Louisiana’s Law of Trusts 25 Years After Adoption of the Trust Code

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The trust originated in England hundreds of years ago and developed over the centuries into a sophisticated instrument for the management and transmission of family wealth.1 In the forty-nine states whose laws derive from England, the trust is a welcome old friend. Louisiana is the one state whose laws of property and inheritance are rooted in a different legal tradition—the civil law existing at the turn of the Nineteenth Century in France and Spain.2 The Louisiana legislature and courts long considered trusts alien and unwelcome; the Louisiana Civil Code did not expressly authorize trusts, and aspects of the trust were philosophically irreconcilable with the Civil Code. In the twentieth century, as the benefits of trusts have become widely appreciated, the Louisiana legislature has reluctantly given the trust a place in its laws of property and inheritance, but the trust provided for under Louisiana law is not the same as the trust in the other states.

Louisiana's current law of private trusts is contained in the Louisiana Trust Code, enacted in 1964 and revised somewhat since then. On the occasion of the twenty-fifth anniversary of the Trust Code it is appropriate to compare and contrast the Louisiana Trust Code to the trust laws of the other states.

An excellent article previously published in this journal has outlined the history of the trust concept in Louisiana.3 While this article will cover some of the same ground, its emphasis will be on particular types of beneficial provisions allowed in private trust arrangements, rather

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than on the trust *per se*, and will emphasize opportunities created by
the legislature's amendments to the Trust Code in 1988 and 1989.4

**FEATURES OF THE AMERICAN TRUST**

The trust laws of the other forty-nine states are fairly uniform but
have diverged somewhat from the English law of trusts.1 The following
is a list of the features of the American trust recognized in the forty-
nine states other than Louisiana.

**Dual Ownership**

The essential feature of a trust is the duality of ownership between
a trustee, who holds legal title to the property in trust, and the ben-
eficiary, who, as the "equitable" owner, is entitled to all the economic
benefits from the property in trust. The trustee is the owner of the
property with respect to third persons, yet must deliver all the benefits
of ownership to the beneficiaries. If a trustee takes an action that
damages a beneficiary, normally the beneficiary's only remedy is against
the trustee, not against the property or a third person who acquired
the property.6

**Creating the Trust**

A trust is created by a "settlor." Formal requirements are minimal.
Generally, a trust must be in writing and signed by the settlor. A trust
of movables, however, may be oral. A trust can even arise uninten-
tionally—when A receives title to property that should belong to B,
certain duties, which are identical to a trustee's duties, may be imposed
upon A under what is called a "constructive trust."7

**Identifying the Beneficiaries**

A trust can have more than one income beneficiary, and these income
beneficiaries may be simultaneous or successive. Although at least one
beneficiary must be designated and in being when the trust is created,
the beneficiaries of a trust can include persons not in being when the
trust is created.8

4. This article will not dwell on the trustee's management powers, or on charitable
or business trusts.
5. G. Bogert, The Law of Trusts and Trustees § 7 (2d ed. 1984); see also Scott,
supra note 1, at § 337.
6. Bogert, supra note 5, at §§ 1, 183, 861; Scott, supra note 1, at §§ 2.3, 199.
American trust instruments use a variety of techniques to determine who will be the ultimate recipients of trust corpus. Upon creation of the trust, a person entitled to trust corpus (a "principal beneficiary") may be (1) vested, (2) identified but not vested, or (3) unidentified. A principal beneficiary is "vested" if any distribution of corpus will either be made to him while living, or made to his heirs or legatees after his death. A principal beneficiary who is "identified but not vested" does not have a heritable interest. If he lives long enough he receives corpus, but the trust instrument provides for an automatic designation of another beneficiary upon the first beneficiary's death. For example, a trust might be established for John Smith to receive income, plus corpus at age forty, but if he dies before age forty the benefits of the trust automatically go to the secondary beneficiaries designated in the trust instrument. If the principal beneficiary is "unidentified," he is determined at a later date under the terms of the trust. An example of a trust with principal beneficiaries unidentified at its creation is a trust paying income to Jack and the principal to Jack's children living at his death. When a trust is created for more than one income beneficiary, often the principal beneficiaries are unidentified because the settlor desires flexibility concerning the ultimate recipients.

The principal beneficiaries of an American trust must be both identified and vested no later than the time limit set by the "rule against perpetuities." A disposition in trust violating the rule against perpetuities is completely invalid. All the states do not have the same rule against perpetuities, but generally the rule requires vesting of interests in trust principal no later than twenty-one years after the death of the last surviving person specified in the trust instrument who is in being when it is established.

The rule against perpetuities allows a trust to remain intact for generations. A typical trust that goes to the limit allowed under that rule is one providing that (1) income is payable to whoever is currently living among the settlor's children, children of deceased children, children of deceased children of deceased children, and so forth, (2) if a descendant dies childless, other descendants of the settlor take that share, (3) the trust terminates twenty-one years after the death of the last to die of settlor's descendants living when the trust was established, and (4) the trust corpus will be divided among all the descendants who are income beneficiaries at the time of termination. We will call this type of trust a "dynasty trust" because of its long duration and its goal of preserving wealth in the family.

9. Scott, supra note 1, at §§ 113.1, 128.8; Bogert, supra note 5, at § 182. The analysis in the text is presented for purposes of comparison with the Louisiana trust and is not the type of analysis a common law trust expert is likely to use.

10. Scott, supra note 1, at § 62.10.
Distributing Benefits

An American trust can take a great variety of approaches to distributions of income and corpus. The trust instrument may provide that only income be distributed during the trust's term or allow principal to be distributed in addition. Under the trust instrument, distributions can be mandatory or in the discretion of the trustee or even a beneficiary. A trustee's discretion may be either tied to objective standards or unbridled.11

Duration of the Trust

The rule against perpetuities effectively limits the allowable term of a trust, although in some cases a trust may continue for the remaining lives of the vested beneficiaries.12

Destructibility

If all beneficiaries and the settlor of an inter vivos trust agree, a trust may be terminated before the term specified in the trust instrument. If the settlor is dead or absent, generally the consent of all beneficiaries suffices to terminate a trust regardless of the specified term unless continuation is necessary to carry out a material purpose for which the trust was created.13

Powers of Appointment

A person—often an income beneficiary—can be given a "power of appointment," which is the power to designate recipients of trust principal. This can be a "general" power, which allows the holder to designate anyone—including himself if exercised while living, or his estate if exercised at death—as the recipient, or a "limited" power, which requires appointment from a specified group of persons.14 A general power to designate a recipient effectively makes the power holder the vested principal beneficiary of the portion of the trust subject to that power. An example of a limited power of designation is a trust under which the settlor's surviving spouse receives the income for life and a limited power to designate the recipients of principal from among the settlor's children. The holder of a general or limited power has complete discretion as to its exercise, subject to any limitation in the trust instrument, with no fiduciary obligation to designate anyone in particular.

11. Id. at §§ 128.2-.8.
12. Id. at § 62.10.
13. Id. at §§ 337, 338.
14. Bogert, supra note 5, at § 273.35.
Sale or Seizure of Beneficiary's Interest

A trust beneficiary can assign his interest in the trust, and his interest can be seized by his creditors, unless the trust instrument contains "spendthrift" restrictions. In all but a few states a "spendthrift trust" can completely prevent a beneficiary from alienating his interest in income. Similarly, in most states a vested interest in principal can also be rendered non-alienable. Thus a beneficiary's interest that is safeguarded from the beneficiary himself is also protected to some extent from seizure by his creditors. Even United States bankruptcy law gives effect to spendthrift trust provisions to the extent recognized by applicable state law. A trust established by a settlor for his own benefit, however, cannot be a spendthrift trust. Almost all trusts routinely contain spendthrift restrictions.

