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Trusts in Mixed Jurisdictions—Aspects of the Louisiana and South African Trusts Compared

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This Article undertakes a comparative analysis of aspects of the Louisiana and South African trusts to provide a contextualized perspective on the assimilation of the common-law trust into two mixed jurisdictions with strong civilian legal traditions. The Article attends, first, to the fact that Louisiana trust law is codified whereas South African trust law is not, and it investigates some of the effects of this fundamental difference on the development of trust law in the two jurisdictions. The Article next examines whether some of the principal obstacles to the reception of the trust in Louisiana proved equally obstructive to the reception of the trust in South Africa. The Article compares, finally, some core elements of the Louisiana and South African trusts to show that divergences between Louisiana and South African private law have caused the two jurisdictions to follow, at least at times, contrasting approaches to the trust institution and the law that governs it.

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I. INTRODUCTION

Louisiana and South Africa are both mixed jurisdictions—civilian legal systems that bear the indelible imprint of the common law.[1] Both jurisdictions have received the common-law trust into their respective civilian legal methodologies. The reception of the trust and the development of trust law in Louisiana and South Africa have been characterized by legal adaptation. Zekoll observes, for example, that the trust was not received in Louisiana through an "uncritical importation of common law ideas."[2] The trust was, instead, adopted and customized in order not to compromise central values of Louisiana's civil-law system.[3] Zimmermann and Visser observe in a similar vein that the common-law trust managed to infiltrate South Africa's civilian "citadel" but that it "had to adapt to the new environment."[4] De Waal asserts, therefore, that the trust that first appeared in South Africa was the English trust, but the trust that eventually emerged was something quite different—in South Africa there was "a reception but subsequent transformation of the English trust."[5]

The reception and adaptation of the common-law trust in Louisiana and South Africa followed different paths. Consequently, and also by

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1. The hybridism that characterizes the Louisiana and South African jurisdictions is so well-established that, I trust, my asserting it here is not contentious. Nevertheless, see LOUISIANA: MICROCOSM OF A MIXED JURISDICTION (Vernon Valentine Palmer ed., 1999) regarding the former and SOUTHERN CROSS—CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (Reinhard Zimmermann & Daniel Visser eds., 1996) regarding the latter.

2. Joachim Zekoll, *The Louisiana Private-Law System: The Best of Both Worlds*, 10 TUL. EUR. & CIV. L.F. 1, 25 (1995).

3. *Id.*

4. SOUTHERN CROSS, *supra* note 1, at 28.

5. M.J. de Waal, *In Search of a Model for the Introduction of the Trust into a Civilian Context*, 12 STELL. L. REV. 63, 76 (2001).

reason of some similarities but also distinct contrasts between the Louisiana and South African legal systems, the trusts of these two jurisdictions correspond in some respects but differ in others. In both jurisdictions the trust has retained elements of the DNA of its English forebear, but distinctive and, at times, divergent legislative and judicial engagement with the trust in the two jurisdictions has loosened the ancestral bond between the Louisiana and South African trusts: they are, in a sense, cousins rather than siblings.

This Article examines aspects of the Louisiana and South African trusts to provide a contextualized perspective on the assimilation of the common-law trust into mixed jurisdictions with strong civilian legal traditions. The Article commences with an investigation into one of the fundamental differences between Louisiana's and South Africa's private law, namely the codification of the former as opposed to the un-codified state of the latter. This difference has had a significant impact on the manner in which the two legal systems received and adapted the common-law trust, and the Article comments on the various methodologies followed in this regard. The Article next examines some of the principal obstacles to the trust's reception in Louisiana. These obstacles are rooted in Louisiana's civil-law system and they appear, at least at first glance, to militate against the trust's reception in Louisiana. The Article shows how these obstacles were overcome and inquires whether similar constraints hampered the trust's reception in South Africa. The Article concludes with a look at some of the Louisiana trust's unique features—features that underscore its adaptation to a civilian context—and investigates whether or not the South African trust shares these features with its counterpart from Louisiana.

II. RECEPTION AND SUBSEQUENT DEVELOPMENT: CODIFICATION VS. COMMON LAW

Numerous legal scholars have noted Louisiana's initial resistance to the trust. This resistance rested formally on the prohibition of substitutions and *fidei commissa* contained in article 40 of the Digest of 1808 as well as in article 1507 of the Louisiana Civil Code of 1825 and subsequently in article 1520 of the Louisiana Civil Code of 1870.[6] Some scholars opine, however, that the real reason behind Louisiana's earlier aversion to the trust lies in what Wisdom calls "the doctrinal difficulty of

6. *See, e.g.*, Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust*, 42 LA. L. REV. 1721, 1726 (1982); *see also infra* Section III.B (regarding the prohibition of substitutions and *fidei commissa*, and its impact on the reception of the trust in Louisiana).

the civilian mind conceiving of a tenure of property based on dual ownership or admitting into the civil law such an alien institution."[7] "Dual ownership" refers, of course, to the English-law conception of a division between a legal estate and an equitable estate—the former vesting, in the trust-law context, in the trustee (as the legal owner of the trust *corpus*) and the latter in the trust beneficiary (as the equitable owner of the trust *corpus*). This notion that different forms of ownership are divisible between different owners (or, to put it differently, that legal title is severable from equitable title) is at odds with the civil law's adherence to singular (or unitary) ownership—the civil law conceives of ownership as absolute, autonomous, and indivisible and prescribes that a person either has full ownership (or complete title) or he or she does not.[8] This conception of singular ownership appeared in Justinian's *Corpus Juris Civilis* and was incorporated into the French *Code Civil*, from where it found its way into the Louisiana Digest of 1808 and the subsequent Civil Codes of 1825 and 1870.[9]

Louisiana's civilian heritage, rooted deeply in the French and Spanish traditions, and in particular Louisiana's Civil Codes stemming from the *Code Civil*[10] make it unique among American jurisdictions—Louisiana has been described as a "civil law island" in the "common law sea" of the other American states that derive their legal systems from English law.[11] Louisianans' exposure to the "American trust"[12] was, therefore, unavoidable, and it was simply a matter of time before the trust would infiltrate also Louisiana's civilian citadel. This happened through legislation, enacted, at least initially, in a piecemeal manner and without much enthusiasm on the legislature's part. Martin notes in this regard that "the Louisiana legislature has reluctantly given the trust a place in its laws of property and inheritance."[13]

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7. John Minor Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act*, 13 TUL. L. REV. 70, 74 (1938); *see also* L.A. Wright, *Trusts and the Civil Law—A Comparative Study*, 6 W. ONTARIO L. REV. 114, 121 (1967); A.N. Yiannopoulos, *Trust and the Civil Law: The Louisiana Experience*, *in* LOUISIANA: MICROCOSM OF A MIXED JURISDICTION, *supra* note 1, at 228.

