

# A New Trust Code For Louisiana: Some Basic Policy Considerations

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A NEW TRUST CODE FOR LOUISIANA: SOME  
BASIC POLICY CONSIDERATIONS\*

*Leonard Oppenheim\*\**

I. INTRODUCTION

Presently in force in Louisiana is a comprehensive Trust Estates Law, enacted in 1938, following repeal in 1935 of the Trust Act of 1920. The 1938 act was inadequate in a number of respects. One shortcoming — the limited duration of the private trust necessitated by a provision of the Louisiana Constitution of 1921 — was eliminated, at least partially, by constitutional and legislative amendments of 1952. In 1959, when the Louisiana State Law Institute launched the present project for a new trust code, the Trust Estates Law was still defective in that it foreclosed to Louisiana residents many federal tax advantages made available to residents of other states by the trust device; failed to crystallize for Louisiana attorneys the alien concept of coexistent legal and equitable title to property; and was not adequately integrated with the provisions of the Louisiana Civil Code dealing with forced heirship, prohibited substitutions and *fidei commissa*. These shortcomings have limited the flexibility of the trust device in Louisiana for those attorneys who do use it, and discouraged others from even trying.<sup>1</sup>

The first step in the present Louisiana State Law Institute project required a decision as to the basic approach to the task in hand. On the basis of careful study it was decided to retain the trust concept embodied in the 1938 act, but to strive for clarity and certainty in operation by defining precisely the uses of the word "trust" within a civil law framework; and to seek

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\*This article is an expanded and updated version of the report given by the writer on the progress of the trusts revision project at the annual meeting of the Louisiana State Law Institute in New Orleans, Louisiana, in March 1963.

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1. For fuller discussion of the defects of the Louisiana law of private trusts, see Oppenheim, *Why a Revision of the Louisiana Trust Estates Act Is Necessary*, 18 LA. L. REV. 599 (1958).

the maximum flexibility, consistent with fundamental principles of Louisiana's legal system, for achievement of family and tax advantages. Certain intermediate legislation was proposed by the Institute and enacted in 1962, both to eliminate uncertainties in the present law created by two Louisiana court decisions and to open the way for the contemplated new trust code.<sup>2</sup>

It seems to this writer that it is no longer necessary to continue the argument raised in some quarters that the trust should not be introduced into Louisiana. In the first place, Louisiana has had trusts since 1920 and, in the second place, even if Louisiana had no trust concept, Louisiana residents could still set up trusts in other states. Moreover, there is no reason why Louisiana residents should be denied the family and tax advantages enjoyed by residents elsewhere. As pointed out above, this does not mean that Louisiana should adopt the common law trust in its entirety but rather that the trust device in Louisiana should accord when practicable and desirable with our civil law concepts. To adopt an extremely limited trust which would not serve the purposes sought to be achieved would also be futile. With these limitations and ideas in mind, the work on a new trust code has proceeded.

## II. FUNDAMENTAL POLICY CONSIDERATIONS

### A. *Title and Duration Period*

The first fundamental problem which concerned the Reporter was: Should the trustee have title? The Reporter and the Advisory Committee unanimously adopted a resolution to the effect that in Louisiana we retain the traditional Anglo-American trust concept contained in the present Trust Estates Law, but define with precision the uses of the word "trust" within a civil law framework so far as is practicable and desirable. This decision was overwhelmingly supported by the Council at its meeting on February 19, 1960.

Most of the civilian jurisdictions regarded the dual ownership of trust property as the fundamental characteristic of the trust and, in order to avoid split ownership, sought to use the trust device without recognizing the trustee as owner of the

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2. The 1962 trust amendments are dealt with at length in Oppenheim, *A New Trust Code for Louisiana: Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169 (1963). The two decisions referred to are *Succession of Guillory*, 232 La. 213, 94 So. 2d 38 (1957); *In re Succession of Meadors*, 135 So. 2d 679 (La. App. 2d Cir. 1961), *cert. denied*, Feb. 6, 1962.

property. At least two of these, Mexico and Quebec, have swung to the title theory.<sup>3</sup> The Union of South Africa, with its Roman-Dutch background, has always insisted that the trustee has title to the property, but that there is no dual ownership of the property itself.<sup>4</sup> Some leading English and American scholars have held this view of the nature of the Anglo-American trust, that is, that there is no split ownership of the trust property.<sup>5</sup> If split ownership be the objection to giving the trustee title, it can be shown that the dual ownership of the trust property is not a necessary feature of the trust.

