Louisiana Law Review

Volume 35 | Number 3
Highlights of the 1974 Regular Session: Legislative Symposium
Spring 1975

Trust Code Revisions

Alfred W. Speer

proceedings used to obtain possession of the movable.[50] To insure recovery, the court must find the amount provided to be reasonable; however, even if the amount is found unreasonable or if no such stipulation was included in the contract, the court has discretion to award damages to the lessor.[51]

Cecil W. Talley

TRUST CODE REVISIONS

Legitime in Trust

Prior to 1974, the term of a trust could not exceed the life of the forced heir,[1] and the legitime could be burdened with an income interest in favor of anyone who could receive a usufruct over the same property.[2] Act 126 of 1974 amending sections 1841(3) and 1844 of the Trust Code provides explicitly that only a surviving spouse is eligible to receive an income interest or usufruct established by trust and states that the trust over the legitime may continue for the same term as would a usufruct over the same property.[3] Since the testator may grant the surviving spouse a confirmed legal usufruct to last until remarriage or, if the surviving spouse remains single, for life,[4] it would seem that an income interest may now also be granted for those

50. LA. R.S. 9:3266 (Supp. 1974).

51. LA. R.S. 9:3267 (Supp. 1974).

1. LA. R.S. 9:1841(3) (Supp. 1964) (as it appeared before Act 126 of 1974): "The legitime or any portion thereof may be placed in trust provided . . . [t]he term of the trust, as it affects the legitime, does not exceed the life of the forced heir . . . ."

2. LA. R.S. 9:1844 (Supp. 1964) (as it appeared before Act 126 of 1974): "The legitime in trust may be burdened with an income interest or with a usufruct in favor of a person other than the forced heir to the same extent that a usufruct of the same property could be stipulated in favor of the same person for a like period." Although the language of the section prior to the 1974 amendment could be read to allow an income interest in favor of any heir, legatee or assign, the cases had limited the usufruct over a legitime to one in favor of a surviving spouse. *See* Succession of Williams, 168 La. 1, 121 So. 171 (1929). An income interest over the legitime has also been so limited. Succession of Bellinger, 229 So. 2d 749 (La. App. 1st Cir. 1969).

3. LA. R.S. 9:1844 (Supp. 1964), *as amended by* La. Acts 1974, No. 126: "The legitime in trust may be burdened with an income interest or with a usufruct in favor of a surviving spouse to the same extent and for the same term that a usufruct of the same property could be stipulated in favor of the same person for a like period." *See also* comments to LA. R.S. 9:1841 (Supp. 1974).

4. Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888).

periods.[5] However, if the income interest is equated to a confirmed usufruct, it would impinge upon the legitime, as does a confirmed legal usufruct, if it extended beyond remarriage of the surviving spouse.[6]

Legitime in Class Trust

A settlor may create a trust in favor of a class consisting of some or all of his children or grandchildren or both, although some members of the class are not yet in being, as long as at least one member exists at the creation of the trust.[7] The Trust Code also provides for placing the legitime or any portion thereof in trust, subject to certain restrictions:[8] for instance, the legitime in trust may be subjected only to specified charges.[9] Although the language of section 1891 of the Trust Code[10] has always implied that the provisions of the class trust were meant to apply to the legitime in trust, only since the enactment of Act 126 of 1974, amending sections 1841 and 1844, has it been clear that the class trust may be a charge on the legitime in trust.[11] This affirmation of the compatibility of class trusts and legitime in trust makes appropriate an examination of the interplay of the rules governing the two trust devices.

Although the Trust Code indicates that a class trust may be created with respect to income or principal or both,[12] this provision

5. *Succession of Bellinger,* 229 So. 2d 749 (La. App. 1st Cir. 1969) held that an income interest was equal to a usufruct over the same property.

6. *Succession of Chauvin,* 260 La. 828, 257 So. 2d 422 (1972) indicated that a testamentary grant purporting to confirm the legal usufruct of Civil Code art. 916 would constitute a burden on the legitime of a forced heir if the usufruct were to last beyond the remarriage of the surviving spouse. Therefore, the court determined that such a usufruct would of necessity terminate at the remarriage of the spouse.

