is entitled to instructions *only* where there is *reasonable doubt* as to his duties and powers.

The courts do not hold themselves out to act as lawyers for timid trustees who seek court protection in every move they make or who desire to save the trust the expenses of procuring the assistance of a lawyer. Further, the trustee is not entitled to instructions on questions which have not yet arisen or may never arise.<sup>22</sup>

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dicates that no subsequent legislation shall affect any "vested rights." Apparently the supreme court views the power to make anticipatory distributions to sole beneficiaries as an "administrative power." There is obvious room for disagreement as to whether an amendment authorizing the trustee to vary the time of enjoyment by a beneficiary "affects his vested rights." Suppose R.S. 9:1963 were amended to give the trustee the power to accumulate income even if the trust instrument is silent. Would such amendment affect the "vested rights" of beneficiaries to a distribution of income every six months, as would be the case under R.S. 9:1962 prior to such amendment?

19. 297 So. 2d 663 (La. 1974).

20. LA. R.S. 9:2233(B) (Supp. 1964): "A trustee may apply [to a proper court] for instructions in *ex parte* proceedings. The order issued therein will protect a third person relying on the order, but will not exonerate a trustee from liability to a settlor or a beneficiary."

21. 297 So. 2d at 667, quoting 3 A. SCOTT, TRUSTS 259 (3d ed. 1967).

22. 297 So. 2d at 667 n.6, quoting G. BOGERT, TRUSTS AND TRUSTEES 96 (2d ed. 1960): "The court will not advise the trustee as to his powers where they are clearly fixed by the trust instrument or by common or statute law, but only in cases of real difficulty where there is an honest doubt after a careful reading of the instrument and the procurement of legal advice from counsel. The courts do not hold themselves out

The court seemed particularly concerned with the effect of such instructions on the beneficiaries adversely affected who were not parties to the trustee-instruction proceedings. Here the question was whether a substantial forfeited interest of three resigned employees in the trust had been properly allocated to the three new employees who replaced them. The court seemed satisfied that the *trustee* could be protected by such instructions but his acts pursuant thereto would not be binding on *beneficiaries* without notice or opportunity to be heard.

In dictum the court encouraged trial courts to seek help with difficult trustee-instructions by pointing out that article 192 of the Code of Civil Procedure permits a trial court on its own motion to call upon "persons learned or skilled in a science, art, profession or calling" as experts to assist in adjudication of any case in which their special knowledge or skill may aid the court. It is not clear whether this reference refers to expert *legal* opinion.

#### COMMUNITY INTEREST IN DEFERRED COMPENSATION BENEFITS

In *Succession of Mendoza*,<sup>23</sup> the decedent had become a member of the Seafarers' Union Welfare Plan prior to his marriage. All contributions were made by the employer and were contingent upon minimum employment under the union collective bargaining agreement. The decedent had the right to designate a beneficiary but did not do so. The issue was whether the death benefit payable to his estate in absence of a designation of a different beneficiary was separate or community property. The Fourth Circuit Court of Appeal held that the death benefit was decedent's separate property since his right thereto had been acquired prior to the marriage. The court cited *Succession of Rockvoan*<sup>24</sup> where the non-testamentary designation of a beneficiary of death benefits was upheld on the basis of the plan's similarity to life insurance and distinguished *Laffitte v. Laffitte*,<sup>25</sup> which held that an employee's fully vested interest in a qualified profit sharing plan, all earned during the marriage, was community property. The death benefit paid under a plan which antedated the marriage constituted the separate property of the deceased. Since no beneficiary was named, the benefit proceeds became probate assets.

Although concurring in the result, Judge Lemmon suggested that

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to act as lawyers for timid trustees who seek court protection in every move they make or who desire to save the trust the expense of procuring the assistance of a lawyer.' "

23. 288 So. 2d 673 (La. App. 4th Cir. 1973).

24. 141 So. 2d 438 (La. App. 4th Cir. 1962).

25. 232 So. 2d 92 (La. App. 2d Cir. 1970).



the decedent's right to name the recipient of the death benefits was not "property" but rather a type of "power of appointment" not susceptible to classification as separate or community; that classification of a mere "power" to divert the proceeds from the probate estate should not be a "property right."<sup>26</sup> Instead, he suggested that such benefits be allocated on the basis of the "source of funds" from which they were derived. Applying this suggestion, he would allocate that portion of the death benefit earned by work *prior to* the marriage to the heirs of the separate estate and that part acquired by work *during* the marriage to the heirs of the community estate.<sup>27</sup>

*Mendoza* illustrates that Louisiana, like some other community property states, is still wrestling with the incorporation of retirement benefits into its traditional property system. Judge Lemmon was concerned that *Mendoza* could have entered the welfare plan on the day before his marriage and worked for thirty years thereafter and that, upon his death, his wife would not be entitled to any of the death benefits for which community labor and industry was almost entirely responsible. Perhaps some comprehensive legislative solution to employee deferred compensation benefits is in order.

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26. Succession of *Mendoza*, 288 So. 2d 673, 675 (La. App. 4th Cir. 1973) (Lemmon, J., concurring).

27. Judge Lemmon's reference to a "power of appointment" seems unfortunate since such powers are not recognized by Louisiana law. LA. CIV. CODE art. 1573. However, his point seems well taken. As to death benefits generally, including life insurance, community property states have adopted either an "inception of title" approach, (characterizing the benefits as separate or community depending upon whether the *right* was initially acquired before or during the marriage) or a "proportionate interest" approach (characterizing the benefits according to the source of payment—*i. e.*, insurance premiums, employee fringe benefits, etc). Louisiana and Texas have adopted the "inception of title" approach. *In re Moseman's Estate*, 38 La. Ann. 219 (1886); *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App. 1963). *But cf.* *Parsons v. U.S.*, 308 F. Supp. 1159 (E.D. Tex. 1970). California and Washington give effect to the "proportionate interest" approach which Judge Lemmon seems to favor. *Forbes v. Forbes*, 118 Cal. App. 324, 257 P.2d 721 (1953); *In re Coffey's Estate*, 195 Wash. 379, 81 P.2d 283 (1938). *See, e.g.*, Garcia, *Retirement Benefits and the Right to Reimbursement in a Community Property Divorce*, 1 COMMUNITY PROPERTY J. 206 (1974), discussing an alternative to both approaches.