Beneficial Uses of American Trusts

Protecting the Beneficiary

Property can be controlled and preserved by a mature person or an institution acting as trustee for a beneficiary who is known to be wasteful, or for a young person until he reaches an age at which he is likely to have the maturity to manage his property sensibly. The spendthrift clause prevents the beneficiary from selling his interest in the trust and limits creditor claims.

Ease of Managing An Incompetent's Property

The property of an interdict or a minor can be held and managed for him without the necessity of court supervision. Also, the settlor can appoint as trustee someone other than the person who has the right under state law to administer the property owned outright by the interdict or minor.

Ease of Management for Several Recipients

Even if all the beneficiaries are competent and money-wise, a trust may be beneficial because it assures centralized management of property and prevents a legatee of a fractional interest from either forcing a partition sale of property or holding up a sale or other disposition of property.

15. Scott, supra note 1, at § 153.
17. Bogert, supra note 5, at § 223.
Preservation of Property for Subsequent Recipients

Property can be preserved to provide for consecutive beneficiaries. Most often the beneficiaries are first, the surviving spouse, then the children of the donor. Subject only to the rule against perpetuities, however, a dynasty trust may benefit members of several generations of income beneficiaries before the trust finally terminates.

Benefitting According to Situation

A person may establish a trust for a group of potential beneficiaries and direct the trustee to make distributions only for specified purposes. Thus a person's lifetime habit of giving pursuant to certain criteria can be continued after death. The settlor may also delegate to the trustee complete discretion in hopes that the trustee will make decisions similar to those the settlor would have made.

Revocable Trusts as Will Substitutes

A person can establish a trust designating himself as income beneficiary and stipulate in the instrument how his successors will be designated at his death. The trust can be revocable while the settlor lives. Such a trust is similar to a power of attorney or mandate during life. Unlike a power of attorney, the trust can continue after the settlor's death, and the property will devolve in essentially the same fashion as under a will. The trustee retains title even after the settlor's death; therefore, the property does not get tied up in the settlor's probate estate.18

Tax-Savings

Some tax benefits of donations can be enjoyed whether the gift is made in trust or free of trust.19 On the other hand, some tax savings can be accomplished only through use of a trust. The following are several ways that the federal tax system specifically encourages trusts.

A trust is a separate taxpayer as to its undistributed taxable income.20 To a limited extent income accumulated in trust can be taxed at a lower

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18. Id. at § 233.
19. But if the donation is made in trust, special planning is sometimes required to receive those tax benefits. For example, the Federal gift-tax annual exclusion, under § 2503(b) of the Internal Revenue Code of 1986 (I.R.C.), is available only for gifts of present interests. A gift in trust is not a present interest unless it meets certain requirements. I.R.C. § 2503(c) (1989); Treas. Reg. § 25.2503-3(b) (as amended in 1983); Rev. Rul. 73-405, 1973-1 C.B. 321; Rev. Rul. 83-108, 1983-2 C.B. 167. For one method of meeting this requirement, see infra text accompanying notes 94-98.
rate than income that is distributed to a beneficiary who is in a high tax bracket.\textsuperscript{21}

The Federal estate tax rules of the Internal Revenue Code allow a marital deduction for a trust (a “QTIP” trust) of which the surviving spouse is not the principal beneficiary, provided that the surviving spouse currently receives all the income of the trust for life.\textsuperscript{22} Before 1982, such a trust qualified for the deduction only if the surviving spouse also had a general power of appointment.\textsuperscript{23} A QTIP trust allows a testator both to determine who will ultimately inherit his estate and to assure that the assets available to produce income for his surviving spouse are not reduced by the payment of estate tax.

A person who has a power to withdraw trust assets for himself is deemed to have made a taxable gift when he allows someone else to become the beneficiary of the assets, either through an exercise of the power or a release of the power.\textsuperscript{24} A release is not treated as a taxable gift, however, to the extent that the value of the trust assets released in a calendar year does not exceed the greater of five percent of the trust assets or $5,000.\textsuperscript{25} Thus, within those limits an income beneficiary, such as a surviving spouse, can be given the assurance that extra funds will be available each year if desired but will not be taxed if the right to withdraw is foregone.

Until recently, trusts could be used to bypass completely the federal transfer tax system upon the death of an income beneficiary. If not vested in principal, an income beneficiary has no interest in the trust that passes as part of his probate estate at his death. Under the structure of the federal estate tax system, neither the trust nor the income beneficiary’s interest in such a trust is subject to estate tax at the income beneficiary’s death.\textsuperscript{26} Thus, a trust establishing a child as income ben-

\textsuperscript{21} Under the current law the amount of the possible tax savings with each trust is rather small. A trust enjoys a 15\% tax bracket only on its first $5,000 of taxable income. The next $8,000 of taxable income is taxed at 28\%, with a 33\% tax rate on the next $13,000 (to average the tax on the total income at a rate of 28\%), and the remainder taxed at 28\%. I.R.C. §§ 1(e), (g) (1989). Also, income accumulated while the beneficiary is over the age of twenty-one may be subject to a “throwback” tax when the accumulated income is distributed to him. I.R.C. § 665(b) (1989).

\textsuperscript{22} I.R.C. § 2056(b)(7) (1989). A usufruct for life also can qualify as QTIP. I.R.C. § 2056(b)(7) (1989). “QTIP” stands for “qualified terminable interest property.” A trust may also qualify for the marital deduction if the surviving spouse is the sole beneficiary and the assets of the trust at that spouse’s death are included in that spouse’s probate estate. Such a trust need not pay all income currently. Treas. Regs. § 20.2056(e)-2(b)(1) (1958).

\textsuperscript{23} I.R.C. § 2056(b)(5) (1989).

\textsuperscript{24} I.R.C. § 2514(b) (1989).

\textsuperscript{25} I.R.C. § 2514(e) (1989). This is called a “5 and 5” power.

\textsuperscript{26} Williams v. United States, 41 F.2d 895 (Ct. Cl. 1930); Rev. Rul. 66-86, 1966-1 C.B. 216.
beneficiary and grandchildren as both successor income beneficiaries and principal beneficiaries would save a level of estate tax by bypassing the child's taxable estate. In a dynasty trust, estate taxes could be avoided at two or more generation levels.

Now, however, a generation-skipping transfer tax is imposed on the value of such trusts at an income beneficiary's death if the beneficiary was a member of a younger generation than the settlor and his successor beneficiaries are members of a still younger generation. This tax is at the highest rate—currently 55 percent—on the estate tax rate schedule.

The generation-skipping transfer tax allows several exemptions. Most importantly, a donor has a one-million dollar exemption that he can allocate to any trust. If the exemption is applied to a dynasty trust at its creation, the trust will avoid all generation-skipping taxes during its term, and, of course, still avoids estate tax at each income beneficiary's death. Thus, the creation of generation-skipping trusts with up to $1,000,000.00 in assets is still encouraged.