7. LA. R.S. 9:1891 (Supp. 1964): "Notwithstanding the provisions of . . . R.S. 9:1841 through 9:1847 [dealing with the legitime in trust], . . . a person may create an inter vivos or testamentary trust in favor of a class consisting of some or all of his children or grandchildren or both, although some members of the class are not yet in being at the time of the creation of the trust, provided at least one member of the class is then in being. Such a trust is called a class trust."

8. *See* LA. R.S. 9:1841 (Supp. 1964) (as it appeared before Act 126 of 1974).

9. *See* LA. R.S. 9:1841(2), 1843-44 (Supp. 1964) (as they appeared before Act 126 of 1974), declaring that the forced heir's interest may be subject to a charge or condition if the trust instrument places restraints on the alienation of the legitime in trust or the legitime is burdened with a usufruct or income interest.

10. *See* note 7 *supra.*

11. LA. R.S. 9:1841(2) (Supp. 1964), *as amended by* La. Acts 1974, No. 126: "The forced heir's interest is subject to no charges or conditions except as provided in R.S. . . . 9:1891 through 9:1906 . . . ."

12. LA. R.S. 9:1893 (Supp. 1964), *as amended by* La. Acts 1974, No. 127 provides

is not dispositive of the question of what interest in a trust is required to satisfy the legitime. Section 1845 provides that an income interest will satisfy the legitime to the same extent as a usufruct over the same property, but the courts have held that a usufruct alone, even over the entire estate of the testator, does not satisfy the legitime.[13] Therefore, it seems certain that the inclusion of a forced heir in a class of beneficiaries of *income alone* would not satisfy the legitime. Further, the general principles of the legitime in trust require that if the forced heir is a member of a class of beneficiaries of *principal alone,* the income interest must be granted to the surviving spouse to the same extent as a legal usufruct or to the forced heir himself. Finally, section 1893 requires that if the settlor desires to create a class of principal and income beneficiaries of a trust over his estate, that class must be the sole beneficiary of the interest affected; therefore, to satisfy the legitime by giving the forced heir an interest in both *principal and income* all the settlor's forced heirs must be members of the class. Although section 1893 now allows invasion of principal in class trusts, no such invasion as would deprive the forced heir of his legitime could be permitted.[14]

Another problem to be resolved when the legitime in trust is subjected to the provisions of the class trust is whether the articles on the class trust or those on the legitime in trust should control the termination of a class trust over the legitime. If the articles on the legitime control,[15] the trust must terminate at the death of the forced heir except when the surviving spouse has the income interest, in which case the trust would have the same term as the legal usufruct.

---

in pertinent part: "A class trust may be created with respect to income or principal, or both, but the members of the class must always be the sole beneficiaries of the interest affected, whether income, principal, or both."

13. *See* Succession of Williams, 184 So. 2d 70 (La. App. 4th Cir. 1966). *See also* Succession of Blossom, 194 La. 635, 194 So. 572 (1940); McCalop v. Stewart, 11 La. Ann. 106 (1856); Succession of Kaufman, 274 So. 2d 471 (La. App. 1st Cir. 1973).

14. LA. R.S. 9:1893 (Supp. 1964), *as amended by* La. Acts 1974, No. 127, provides in pertinent part: "Subject to R.S. 9:2068, the trustee may invade accumulated income or principal for the benefit of one or more individual income beneficiaries or one or more members of any class of income beneficiaries, even though such income beneficiary may not be a member of the class of principal beneficiaries." LA. R.S. 9:2068 (Supp. 1964), *as amended by* La. Acts 1974, No. 158, in turn, allows invasion except as provided in R.S. 9:1841-47 (dealing with the legitime in trust). LA. R.S. 9:1847 (Supp. 1964) forbids the trustee from invading the principal in a manner which would deprive the forced heir of any or all of his legitime. Thus, the principal may not be invaded for the benefit of the surviving spouse or any other co-member of the class who is not a forced heir.

15. LA. R.S. 9:1841(3), 1844 (Supp. 1964), *as amended by* La. Acts 1974, No. 126.

If, however, the rules applicable to class trusts control,[16] the trust would terminate only after the class has closed, that is, after no other member could possibly join the class, and (1) all the class members die, if no other term is stipulated, or (2) if the class is of principal beneficiaries only, when the last income beneficiary dies.