8. Jarvis J. Claiborne, *An Analysis of the Louisiana Constitutions of 1921 and 1974, and Their Impact on Louisiana Trust Law*, 10 S.U. L. REV. 65 (1983).

9. Lorio, *supra* note 6, at 1721-22.

10. John Minor Wisdom, *Progress in the Codification of Trusts*, 14 TUL. L. REV. 165, 185 (1940).

11. Zekoll, *supra* note 2, at 2.

12. A description used by Edward F. Martin, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, 50 LA. L. REV. 501, 502 (1990) to denote the trust of the Anglo-American variety.

13. *Id.* at 501.

The first legislative step in this process occurred in 1882 when all donations made to trustees for educational, charitable, or literary purposes were statutorily exempted from the laws pertaining to prohibited substitutions and *fidei commissa*.[14] In 1902 Louisiana banks were authorized to, among others, act in various fiduciary capacities, to accept and execute trusts, and to act as trustees.[15] Louisiana banking corporations under the supervision of the state bank examiner were permitted to use the word "trust" in their corporate titles in 1910.[16] Trustees were authorized to act for bondholders and note-holders under conventional mortgages in 1914.[17] In 1918 Louisiana banks were obliged to have the word "trust" in their corporate names.[18] The enactment of the Trust Act 107 of 1920 was a significant milestone because this Act legalized private trusts for a limited duration in Louisiana, and its enactment was followed by the recognition of "trust estates" in the Louisiana Constitution of 1921. The Trust Act was, however, repealed in 1935. The resultant vacuum was filled by the Trust Estates Act 81 of 1938, a statute that has been described as "the first complete code of trust law adopted by a North American state"[19] and one that "makes it clear that Louisiana has gone the full way and adopted the common law trust."[20]

Mintz remarks, however, that the Trust Estates Act elicited considerable discontent,[21] probably because it was not well-integrated with the Louisiana Civil Code[22] and, also, because the Louisiana judiciary "failed to embrace this new institution with enthusiasm."[23] Consequently, many Louisianans opted to go to other American states to set up their trusts because trust law was more settled elsewhere than in Louisiana.[24] The weaknesses of the Trust Estates Act coupled with the judiciary's recalcitrance toward its trust concept prompted the adoption of

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14. Act 124 of 1882.
15. Act 45 of 1902.
16. Act 144 of 1910.
17. Act 72 of 1914.
18. Act 70 of 1918.
19. Lorio, *supra* note 6, at 1729.
20. Wisdom, *supra* note 7, at 83; *see also* Wisdom, *supra* note 10, at 187 (stating with regard to the recognition of the limited-duration private trust under the Trust Estates Act: "The Louisiana specie . . . is a bob-tailed trust, only an express trust for a limited term—but nevertheless it is the Anglo-American trust.").
21. Donald R. Mintz, Succession of Simms—*"The [Civil] Law is a Jealous Mistress,"* 41 TUL. L. REV. 885, 905 (1967).
22. Lorio, *supra* note 6, at 1729.
23. Mintz, *supra* note 21, at 885.
24. Claiborne, *supra* note 8, at 80.

Louisiana's current Trust Code through Act 338 of 1964.[25] In 1962, prior to the adoption of the Trust Code, the Louisiana legislature amended the state's constitution to permit trusts to contain substitutions to the extent authorized by the legislature. The legislature also amended article 1520 of the Louisiana Civil Code to make substitutions in trusts an exception to the prohibition contained in that article. Lorio notes, however, that the adoption of the Trust Code did not translate into a complete acceptance of trusts in Louisiana, in particular because some trusts were still invalidated on the ground that they contained prohibited substitutions.[26] Subsequent amendments to the Trust Code, coupled with a more liberal judicial approach to substitutions,[27] facilitated finally the trust's complete reception in Louisiana.

It is evident from the above synopsis that the trust's assimilation into Louisiana's civilian legal system—or, as Wisdom describes it, Louisiana's "capitulation" to the trust[28]—has been a somewhat tumultuous affair, and that the legislature had to navigate some stormy waters in order to effectuate the reception, ultimately using codification: a *modus operandi* that does not offend civilian sensibilities. By comparison, the reception of the trust in South Africa has been rather plain sailing.

South Africa's civilian common law[29] is Roman-Dutch law—an uncodified *ius commune* developed in the Netherlands, and in its province of Holland in particular, through the reception of Roman law and its synthesis, particularly during the sixteenth and seventeenth centuries, with Germanic customary law, feudal law, and canon law.[30] The Dutch settled at the Cape of Good Hope (present-day Cape Town) in the middle of the seventeenth century, and Roman-Dutch law was transplanted onto the new settlement. The Dutch ruled at the Cape until Britain, at war with France and fearing that Napoleon Bonaparte's invasion of the Netherlands would give the French control over the trade route to the East around Africa's southern tip, occupied the Cape in 1795. The British returned the Cape to the Netherlands (known at the time as the Batavian Republic) in 1803 when the Peace of Amiens ended the war between Britain and France. This peace was short-lived, however, and

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25. La. R.S. 9:1721 *et seq*.

26. Lorio, *supra* note 6, at 1731.

27. *Id*.; *see also* Leonard Oppenheim, *The 1972 Amendments to the Trust Code of 1964*, 47 TUL. L. REV. 315, 324 (1973).

28. Wisdom, *supra* note 7, at 82.

29. "Common law" is used here to denote law that does not originate in legislation.

30. Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, *in* SOUTHERN CROSS, *supra* note 1, at 37-41.

hostilities between Britain and France resumed a few years later, whereupon Britain occupied the Cape for a second time in 1806. The British, in accordance with their colonial policy of the time, retained Roman-Dutch law as the official law of the Cape Colony but modeled the Colony's administration of justice on the British system. For example, *stare decisis*—the doctrine of judicial precedent—became part and parcel of the Cape Colony's judicature. The British did likewise when, in the course of the nineteenth and the early twentieth centuries, they colonized the other southern African territories that make up present-day South Africa.

Napoleon's invasion of the Netherlands in 1795 marked the end of Roman-Dutch law in Europe. The French *Code Civil*, enacted in 1804, replaced Roman-Dutch law in the Netherlands when it was introduced to that country in 1809. The British occupied the Cape prior to the *Code Civil*'s introduction to the Netherlands, and the Cape as well as the other southern African British colonies consequently escaped the codification movement that swept across continental Europe in the nineteenth century. South Africa, therefore, retained (and subsequently adapted) Roman-Dutch law as its un-codified civilian common law. Van Zyl states:

> In South Africa we follow the law of Holland as it was up to 1806. We have nothing to do with the Code Napoleon, which was in force in Holland from April, 1809, till October, 1838, nor with Holland's own codification of her laws in October, 1838.[31] Both are excellent works . . . [but] however interesting they may be for reading and studying, they are as Codes not in force in South Africa.[32]

The Roman-Dutch law transplanted at the Cape was, of course, unfamiliar with the trust,[33] but it did recognize some "trust-like" institutions such as the *fidei commissum* and *bewind*.[34] However, in the aftermath of the second occupation the British settlers persisted in the (to them) familiar practice of using trusts in, among others, testamentary

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31. Note that the Netherlands subsequently enacted a new civil code, the *Nieuw Burgerlijk Wetboek*, which came into force in a piecemeal fashion during the latter half of the twentieth and the early part of the twenty-first centuries.