**The Historical Background of the Louisiana Trust Code**

When Louisiana had no law on trusts, attempts to create trusts in Louisiana failed. Two aspects of the American trust are troubling to a civilian system such as Louisiana's. One is the division of ownership between the trustee and the beneficiary. Not only does the Louisiana Civil Code not specifically authorize such a division of ownership, but the Civil Code also used to contain an express prohibition of fidei commissa. While this author would enjoy participating in the debate over what was meant by fidei commissa, the question now is of historical interest only. We need only note that the Louisiana Supreme Court, relying in part on the opinion of a group of French scholars, for more on this era, see Wisdom, A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trusts Estates Act, 13 Tul. L. Rev. 70 (1938), Nabors, Restrictions Upon the Ownership of Property in Louisiana—Trusts, Fidei Commissa and Substitutions, 4 Tul. L. Rev. 190 (1930).

27. I.R.C. §§ 2601-2663 (1989). Exempt from this tax are transfers from irrevocable intervivos trusts to the extent that they were funded before September 25, 1985, and trusts under wills of persons dying before 1987, if the will was executed before October 22, 1986. Pub. L. No. 99-514, § 1433(b)(2), 100 Stat. 2718 (1986).
30. For more on this era, see Wisdom, A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trusts Estates Act, 13 Tul. L. Rev. 70 (1938), Nabors, Restrictions Upon the Ownership of Property in Louisiana—Trusts, Fidei Commissa and Substitutions, 4 Tul. L. Rev. 190 (1930).
believed that in forbidding *fidei commissa* the redactors of the Civil Code meant to prohibit trusts.\textsuperscript{34}

A second feature of the American trust that presents problems to the civilian is the ability to defer vesting of interests in trust corpus, that is, to establish the trust without an immediately vested principal beneficiary. Deferred vesting is contrary to civilian immediate vesting concepts. The Louisiana Civil Code assumes that a person's successors become seized of their inheritance as of the moment of death, and what they inherit is immediately transmittable to their own heirs or legatees.\textsuperscript{35} This concept is modified by the rules on renunciation of successions,\textsuperscript{36} by the practical needs of a succession administration,\textsuperscript{37} and by the recent enactment of a law allowing ninety-day survivorship clauses.\textsuperscript{38} Nevertheless, any delay in vesting of benefits is of limited duration. All other vesting of interests at a future date is still implicitly forbidden by the Civil Code.

Related to this concept is the rule against substitutions.\textsuperscript{39} A substitution, as defined through the caselaw, is an arrangement under which A inherits property, but is charged to preserve the property in order to turn it over to B at A's death. Any disposition containing a substitution is completely null and void. This severe penalty was justified on the basis that the substitution kept the property out of commerce and improperly attempted to write A's will for him.\textsuperscript{40}

Even "conditional substitutions" were forbidden in most cases.\textsuperscript{41} An example would be, "to A, but if A dies before majority then to B." Roman law, by contrast, permitted pupillary and exemplary substitutions in which property left to A would pass to B if A died while a minor or insane.\textsuperscript{42} This is not to say that, under Louisiana law, a bequest cannot be made subject to a condition. The Civil Code permits conditional bequests, which presumably are valid because the person who owns the property subject to the condition can dispose of the property.\textsuperscript{43} In Louisiana, however, testators have rarely made conditional bequests.
for fear of inadvertently falling under the prohibition against substitutions.

As a corollary to the requirement of vesting at death, the Civil Code forbids "willing through a third party." A testator cannot give to his executor or another party the power to affect how much of an estate a beneficiary will receive. A recent amendment to Louisiana Civil Code article 1573 does, however, permit giving the executor the power to select assets to fund a bequest of a "quantum or value" of the estate, determined "by formula or by specific sum." Although this authorization is not as broadly worded as some may wish, many practitioners believe Louisiana Civil Code article 1573 now authorizes giving an executor discretion to fund any bequest of a fraction of an estate.

Of the two obstacles to full use of the American Trust—ownership dichotomy and deferred vesting—the civilian distaste for deferred vesting has been much the more serious; indeed, as will be seen, it continues to have a major influence on the Trust Code today.

The legislature first authorized private trusts in 1920. Although the division of ownership between trustee and beneficiary was no different from that of an American trust, the legislature allowed the beneficiary to be deprived of legal ownership for only a limited time; the trust could terminate no later than ten years after the later of either the donor's death or a minor beneficiary's reaching his majority. Of course the beneficiary was implicitly vested at the creation of the trust. The paucity of reported cases under the law suggests that it was little used.

In 1921, meanwhile, a rearguard action was mounted against trusts. The newly adopted Louisiana Constitution of 1921 contained a provision forbidding the legislature from "authorizing the creation of substitutions, fidei commissa or trust estates," except for trusts lasting no longer than 1920 Louisiana Acts No. 107 permitted: that is, for no more than ten years from the later of either the donor's death or the beneficiary's majority.47

The 1920 trust law was repealed in 1935. Within three years the legislature decided again that the benefits of the trust should not be entirely spurned. In 1938, it enacted 97 articles comprising a much more detailed law on "trust estates," referred to as the "Trust Estates Law." At first the new law was not much more beneficial than the 1920 Act because of the term limitation still imposed by the constitution. In 1952 that barrier fell, and for the first time Louisiana law allowed a trust

47. La. Const. 1921, art. IV, § 16 (superceded 1974).
to be established for the life of a beneficiary. In 1962 the legislature\textsuperscript{50} paved the way for the Trust Code by (1) removing the prohibition of \textit{fidei commissa} from Louisiana Civil Code article 1520, and (2) with the approval of the people, amending the constitution so that it no longer prohibited \textit{fidei commissa} but instead specifically allowed the legislature to authorize substitutions in trusts. Finally in 1964, the legislature\textsuperscript{51} adopted a restatement of the Trust Estates Law, renamed the "Louisiana Trust Code" (codified in Louisiana Revised Statutes 9:1721 through 2252); the over 200 articles of this code represented a more sophisticated, complete, and flexible law of trusts. The Trust Code was the product of four years of debate and drafting by the Louisiana State Law Institute and a special Trust Advisory Committee of which Leonard Oppenheim was the reporter.\textsuperscript{52} The final compromise version of the Trust Code includes civilian vesting limitations, discussed below, that can be frustrating to anyone used to American trusts, but otherwise has proved workable and beneficial. The few changes made to the Trust Code since 1964 have chiefly been motivated by a desire to ease its vesting restrictions.

\section*{Characteristics of Louisiana Trusts as Compared to "American" Trusts}

The following is a description of the features of the Louisiana trust currently permitted under the Louisiana Trust Code, using the same topic headings as those above describing the American trust.

\subsection*{Dual Ownership}

Like all of Louisiana's trust laws, the Trust Code accepts the common law dichotomy of ownership: title to the property is in the trustee, but the benefits of ownership are owed to the beneficiary.\textsuperscript{53}

\subsection*{Creating the Trust}

A Louisiana trust must be in writing, thus, intentionally established. A trust can be established during life by an act signed before two

\textsuperscript{50} 1962 La. Acts No. 45 and 521.

\textsuperscript{51} 1964 La. Acts No. 338.


\textsuperscript{53} La. R.S. 9:1731, 2082 (1965).
witnesses and a notary; moreover, a trust can be established by will at death. The form requirements for lifetime trusts are much stricter under Louisiana law than in the other states.

**Identifying the Beneficiaries**

The Trust Estates Law seemed to allow a trust to have one or more beneficiaries of income (an "income beneficiary") different from the beneficiary or beneficiaries who ultimately receive the trust corpus (a "principal beneficiary"); but any doubt on that score was removed in 1962, and the Trust Code clearly permits such an arrangement.

