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LOUISIANA COUNTERPARTS TO LEGAL AND EQUITABLE TITLE

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Why the absence of trusts in the civil law? That question has been debated in the literature for more than fifty years.[1] Some writers suggest that the redactors of the Code Napoleon viewed the trust as contrary to the political idealism that produced the French Revolution. Preoccupied with the abolition of feudal burdens, the Code Napoleon borrowed the idea of indivisible and absolute ownership from the classical period of Roman law. According to some scholars, the civil law had been moving toward a concept of divided ownership, *i.e.*, the separation of *ownership* from the *control* of property, when the Code Napoleon abruptly ended that trend. In those civil law jurisdictions strongly influenced by the political idealism of the French Revolution, the trend toward adoption of the trust concept was reversed successfully. However, in some civil law jurisdictions, such as Quebec, Scotland, South Africa and later Latin America, which were situated near influential common law neighbors, the notion of separating ownership from control gained considerable currency.[2] In one way or another, these latter jurisdictions accomodated their laws to the practical necessity of the trust device. Though called a "substitution" in Quebec, and a "fidei commissario" in Mexico, the accomodation has been made.

Perhaps more than any other civil law jurisdiction, Louisiana has embraced the language and concepts of the Anglo-American trust. Some commentators have referred to the Louisiana Trust Code of 1964 as an amalgamation of the *Trust Estates Law*, the *Restatement of Trusts* and the *Uniform Principal and Income Act*.[3] Yet some gaps remain.

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1. Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L. J. 1126 (1927); Garrigues, *Law of Trusts*, 2 AM. J. COMP. L. 25 (1953); Stone, *Trusts in Louisiana*, 1 INT'L & COMP. L. Q. 368 (1952); Comment, *Why No Trusts in the Civil Law?*, 2 AM. J. COMP. L. 209 (1953).

2. *See* Comment, *supra* note 1, at 208-12. *See also* Garrigues, *supra* note 1, at 30-32; Pringsheim, *Legal Estate and Equitable Interest in Roman Law*, 59 L. Q. REV. 244 (1943).

3. *See generally* Oppenheim, *Introductory Comments to the Louisiana Trust Code*, LA. R.S. 3A, XXVII & XXXI (Supp. 1965).

Prior to the enactment of the Trust Code, the precise interests of the trust beneficiary and the trustee in the trust property were ill-defined. Who was the *owner* of the trust property? Was the owner the trustee who could manage, but not enjoy, or the beneficiary who could enjoy, but not manage? Since orthodox civil law property concepts forbade the bifurcation of ownership, it was arguable that the owner was either the beneficiary or the trustee, but in no case both. After all, ownership was supposed to be absolute and indivisible.

The Trust Code of 1964 did not undertake specifically to settle the question. Perhaps the sole clue is found in section 1781 which provides: "A trustee is a person to whom *title* to the trust property is transferred to be administered by him as a fiduciary."[4] If "title" were tantamount to absolute and indivisible ownership, then the ownership of trust property must be in the trustee. Thus, when the attributes of ownership become important, one would look to the trustee's title for the appropriate solution.

However, suppose a trust beneficiary marries after the trust is created and thereafter divorces while the trust is still in existence. The non-beneficiary spouse claims that trust income accruing during the marriage fell into the community. In *Reynolds v. Reynolds*,[5] the Louisiana Supreme Court has recently supplied an answer, if not a solution.

Mrs. Reynolds was one of four beneficiaries of a testamentary trust created prior to her marriage. Some of the trust income accruing to her interest during her marriage was distributed to her and deposited by her in a bank account to which she had sole access. The remainder of Mrs. Reynolds' share of the income was accumulated by the trustee under discretionary powers granted in the trust instrument. Upon divorce, her ex-husband claimed that all of the trust income accruing during the marriage, both distributed and undistributed, had fallen into the community. Mrs. Reynolds had not recorded an affidavit of paraphernality as required by former Civil Code article 2386.[6] She claimed, on the other hand, that all distributed and undistributed income was her separate property, relying upon *Dunham v. Dunham*.[7]

The third circuit held that all of the trust income accruing during the marriage fell into the community, whether distributed or not.

4. LA. R.S. 9:1781 (Supp. 1964) (emphasis added).

5. 388 So. 2d 1135 (La. 1980).

6. The same principle is carried forward into the current law. LA. CIV. CODE art. 2339.

7. 174 So. 2d 898 (La. App. 1st. Cir. 1965). *But see* United States v. Burglass, 172 F.2d 960 (5th Cir. 1949).