32. C.H. van Zyl, *The Sources of South African Law (Part IV)*, 19 S. AFRICAN L.J. 35, 49 (1902).

33. The South African Appellate Division (now called the Supreme Court of Appeal, which is South Africa's highest court in non-constitutional matters) acknowledged Roman-Dutch law's unfamiliarity with the trust in *Braun v. Blann & Botha* 1984 (2) SA 850 (A) at 858H-859A. *See also Boyce v. Bloem* 1960 (3) SA 855 (T) at 866D; *Gross v. Pentz* 1996 (4) SA 617 (A) at 629F.

34. Tony Honoré, *Trust*, *in* SOUTHERN CROSS, *supra* note 1, at 849.

bequests, deeds of gift, pre-nuptial contracts, and land transfers.[35] The trust was, therefore, introduced to South Africa through general usage by the British colonists rather than by statutory directive.[36] It is, in this light, unsurprising that Solomon J.A. remarked in *Estate Kemp v. McDonald's Trustee*,[37] a leading Appellate Division judgment on a testamentary trust handed down just over a century after the second British occupation, that "[t]he [trust] idea is now so firmly rooted in our practice, that it would be quite impossible to eradicate it."[38] In *Braun v. Blann & Botha* the Appellate Division confirmed that the development of trust law in South Africa has been, and continues to be, the province of the courts rather than the legislature. Joubert J.A. said:

> In South Africa, which has a civil law legal system, the trust was introduced in practice during the 19th century by usage without the intervention of the Legislature . . . . Our Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law.[39]

The foregoing does not mean, however, that the trust's reception in South Africa did not encounter the occasional judicial caution. It is perhaps unsurprising that the warnings expressed by South African judges regarding the reception of the trust and the use of trust terminology in South Africa correspond greatly with some of the above-stated reasons for Louisiana's initial resistance to the trust. In *Lucas' Trustee v. Ismail & Amod*,[40] for example, Innes C.J. cautioned strenuously against the importation of English trust-law notions that are incompatible with South Africa's civilian legal tradition:

> Now the word "trustee" . . . is a term derived from the English law, and I think it must be used with considerable caution. If by trustee is meant a man occupying some capacity recognised by our law, and undertaking some obligation known to our law, to hold property for another, and not for himself, then the expression is a convenient one, and may be safely applied. But if the word trustee is employed as somehow vaguely introducing the English doctrine of trusts, whether express or constructive, and as implying the existence of some real right in the *cestui que trust* which would not be

35. EDWIN CAMERON, MARIUS J. DE WAAL, BASIL WUNSH & PETER SOLOMON, HONORÉ'S SOUTH AFRICAN LAW OF TRUSTS 21 (5th ed. 2002).

36. *Braun* 1984 (2) SA at 859E.

37. *Estate Kemp v. McDonald's Trustee* 1915 AD 491.

38. *Id.* at 508.

39. *Braun* 1984 (2) SA at 859E-F.

40. *Lucas' Trustee v. Ismail & Amod* 1905 TS 239.

> conferred by our law, then it is a dangerous word and should be very strictly scrutinised.[41]

The cautiousness with which some South African courts approached the trust was tempered by the statutory regulation of aspects of trust law in the course of the twentieth century—in so doing the South African legislature effectively placed its stamp of approval upon the South African version of the trust. The Administration of Estates Act 24 of 1913 established state control over the executors of deceased estates and hence also the administrators of trusts created in respect of such estates. The Trust Monies Protection Act 34 of 1934 extended state control over trusts by including *inter vivos* trusts within its regulatory ambit. Chapter III of the Administration of Estates Act 66 of 1965 required that trustees obtain written authorization before acting as such. However, Chapter III never came into operation and was repealed by the Trust Property Control Act 57 of 1988, the statute that currently regulates aspects of trusteeship and related matters in South Africa. It is important to note that the Trust Property Control Act, although enacted to establish firmer state control over trust property, was not intended, and does not function, as a trust code in South African law—the courts remain the principal constructors of South African trust law and the doctrine of judicial precedent, introduced by the British at the Cape in the early nineteenth century, is central to this development by the judiciary.[42]

The foregoing Part of the Article shows that, although the reception of the trust and the subsequent development of trust law in Louisiana and South Africa followed different paths, both jurisdictions successfully received the common-law trust into their respective civilian legal systems. Louisiana had to surmount a number of legal obstacles in order for this reception to have occurred. What these obstacles were, how they were surmounted, and whether or not the reception of the trust in South Africa faced similar constraints are addressed in the Article's next Part.

III. OBSTACLES TO THE RECEPTION OF THE TRUST IN LOUISIANA AND HOW THE SOUTH AFRICAN LEGAL POSITION COMPARES

Lorio identifies three principal obstacles to the reception of the trust in Louisiana: the duality of ownership that underpins the common-law trust as opposed to Louisiana's civilian conception of ownership; the prohibition of substitutions and *fidei commissa* contained in the

41. *Id.* at 244.

42. FRANCOIS DU TOIT, SOUTH AFRICAN TRUST LAW: PRINCIPLES AND PRACTICE 21 (2d ed. 2007).

Louisiana Civil Code; as well as the tension between forced heirship on the one hand, and using the trust as a device for the economic protection of the family on the other hand.[43] These obstacles are analyzed hereafter with a comparative exposition on the South African position. The objective of this examination is to show how the two jurisdictions have successfully integrated the trust into their respective private-law regimes by surmounting the obstacles that typically prevent the trust's accommodation in a civilian context. It is shown, moreover, that Louisiana and South Africa have frequently followed different legal routes to the aforementioned end because the trust's reception in the two jurisdictions occurred in dissimilar legal environments.