The decision as to which set of articles controls termination will also affect the vesting of the trust interest. According to the sections on class trusts, the heirs or legatees of the forced heir are vested with his interest in the trust upon his death, absent a stipulation in the trust instrument that the interest of a class member who dies intestate and without descendants vests in the other members of the class.[17] If the rules of termination of the legitime in trust prevail, the heirs or legatees of the forced heir receive at his death the portion of the principal equal to his forced portion as well as any other interest he may have possessed in the remainder of the trust.[18]

Even after the 1974 amendments, the Trust Code itself does not provide a solution to this dilemma; hence, a solution outside the Code may be sought.[19] Since Louisiana law has traditionally afforded scrupulous protection to the rights conferred under the institution of forced heirship,[20] it may seem that the articles on the legitime in trust should govern so as to free the legitime at the death of the forced heir. At the same time, however, legislative modifications of the scheme of forced heirship have been judicially sanctioned,[21] and the provisions of the class trust governing requisites for and consequences of termination of the trust may be viewed as such a modification when they are applied to the legitime in trust.

---

16. LA. R.S. 9:1896, 1901, 1902 (Supp. 1964).

17. LA. R.S. 9:1895 (Supp. 1964).

18. LA. R.S. 9:1841(3) (Supp. 1964), *as amended by* La. Acts 1974, No. 126; LA. R.S. 9:1841(4) (Supp. 1964).

19. LA. R.S. 9:1724 (Supp. 1964) provides that the terms of the Trust Code are to be interpreted so as to allow for freedom of disposition, with resort to the Civil Code and other statutes only when the Trust Code is silent, and forbids the invocation of the Civil Code and other statutes to defeat dispositions sanctioned by the Trust Code. However, R.S. 9:1724 only purports to direct the solution of possible conflicts between sections of the Trust Code and other statutes. The present conflict is between Trust Code sections, and therefore R.S. 9:1724 should not, of itself, direct a solution.

20. See Succession of Braswell, 142 La. 948, 77 So. 886 (1918); Succession of Young, 205 So. 2d 791 (La. App. 1st Cir. 1967); Succession of Ramp, 205 So. 2d 86 (La. App. 4th Cir. 1967); Succession of Williams, 184 So. 2d 70 (La. App. 4th Cir. 1966).

21. *See* Succession of Earhart, 220 La. 817, 57 So. 2d 695 (1952).

Invasion of Class Trusts

Article 1893 of the Trust Code has been amended to allow invasions of the principal or accumulated income of a class trust for the benefit of any member of any class of income beneficiaries or one or more individual income beneficiaries.[22] Formerly, the section could have been interpreted to mean that an invasion was permitted only when the class of income beneficiaries to be benefited thereby was identical to the class of principal beneficiaries.[23] The amendment makes it clear that the principal or accumulated income may be invaded to benefit any beneficiary whether or not a member of the class of principal beneficiaries.

Conditional Substitutions in Trust

Act 160 of 1974, amending section 1972 and adding sections 1973 through 1977 of the Trust Code, provides for the first time a mechanism for creating conditional substitutions in trust.[24] Prior to 1974, section 1972 provided that, subject to the trust instrument and certain class trust provisions, the interest of a principal beneficiary vested in his heirs at his death. Act 160 modifies section 1972 to provide that the trust instrument may stipulate against such vesting.[25] Now, when a principal beneficiary dies intestate and without descendants, his interest may be vested in some other person or class of persons termed "substitute beneficiaries."[26] Because a substitution

22. *See* note 14 *supra*.

23. LA. R.S. 9:1893 (Supp. 1964) (as it appeared before Act 127 of 1974) provided: "A class trust may be created with respect to income or principal, or both, but the members of the class must always be the sole beneficiaries of the interest affected, whether income, principal or both. The trustee may invade accumulated income or principal for the benefit of one or more members of the class of income beneficiaries in accordance with R.S. 9:2068." If the first sentence of former section 1893 was viewed as controlling the extent of the invasion permitted by the second sentence, an invasion to benefit any person or class other than the principal beneficiary would be deemed to violate the provisions of R.S. 9:1893.

24. In 1962, La. Const. art. IV, §16 (1921) and LA. CIV. CODE art. 1520 were amended to allow such substitutions in trust as authorized by the legislature. LA. R.S. 9:1723 (Supp. 1964) is such an authorization. The 1974 Constitution contains no prohibition against substitutions of any kind.