Unlike requirements for American trusts, however, Louisiana law requires that all beneficiaries, including principal beneficiaries and successor income beneficiaries, be designated and vested from the inception of the trust. The seizin principles of the Louisiana Civil Code have thus been extended to trusts. Vested rights in trust principal must be heritable, except to the extent shifts are permitted at a beneficiary's death. The requirement of immediate vesting prevents the use of the dynasty trust to the full extent that it is used in the American trust. Even in the class trust, as described below, a generation can share in a trust only if a member of the class is in being when the trust is created; furthermore, the class generally cannot include great-grandchildren, great-grandnieces, or great-grandnephews.

A beneficiary of a trust does not have to be an individual. The 1989 legislature modified the Trust Code to make it clear that a trustee of one trust can be the beneficiary of another trust. Probably, the beneficiary trust must be a valid Louisiana trust. Naming a trust as a beneficiary of a trust may allow a settlor to do indirectly what he cannot do directly. For example, under the Trust Code, the right to trust income is not heritable. If John Doe is only an income beneficiary of trust A, the trust instrument cannot stipulate that at his death his heirs or legatees succeed to his right to income. But if trust B, of which John

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58. See supra note 35.
60. See infra notes 77-84.
61. La. R.S. 9:1891 (1965). A member of the third lower generation can, however, be a member of the class by representation. La. R.S. 9:1894 (1965).
Doe is sole beneficiary, is itself the income beneficiary of trust A, then John Doe's heirs or legatees, as successors to his interest in trust B, apparently can receive through trust B the income from trust A after John Doe's death until either trust A or trust B terminates.

Three exceptions to the rule of immediate vesting have emerged: the class trust exception, the revocable trust exception, and the limited ability to make shifts at death.

Class Trusts

If a trust is established for a class consisting of some or all of the settlor's children or grandchildren, or both, the Trust Code allows members of the class born or adopted after the trust is established to become beneficiaries. A class can be the designated beneficiary only if at least one member of the class is in being at the inception of the trust. Since 1982 it has been possible to establish a class trust not only for any of the settlor's children or grandchildren, but also for any of the settlor's nieces, nephews, grandnieces, and grandnephews.

Because the class trust is generally the only way to provide for later-born individuals in an irrevocable trust, its limitations can be frustrating. However, a person can sometimes circumvent these limitations. The settlor of a trust is not the only person who can donate to it. Thus, a person having the requisite relationship to a group can set up a class trust for them; then someone not having the requisite relationship can make a donation to it. For example, John Doe cannot establish a class trust for his great-grandchildren; but if John's daughter Mary establishes a bona fide class trust for her grandchildren, John can make a gift to that trust.

Revocable Trusts

Since 1938 it has been possible to establish a revocable inter vivos trust; that is, the settlor makes a donation into trust during life but reserves the power to revoke the trust in order to take back the donation. Thus, the donation is incomplete until the trust becomes irrevocable. In 1988, on the recommendation of the Louisiana State Law Institute, the Trust Code was amended to permit a revocable trust to defer designating the income and principal beneficiaries until a date after the creation of the trust, but not after the trust becomes irrevocable.

The trust will usually become irrevocable at the death of the settlor. The beneficiaries identified at the later date do not have to be in being at the time the trust is created.\textsuperscript{70} If no beneficiary—as defined in the trust instrument—is in being when the beneficiaries are to be determined, the settlor or his estate is deemed to be the beneficiary.\textsuperscript{71}

This new exception to the requirement of immediate vesting of beneficial interests is without precise analogy in the Civil Code.\textsuperscript{72} The Civil Code does not allow an \textit{inter vivos} donation to be made to a person who will be identified later.\textsuperscript{73} The Civil Code does, however, describe several situations in which \textit{inter vivos} donations can be taken away, depending on future events occurring up to and including the donor's death. These include the right of the donor to revoke a gift for ingratitude,\textsuperscript{74} the right of the forced heirs to reduce gifts,\textsuperscript{75} and the right of the donor to take back a gift when the donee dies before the donor.\textsuperscript{76} This legislative change, therefore, is not a major tear in the civilian fabric because at least vesting of interests at death is preserved.

In order to avoid abuse of this provision, Trust Code article 2014 unequivocally provides that a revocable trust with deferred vesting can have only one settlor. Having more than one settlor would be inconsistent with the immediate vesting rule. The trust could remain revocable after the death of one of the settlers, according to Trust Code article 2044, and consequently, vesting of interests in property donated into the trust by the deceased settlor would be deferred until after his death.

If a non-settlor makes an addition to the trust and dies before the settlor, it is true that the ultimate recipient of his property, if it remains in the trust, will be determined after the death of that donor. This does not, however, present a violation of the immediate vesting rule. The addition to the trust is an immediately vested gift to the trust’s settlor because he has the ability to revoke or amend the trust and thus dispose of the third party’s gift as he wishes.

\textit{Substitutions at Death}

Upon the original principal beneficiary's death, in certain specified circumstances the trust instrument can designate another person or persons as substitute principal beneficiaries. This ability to substitute prin-
Principal beneficiaries was first allowed in the 1964 Code in the context of class trusts. It was extended to other types of trusts in 1974. In 1989, on the recommendation of the Louisiana State Law Institute, Trust Code article 1973 was amended to allow successive substitutions. This means, for example, that if four siblings are initial principal beneficiaries, and the surviving three succeed to the interest of the first to die, when a second sibling dies the trust instrument can direct that both the second sibling’s original interest and his substitute interest pass to the surviving two siblings.

Although called “substitutions,” these shifts of principal interest at death are by no means tantamount to the “prohibited substitution,” and are not widely available because of the following limitations:

Such a shift is not allowed if the principal beneficiary leaves a will. The heart of the immediate vesting rule is the ability to leave the property to one’s legatees. As mentioned, the Louisiana Supreme Court found the substitution especially offensive because it diminished the instituted beneficiary’s power of testation. The Trust Code continues to promote that power of testation.

Such a shift is also not allowed if the principal beneficiary is survived by any descendants. This rule is a reflection of the strong state policy favoring descendant heirs.

Until 1982 it was necessary that the substitute beneficiary be in being and ascertainable at the inception of the trust. A significant change was made in 1982: if the substitute beneficiaries in a non-class trust are descendants of the settlor, the instrument can provide for determination of the substitute beneficiaries at the date of the original principal beneficiary’s death rather than at the creation of the trust. Thus, descendants born after the trust is created can be substitute beneficiaries. This clause has limited application; non-descendant substitute beneficiaries, and substitute beneficiaries of a class trust, still must be in being and ascertainable upon the creation of the trust.

81. It should be noted that the legislature, in 1972, defeated the first attempt to allow shifts in non-class trusts. The 1972 version would have allowed shifts even when the deceased beneficiary died testate. Oppenheim, The 1972 Amendments to the Trust Code of 1964, 47 Tul. L. Rev. 315 (1973). For an argument in favor of deleting this limitation, see Lemann, Conditional Substitutions in Trust, 50 Tul. L. Rev. 346 (1976).
83. For a discussion of the forced portion in trust, see infra text accompanying notes 139-43.
The substitution upon the intestate death of the original beneficiary in the absence of descendants is most likely to occur when a beneficiary dies young or is mentally retarded. Thus, the objectives of the pupillary and examplary substitutions of Roman law can generally be accomplished now in Louisiana.