A. Duality of Ownership

1. Solving the Problem

The severance of legal ownership from equitable ownership—often denoted as the "essence" of the common-law trust[44]—has been advanced as a principal obstacle to the introduction of the trust to Louisiana because this duality is foreign to Louisiana law's civilian conception of ownership.[45] However, at least two solutions are available to address this problem. First, the civil law recognizes a number of institutions and constructs that functionally accomplish the purpose of trusts and that can, therefore, by analogy simply be called "trusts" in the civil law. These include, but are not limited to, the *fidei commissum*, *fiducia*, mandate, *modus*, deposit, curatorship, and usufruct. However, many Louisiana trust-law scholars have opined that not one of these civil-law institutions and constructs is truly equivalent to the trust. Wisdom argues, for example, that all the civilian alternatives differ conceptually from the trust and each falls short of the trust in some important respect.[46] The *fidei commissum* is, arguably, the civilian institution that bears the closest resemblance to the trust.[47] Nevertheless, substantial differences between the *fidei commissum* and the trust render an equation of the former with the latter untenable. To name but a few of these differences: under a trust, the trustee and the trust beneficiary's interests are

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43. Lorio, *supra* note 6, at 1738.

44. Wisdom, *supra* note 7, at 77; Wisdom, *supra* note 10, at 186.

45. Wisdom, *supra* note 7, at 77. See, however, Lorio, *supra* note 6, at 1722 who points out that dual ownership was indeed known during the Roman classical period.

46. Wisdom, *supra* note 7, at 79.

47. Wright, *supra* note 7, at 117; *see also* Paul Matthews, *The Compatibility of the Trust with the Civil Law Notion of Property*, *in* THE WORLDS OF THE TRUST 313, 332-33 (Lionel Smith ed., 2013).

concurrent, whereas a *fidei commissum* involves a succession of interests from the fiduciary to the fidei commissary; a fiduciary enjoys a beneficial interest in the property subject to a *fidei commissum*, whereas a trustee enjoys no comparable interest in trust property; a trust founder may impose restrictions on a trustee's management of trust property, whereas the grantor of a *fidei commissum* cannot, as a rule, be prescriptive in regard to the fiduciary.[48] In light of these (and other) differences between the two institutions, many Louisiana trust-law scholars have questioned whether the *fidei commissum* can be regarded as "a trust" or even whether the term "*fidei commissum*" necessarily includes "the concept of a trust."[49] This solution to the reception of the trust into Louisiana's civil law appears, therefore, to be an imperfect one.

Unsurprisingly, South African trust law evinces exactly the same phenomenon. Innes C.J., attempting a Romanist reconfiguration of the trust for South African purposes,[50] said in *Estate Kemp v. McDonald's Trustee* that "a testamentary trust is in the phraseology of our law a *fidei-commissum* and a testamentary trustee may be regarded as covered by the term fiduciary."[51] This attempted reconfiguration of the testamentary trust as nothing other than the *fidei commissum* of Roman law was, however, criticized in subsequent judgments,[52] and was authoritatively rejected by the Appellate Division in *Braun v. Blann & Botha* when Joubert J.A., no doubt mindful of the above-mentioned differences between the *fidei commissum* and the trust, said:

> Admittedly, many of the functions which the *fideicommissum*, either by itself or in conjunction with other devices of the Roman law performed, could have been performed by the trust had the latter been known to the Romans, but the fact remains that historically and jurisprudentially the *fideicommissum* and the trust are separate and distinct legal institutions, each of them having its own set of legal rules.[53]

Joubert J.A. characterized the South African trust as "a legal institution *sui generis*"[54] and, in so doing, finally laid to rest any

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48. Wright, *supra* note 7, at 118; *see also* Wisdom, *supra* note 7, at 75; Lorio, *supra* note 6, at 1724.

49. Wisdom, *supra* note 7, at 75; *see also* Wright, *supra* note 7, at 118.

50. The apt description "Romanist reconfiguration" is advanced by Edwin Cameron, *Constructive Trusts in South Africa: The Legacy Refused*, 3 EDINBURGH L. REV. 341, 348 (1999).

51. *Estate Kemp v. McDonald's Trustee* 1915 AD 491 at 499.

52. *See, e.g.*, *Estate Watkins-Pitchford v. Commissioner for Inland Revenue* 1955 (2) SA 437 (A) at 460B-D; *Greenberg v. Estate Greenberg* 1955 (3) SA 361 (A) at 368G.

53. *Braun v. Blann & Botha* 1984 (2) SA 850 (A) at 859C.

54. *Id.* at 859E.

purported reconfiguration of the South African trust as the Roman *fidei commissum*.

A second solution to the problem posed by the common-law trust's duality of ownership to the introduction of the trust into Louisiana's civilian legal context is to conceive of the trust's essence not in terms of divided ownership (or title) but as a separation between control (or management) and enjoyment (or benefit). Wright points out that the trust, conceived in this manner, simply represents an extension of the law in most civilian jurisdictions that an owner's right of control over his or her property may be limited by the appointment of a functionary—typically an administrator—who controls the property for the benefit of the owner.[55] The separation of control from enjoyment is indeed foundational to the conceptualization of the South African trust. Cameron J.A. said in *Land & Agricultural Bank of South Africa v. Parker*[56] that the "core idea" or the "essential notion" of the South African trust is "that enjoyment and control should be functionally separate."[57] The Judge of Appeal elaborated by saying that "the central notion" of the South African trust is that the trustee—the functionary entrusted with the control over the trust property—exercises control on behalf of and in the interest of another—the trust beneficiary.[58] Cameron J.A., in making these pronouncements, echoed the long-held view of Tony Honoré—a leading light in the development of South African trust law—that "control by the trustee/administrator rather than ownership is the essential feature of a trust."[59] Honoré also propounded the notion of the separation of estates (or patrimonies) as a corollary to his view on the essence of the South African trust. The separation of estates entails that the trust estate vests in the trustee in his or her official capacity (*qua* trustee) and not in his or her private capacity.[60] The South African legislature approved of Honoré's view by pertinently affirming the separation of private estates and trust estates in section 12 of the Trust Property Control Act, which provides, "Trust property shall not form part of the personal estate of the trustee except in so far as he as the trust beneficiary is entitled to the trust property."

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55. Wright, *supra* note 7, at 117.

56. *Land & Agricultural Bank of South Africa v. Parker* 2005 (2) SA 77 (SCA).

57. *Id.* §§ 19, 22.

58. *Id.* § 19.

59. TONY HONORÉ & EDWIN CAMERON, HONORÉ'S SOUTH AFRICAN LAW OF TRUSTS 4 (4th ed. 1992) (this edition is referenced here because it was the last one to which Honoré himself contributed; he was not a co-author of the subsequent fifth edition).

60. *Id.* at 237.