It was necessary, of course, to consider the effect of the internal revenue rulings upon any new trust institution in which the trustee would not be given title to the property. After careful consideration it was felt that unforeseen tax problems and confusion might well arise if Louisiana departs from the present Trust Estates Act, particularly as the view of the Reporter and the Advisory Committee indicates that this concept of ownership in the trustee is the correct one.

The second major problem which was considered was: Should the maximum duration period of the trust be revised? As a matter of fact, the Reporter and the Advisory Committee believe that the maximum duration period of the trust is one of the most important problems to be considered. The 1952 amendment did extend the duration period, but a great deal of confusion was caused by the wording of the amendment. The best example of this is to be found in the word "beneficiary" as included in the amendment. Since beneficiary was not defined, it was not known whether the income or principal beneficiary was meant. The alternate ten-year period also caused considerable confusion since it was not known exactly what happened when the income beneficiary died within the ten-year period.

A survey was made of the other states to determine if they have any limitations specifically applicable to the duration of a private trust. Only Oklahoma had such a statute, which stated that trusts were to be "limited in duration to a definite period of not to exceed twenty-one years or to the period of the life or

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3. 12 BAUDOIN, *LE DROIT CIVIL DE LA PROVINCE DE QUEBEC* ch. 6 (1953); Goldschmidt, *The Trust in the Countries of Latin America*, 3 *INTER-AMERICAN L. REV.* 29 (1961).

4. Hahlo, *The Trust in South African Law*, 2 *INTER-AMERICAN L. REV.* 229 (1960).

5. 4 POWELL, *THE LAW OF REAL PROPERTY* § 500 (1954); Williams, *The Three Uncertainties*, 4 *MODERN L. REV.* 20 (1940).

lives of the beneficiary or beneficiaries thereof."<sup>6</sup> This statute was amended in 1949 so as to be inapplicable to private trusts. The common law rule against perpetuities ordinarily requires only that all interests become vested not later than the expiration of the period of the rule.<sup>7</sup> However, there is a growing tendency to use the same period as a limitation upon the duration of an indestructible trust even when all the interests are vested. New York particularly has applied its perpetuity rule to the duration of trust because by statute every trust to pay income is indestructible.<sup>8</sup> The present statute adopts the indestructibility rule obtained by judicial decision in the American states, contrary to the English rule which allows the beneficiary to terminate the trust if he is under no disability. Nevertheless, the proposed duration period for Louisiana is more conservative than the rule in any other state, whether statutory or judicial, and is also more conservative than the Restatement of Property rule.

The Committee specifically rejected any time limit based upon the period of the common law rule against perpetuities, and also narrowed the present rule from any beneficiary to an income beneficiary.<sup>9</sup> The Committee contemplates the possibility that an income beneficiary might die soon after the creation of the trust and the trust purposes would be defeated by the termination of the trust. An alternate minimum period is therefore proposed. The settlor can provide that the trust be continued for fifteen years in all events, but he must expressly elect this alternate period. The life of the income beneficiary is the measuring life; the life of the principal beneficiary cannot be the measuring life unless he is also an income beneficiary under the terms of the trust instrument. If he receives income under the terms of the trust instrument, he is an income beneficiary, however, whether or not he is specifically designated an income beneficiary. It was foreseen that a principal beneficiary who is not to receive income under the terms of the trust instrument might become an income beneficiary by reason of the operation

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6. OKLA. STAT. ANN. tit. 60, § 172 (1963); see Browder, *Perpetuities in Oklahoma*, 6 OKLA. L. REV. 1 (1953).

7. SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* §§ 1222-35 (1956).

8. N.Y. PERS. PROP. § 15; see 1 CASNER, *ESTATE PLANNING* ch. XI, pp. 627-41 (3d ed. 1961).

9. Some of these results were achieved by amending the duration section of the Trust Estates Law by La. Acts 1962, No. 74. See Oppenheim, *A New Trust Code for Louisiana: Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169, 178-80 (1963).

of the minimum fifteen-year period. It is made clear, therefore, that under such circumstances the principal beneficiary is not an income beneficiary for the purpose of determining the maximum term of the trust.