**Distributing Benefits**

Unlike the rules for American trusts, the Trust Code imposes very different restraints on the distribution of income as compared to corpus distributions.

**Distributions of Income**

A trustee has available three possible types of discretion concerning the payment of income: discretion as to timing of payments to beneficiaries, discretion as to allocation of income between beneficiaries, and discretion as to allocation of receipts and expenditures between income and principal.

A trustee can be given complete discretion to determine when a beneficiary's income is distributed. Accumulated income remains, however, vested in the income beneficiary and must eventually be distributed to him, or to his heirs or legatees.

The Trust Estates Law did not expressly allow settlors to authorize trustees to allocate income between beneficiaries; presumably, therefore, the trust instrument had to stipulate the fraction of income allocated to each beneficiary. Under the Trust Code, however, it has been possible for a trust instrument to authorize the trustee to allocate income between income beneficiaries pursuant to "an objective standard established in the trust instrument." This is believed to permit a settlor to stipulate in a trust instrument not only that beneficiary A will receive, for example, one-third of the trust income, or the first $5,000 of trust income each year, but also that beneficiary A's share be determined through exercise of the trustee's judgment, such as by a stipulation that A will receive only that portion of the income he needs for his support, maintenance, education, or medical expenses. The amount not needed by beneficiary A can be allocated to beneficiary B or allocated to principal.

The Trust Code contains detailed rules on the allocation of receipts and charges between the income and principal interests in trust. A

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86. La. R.S. 9:1964 (1965). This does not appear to be true, however, as to class trusts. La. R.S. 9:1985 (1965).
trust instrument can deviate from these rules.\textsuperscript{89} In addition, the settlor can give the trustee discretion to allocate between income and principal in a manner different from that provided in the Trust Code, provided that the allocation is "reasonable and equitable in view of the interests of those entitled to income as well as those entitled to principal."\textsuperscript{90}

As discussed below under "Trusts and the Forced Portion," a trust of the forced portion must distribute income currently to the forced heir. The forced heir could thus contest a testator's attempt to burden his forced portion by putting it into a trust subject to any of the powers and limitations described above.

\textit{Distributions of Principal}

Considerable latitude can be given to the trustee or anyone else to determine when trust corpus is paid to the principal beneficiary.\textsuperscript{91} More complex rules apply if principal is to be distributed to someone other than the principal beneficiary.

To be entirely consistent with civilian vesting concepts, the Trust Code would require principal in all cases to be distributed only to the principal beneficiary who is determined upon the creation of the trust. Indeed, it was implicit in the 1920 and 1938 Acts that the principal beneficiary would receive the trust corpus in due course. Under the current Trust Code, however, the trust instrument can provide for shifts of trust principal from one beneficiary to another in certain specified circumstances. The substitution at death, described above,\textsuperscript{92} is just one such situation. The opportunities for such shifts have been considerably increased since 1964, particularly by changes, described below, made by the 1989 legislature upon the recommendation of the Louisiana State Law Institute. The rule of immediate vesting, however, still significantly limits these opportunities.

\textit{Distribution to Income Beneficiary Under Objective Standards}

Louisiana Trust Code article 2068(A) allows a trustee to distribute principal to one beneficiary although it is vested in another beneficiary. The recipient must be an income beneficiary, and the "invasion" must be permitted under objective standards set forth in the trust instrument. Invasion, when the objective standards are met, is either (i) \textit{required}, in which case the trustee, as the settlor’s agent, can be liable to the

\textsuperscript{89} La. R.S. 9:2142(1) (1965).
\textsuperscript{90} La. R.S. 9:2142(3) (Supp. 1990). This authorization was formerly only in an official comment but on the recommendation of the Law Institute was elevated to the text by 1989 La. Acts No. 114.
\textsuperscript{91} La. R.S. 9:2025 (1965), 2068(B) (Supp. 1990).
\textsuperscript{92} See supra text accompanying notes 77-84.
beneficiary in need if he fails to act as the instrument requires; or (ii) permitted, in which case the trustee is free to decide whether to make the allowed invasion without being liable to any beneficiary.

As originally enacted, invasion had to be for "support, maintenance, education, medical expenses, or welfare under objective standards set forth in the trust instrument." It was not entirely clear whether the "welfare" clause would allow a trust instrument to permit invasion for purposes other than support, maintenance, education and medical expenses. Could invasion be allowed to purchase a home, or to enable the beneficiary to enter a business? The 1989 restatement of this section makes it clear that the invasion can be for any purpose set forth in the trust instrument. The 1989 change also makes it clear that "support, maintenance, education, and medical expenses" are in themselves objective standards; formerly, cautious practitioners would generally add a standard such as "to maintain the beneficiary at his standard of living."

Withdrawal Power

Louisiana Trust Code article 2068(A) was also amended in 1989 to permit a settlor to provide in a trust instrument that an income beneficiary may withdraw, at his discretion, trust corpus up to a specified dollar amount or percentage. For example, a trust for descendants as principal beneficiaries can allow the settlor's spouse, if an income beneficiary, to take amounts in addition to income without having to prove need. The income beneficiary's failure to exercise this withdrawal right amounts to a gift to the principal beneficiaries. But, as already mentioned, a special provision of the Internal Revenue Code exempts such a lapse from gift tax provided that the amount of the lapse does not exceed 5 percent of the trust corpus, or $5,000, if greater. Settlors may wish to limit the withdrawal power of an income beneficiary so that the value of the lapsed amount will fall within the gift-tax-free parameters of this "5 and 5" power.

The new withdrawal power also solves a difficulty in making annual tax excludable gifts to trusts having different income and principal beneficiaries. A person can exclude from federal gift tax donations to an individual of an amount up to $10,000 a year derived from "present-interests" in property. A gift in trust is not a present interest unless

94. Id.
95. See supra text accompanying note 25.
it meets one or more specific tests.88 One can manufacture a present interest by giving a beneficiary the temporary power to withdraw the gift from the trust.89 Prior to 1989, the Trust Code did not expressly authorize giving a withdrawal power to an income beneficiary; only the principal beneficiary could be given that power.100 If the principal beneficiary were given the power, however, he could be deemed the “grantor” of the trust for federal income tax purposes, and thus be taxed on some, if not all, of the income subsequently produced by the donated property in the trust even though the income was paid to someone else as income beneficiary.101 If the income beneficiary has the withdrawal power, as now permitted, this income-tax problem is substantially avoided because the income beneficiary will be taxed on the distributed income anyway.

Addition of Class Member

As implied in the above discussion of class trusts,102 the birth or adoption of a new member of the class reduces the interests of the other members of the class.

Duration of Trust

As mentioned, in 1952 the maximum term for a trust became the life of the beneficiary, or ten years from the settlor’s death, whichever is longer. In the 1964 Trust Code, the maximum term was extended to the longer of (a) fifteen years from the death of the last surviving settlor, or (b) the death of the last surviving income beneficiary. The fifteen year limit was extended to twenty in 1968.103 If the trust instrument stipulates an excessive term, the term is reduced to the maximum allowed without penalty.104

Because the term of a trust for several beneficiaries is governed by the death of the last one, it may continue for many years after the first one dies. Only the lives of designated beneficiaries can govern the term, not the lives of heirs, assignees, or substitute beneficiaries.105 Even so, it is quite possible for a Louisiana trust to last for a very long time. For example, a class trust for children and grandchildren, estab-

88. See supra note 19.
92. See supra text accompanying note 64.
lished when the first child is born and lasting until the death of the last surviving grandchild, could have a term of more than 100 years.