De Waal points out that the primary function of a trust beneficiary's equitable ownership of trust property under English law is to prevent such property from becoming part of the trustee's private property, thereby protecting the trust beneficiary in case of a trustee's insolvency.[61] He argues that the separation of estates fulfils exactly the same function in South African law insofar as a trustee's private creditors and the trust beneficiary claim against different estates—the trustee's private creditors claim against the trustee's private estate and the trustee's insolvency with regard to his or her private estate cannot, therefore, pose any risk to the trust beneficiary; conversely, the trust beneficiary has no claim against the trustee's private estate (except, of course, when the trustee committed a breach of trust) and the trustee's private creditors will, in case of the trustee's insolvency with regard to his or her private estate, prevail against the trust beneficiary.[62] The separation of estates therefore overcomes civil law's conceptual problem with the common law's dual ownership; yet it functionally yields the same results, particularly with regard to the trust beneficiary's rights and remedies.[63]

Legal scholars from Louisiana have also voiced their approval regarding trusts shorn of the law-equity-divide. It is interesting to note that they have done so with explicit reference to the corresponding conceptualization of trusts in other mixed jurisdictions, and specifically in South Africa.[64] Moreover, these scholars conceive the "core idea" or the "essential notion" of the trust along lines similar to those propounded in *Land & Agricultural Bank of South Africa v. Parker*. For example, Mintz, writing on *Succession of Simms*,[65] a Louisiana case decided in terms of the erstwhile Trust Estates Act, reasons that "the essential functional or substantive character of the trust can be understood in any legal system as a separation of control of property and interest in property."[66] The Louisiana legislature ostensibly embraced this conceptualization of the trust. Article 1731 of the Louisiana Trust Code defines a trust as "the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the

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61. M.J. de Waal, *The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared*, 117 S. AFRICAN L.J. 548, 560 (2000).

62. *Id.* at 562.

63. Gregory S. Alexander, *The Dilution of the Trust*, *in* THE WORLDS OF THE TRUST, *supra* note 47, at 305, 308.

64. *See, e.g.*, Leonard Oppenheim, *A New Trust Code for Louisiana—Act 338 of 1964*, 39 TUL. L. REV. 187, 189 (1965); *see also* Wright, *supra* note 7, at 116.

65. Succession of Simms, 175 So. 2d 113 (La. App. 4th Cir. 1965); 195 So. 2d 114 (La. 1967).

66. Mintz, *supra* note 21, at 908-09.

benefit of another." Martin concludes that the Trust Code articulates the dichotomy that "title to the property is in the trustee, but the benefits of ownership are owed to the beneficiary"[67]—essentially, therefore, the separation of the trustee's control (manifested, in terms of the Trust Code, by the trustee's "title") from the trust beneficiary's enjoyment (manifested, in terms of the Trust Code, by the beneficiary's "benefit") that also typifies the South African trust. However, as Yiannopoulos rightly points out, whenever control and enjoyment are separated, the question arises as to the nature of the interests held by the controller on the one hand, and the person entitled to the enjoyment on the other hand.[68] The answer to this question has been settled in South African law but remains a bone of contention in Louisiana law.

2. Who Owns the Trust Property?

Some Louisiana trust-law scholars hold the view that the Trust Code's definition of a trust in terms that vest the "title to property" in the trustee warrants the interpretation that "title" means "ownership" (in its civilian meaning) and, therefore, that the trustee alone owns the trust property. It is important to keep in mind, however, that, should the trustee indeed own the trust property, his or her ownership is devoid of any beneficial interest in the trust *corpus*.[69] The trust beneficiary is, according to this interpretation, not vested with any real right (*ius in rem*) to the trust property,[70] but he or she holds only a personal right (*ius in personam*) against the trustee to enforce the trust provisions.[71] However, because the trustee acts in a fiduciary capacity and, therefore, has to exercise his or her ownership solely in the interest of the trust beneficiary, certain remedies lie with the beneficiary to protect his or her interests under the trust.[72]

Other legal scholars opine that the better interpretation is the one that denotes the principal beneficiary as the owner of the trust property. Gruning argues, for example, that the trust can be conceived as "a new kind of burden on ownership, in addition to the *numerus clausus* of real rights sanctioned by the legislature"—it serves to encumber the principal

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67. Martin, *supra* note 12, at 511.

68. Yiannopoulos, *supra* note 7, at 223.

69. Oppenheim, *supra* note 64, at 198.

70. *See, e.g.*, Leonard Oppenheim, *A New Trust Code for Louisiana: Some Basic Policy Considerations*, 23 LA. L. REV. 621, 623 (1963); Wright, *supra* note 7, at 123; 11 EDWARD E. CHASE, JR., LOUISIANA CIVIL LAW TREATISE: TRUSTS 34 (2d ed. 2009).

71. Dan Broussard, *Trusts—Creation—Validity—Nature of Beneficiary's Interest*, 15 LOY. L. REV. 382, 392 (1968-69).

72. Wright, *supra* note 7, at 124.

beneficiary's ownership of trust property.[73] Gruning reasons, furthermore, that the trustee resembles an owner only in respect of his or her management of the trust *corpus*, but that various other considerations militate against the trustee resembling an owner: a court may remove a trustee for cause,[74] a court may appoint a trustee, even provisionally and on the court's own motion,[75] and a trust's existence is not dependent on a trustee's acceptance.[76] Gruning concludes, based on these considerations, that "if the civil law insists on finding an owner, the principal beneficiary seems the necessary choice."[77] Yiannopoulos is another proponent of this view. He reasons that the trustee's "title" does not equate to full ownership; instead, it merely translates into a power of administration and disposition—the ownership of trust property vests, according to Yiannopoulos, in the principal beneficiary.[78] He, therefore, advances the following explanation regarding the respective parties' interests under a Louisiana trust:

> The trustee has a real right that permits him to manage and dispose of the trust property. The beneficiary likewise has a real right—ownership subject to trust, that is, ownership without power of administration and disposition. Thus, functionally, the trust device has been accommodated in Louisiana without the implications of a dual ownership that is unknown in the civil law.[79]

Louisiana courts seem equally divided on the matter. Much has been written regarding the judgment on point in *Reynolds v. Reynolds*.[80] Gruning provides a handy summary of the views expressed in the various judgments in this matter.[81] These views vary—in consonance with the divergent scholarly opinions mentioned above—between the standpoint that the trustee is vested with the ownership of the trust *corpus* on the one hand, and the belief that a trustee's "title" does not equate to ownership on the other hand. The former standpoint admits to the trust beneficiary having some beneficial interest under the trust, whereas the latter typifies the trustee's "title" as only of an administrative and fiduciary nature

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73. David William Gruning, *Reception of the Trust in Louisiana: The Case of* Reynolds v. Reynolds, 57 TUL. L. REV. 89, 119 (1982).

74. La. R.S. 9:1785.

75. *Id.* 9:1786.

76. *Id.* 9:1731, :1785.