### B. Successive Beneficiaries

(1) *Separate Income and Principal Beneficiaries.*—The proposed draft of the duration period contemplates that the income beneficiary and principal beneficiary may be different persons. There is no substitution of beneficial interest here because there is no identity of the "thing" or interest. One takes income, the other takes principal. In substitution, the first donee must take the property, the title, which is divested only if the substitute survives the institute. In the case of income beneficiary, that person can never take the entire ownership. His interest is never the inheritable property, even if the second donee should die first. Civil Code Article 607 states that a donation of the revenues of property is "a kind of usufruct" for the purpose of determining its duration. However, this interest may not be strict usufruct.<sup>10</sup>

It seems obvious, then, that a donation of income to one and principal to another should not constitute substitution. Moreover, the 1962 trust amendments have now set at rest the implications of *Guillory* and *Meadors*.<sup>11</sup>

(2) *Successive Income Beneficiaries.*—Successive income beneficiaries are permissible without conflicting with any Civil Code provision. Furthermore, the surviving income beneficiaries can take the shares of those predeceasing, until the last surviving income beneficiary takes all the income. The analogy to usufruct is used, just as Civil Code Article 607 analogizes an income interest to usufruct. There is language in *Succession of McCan*<sup>12</sup> that the only dismemberment of ownership which can be made is by separating the usufruct "for a single life." This language cannot be taken literally since Civil Code Article 538 allows the usufruct to be given to more than one. The language of *McCan* cannot preclude the interpretation of one lifetime to

10. *Orphan Society v. New Orleans*, 12 La. Ann. 62 (1857). See also *Succession of Auld*, 44 La. Ann. 591, 594, 10 So. 877, 877 (1892): "It is equally true that the reprobated disposition must be of property of the testator, and not of income or revenue to subsequently accrue from the use of property after the testator's death."

11. See Oppenheim, *A New Trust Code for Louisiana: Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169, 175-76 (1963).

12. 48 La. Ann. 145, 166 (1896).

mean the surviving one. There is no substitution because the right of each usufructuary dies with him; it is not "preserved and returned." The Roman law allowed successive usufructs, provided that all donees were in being.<sup>13</sup> All the French writers agree that they are permitted, and the Louisiana jurisprudence has allowed it.<sup>14</sup>

In case the usufruct is donated to several persons conjointly, rather than one after the other, the question arises whether or not the survivors may take the fractional share of fruits. The answer is in the Civil Code itself. Article 539 states that usufruct may be given in divided or undivided portions. This article seems to contemplate the distinction made in Roman law that usufruct might be conjoint or in separate shares. Since the Roman law considered that the fruits were earned from day to day, the usufruct was never "vested" in the sense that accretion could no longer take place. Because it was conditioned on the survival of the usufructuary, the usufruct could remain conjoint. The right of accretion was not cut off.<sup>15</sup> This same view is given by Frere-Smith in *Manual of South African Trust Law*.<sup>16</sup> He states that by traditional civil law usufruct may be conjoint and the survivors take the entire income.<sup>17</sup> All the French writers have agreed that usufruct in several persons may be "revertible" to the survivors. Finally, the Louisiana jurisprudence has recognized conjoint usufruct.<sup>18</sup>

Our research convinces us that the new trust act may authorize survivorship rights in income, and this would not be substitution.<sup>19</sup> The duration provision approved by the Council contemplates this in speaking of the duration for the life of the last surviving income beneficiary.

### C. Accumulation of Income and Invasion of Principal

The Reporter and the Advisory Committee unanimously rec-

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13. BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW* 127-32 (2d ed. 1952).

14. *McCalop v. Stewart*, 11 La. Ann. 106 (1856); see *Gibson v. Zylks*, 186 La. 1043, 173 So. 757 (1937).

15. *DIGEST* 7.2.1.

16. FRERE-SMITH, *MANUAL OF SOUTH AFRICAN TRUST LAW* 42-47 (1953).

17. *Id.* at 44.

18. *Samuels v. Brownlee*, 36 La. Ann. 228 (1884); *Arcenaux v. Bernard*, 10 La. 246 (1836).

19. For a further analysis of this point, see Oppenheim, *A New Trust Code for Louisiana: Some Steps Toward Its Achievement*, 37 *TUL. L. REV.* 169, 176 (1963).

commend that these provisions be permitted expressly by the new trust act, for the reason that we do not believe that any substitution takes place, nor is there a power of appointment created.

If there is a sole beneficiary of the trust or of a separate share of the trust, there can be no substitution in accumulating his income or invading his principal for his benefit. The same person is entitled to income and principal so there can be no shifting of economic benefit.