On original hearing the supreme court reversed.[8] The majority based its decision on the nature of the trustee's *title*, predicated on section 1781 of the Trust Code, which equates title with ownership. The majority interpreted that article on original hearing:

> That the *title* transferred to the trustee in the case at bar was intended to vest ownership in the trustee is made manifest by the meaning of the word "title" . . . . When *ownership* is vested in the trustee with full powers as such it cannot be said that the beneficiary of the trust then has rights in the property which entitle her to its fruits unless, as in this case, the trustee willed it so. No statute in Louisiana confers upon a trust *beneficiary* . . . the *ownership* of the corpus of the trust; the interest of the beneficiary is an interest *in the trust, not* in the *corpus*. Likewise, no Louisiana case . . . confers upon the beneficiary a right of *ownership* in the corpus of the trust. . . . While . . . *ownership* remained in the trustee the fruits of the property *could not fall into the community* between the beneficiary wife and her husband. . . . The *beneficiary* . . . had *no right to administer* the trust property; the full authority in that respect was vested in the trustee. . . . She was without even the slightest indicia of *ownership* so long as the trust endured. Thus the funds transferred to the wife as beneficiary of the trust prior to the dissolution of her marriage were not the fruits of her property. The funds were, instead, property which she received from income of the trust corpus *owned by the trustee*. If however, these funds, once transferred to the wife's account, had produced revenues in the form of interest or otherwise, that interest would have become "fruit" to her separate property and as such would fall into the community existing between the parties.
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> This same result, although somewhat differently postured factually, pertains to the *undistributed* trust revenues. Only the trustee had the right to order these revenues paid to the grandchildren beneficiaries and then for the purpose of their maintenance and education in his discretion during the existence of the trust. So long as the trustee *retained* them, they remained the *property* of the trust. . . .
>
> The settlor . . . plainly did not intend that the beneficiaries . . . acquire administration or control of the corpus or undistributed revenues of the trust until the trust was terminated. At that time the corpus of the trust and its remaining revenues were to be delivered to her grandchildren, the beneficiaries. *Until that*

8. 388 So. 2d 1135 (La. 1980).

time the beneficiaries could not invoke Article 2386 with respect to property and its revenues *owned* by the trustee.

These reasons result in this Court's approval of *Dunham v. Dunham*, and our decision not to consider *U.S. v. Burglass*, authoritative in Louisiana State courts.[9]

A dissenting opinion offered by Justice Dennis, joined by Justices Marcus and Blanche, would have adhered to the third circuit result.[10]

On rehearing, the supreme court held that *distributed* income fell into the community, but that *undistributed* trust income remained the separate property of the beneficiary spouse.

According to the plurality opinion on rehearing:

The *beneficial interest* of Ms. Reynolds in the trust is clearly *less* than *full ownership* . . . . *Title* to the property vested in the trustee. . . . The undistributed income from the trust was under the control and dominion of the trustee. It accrued to the trustee during the term of the trust, as a civil fruit unseparated from the corpus of the trust . . . Ms. Reynolds had no right to this money until the trustee decided to distribute it. The *undistributed* income did *not* fall into the community.

Although [Ms.] Reynolds *did not own* the corpus of the trust, her paraphernal estate included a *beneficial interest*, an incorporeal right. . . . The distributed revenues from that incorporeal right were civil fruits. . . . Once distributed, the wife had full ownership of this income. These fruits of the wife's paraphernal property fell into community because no instrument was filed to reserve them for the wife.[11]

A dissent by the Chief Justice argued that the original opinion was correct; *i.e.*, *neither* distributed *nor* undistributed trust income fell into the community.[12] Most of the dissenting opinion is devoted to a discussion of the trustee's "title" and "ownership." The dissent began by separating Mrs. Reynolds' interests as principal beneficiary, and as income beneficiary, noting the different treatment of these interests when creditors' rights were violated and for federal gift tax purposes.[13] The dissent further noted that the trust instru-

9. *Id.* at 1139 (emphasis added) (citations omitted).

10. 388 So. 2d at 1140 (Dennis, J., dissenting).

11. 388 So. 2d at 1141 (emphasis added).

12. 388 So. 2d at 1144 (Dixon, C.J., dissenting).