77. Gruning, *supra* note 73, at 120.

78. Yiannopoulos, *supra* note 7, at 229.

79. *Id.*

80. Reynolds v. Reynolds, 365 So. 2d 530, 532 (La. App. 3d Cir. 1978); 388 So. 2d 1135, 1138 (La. 1980).

81. Gruning, *supra* note 73, at 116.

whilst the principal beneficiary's interest in the trust *corpus* is acknowledged as ownership. Lorio concludes that, because the Supreme Court rendered a plurality decision in the *Reynolds* case, it left the characterization of the respective interests of the trustee and trust beneficiary in terms of the Trust Code "rather tenuously defined."[82] The Supreme Court ostensibly provided direction regarding the trustee's "title" in *Bridges v. Autozone Properties, Inc.*[83] when it held that "title" in the Trust Code's definition of "trust" equates with the civil law's notion of absolute and undivided ownership, which, accordingly, vests in the trustee alone. Conversely, the trust beneficiary has no title to, or ownership in, the trust property, but enjoys only a *ius in personam* against the trustee to claim what is due to him or her under the trust.[84] However, Chase expresses uncertainty whether this formulation in the *Bridges* judgment is indeed satisfactory.[85] McAuley likewise points out that the Supreme Court in the *Bridges* case did not engage in an independent examination of the "title issue"; instead, it simply adopted the corresponding position taken by the Fifth Circuit of the United States Court of Appeals in the earlier case of *Read v. United States (Department of Treasury)*.[86] *In casu* the court found that title to trust property vests in the trustee alone, in particular because the Trust Code's definition of "beneficiary" contains no mention of "title" or "ownership of trust assets" in regard to the trust beneficiary.[87] McAuley argues, however, that extraneous sources for an understanding of the meaning of "title" in Louisiana law—such as the erstwhile Trust Estates Act as well as the Restatement (Second) of Trusts[88]—indicate that "title" is not equal to "ownership."[89] He points out that the court in *Read*'s case failed to take cognizance of these sources and, therefore, that the court's reasoning is questionable.[90] McAuley would clearly have preferred a definitive indication in the Trust Code regarding the extent and scope of "title to property" in the definition of "trust," and he, consequently, regards the approach in *Read*'s case—and, by implication, also in *Bridges*' case—as

82. Lorio, *supra* note 6, at 1735.
83. Bridges v. Autozone Props., Inc., 900 So. 2d 784 (La. 2005).
84. *Id.* at 796-97.
85. 11 CHASE, *supra* note 70, at 5.
86. Read v. U.S. (Department of Treasury), 169 F.3d 243 (5th Cir. 1999).
87. *Id.* at 249.
88. Currently the Restatement (Third) of Trusts.
89. Michael McAuley, *Truth and Reconciliation: Notions of Property in Louisiana's Civil and Trust Codes*, *in* RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW 119, 171 (Lionel Smith ed., 2012).
90. *Id.*

an understandable, though unfortunate, result of the Trust Code's silence on point.[91]

The South African position should satisfy McAuley's plea for greater elucidation in the Louisiana Trust Code regarding the title issue. It is at this juncture necessary to refer again to Honoré's view that, insofar as the conceptualization of the South African trust is concerned, it is immaterial where the ownership of trust assets is located because the control exercised by the functionary who administers trust property derives from the particular trust instrument and the law in general, and is not dependent on whether that functionary technically owns the property that he or she administers.[92] Honoré, therefore, propounded a fusion of Roman-Dutch administratorship and English trusteeship—he advocated that a trust exists not only when the trustee is vested with the ownership of trust property but also when the trust beneficiary owns the trust property (subject, of course, to the trustee's administration). Honoré opined that this is the manner in which the South African legislature and courts have always conceived of the trust:

> The Dutch administrator was a non-owning "controller." The term "administrator" has often been used in South Africa of a testamentary "controller." Again, the term "trustee" can be confined, following English law, to a *reghebbende* [right-holder]. But both these terms have acquired a wider sense which testifies to the existence of a body of rules in South Africa governing *all* controllers, testamentary and *inter vivos*, owning and non-owning.[93]

Honoré termed the trust arrangement by which the trustee does not own the trust property a "*bewind* trust" after the Dutch administratorship arrangement known as the *bewind*.[94] Honoré's views were not, however, acceptable to all. Joubert, in a scathing extra-curial attack, criticized Honoré's conceptualization of the trust as inclusive of Roman-Dutch administratorship. Joubert insisted that the South African trust must correspond with the English trust where the trustee is the legal right-holder in respect of the trust property, and he, consequently, scorned Honoré's notion of a non-owning trustee.[95] The South African legislature

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91. *Id.* at 172.

92. Honoré, *supra* note 34, at 865.

93. A.M. Honoré, *Honoré's Views on Trust Law: A Reply*, 32 J. CONTEMP. ROMAN-DUTCH L. 126, 128 (1969).

94. Honoré, *supra* note 34, at 865.

95. C.P. Joubert, *Honoré se Opvattings oor ons Trustreg*, 31 J. CONTEMP. ROMAN-DUTCH L. 124, 262 (1968).

nevertheless embraced Honoré's views when it enacted the Trust Property Control Act.[96] This Act defines "trust" in section 1 as follows:

> "[T]rust" means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed—
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> *(a)* to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
>
> *(b)* to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act 66 of 1965).

In *Bafokeng Tribe v. Impala Platinum Ltd.*[97] the court elucidated the two arrangements laid down in the foregoing definition. The court typified the former as the ordinary trust arrangement where the trustee, and not the trust beneficiary, is vested with the *dominium* in the trust property.[98] This arrangement is frequently termed the "ownership trust" in South Africa legal parlance.[99] The latter is the *bewind*-trust arrangement, which the court in the *Bafokeng Tribe* case explained in the following terms:

> An instance where the founder makes a gift or bequest to the beneficiary, instead of transferring the assets to the trustee . . . and vests the administration of the assets in the administrator or trustee, corresponds to a bewind in Dutch law, and a bewindhebber in Roman-Dutch law. In a bewind trust the ownership of the assets of the trust vests in the beneficiary, but the administration of the trust vests in the trustee or bewindhebber.[100]

The trustee's ownership under an ownership trust is usually described as bare ownership (*nudum dominium*) as opposed to beneficial ownership (*utile dominium*)—the trustee is the owner and the administrator of the trust property, but only for the purpose of trust administration for the benefit of the trust beneficiary or the achievement

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96. *See* François du Toit, *Jurisprudential Milestones in the Development of Trust Law in South Africa's Mixed Jurisdiction*, *in* THE WORLDS OF THE TRUST, *supra* note 47, at 257, 274-75.

97. *Bafokeng Tribe v. Impala Platinum Ltd.* 1999 (3) SA 517 (BHC).

98. *Id.* at 545E.