If the income beneficiary and principal beneficiary are different persons, although it is believed that even here there is no substitution or power of appointment, a tentative decision was made not to permit invasion in this situation. Recent comments have made the Committee agree to reconsider this decision.<sup>20</sup>

(1) *Accumulation of Income.*—The Civil Code states that the donation of the revenues of a property is “a kind of usufruct.”<sup>21</sup> The jurisprudence has noted that this is a peculiar type of usufruct, unaccompanied by any right to possession.<sup>22</sup> The Civil Code does, however, recognize an interest in the fruits which may not be necessarily strict usufruct, but which is like usufruct for the purpose of duration of the interest.<sup>23</sup> This interest, then, cannot be a forbidden “tenure” of property. It is analogous to usufruct; it is more like an annuity or an alimentary pension. So long as the first donee receives only income, and the principal is given to another, there can be no question of substitution. If all the revenues of a property can be given to one, surely less than all the revenues may be donated. The Code contemplates this in charging the usufructuary with the payment of annuities. The annuitant receives less than all the income.<sup>24</sup> In *Succession of Cotton*,<sup>25</sup> the court characterized as

20. The Reporter and two members of the Advisory Committee (Mr. Alvin Rubin of Baton Rouge and Mr. Cecil Ramey of Shreveport) participated in a panel discussion entitled “Stump the Trust Experts” before the Trust Estates, Probate and Immovable Property Law Section at the Annual Meeting of the Louisiana State Bar Association at Biloxi, Mississippi, on April 25, 1963. During the discussion it became apparent that many attorneys believe that there should be invasion of principal even though the income and principal beneficiaries are different persons.

21. LA. CIVIL CODE art. 607 (1870).

22. *Orphan Society v. New Orleans*, 12 La. Ann. 62 (1857).

23. LA. CIVIL CODE art. 607 (1870).

24. *Id.* art. 580.

25. 172 La. 819, 135 So. 368 (1931).

an annuity a provision for a specified amount of the income for the income beneficiary. By provision of the Civil Code, the fruits follow the property,<sup>26</sup> so it seems that under the Civil Code itself a portion of the fruits can be donated, and the remainder would be "accumulated" and added to the principal.

There is no power of appointment in the trustee for the reason that the standard for determining what the income beneficiary will actually receive is provided in the trust itself. If the trust instrument grants an income interest to the beneficiary, limited by an ascertainable standard of support, the trustee must follow the standard. In doing so he is exercising a fiduciary power; he is not shifting the economic benefit. This distinction is used in tax law and it seems to be a valid distinction for our use in determining whether there is a power of appointment forbidden by Civil Code Article 1573.

Our civil law system has always understood the alimentary pension. While ordinarily the amount is set in specific terms, there is no Civil Code rule requiring this so long as the donor makes the amount ascertainable so as to avoid power of appointment. In this case the standard prevents the trustee from appointing the beneficial interest in the sense of Civil Code Article 1573. There seems to be no reason why accumulation should not be permitted.

(2) *Invasion of Principal.*— Accumulation of income can never be substitution because there is no shifting of principal. The invasion of principal is more difficult because the income beneficiary receives principal that is first vested in the principal beneficiary. However, our law has always understood that substitution takes place at the death of the donee who is first "vested" with the ownership. In this case the income beneficiary may receive principal, but he does not receive it at the death of the vested owner. Here the transfer may occur at any time. The power of invasion has no relation to the death of the vested owner, so there can be no substitution. The principal beneficiary does not preserve the principal for his lifetime, and then return it to another.

The income beneficiary has an interest in the nature of annuity or alimentary pension. Ordinarily an annuity or ali-

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26. I.A. CIVIL CODE art. 499 (1870).

mentary pension is charged first on the legatee of the usufruct.<sup>27</sup> If, however, there is no legacy of usufruct, the legatee or heir of the succession must pay the charge, even if it is necessary to use some of the capital of the succession. The universal legatee has merely been given less.

The case of *In re Courtin*<sup>28</sup> is authority for allowing invasion of principal for support. The case has been criticized<sup>29</sup> on the basis that the court treated the interest as "quasi-usufruct." The best explanation of the case is that the universal legatee was charged with an annuity, first to be paid from income but to be paid from principal if necessary. The case is consistent in result with the Civil Code provisions that contemplate an annuity or alimentary pension for support, charged on the heir or universal legatee.

There is no power of appointment for the same reason as detailed above. The standard of support set by the settlor means that he has given the principal beneficiary less than the full amount of the principal. The settlor, not the trustee, has determined the quantity of interest. It should be noted that any legacy of usufruct, annuity, or alimentary pension is uncertain in total dollar amount, for that total will depend upon the length of the annuitant's life. The amount to be received need not be ascertained in dollars so long as it is ascertainable from the terms of the donation. It may well be that invasion of principal should be permitted in all situations.<sup>30</sup>

(3) *Sprinkling or Spray Provisions.*—The Reporter and the Committee do not recommend that "sprinkling" trusts or "spray" provisions be authorized. Where these give absolute discretion to the trustee and thus may constitute a power of appointment, such provisions would be highly inadvisable.