**Destructibility**

In the debate over the Trust Code, one issue was whether the beneficiaries should be able to terminate a trust at will. A rule allowing termination would be in accord with the civilian policy behind the prohibition of *fidei commissa*: if a person who is both income and principal beneficiary is able to make himself full owner, even if contrary to the intention of the settlor, the trust would be less of a departure from the Civil Code's former prohibition of dismembered ownership. Because the law of American trusts sometimes allows beneficiaries to terminate a trust early, it seemed that some measure of destructibility might be incorporated in the Trust Code. As adopted, however, the Trust Code specifically prohibited in all situations destruction of a trust by consent of all interested parties.

The parties desiring to terminate a trust early may, however, be able to obtain relief from the court. The Trust Code allows the proper court to terminate a trust before the end of its stipulated term if (1) a person who is both income and principal beneficiary is in need, or (2) the court finds that circumstances have changed such that "the continuation of the trust would defeat or substantially impair the purposes of the trust," or (3) the court finds that the purpose for which the trust was established has become impossible or illegal. Although each of these rules appears to have very limited application, experience has shown that the change of circumstances rule is quite helpful. Often the sole beneficiary of a trust has been able to obtain an early termination when the change of circumstances was nothing more significant than, for example, the beneficiary having grown up and demonstrated that he could handle the trust funds just fine on his own. As long as all parties agree, judges are generally obliging. One wonders whether the judges' receptivity is grounded in the civilian belief that a person with all of the benefits of ownership should also have all of the powers of ownership.

**Powers of Appointment**

Generally speaking, the Trust Code does not allow powers of appointment. Such powers are inconsistent with the requirement that ben-

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106. See discussion at Oppenheim, supra note 52, at 629; Pascal, supra note 52, at 644; Oppenheim, Trust Code, supra note 52, at 190.
eficiaries be identified and vested when the trust is created. They also, of course, violate the Civil Code prohibition against willing one's property through third parties. The Trust Code, however, in several places allows a trust instrument to give to trustees or other persons discretionary powers affecting beneficial enjoyment. If the exercise of such a power is not subject to a fiduciary obligation, so that the discretion of the power holder is truly complete, the power has all the earmarks of a power of appointment.

Some powers that can be given to a trustee of a Louisiana trust allow him to act with broad discretion, but within the limits of an objective standard. These include the power to allocate income, and the power to decide whether an income beneficiary's need justifies invasion of the principal. An arbitrary exercise of these powers can be checked. These are clearly not powers of appointment.

On the other hand, the following powers that affect beneficial enjoyment may not be subject to a fiduciary duty:

As mentioned above, a trustee can be given the power to invade principal for an income beneficiary providing that the invasion complies with objective standards. If the objective standard is met, but the instrument merely permits rather than directs the trustee to make the distribution, his choice amounts to a power of appointment of sorts. If the trustee, instead, is required to distribute principal pursuant to the objective standards, he does not have a power of appointment because the distribution of principal can be enforced by the affected income beneficiary.

The trustee or another person can be given the unfettered power to terminate a trust. When the income and principal beneficiaries are not the same, the termination will cut off the rights of the income beneficiary. Unless a fiduciary obligation to the income beneficiary is read into the statute, the power to terminate is a sort of power of appointment.

If the power to amend the trust instrument has been reserved, all surviving competent settlors must concur in the modification. A modification made by a competent settlor affecting an incompetent beneficiary's interest would amount to a power of appointment as to that interest.

A revocable trust created by more than one settlor is revocable by all "surviving competent settlors." Because the share of a deceased

113. See supra text accompanying note 93.
or incompetent settlor in the trust can be revoked by the remaining competent settlors, they have a sort of power of appointment over his share of the trust.

**Sale or Seizure of Beneficiary's Interest**

Spendthrift protection, although a further step away from the civilian idea that an owner should have control over his property, is essential to assure that the purposes of a trust are carried out. Spendthrift trust clauses were first permitted in the 1938 Trust Estates Law, but only as to income interests. A 1944 change extended the protection to interests in principal. Louisiana's spendthrift trust rules are now similar to those of the other states that give effect to spendthrift trust clauses. A beneficiary of a Louisiana spendthrift trust cannot alienate his interest. The beneficiary's interest is protected from all debt obligations except child support, alimony, tort claims, and necessary services or supplies. Formerly, the right to income was protected from creditors as to only the first $10,000 a year. The limit was raised to $20,000 in 1985 and removed altogether in 1987.

**Benificial Uses of Louisiana Trusts**

The following discussion parallels the above discussion of the beneficial uses of "American" trusts.

**Protecting the Beneficiary**

A Louisiana trust is equally as useful as an American trust for this purpose.

**Ease of Managing An Incompetent's Property**

A Louisiana trust is equally as useful as an American trust for this purpose.

**Preservation of Property for Subsequent Recipients**

Since the Louisiana Trust Code requires immediate vesting of interests, and heritability of interests in trust principal, the Louisiana trust

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122. See supra text accompanying note 17.
is less effective than the American trust to preserve property for subsequent recipients.

**Benefiting According to Situation**

In certain circumstances, a Louisiana trust is less useful than an American trust for this purpose. A settlor, for example, can establish a "pot trust" for his grandchildren that will pay income and principal only for those grandchildren who currently need funds for education. Unneeded income can be added to principal. However, the trustee cannot be given the complete discretion that the settlor would have had to dispose of the property.

**Revocable Trusts as Will Substitutes**

As a will substitute, the revocable trust probably will work as well in Louisiana as in other states. The interests of the principal beneficiaries can now vest in a Louisiana revocable inter vivos trust at the death of the settlor; they no longer have to vest when the trust is established. Persons who are born into or die out of the group of potential beneficiaries between the time that the trust is established and the settlor dies will automatically be included or removed as beneficiaries. The settlor can probably even direct in the trust instrument that the revocable trust be split into separate trusts for different beneficiaries when the trust becomes irrevocable.

**Tax-Savings**

All significant tax-saving benefits of American trusts can be realized using Louisiana trusts.\(^{123}\)

**Trusts and the Forced Portion**

Louisiana is the only American state that reserves a "forced portion" for descendant heirs.\(^{124}\) Forced heirship has been considered so important that it is protected by the state constitution.\(^{125}\) Nevertheless, the citadel of forced heirship is under attack. In 1980, the forced portion for three or more children was reduced from two-thirds to one-half of the de-

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123. The marital deduction allowed under I.R.C. § 2056(b)(5) (1989), that is, through a trust giving the surviving spouse income for life and a general power of appointment, is not available in Louisiana. This is no longer a hardship, however, because the QTIP trust under I.R.C. § 2056(b)(7) (1989) provides the benefits of such a trust without having to give the spouse a power of appointment. See supra text accompanying note 22. In the other states, where either type of trust can be used, the QTIP trust is usually chosen.


125. La. Const. art. XII § 5.
ceased's estate, and the forced portion of only one child was reduced from one-third to one-fourth; the forced portion of two children remains one-half. Furthermore, proceeds of insurance policies on the decedent's life, premiums paid on such policies, benefits under qualified plans, individual retirement accounts, and gifts to charity made more than three years prior to death have all been exempted in recent years from the calculation of the forced portion. In 1989 the legislature abolished forced heirship for any child (and his descendants) who reaches his twenty-third birthday. This change is not scheduled to go into effect until July 1, 1990, and may well be modified by the legislature before then.