25. LA. R.S. 9:1972 (Supp. 1964), *as amended by* La. Acts 1974, No. 160: "Upon a principal beneficiary's death, his interest vests in his heirs or legatees, subject to the trust; provided, however, that the trust instrument may stipulate otherwise to the extent permitted by R.S. 9:1973 through 9:1977 and R.S. 9:1895."

26. *See* LA. R.S. 9:1972-77 (Supp. 1974). Prior to these amendments, the Trust Code "permitted the shifting of principal only where the trust instrument permitted invasion of principal (R.S. 9:2068) and in the class trust where the class beneficiary died both intestate and without descendants (R.S. 9:1895)." Comment to LA. R.S. 9:1972 (Supp. 1974).

may take effect only if the principal beneficiary dies intestate and without descendants,[27] this provision, like section 1895 governing class trusts,[28] may modify forced heirship only in the ascending line.[29]

A settlor seeking to establish a conditional substitution must stipulate the substitution in the trust instrument;[30] the trustee may not establish any type of substitution, nor may the settlor delegate to the trustee the power to create a substitution. In addition, the settlor must stipulate in the trust instrument whether an interest is to vest in a substitute beneficiary during the term of the trust or at the termination of the trust.[31] The substitute's interest may be conditioned on his surviving the original beneficiary, and if such a condition is imposed, the settlor may name alternative beneficiaries to take in the event that the substitute fails to outlive the original beneficiary.[32] Both the alternative and substitute beneficiaries must be in being and ascertainable at the creation of the trust, except when a class is such a beneficiary.[33] Unless the interest of a substitute beneficiary is conditioned on his surviving the original beneficiary, his interest vests in his heirs at his death subject to the trust.[34] Section 1977 of the Trust Code provides that the class trust rules[35] as to the interest of a deceased member apply when a class is a substitute or alternative beneficiary.

The interest in principal a substitute or alternative beneficiary

27. If the beneficiary dies testate or with descendants, R.S. 9:1972 governs the distribution of his interest.

28. LA. R.S. 9:1895 (Supp. 1964): "An interest of a child or grandchild who dies during the term of the trust vests in his heirs or legatees, but the trust instrument may provide that the interest of a child or grandchild who dies intestate and without descendants during the term of the trust vests in the other members of the class."

29. *See* Comment to LA. R.S.9:1972 (Supp. 1974). *See also* Succession of Earhart, 220 La. 817, 57 So. 2d 695 (1952).

30. LA. R.S. 9:1972 (Supp. 1964), *as amended by* La. Acts 1974, No. 160.

31. LA. R.S. 9:1973 (Supp. 1974).

32. LA. R.S. 9:1974 (Supp. 1974).

33. LA. R.S. 9:1975 (Supp. 1974). Although the article speaks only of "a substitute beneficiary," it should be construed to apply equally to alternative beneficiaries. An alternative beneficiary is merely an alternative *substitute beneficiary* (LA. R.S. 9:1974 (Supp. 1974); hence, the rules governing substitute beneficiaries also control the rights of alternative beneficiaries.

34. LA. R.S. 9:1976 (Supp. 1974). The phrase "subject to the trust" within R.S. 9:1976 should not be read as affecting the actual vesting, but merely as a ratification of the trust instrument.

35. LA. R.S. 9:1894-95 (Supp. 1964). These provisions create a possible second shift in principal through the application of R.S. 9:1895 to the members of the class of substitute or alternative beneficiaries.

is allowed to acquire after the creation of the trust[36] may seem similar to future interests at common law.[37] However, the Trust Code provides that ordinarily any interest in principal must vest at the creation of the trust;[38] therefore, it would seem that any interest which a substitute or alternative beneficiary acquires on the death of the original beneficiary also vests at the creation of the trust.[39] Thus, the authorization of "conditional substitutions" in sections 1973 and 1974 simply creates a shift in principal interest comparable to the shift allowed within the class trust provisions[40] and not a future interest in the trust.

Effects of Revocation

Section 2046 of the Trust Code was amended to clarify the effects of revocation or rescission of a trust. Prior to 1974, section 2046 could have been interpreted to mean that upon the revocation or rescission of the trust all property which had ever formed a part of the trust would revert to the settlor.[41] Foreseeing such an interpretation, the trustee of a revocable trust might have felt compelled to retain all of the trust property in anticipation of a revocation.[42] Act 128 of 1974 specifically provides that only the trust property held by the trustee at the time of a revocation or rescission will revert,[43] thus affirming

36. LA. R.S. 9:1973 (Supp. 1974): "The trust instrument may provide that the interest of a principal beneficiary who dies intestate and without descendants during the term of the trust or at its termination vests in some other person or persons, each of whom shall be a substitute beneficiary."