#### D. The Right To Terminate the Trust

This question was raised again in connection with the duration period, after a study of the substitution problem had been made.

27. *Id.* art. 580.

28. 144 La. 971, 81 So. 457 (1919).

29. Nabors, *Restrictions Upon the Ownership of Property in Louisiana—Trusts, "Fidei Commissa" and Substitutions*, 4 TUL. L. REV. 1, 16 (1929).

30. Of course, the legitime of the forced heir could not be impinged upon by an invasion provision.

In a trust for a sole beneficiary, or a separate share for a sole beneficiary, the beneficiary "owns" the principal, yet he cannot receive the property free of the charge of trust at any time during his lifetime. He has been given income and principal; as a practical matter he has income plus the power to dispose of the principal at his death to anyone he may choose. Aside from the invalidity of the power of appointment, the French authorities see a substitution if the power is limited to one of a particular class.<sup>31</sup> If, however, the power is unlimited and the donee may choose anyone he wishes, there has been no second gratuity and there is no substitution. However, the charge to preserve is reputed not written.<sup>32</sup> Obviously the charge of trust cannot be reputed not written. It is then arguable that the beneficiary is required to preserve his spendthrift interest in principal for his entire lifetime and return it at his death to another. Any allegation of substitution could be cured by giving the beneficiary a right to terminate after a certain age, if all income beneficiaries were dead and the optional fifteen-year period had passed. In England a beneficiary under no disability always has a power to terminate.<sup>33</sup> In America the rule of indestructibility was established in the *Clafin* case, in which the trust was to terminate when the beneficiary reached thirty-five. Although our indestructibility rule has been criticized,<sup>34</sup> much can be said in its favor.

In spite of this possible objection, a majority of the Committee and the Reporter recommend that the American rule of indestructibility be adhered to and that the present law remain unchanged in this respect. Since this does not result in substitution, the settlor should have the power to determine the disposition of his property within the limits of the duration period. The rule against perpetuities in Anglo-American law requires only that interests "vest" within the period. Although there is a companion rule requiring that a trust not be indestructible for too long a time, our duration period is at least as conservative, if not more conservative, than the Anglo-American rule.

31. DALLOZ, JURISPRUDENCE GÉNÉRALÉ v° *Substitutions*, n° 89 (1856); 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 3276-3298 (1959).

32. 11 BAUDRY-LACANTINERIE, TRAITÉ THÉORETIQUE ET PRATIQUE DE DROIT CIVIL — DES OBLIGATIONS n° 3094 (1905).

33. 4 POWELL, LAW OF REAL PROPERTY § 567 (1949).

34. Martin, *On the Terminability of Trusts*, 13 TUL. L. REV. 585 (1939). However, see 4 POWELL, LAW OF REAL PROPERTY § 3567 (1949); RESTATEMENT, (SECOND), TRUSTS § 337 (1959).

*E. The Forced Heir's Right To Terminate as to His Legitime*

The question of the right to terminate was considered separately as to the legitime in trust. Should the forced heir be able to demand the principal of his reserved portion, at least after a certain age? When the 1938 statute provided that the legitime might be placed in trust, the duration period was shorter and the forced heir would ordinarily receive his principal during his lifetime. The lengthening of the duration has accomplished the depriving of the forced heir of the enjoyment of his reserved capital for his entire lifetime. The right of termination would give him at least an option to continue the trust or demand the reserved portion.

Again, a majority of the Committee and the Reporter recommend that the present act remain unchanged in this respect. It is often inconvenient for the trustee to be required to partition the capital. The major objective of the trust may be to prevent just this. The settlor can always provide that the trustee can invade principal for the sole beneficiary of the trust, or a separable share, and the trustee is not limited to any standard of support where there is one beneficiary of income and principal. The settlor can, if he wishes, provide that the beneficiary have the power of termination. The right of forced heirs may not be abolished but it may be restricted.<sup>35</sup> Therefore, there appears to be no reason why the trust should not be indestructible even where the legitime is placed in trust.