99. De Waal, *supra* note 61, at 561.

100. *Bafokeng Tribe* 1999 (3) SA at 542C.

of some impersonal trust object. Consequently, the trustee does not acquire any beneficial rights or other benefits *qua* trustee in the trust property.[101] Moreover, the trustee owns the trust property in an official capacity and not as a private owner.[102] The trust beneficiary's ownership of the trust property under the *bewind* trust is indeed of a beneficial nature but is limited insofar as the control and administration of that property is transferred to the trustee.[103] The trust beneficiary under the ownership trust has a personal right against the trustee to enforce the trust provisions and to claim what is due to him or her under the trust. The trust beneficiary under the *bewind* trust owns the trust assets but also has a personal right against the trustee to enforce the trust provisions and to claim what is due to him or her under the trust.[104] Because a trustee acts, in South Africa as in Louisiana, in a fiduciary capacity certain remedies lie with the trust beneficiary to protect his or her interests under the trust.[105]

McAuley asserts that there exists "a new immediacy to resolve the 'title' issue" in Louisiana trust law; moreover, that "only the lawmaker can attend to it."[106] The South African legislature did exactly that when it enacted the Trust Property Control Act.

B. The Prohibition of Substitutions and Fidei Commissa

The Louisiana Digest of 1808[107] as well as the Civil Code of 1825[108] prohibited, and the Civil Code of 1870[109] currently prohibits, substitutions and *fidei commissa* in Louisiana law. The question whether these prohibitions were intended to prohibit also trusts remains open.[110] Some Louisiana courts adhered to the view that the trust indeed constitutes a form of substitution,[111] and these courts were, consequently, loath to recognize the trust in the absence of an enabling act.[112] The subsequent

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101. WALTER GEACH & JEREMY YEATS, TRUSTS: LAW AND PRACTICE 19 (2007).

102. DU TOIT, *supra* note 42, at 10.

103. GEACH & YEATS, *supra* note 101, at 19.

104. *Id.* at 115; *see also* M.J. DE WAAL & M.C. SCHOEMAN-MALAN, LAW OF SUCCESSION 181 (5th ed. 2015).

105. *See generally* François du Toit, *The Fiduciary Office of Trustee and the Protection of Contingent Trust Beneficiaries*, 18 STELL. L. REV. 469 (2007).

106. McAuley, *supra* note 89, at 169.

107. LA. DIGEST art. 40 (1808).

108. LA. CIV. CODE art. 1507 (1825).

109. LA. CIV. CODE art. 1520 (1870).

110. Lorio, *supra* note 6, at 1726.

111. The two judgments referenced by virtually all commentators on point are *Succession of Guillory*, 232 La. 213, 94 So. 2d 38 (1957) and *Succession of Meadors*, 135 So. 2d 679, 681 (La. Ct. App. 2d Cir. 1961).

112. Lorio, *supra* note 6, at 1728.

legislative development, culminating in the recognition of the trust and, ultimately, the adoption of the current Louisiana Trust Code, was discussed earlier.[113] Lorio notes, interestingly, that even after the adoption of the Trust Code Louisiana courts continued to scrutinize trusts closely and invalidated some trusts because they were seen as containing prohibited substitutions.[114] The likely reason is that the Trust Code never expressly authorized the substitutions that were found to be prohibited in earlier trust cases.[115] This judicial attitude subsided in the 1970s when the courts took a more liberal view to trusts.[116] Additionally, the Trust Code was amended in 1974 to authorize explicitly some limited conditional substitutions. However, conditional substitutions that go beyond this legislation remain invalid.[117]

Lemann provides an example of a conditional substitution; in other words, a substitution which, depending on subsequent events, may or may not occur: a testator makes an outright bequest to A but stipulates that, if A were to die without leaving issue, the bequest must go to B. If A dies with issue, no substitution occurs and A's power of testation remains unfettered because A is not obliged to leave the bequeathed property to his or her issue but can leave it (subject to forced heirship) to whomever he or she pleases. If, on the other hand, A dies without issue, the testator has effectively purported to bequeath the same property to someone else (B), and that constitutes a substitution.[118] This conditional substitution is, outside of a trust, impermissible because it is a prohibited substitution under article 1520 of the Louisiana Civil Code.[119] What is the position should the testator have made this bequest in trust? Article 1973 (as amended[120]) of the Trust Code provides, *inter alia*, that, except with regard to the *legitime* in trust, a trust instrument may provide that the interest of an original or a substitute principal beneficiary of an irrevocable trust vests in one or more of his or her descendants upon the

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113. See *supra* Part II.

114. Lorio, *supra* note 6, at 1731.

115. Yiannopoulos, *supra* note 7, at 230.

116. Lorio, *supra* note 6, at 1731.

117. La. R.S. 9:1972-1981; *see* Yiannopoulos, *supra* note 7, at 230.

118. Thomas B. Lemann, *Trust: A Common-Law Institution in a Civilian Context*, 8 TUL. EUR. & CIV. L.F. 53, 57 (1993).

119. It is arguable that the bequest can also be viewed as a stipulation for the right of return which, under article 1532 of the Louisiana Civil Code, can only be made in favor of the donor and not in favor of a third party such as B in Lemann's example.

120. Note that the conditional substitution provided in Lemann's example would not have been allowed in trust at the time when his article appeared because the law at that time permitted substitutions of principal only if the beneficiary died intestate and without descendants. Article1973 was subsequently broadened to permit further substitutions, *inter alia* the substitution of principal to the beneficiary's descendants discussed hereafter.

death of the beneficiary either during the term of the trust or at its termination. The trust instrument may provide that the interest vests in another person if the beneficiary dies without descendants. Therefore, if a testator makes a bequest of trust principal to A in an irrevocable trust, and stipulates that, if A were to die during the currency of the trust, the trust principal must devolve on his descendants and, if A left no descendants, the trust principal must go to B, such a bequest effects a valid substitution—either to A's descendants or to B—in the event of A's death whilst the trust is in existence. This substitution is expressly authorized by article 1973 of the Trust Code.

Wisdom points out that "substitution" in the above context must be understood as analogous to the conveyance of a fee entail in the common law—a donation of property to a donee, who holds title and possession for life without the power of alienation; the property to be transmitted at the donee's death to a successive donee designated by the donor.[121] Wisdom describes a *fidei commissum* as the arrangement where property is given to one for the benefit of another; the property to vest in the latter at a given time or upon the fulfillment of a stated condition.[122] The prohibition of substitutions and *fidei commissa* in the Louisiana Civil Code is based on the public policy that property should not be removed from commerce.[123] Wisdom notes, however, that *fidei commissa* were not prohibited in France at the time the Louisiana Civil Code of 1870 was adopted,[124] and it remains a matter of conjecture what the redactors of the Civil Code meant when they originally proclaimed that substitutions and *fidei commissa* "are and remain prohibited."[125] Some have surmised, as indicated earlier, that this prohibition of the *fidei commissum* was in fact an attempt to ban the common-law trust from Louisiana.[126] Others find the notion that the redactors, given their knowledge of the civil law, would have used a Roman-law term to

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121. Wisdom, *supra* note 7, at 71.