13. *Id.* at 1144-45. Presumably this discussion refers to the spendthrift provisions of the Trust Code, LA. R.S. 9:2001-07 (Supp. 1964), and to the distinction for federal gift tax purposes made between "present interests" and "future interests." I.R.C. § 2503.

ment subjected Mrs. Reynolds' income interest to spendthrift provisions and gave the trustee the power to accumulate or distribute income.[14] This limited income interest was analogized to "an annuity or an alimentary pension rather than as a usufruct or right to fruits."[15] As to Mrs. Reynolds' interest in principal, the dissent opined:

> It is apparent that the only interest bequeathed to Mrs. Reynolds was the right to receive a portion of the trust corpus at *some* time in the future. It should be noted that not only was the *time* at which this right could be exercised made *indefinite* by the terms of the will (dependent upon the possible birth of additional grandchildren before the testator's death and the possible deaths of the grandchildren before the age of twenty-one) but that the *amount* of the property to be received was also indefinite. That is, the percentage of the total corpus she could ultimately receive was dependent upon the number of grandchildren living at the time of the testator's death, while the nature and value of the corpus itself were dependent upon the manner in which the trustee exercised his powers to manage, lease, sell and encumber the trust property, to invest and reinvest, and to make payments of principal to the various beneficiaries in accordance with their needs. It is conceivable that there might be *no* trust property upon which Mrs. Reynolds could exercise her right to delivery at the termination of the trust. It is because of the indeterminate nature of the interest in principal (and also in income . . .) that "eventual interests in trusts usually are not readily assignable."[16]

The dissent continued:

> It is *unreasonable* to characterize Mrs. Reynolds' right to receive an indefinite amount of property at an undetermined future date as an interest which constitutes *ownership* of property under the principles of this state's property law. . . .
>
> It is obvious that Mrs. Reynolds' future and indefinite right is devoid of the indispensable elements of ownership: immediacy, dominion, and authority [citing Article 477, Civil Code as amended in 1979]. It is argued that these elements are also absent in situations of curatorship, tutorship and the administration of successions, but that interdicts, minors and heirs are nonetheless "*owners*" of their property. In common law jurisdictions, the relationship established by a trust is distinguished from the rela-

14. 388 So. 2d at 1146 (Dixon, C.J., dissenting).
15. *Id.*
16. *Id.* at 1147 (emphasis added).

> tionship involved in situations like curatorship through the context of title: a curator has *possession* and powers of disposition, but the *title* to the property remains in the ward, so that the curator may be likened to the ward's court appointed agent.[17]

However, the dissent urged:

> The rights granted to the *trustee* by the settlor constitute *ownership* under our law. . . . Additional evidence of the trustee's ownership is provided by the fact that where there are personal liabilities incidental to ownership of the trust property, e.g. for specific performance of contracts and convenants running with the land, *these fall on the trustee just as if he were absolute owner*. . . . Article 477 . . . authorizes the restriction of an owner's rights "within the limits and under the conditions established by law"—here the duties imposed upon a trustee by the Louisiana Trust Code.
>
> We therefore should find that Mrs. Reynolds' interest in the corpus of the trust did not constitute an "ownership" of separate property which could produce *either* income payments or undistributed income as "fruits". Instead, the trust agreement conferred upon her, as a donation *mortis causa*, an independent interest in receiving those funds; the income is hers by virtue of the donation mortis causa, and therefore her separate property.[18]

The dissent then reviewed the place of bifurcated ownership in a civil law system:

> Principles established in the Civil Code are designed to function in an entire system of laws in this state. When the principle is clear, concise, broad and universally understood and accepted, it should not be deemed changed or abandoned by inference. If subsequent legislation clearly indicates that our former concept of ownership is hereafter changed or modified in some respect, the change should be accepted. Further, if the legislature establishes a relationship between persons and property *that cannot function*, or will be hampered and impeded in its operation *by its adhering to the established concept of ownership, then, and only then, would we be justified in finding an inference that the legislature intended to change the law of ownership.*
>
> Here there is neither statutory provision changing the meaning of ownership, nor conceptual hiatus requiring us to find an inference of intent to change it, in order to permit the legislative scheme to function. The trust is permitted by the Constitution

17. *Id.*
18. *Id.* at 1148 & n.3.

> (Article 12, § 5) and the statutory scheme is as complete as it need be. Absolutely no impediment to the function of the trust will occur by the application of the accepted Civil Code concept of ownership. The *unknown* factor in this case would be the effect of holding that the income beneficiary and the trustee *both* have *ownership interests* in the property constituting the corpus.
>
> The statutes do *not* say whether the trustee or the beneficiary is the *owner* of the corpus. The trustee has *title*. R.S. 9:1731 contains no inference that the beneficiary is the owner. . . . Section 1731 fixes the relationship of the trustee as a *fiduciary* to administer the corpus for the benefit of another. *The will gave him all the powers of ownership. Ownership powers* in the trustee are not essential for the validity or utility of a trust, *but this trustee is the owner.*[19]