*F. Spendthrift Provisions for Principal Affecting the Legitime*

The original 1938 statute allowed spendthrift provisions for income only. In 1944 this authorization was extended to include spendthrift provisions for principal. Should the settlor be allowed to prevent the forced heir's assigning his interest in the principal of his reserved portion? It should be noted that the 1938 act authorized the placing of the legitime in trust so long as all the income was paid to the forced heir, but ordinarily the forced heir would actually receive the principal during his lifetime, and, moreover, the spendthrift provisions could not affect the principal. By one of the 1952 amendments, the forced heir

35. Succession of Earhart, 220 La. 817, 824, 57 So. 2d 695, 697 (1952): "The framers of the Constitution evidently contemplated that the creation of such trust estates was not the abolishing of forced heirship. . . . Insofar as the codal articles relating to forced heirship are concerned they must bow to this recent statute." La. R.S. 9:1794 (1950), as amended, La. Acts 1962, No. 74.

may now have only a right to income and the power to dispose of the principal at his death.<sup>36</sup>

The Committee members and the Reporter feel that the present provisions should be retained. The settlor may choose not to use the spendthrift provisions; but if the forced heir needs their protection, the settlor has the means of providing that protection. The trustee can be given discretion to advance the capital in a proper case. This is an area in which no general rule should be specified by the legislature. The settlor himself should have the choice to use the provisions or not, as family circumstances require.

### G. *Pour-Over Provisions*

The Reporter and the Advisory Committee have recommended that a provision authorizing "pour-over" dispositions be authorized. There are two methods of accomplishing a testamentary pour-over of assets to a pre-existing inter vivos trust.

In the first, the testator bequeaths property to the trustee on the same terms as set out in the inter vivos trust, referring to that trust rather than repeating those terms in the will itself. The purpose of this short-cut is not only to effect an economy of effort in writing the will, but also to effect a merger of the trusts for the purpose of administration by absolute identity of terms of the two trusts. Obviously, the reference to a non-testamentary document is met with the rule forbidding incorporation by reference. Some states having the general rule have allowed an exception, where the act or fact referred to has "independent legal significance." Thus, a typed list of dispositions could not be incorporated, but a document that had legal effect apart from the testament might be incorporated. Louisiana has allowed reference to a pre-existing bill of sale in order to determine the particular identity of the object of the legacy.<sup>37</sup> The Civil Code itself allows extrinsic evidence to clear up an ambiguity in the designation of the legatee.<sup>38</sup> There was no incorporation by reference in referring to a printed receipt for deposit of a will in order to identify that will as the one

36. See Oppenheim, *Louisiana's New Trust Law*, 92 TRUSTS & ESTATES 362 (1952).

37. *Hall v. Hill, McLean & Co.*, 6 La. Ann. 745 (1851).

38. LA. CIVIL CODE art. 1714 (1870); see *Succession of Tilton*, 133 La. 435, 63 So. 99 (1913).

being revoked.<sup>39</sup> The weakest application of this exception is said to be the "receptacle" cases where a testator leaves all that shall be found in a certain drawer or trunk.<sup>40</sup> Louisiana had validated this type of disposition, even though the testament is in fact amended by the mere act of adding to or withdrawing money from the drawer or trunk.<sup>41</sup> Furthermore, Louisiana has allowed a disposition to be disposed according to typed instructions by finding the request precatory so that there was no need for incorporation.<sup>42</sup>

Thus, even if the language used clearly creates a new trust, the exception could be applied to avoid the application of rule against incorporation by reference.

The second theory for validating the result is by the use of the true "pour-over." By this device no new testamentary trust is created; there is merely an addition of assets by testament to a pre-existing trust. This is a *legacy* to a pre-existing trust. No incorporation is necessary for the testament does not create a new testamentary trust. The assets are added by will to an inter vivos trust. The difficulty has been that testators may use language that appears to create a new trust and the incorporation rule must be dealt with. For the purpose of curing any doubt that such provisions shall be valid, nineteen states have passed statutes authorizing some type of "pour-over" provision. Forty-one states now consider some type of "pour-over" provisions valid. Only in two states, including Louisiana, is the "pour-over" reputed invalid.<sup>43</sup>

The Commissioners on Uniform State Laws have approved a Uniform Testamentary Addition to Trusts Act, adopted in August 1960. The statutes vary greatly in dealing with provisions concerning power of revocation or amendment of the inter vivos trust. If it is felt that a change of will should not be accomplished by merely amending the inter vivos trust, this can be met by authorizing the "pour-over" only to trusts in which there is no power to amend or revoke the trust. However, amend-

39. *Hessmer v. Edenborn*, 196 La. 575, 199 So. 647 (1940); see Oppenheim, *The Testate Succession*, 36 TUL. L. REV. 1 (1961).

40. See 1 SCOTT, TRUSTS § 54.2 (1956); Polasky, "Pour-over" Wills, 98 TRUSTS & ESTATES 949, 951 (1959).

41. *Roman Catholic Church v. Miller*, 5 Mart. (N.S.) 101 (La. 1826).

42. *Girven v. Miller*, 219 La. 252, 52 So. 2d 843 (1951), 26 TUL. L. REV. 115, 117 ("The utility of the incorporation by reference doctrine suggests that the Louisiana law of wills should be modified.")