37. A common law future interest does *not* vest until the termination of the prior estate. A substitute's interest might be considered the equivalent of a contingent remainder or shifting executory interest at common law. However, under the common law the interest vests only after the contingency occurs. In other words, future interest entail future vesting. *See* J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, & ESTATE PLANNING 696, 698-99 (1972).

38. LA. R.S. 9:1971 (Supp. 1964): "The interest of a principal beneficiary is acquired immediately upon the creation of a trust, subject to the exceptions provided in this Code."

39. LA. R.S. 9:1974 (Supp. 1974): "The interest of a substitute beneficiary may be conditioned upon his surviving the principal beneficiary. The trust instrument may provide for one or more alternative substitute beneficiaries if a substitute beneficiary does not survive the principal beneficiary."

40. LA. R.S. 9:1895 (Supp. 1964). *See* note 28 *supra*.

41. J. LeVan, The Louisiana Estate Planner, vol. 1, no. 1, Summer, 1974.

42. The principles of LA. R.S. 9:2046(1) (Supp. 1964) (as it appeared before Act 128 of 1974) are very similar to those discussed in G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 998 (1975), A. SCOTT, THE LAW OF TRUSTS §§ 329(A), 330 (1956) and RESTATEMENT (SECOND) OF TRUSTS § 345 (1959). None of these sources, however, seem to contemplate the strict reading which was given to former R.S. 9:2046(1).

43. LA. R.S. 9:2046(1) (Supp. 1964), *as amended by* La. Acts 1974, No. 128 § 1.

the legal title[44] of the trustee and his power of sale.[45] In addition, paragraph five was added to section 2046 to provide that the acts of a trustee of a revocable trust prior to revocation are as valid as those of a trustee of an irrevocable trust,[46] thereby foreclosing any possible attacks on the power of the trustee to alienate trust property prior to the settlor's effective revocation or rescission. Section 2046(5) also provides the trustee with limited powers after termination of the trust to carry out the revocation or rescission.[47]

Alfred W. Speer

CONDOMINIUMS

The Louisiana Condominium Act,[1] adopted by the legislature substantially as drafted by the Louisiana State Law Institute, replaces the Horizontal Property Act of 1962[2] as the statutory foundation for the regime of condominium property in Louisiana. Condominium is the property regime under which certain portions of immovable property are subject to individual ownership and the remaining portions are owned in indivision by the individual owners.[3] In practical terms, it is the regime under which individual units or apartments in a multi-unit building or project are individually owned while common elements of the project such as land, principal struc-

44. *See* LA. R.S. 9:1731 (Supp. 1964).

45. *See* LA. R.S. 9:2119 (Supp. 1964).

46. Although the Trust Code sections do not so provide, it would seem that the trust instrument of a revocable trust should provide a procedure for notifying the trustee, beneficiaries, and the public upon revocation and should stipulate that the termination will not be effective until such notice is given. In the absence of such notification, transfers made by the trustees subsequent to revocation are still valid. *Cf.* LA. CIV. CODE art. 2266.

47. LA. R.S. 9:2046(5) (Supp. 1974): "Acts of the trustee with regard to the trust property shall not be affected by the subsequent revocation or rescission of a disposition in trust. After a trust has been revoked or rescinded, the trustee shall have only those powers necessary to carry out the effects of the revocation or rescission." Since the section does not specify what powers the trustee has, if the trust instrument itself is silent, the RESTATEMENT (SECOND) OF TRUSTS, § 344 (1959) and its comments provide guidelines for the definition of those powers.

1. La. Acts 1974, No. 502, *amending & reenacting* LA. R.S. 9:1121-42 [hereinafter cited as Condominium Act].

2. LA. R.S. 9:1121-42 (Supp. 1962) (replaced by Louisiana Condominium Act, La. Acts 1974, No. 502) [hereinafter cited as Horizontal Property Act].

3. Condominium Act § 1123(1), LA. R.S. 9:1123(1) (Supp. 1974).