The forced portion can be burdened with a usufruct in favor of the surviving spouse. At one time, the usufruct could be imposed only if the surviving spouse was the other parent of the forced heir, only as to community property of the decedent, and only until remarriage of the surviving spouse. The deceased spouse can now leave the surviving spouse a usufruct for life over all the decedent's property regardless of whether the surviving spouse is the other parent of the heirs.

The approach of all of Louisiana's trust laws to forced heirship has been the same: testators are allowed to place the forced portion into trust only if the trust is subject to special requirements assuring benefits comparable to the benefits of ownership free of trust.

**Basic Requirements**

Both the 1920 trust law and the Trust Estates Law required that the income attributable to the forced portion be distributed currently. The 1964 Trust Code incorporated that rule and added others. A trust of the forced portion, when the testator's surviving spouse is not income beneficiary, must comply with the following rules:

All income (net of charges against income) must be distributed currently, at least as often as once a year. Furthermore, the trust must be invested so as to produce a reasonable income for the forced

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133. Id.
heir. The settlor's authorization or direction to retain unproductive property may, therefore, be ineffective.\textsuperscript{134}

The trust must terminate as to the forced portion no later than upon the forced heir's death.\textsuperscript{135} This maximum term is shorter than that of other Louisiana trusts. The usual rules applicable to the death of a principal beneficiary apply: the principal passes to the heirs or legatees of the forced heir; but if he dies intestate and without descendants, the instrument can direct a shift to persons other than his heirs.\textsuperscript{136}

The forced heir must be the principal beneficiary of the trust,\textsuperscript{137} even though he can be limited to receiving only income during his life. The forced heir, thus, is assured of the right to dispose of the trust corpus at his death.

The forced heir's interest can be subject to no additional "charges or conditions" other than the surviving spouse's income interest described in the following section.\textsuperscript{138}

**To What Extent Can Benefits for the Surviving Spouse Burden the Forced Portion in Trust?**

The brief provisions for the forced portion in trust contained in the 1920 and 1938 Acts did not mention the testator's surviving spouse. Therefore, both appeared to forbid naming the surviving spouse as income beneficiary of the forced portion in trust. Those Acts probably presented no impediment, however, to placing the forced portion in trust subject to a usufruct in the surviving spouse.

Since 1964, the Trust Code has made the usufruct unnecessary; it allows the surviving spouse to be income beneficiary of a trust of the forced portion "to the same extent and for the same term" that the surviving spouse could be usufructuary of it.\textsuperscript{139} Thus, the rules set forth above regarding the forced heir's right to income apply only when the forced portion is not subject to an income provision for the surviving spouse. When the surviving spouse is income beneficiary, the trust does not have to terminate when the forced heir dies first, but can continue until the settlor's surviving spouse dies.\textsuperscript{140}

The Trust Code's provisions allocating receipts between income and principal beneficiaries are not the same as the Civil Code's provisions

\textsuperscript{134} See Succession of Dunham, 393 So. 2d 438, 451 (La. App. 1st Cir. 1980), aff'd in part and rev'd in part, 408 So. 2d 888 (1981); Succession of Burgess, 359 So. 2d 1006 (La. App. 4th Cir.), writ denied, 360 So. 2d 1179 (1978).


\textsuperscript{140} La. R.S. 9:1842(3) (Supp. 1990).
allocating receipts between a usufructuary and a naked owner.\textsuperscript{141} As a consequence, a surviving spouse entitled to income from the forced portion held in trust may not receive the same amount of money as a surviving spouse having a usufruct over the same property. The forced heir apparently has no complaint if the Trust Code allocations result in his receiving a smaller benefit than he would have received from a naked ownership free of trust; the "to the same extent" language of Trust Code article 1844 refers to the ability to burden the forced portion at all rather than to a requirement that the allocation of revenue to the forced heir be identical. The forced heir probably does have recourse, however, if the trust instrument causes a larger share of revenue to be allocated to the surviving spouse than the share specified in Trust Code, even if the spouse would be entitled to the larger share if the benefit were left in usufruct.\textsuperscript{142} For example, if minerals are placed in a forced portion trust and the surviving spouse is income beneficiary, the share of royalty revenues allocated to principal (the depletion reserve) probably must be at least as great as the 27 1/2 percent rate stipulated in the Trust Code,\textsuperscript{143} even if the surviving spouse as usufructuary would have been entitled to 100 percent of the revenues.

The surviving spouse's benefits from the forced portion are limited to income. The trustee cannot distribute to the surviving spouse any trust principal that is part of the forced portion, regardless of the surviving spouse's need, unless the forced heir agrees.

If a trust provision overburdens the forced portion, normally only the impermissible burden is invalid rather than the entire trust.\textsuperscript{144}

**SUSTAINING A DEFECTIVE TRUST**

Shortly before the Trust Code was enacted, the Louisiana Supreme Court in *Succession of Guillory*\textsuperscript{145} and the Louisiana Court of Appeals for the Second Circuit in *Succession of Meadors*\textsuperscript{146} invalidated dispositions in trust as containing substitutions. The broad, cryptic language used in the two decisions made the redactors of the 1964 Trust Code nervous. It was not clear whether the courts struck down the trusts in question—which were contained in non-Louisiana wills obviously drafted without reference to the unique limitations of Louisiana law—because of their numeros violations of Louisiana vesting principles, or because

\textsuperscript{142} See La. R.S. 9:1844, comment (c) (1965).
\textsuperscript{144} La. R.S. 9:1842 (1965).
\textsuperscript{145} Succession of Guillory, 232 La. 213, 94 So. 2d 38 (1957).
\textsuperscript{146} Succession of Meadors, 135 So. 2d 679 (La. App. 2d Cir. 1961).
the trust concept itself was inimical. To maximize the likelihood that a trust under the Trust Code would be sustained, the redactors took the following steps:

1) To make it clear that the Civil Code's rule against substitutions does not override Trust Code provisions, the Trust Code in three places states that a substitution in trust authorized by the Trust Code is valid even if it would be invalid if made free of trust.

2) Most litigation over the validity of trusts involves poorly drafted documents. As a matter of policy, Louisiana Civil Code article 1713 requires that an ambiguous provision of a testament be interpreted so as to give it effect. The courts, while giving lip service to that policy, have not always followed it in substitution cases. To emphasize this rule of construction, the Trust Code also specifically provides that "[a] trust instrument shall be given an interpretation that will sustain the effectiveness of its provisions if the trust instrument is susceptible of such an interpretation."

3) Finally, if a court should find that the settlor of a trust unambiguously intended an invalid disposition, the Trust Code states that the invalid provision in the trust instrument does not cause the trust to fail "unless the invalid provision cannot be separated from the other provisions without defeating the purpose of the trust."