43. See 99 TRUSTS & ESTATES 832 (1960).

ment of the trust is not nearly so informal as merely changing the contents of a drawer, and that is allowed in Louisiana.

The Reporter and the Committee have recommended that "pour-over" provisions be authorized in the trust code and provisions permitting "pour-overs" have been drafted.

#### IV. ADDITIONAL PROBLEMS

##### A. *General Considerations*

In addition to those matters discussed thus far, the Reporter and the Committee have considered the rights and remedies of the beneficiary, the trust property,<sup>44</sup> problems of the community property in trust and the substitution rule as it relates to class gifts and survivorship conditions. In fact, most of the difficult principal problems confronting the drafters of the new trust code have been considered.

It was at this point that the Committee found itself in somewhat a dilemma. Just as, in the beginning, the major policy hurdle of the conceptual formulation of the trust was referred to the Committee, again a policy question was faced with reference to substitution and the "donee in being" rule. Most of the Committee members feel that one of the objectives of the revision of the Trust Estates Law should be to afford to Louisiana settlors flexibility comparable to that afforded by other states. All of the Committee members recognize that the jurisprudence has interpreted Article 1520 so strictly as to ignore any other provision of the Code that is not easily reconcilable with 1520.<sup>45</sup> Even though the 1962 amendments seek to liberalize the rules of the Louisiana *jurisprudence* in regard to trusts, the question arises whether to attempt to justify the new rules by clarifying the meaning of the Civil Code and explaining in terms of legal history. After a full study, we are convinced that the Civil Code is not understood properly; but the proofs are not elegantly simple. They involve all the complications of any discussion of future interests. Most of the Committee members feel that perhaps the best solution at this time is to authorize such provisions

44. While the Reporter and the Committee believe that a usufruct in trust is valid, a specific provision is placed in the trust code to this effect. See Succession of Harper, 147 So. 2d 425 (La. App. 2d Cir. 1962).

45. LA. CIVIL CODE art. 1520 (1870) was amended in 1962 to achieve some degree of liberality for "substitutions in trust." See Oppenheim, *A New Trust Code for Louisiana: Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169, 177-78 (1963).

as seem needed in our present society. The constitutional amendment certainly is in accord with this approach.<sup>46</sup>

The policy arguments outlined in Marcadé and repeated by our writers and courts are the same arguments for any rules against perpetuities.<sup>47</sup> This social policy finds its expression in various formulae. The rule against "the remoteness of vesting" is one definition, but leading American property scholars have criticized the definition as inadequate. "It is fallacious because it completely disregards the basic social policy for which the rule against perpetuities has existed and for which it still functions. That policy prohibits limitations causing socially inconvenient interferences with the alienability and usefulness of property."<sup>48</sup> Professor Powell alleged in the New York Report on the Rule Against Perpetuities published in 1936 that the rule against remote vesting exists so as to prevent "suspension of the power of alienation," which were the terms of definition of the New York rule. He asserted that both rules were really the same rule. The third aspect of the rule is reflected in the limited duration of indestructible trusts. For example, in a non-spendthrift trust with power of sale, both the rule against remoteness and the rule against suspension of alienation may be satisfied. But nevertheless, such a trust may not last for too long a time because ownership should not be dismembered for too long a time. This was recognized by the New York Law Revision Commission as another aspect of the rule.<sup>49</sup> This aspect is the best statement of the social policy of Louisiana. It is reflected in the statement in *Succession of McCan*<sup>50</sup> that a testator can dismember the property only by separating the usufruct for one lifetime. This is not an accurate statement of the only dismemberment allowed by the Louisiana Civil Code, but it does reflect the correct policy that ownership can be dismembered for one lifetime. The Civil Code allows conditional legacy or even conditional institution of heirship.<sup>51</sup> These conditions will necessarily be determined within one lifetime because the donee

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46. The pertinent sentence of LA. CONST. art. IV, § 16, as amended, reads: "Substitutions not in trust are and remain prohibited; but trusts may contain substitutions to the extent authorized by the Legislature."

47. See Oppenheim, *The Testate Succession*, 36 TUL. L. REV. 1, 17-20 (1961); Comment, *The Universality of a Curse: Future Interests in the French Law*, 3 LA. L. REV. 795 (1941).

48. 5 POWELL, REAL PROPERTY § 772(3) (1956 ed.).

49. N.Y. LAW REFORM COMMISSION REPORT 353 (1938).

50. 48 LA. ANN. 145 (1896).