The "title" of the trustee is no more than fiduciary or managerial. His "ownership," if any, is severely circumscribed by his duties. A trust is not an entity, but merely a relationship arising out of the peculiar circumstances.[20] During the trust relationship, questions may arise involving the ownership of the trust property; these questions can be answered only by attributing the underlying ownership to the beneficiaries. For example, in *St. Charles Land Trust v. St. Amant*[21] it was necessary to determine whether a nonresident beneficiary's interest in a trust was movable or immovable for Louisiana inheritance tax purposes. Because the trust owned only producing mineral interests in Louisiana, the beneficiary's interest was classified as immovable and taxed as such.[22] Had the ownership of the trust property been in the *trustee*, and not in the beneficiary, the beneficiary would have owned nothing; thus no tax would have been due.[23]

The same question can arise in other fiduciary relationships such as tutorship, curatorship, or in successions. In *Succession of Cutrer v. Curtis*[24] the first circuit concluded that an heir may sell his *interest* in the succession while it is under administration, though he cannot convey title to any particular property.[25] Third persons may deal with the succession representative *as though* he were the owner,

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19. *Id.* at 1149 (emphasis added).

20. LA. R.S. 9:1731 (Supp. 1964): "A trust, as the term is used in this Code, is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another."

21. 253 La. 243, 217 So. 2d 385 (1969).

22. 253 La. at 258, 217 So. 2d at 390.

23. 253 La. at 251, 217 So. 2d at 388.

24. 341 So. 2d 1209 (La. App. 1st Cir. 1976).

25. *Id.* at 1216.

although in the civil law system, ownership passes directly to the heir under the principle of *le mort saisit le vif*.[26]

Suppose a married person owning separate property is interdicted. The power to administer his property passes to his curator. Does the imposition of curatorship operate to change the *character* of income from separate property, merely because the interdict can no longer administer it? Is the income accruing to inherited property the separate property of the heir or legatee merely because he cannot compel distribution? In *Baten v. Taylor*[27] the supreme court acknowledged that the heir *owns* even though he may not *manage* for a time.[28] In this context, at least, the court recognized the division of ownership from control. It would seem that the same concepts should apply equally to tutorship, curatorship and trusts.

The tutor, curator, or trustee may *act* like owners in the eyes of third persons, but only as to third persons.[29] They may not enjoy the use of the property. The true owner is the minor, the interdict, or the beneficiary.[30] The title transferred to the Louisiana trustee is surely not absolute ownership as envisioned in the *Code Napoleon*, but the investiture of *fiduciary capacity* to deal with third persons.[31] The fiduciary may have a sort of title sufficient to transmit ownership, but he can never enjoy it. Ownership, absent the power to manage, remains in the beneficiary (minor or interdict), bereft of the power to manage.

In terms of results, it appears the supreme court has compromised in *Reynolds*. The opinion leaves several unresolved problems in its wake. Under the rationale of *Reynolds*, the trustee's power to accumulate income becomes the power to *characterize* income accuring during the marriage, regardless of the preference of the spouses. The characterization of income accruing during marriage traditionally has been determined by the spouses themselves, either by declaration of the owner spouse or by matrimonial agreement. I find no authority in the Trust Code to disturb these normal means of classification. It seems clear that trust income, distributed or undistributed, should be governed by these ordinary community property principles.

Further implications of *Reynolds* are troubling. The holding resurrects the spectre of classifying income from separate property

26. *See* LA. CIV. CODE art. 940.
27. 386 So. 2d 333 (La. 1979).
28. *Id.* at 340.
29. At common law each would have legal title.
30. At common law each would have equitable title.
31. LA. R.S. 9:1731 (Supp. 1964).

according to the circumstances of its administration. This approach, proven unworkable, was replaced in 1944 by notarial declaration of paraphernality.[32]

If *Reynolds* means that the characterization of income depends upon actual powers of administration available to the spouse, then how, for example, does it apply to employee benefit trusts? Suppose an employee marries after becoming a qualified participant in a profit sharing plan. Do the earnings accruing to his account remain his separate property during marriage because his interest is managed by the plan trustee? Does the income from the married interdict's separate property remain separate because he can no longer administer that property? Does the income accruing to a bequest before distribution remain the separate property of the legatee?

The equities were certainly with Mrs. Reynolds. As a matter of policy, her trust income *should* have been insulated from the claims of her divorced husband. However, adoption of that policy would require a fundamental change in Louisiana community property law.[33] Meanwhile, the *Reynolds* decision has an air of instability about it. There is no majority opinion; the supreme court was split three ways. The plurality position may be subject to reconsideration in future cases, hopefully along the lines suggested.

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32. Former Civil Code article 2386, as amended by Act 286 of 1944, is continued in all important particulars by article 2339. *See* LA. CIV. CODE 2339, *as amended by* 1979 La. Acts, No. 709.

33. LA. CIV. CODE art. 2339, *as amended by* 1979 La. Acts, No. 709.