Based on these provisions, what is a court to do with a defective trust, such as a trust document that contains substitution-type provisions not authorized by the Trust Code? This author submits that the effect of any invalid provision in a trust document, even if in the nature of a substitution, must be determined not under the Civil Code but under article 2251 of the Trust Code: the invalid provision should be stricken without defeating the validity of the trust unless it affects the very purpose of the trust; only then does the trust fail. Under this rule a provision in the trust having the characteristics of a prohibited substi-

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148. La. R.S. 9:1723, 1724, 1737 (1965). While making every effort to assure that no trust could be invalidated because it contained a substitution, the redactors did—as we have shown—impose certain requirements consistent with the prior law on prohibited substitutions: beneficiaries must be identified; their interests must be fixed at the creation of the trust; and, subject to certain exceptions, a principal beneficiary's interest must pass to his heirs or legatees at his death. Thus, it is not clear that any traditional substitutions are actually permitted under the Trust Code.
tution could invalidate the trust, but total invalidity is not required in every case.

If a trust does not properly designate a beneficiary at the creation of the trust, the trust must fail for want of a beneficiary.\textsuperscript{152} On the other hand, if a beneficiary is properly designated upon the creation of the trust, the trust should normally be given effect. If the trust document provides for an improper substitution upon the death of the first designated principal beneficiary, the issue should be whether the substitution can be stricken from the instrument "without defeating the purpose of the trust," as provided in Trust Code article 2251.

A court should strike an invalid shift at death and uphold the trust if the first-named principal beneficiary is clearly the primary object of the settlor's concern. This approach is especially appropriate if the trust is designed to terminate when the principal beneficiary reaches a designated age, so that the shift can occur only if the beneficiary fails to reach that age. Striking the shift and upholding the disposition would not do violence to the testator's obvious intention to provide primarily for the designated principal beneficiary.

The way courts have actually analyzed dubious trust agreements has been somewhat different than the approach just suggested, but the end results—after an initial disappointing decision—have been in favor of the validity of questionable trusts, as the redactors had hoped.

The first case decided under the Trust Code by the Louisiana Supreme Court was \textit{Chrichton v. Succession of Gredler.}\textsuperscript{153} In \textit{Chrichton}, the court had to determine the validity of a testamentary trust established for the settlor's two nephews. The trust was to terminate at the nephews' deaths, and the property was pass to their children \textit{then living}, or if none, to other relatives identified at that time. Stipulations for successor beneficiaries to take upon the deaths of the first named beneficiaries were not authorized by the Trust Code. The court held that as a result the trust was entirely invalid because it contained a substitution, and that the substitution was not "in trust" because it occurred upon the termination of the trust. This analysis is faulty. The shifting of interests occurred as part of the trust arrangement; therefore, it was a substitution in trust. A proper rationale for the court's decision would have been that the trust failed either because no trust principal beneficiary was properly designated at the creation of the trust,\textsuperscript{154} or because the invalid shift from the original principal beneficiaries at their deaths could not be excised from the trust instrument without defeating its purpose.

\begin{footnotesize}
\begin{enumerate}
\item[152.] La. R.S. 9:1802, comment (c) (1965).
\item[153.] 235 So. 2d 411, 256 La. 156 (1970). For critiques of the decision see Note, Prohibited Substitutions v. The Louisiana Trust Code, 31 La. L. Rev. 404 (1971); Oppenheim, supra note 81, at 322.
\item[154.] La. R.S. 9:1803 (1965).
\end{enumerate}
\end{footnotesize}
But even if the provisions as to principal were invalid, should the trust have failed completely? While the trust instrument was not clear on this point, it implied that the nephews would receive all the income of the trust during their lives. Had the trust been construed that way—the court never reached this question—the interests in income would have been properly established under the Trust Code regardless of the invalidity of the designation of principal beneficiaries. Arguably, then, the trust document should have been enforced as to the nephews’ right to income, so that the trust would last for their lives and the principal would pass to the testator’s intestate heirs upon their deaths. This analysis is supported by the redactors’ comment (c) to article 1802 of the Trust Code:

If the trust instrument does not designate a beneficiary, the trust fails. If either a beneficiary of income or principal is designated, the trust does not fail.

In *Chrichton*, the court seemed to do what prior courts had often done—go out of its way to find a prohibited substitution invalidating an entire trust. The tide turned with *Succession of Materiste*,¹⁵⁵ in which the Louisiana Court of Appeal for the First Circuit was faced with a testamentary trust for brothers and sisters providing that upon termination of the trust the principal passed to the descendants of the brothers and sisters, but the share of those that did not leave descendants would pass to the descendants of the other brothers and sisters. The testator may have intended to create an invalid substitution of beneficiaries after the creation of the trust. The trial court decided that because the trust provisions could be interpreted that way, the trust contained a prohibited substitution. Nevertheless, ambiguity in the document allowed the court of appeal to determine that the testator only intended to make vulgar substitutions. Thus, all interests in trust principal were vested and heritable at the creation of the trust. The court of appeal emphasized that “the law requires that a prohibited substitution must not be found unless the only plausible understanding of the provision in question leads necessarily to that conclusion.”¹⁵⁶

After *Materiste*, the Louisiana courts have not returned to the negative attitudes of *Chrichton* and before. In *Succession of Stewart*,¹⁵⁷ the supreme court analyzed a will using the same validity-favoring rules of construction that the first circuit used in *Materiste*. *Stewart* involved the interpretation of a will of a person who died in 1956, prior to the 1962 and 1964 legislative and constitutional changes. Because it was

¹⁵⁵. 273 So. 2d 617 (La. App. 1st Cir. 1973).
¹⁵⁶. Id. at 621.
ambiguously drafted, the court could not easily determine who the intended beneficiaries were. The court interpreted the will as properly fixing the beneficiaries at the creation of the trust.

The courts in *Stewart* and other cases\(^\text{158}\) have made it clear that the Trust Code does not require that the beneficiaries of a trust be specifically identified as "the income beneficiary" and "the principal beneficiary" so long as the intention to designate them as such can be found. Furthermore, one court,\(^\text{159}\) in order to validate a trust, found that when the settlor did designate himself as the principal beneficiary, he actually intended his nieces and nephews, who took after his death, to be the principal beneficiaries.

In *Succession of Burgess*,\(^\text{160}\) a will established a trust for grandchildren living at decedent's death, and provided that if a grandchild died intestate and without descendants his interest vested in the other grandchildren or their descendants. The trust did not qualify as a class trust, and at the time of the settlor's death in 1971 such a shift was not permitted in non-class trusts. Thus, the provision for the shift was invalid. The court decided that the invalid shift did not amount to a "substitution" that would invalidate the entire trust because the shift would occur only when the beneficiary failed to exercise his testamentary power. In contrast, a substitution prevents the instituted legatee from disposing of his property by will. As a result, only the shift was stricken as illegal and the underlying trust was upheld.

Thus, although sometimes inappropriately using "substitution" terminology, the courts have in recent years applied the provisions of the Trust Code concerning interpretation of trust instruments in the liberal way that its redactors apparently intended.

**Conclusion**

The twenty-five years since the adoption of the Trust Code have seen a greatly increased use of trusts in Louisiana, increased receptivity in the legislature to making the benefits of the American trust available in Louisiana, and an increasingly receptive attitude in the judiciary. The next twenty-five years will no doubt see a continuation of these trends.

\(^{158}\) See, e.g., *Succession of Tatum*, 347 So. 2d 79 (La. App. 2d Cir.), writ refused, 350 So. 2d 896 (1977).

\(^{159}\) *Succession of Tufts*, 491 So. 2d 673 (La. App. 4th Cir.), writ denied, 497 So. 2d 308 (1986).

\(^{160}\) 359 So. 2d 1006 (La. App. 4th Cir.), writ denied, 360 So. 2d 1178 (1978).