51. LA. CIVIL CODE art. 1698 (1870).

will lose his interest if he does not survive the condition. At common law a contingent interest is transmissible but in civil law it is not. Therefore, the civil law has this time limit on conditions that is covered by the rule against perpetuities at common law.

### *B. Trusts for a Class of Descendants*

Since the trust dismembers the perfect ownership for one lifetime, there is no policy reason against allowing the interests in trust to be uncertain, as long as all vesting and ascertainment takes place no later than the termination of the trust. If the property is already "tied up" for one lifetime (the life that measures the duration of the trust), the beneficial interest could be given to those who are born within the period of the duration of the trust, so long as one principal beneficiary of the class was in being at the creation of the trust. A trust for afterborns can be justified even though usufruct and naked ownership to afterborns cannot. The trustee must represent all interests impartially.

Just as in New York, we conclude that "remoteness of vesting" is not allowed because it suspends alienation and dismembers ownership. If dismembership is already allowed for a limited time, then we need not require the interest to be vested until the expiration of that time. Furthermore, it has been pointed out that conditional legacy results in a gap of time before vesting and the Civil Code limit on remoteness is that it must vest within the lifetime of the conditional donee. Therefore, there is no strict policy in our Code that every interest must be vested immediately upon the death of the testator. Even if our law does not allow conditional naked ownership, it should be allowed in trust because a trustee will protect contingent interests but a usufructuary might not.

At the same time most of the Committee members feel that while the chief objective of our drafting is clarification of the uses of the trust, a more flexible trust is highly desirable. It is alleged that what settlors, trustees, and the lawyers most want is a statute that details what can be done with the trust and one which permits practical results to be achieved.

The result of the approach would seem to be this, based on a study of the Civil Code and its antecedents. If the jurispru-

dential interpretation of the Civil Code is relied upon, then it is doubtful that any type of survivorship condition can be allowed, and certainly not the class gift. If the Civil Code as properly understood controls, then certain types of survivorship conditions can be allowed, but not the class gift. If the trust rules are not to be limited by a technical definition of substitution, but rather by the policy behind the substitution rule, then survivorship conditions and the class gift can be allowed, so long as property is not thereby "tied up" for more than one lifetime, the measuring life of the trust.

The Reporter and the Committee feels that a limited type of class gift which will be restricted to descendants should be permitted. While difficult problems present themselves, it is felt that the desirability of such a class gift makes it essential to solve these problems in order to provide adequately for the needs of Louisiana settlers.

### C. *The Marital or Conjugal Trust*

The Reporter and the Committee are also presenting for adoption a special type of trust that will affect the community and separate interests of the husband and wife. In some instances the settlor may desire to create a trust wherein the income for all of his property, separate and community, will go to the surviving spouse even though the corpus might go to other parties. Only some of the results the settlor seeks to achieve may be accomplished under the present Trust Estates Law. For example, there may be children of a prior marriage so that there is no usufruct of the surviving spouse to be placed in trust or he has a considerable amount of separate property and there are three or more children of the marriage.<sup>52</sup> In other community property states the widow's election has been used by which the husband transfers the entire community interest to a trust, creating a life estate for the wife with remainder over to the children or other beneficiaries.<sup>53</sup> However, the widow's election does not seem possible in Louisiana.<sup>54</sup> The new provisions contemplate a "conjugal trust" which may be created inter

52. It has been suggested that the settlor could place the usufruct of *id.* art. 1499 in trust, but this article has never been interpreted by the Louisiana courts.

53. See Comment, 37 TUL. L. REV. 297, 301 (1963) for a discussion of the widow's election.

54. *Ibid.*

vivos, may be revocable upon the death of the spouse first to die and may consist of both community and separate property.

#### V. ADMINISTRATIVE PROVISIONS

In the preparation of the new code a reconsideration is being made of the administrative provisions of the trust. This involves duties and powers of the trustee, liabilities of the trustee, compensation and indemnity of the trustee, allocation to interest and principal, remedies of the beneficiary, etc. Since the Trust Estates Law of 1938 contains the Uniform Income and Principal Act,<sup>55</sup> the new Income and Principal Act adopted in 1962 is extremely helpful in redrafting this portion of the trust code.

As a matter of fact, all sources have been re-examined for the entire project. Where new materials are available, these have proved of inestimable assistance. The Restatement of Trusts, Second, which has recently been completed, the redrafted model Spendthrift Statute, the Uniform Testamentary Additions to Trusts Act (1960), all have played a role in the redrafting.

Only by considering all facets of every problem, by carefully examining and re-examining all questions, will a comprehensive and understandable trust code emerge that will provide adequately for Louisiana settlers.

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55. LA. R.S. 9:2091-2101 (1950).