122. *Id.* at 72. As will be seen below, this is also the meaning attributed to "fidei commissum" in South African law. *See also* Claiborne, *supra* note 8, at 68-69; John H. Tucker, Jr., *Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantical Reappraisal*, 24 LA. L. REV. 439, 447 (1964) (noting that "fideicommissum in Roman law meant exactly the same thing as the prohibited substitution described in art. 1520 of the Louisiana Civil Code"). *But see* Ronald J. Scalise Jr., *Prohibited Substitutions: Louisiana's Experience with a French Institution*, 48 LOY. L. REV. 715, 722 (2002) ("The prohibited substitution in Louisiana law was unknown at Roman law. Substitutions in Roman law referred mainly to the vulgar and pupillary ones, not to the prohibited type existing in both Louisiana and France . . . .").

123. Claiborne, *supra* note 8, at 69. *But see* Scalise, *supra* note 122, at 749-51.

124. Wisdom, *supra* note 7, at 72.

125. *Id.* at 73.

126. *Id.*; *see also* Lorio, *supra* note 6, at 1728.

prohibit the use of an alien legal concept such as the trust to be "completely unjustifiable."[127]

What is the position in South Africa? The Roman *fidei commissum* was received into Roman-Dutch law and was, accordingly, a recognized legal institution at the Cape in 1806. As such, fideicommissary substitution became—and remains—part and parcel of modern South African law, and it did not suffer the fate of a codal prohibition that befell its Louisiana counterpart. It is important to note that the Romans used the testamentary *fidei commissum* to effect either a direct bequest (of an inheritance or legacy) or an indirect bequest. The latter refers to the use of the *fidei commissum* to effect a substitution—the *substitutio fidei commissaria*.[128] The term "*fidei commissum*" in contemporary South African law carries this meaning—that of a substitution in terms of which the fiduciary acquires beneficial ownership of the fidei commissary property subject to the obligation to preserve the property and ultimately to transfer it to the fidei commissary upon fulfillment of the fidei commissary condition.[129] The principal restriction resting on a fiduciary's ownership is that the fiduciary cannot alienate the fidei commissary property.[130] Corbett *et al.* emphasize, in their seminal work on the South African law of successions, that the South African *fidei commissum* occasions a substitution: the fidei commissary is substituted for the fiduciary insofar as the substitute beneficiary (the fidei commissary) acquires successively the property bequeathed through the instituted beneficiary (the fiduciary).[131]

It is interesting to note that Lemann's above-mentioned example of a conditional substitution may yield a different outcome in terms of the South African law of successions by reason of the rules pertaining to the tacit (or implied) creation of *fidei commissa*. In Lemann's example a testator makes an outright bequest to A but stipulates that, if A were to die (after the testator's death, of course) without leaving issue, the bequest must go to B—if A dies with issue, no substitution occurs; if, however, A dies without issue, B is substituted for A. In South African law a testamentary bequest made conditional upon a beneficiary's death without leaving issue is known as a *si sine liberis decesserit* clause, and its effect in the instance where the deceased fiduciary is indeed survived

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127. Tucker, *supra* note 122, at 465; *see also* Scalise, *supra* note 122, at 728.

128. N.J. VAN DER MERWE & C.J. ROWLAND (IN COOPERATION WITH M.B. CRONJÉ), DIE SUID-AFRIKAANSE ERFREG 301-09 (6th ed. 1990).

129. DE WAAL & SCHOEMAN-MALAN, *supra* note 104, at 147-48, 154, 158.

130. *Id.* at 155.

131. M.M. CORBETT, GYS HOFMEYR & ELLISON KAHN, THE LAW OF SUCCESSION IN SOUTH AFRICA 260 (2d ed. 2001).

by issue was considered by the Appellate Division in *Du Plessis v. Strauss*.[132] The court found, after a comprehensive examination of the common law, that a *si sine liberis decesserit* clause coupled to a conditional *fidei commissum* gives rise to a presumption that the testator tacitly appointed the *liberi* (the children or issue mentioned in the *sine liberis* clause) as *fidei commissarii*, provided that the *liberi* are descendants of the testator. Put differently, in the case of descendants, a *si sine liberis decesserit* clause is in itself an indication that the testator presumably intended the *liberi* as *fidei commissarii*. This presumption falls away, however, if the will reveals a contrary intention on the testator's part.[133] Therefore, if Lemann's example of an outright bequest to A and, if A were to die without leaving issue, to B, is considered in terms of the *Du Plessis* judgment, a *substitutio fidei commissaria* in favor of A's issue is presumed if A dies with issue after the testator's death (provided the issue are descendants of the testator). In this example, fidei commissary substitution is, of course, also expressly created in B's favor if A dies without issue.

Can both these substitutions—an express *fidei commissum* on the one hand, and a tacit *fidei commissum* in terms of a *si sine liberis decesserit* clause on the other hand—occur in trust under South African law? It is submitted that this question yields an affirmative answer. Firstly, there is nothing in South African statute law or the common law that expressly or impliedly prohibits a bequest of trust principal to successive beneficiaries through a *substitutio fidei commissaria*. Secondly, the Trust Property Control Act's definition of "trust property" includes movable and immovable property as well as contingent interests in property. Trust principal—whether movable or immovable—falls within this definition. Moreover, it has been suggested that "contingent interests in property" include, for purposes of the definition in section 1 of the Act, the fiduciary interests typically held under *fidei commissa*.[134] This suggestion is bolstered by the view that the definition of "property" in other South African statutes—and the Estate Duty Act 45 of 1955 in particular—should guide any determination regarding which assets can be the subject-matter of a trust.[135] Section 3(2)(a) of the Estate Duty Act expressly includes any fiduciary interest in property in its definition. It is submitted, therefore, that, if a South African testator makes a bequest of immovable trust principal to his son A under a fixed-term trust, but

132. *Du Plessis v. Strauss* 1988 (2) SA 105 (A).
133. *Id.* at 145B-D.
134. DU TOIT, *supra* note 42, at 7.
135. P.A. OLIVIER, TRUST LAW AND PRACTICE 25 (1990).

stipulates that, if A were to die during the currency of the trust without leaving issue, A must be substituted by his (the testator's) best friend B in respect of the trust principal, such a bequest effects a valid fidei commissary substitution regarding the trust principal in favor of B (if A dies without issue during the trust's existence) or in favor of A's issue (if A dies with issue during the trust's existence)—the trust principal constitutes trust property in terms of the Trust Property Control Act's applicable definition, as does the principal beneficiary's fiduciary interest under the trust.[136] The Louisiana and South African legal positions on point thus yield similar outcomes, albeit via different legal routes—the former through the Louisiana Trust Code; the latter through a combination of the South African common law (as judicially interpreted) and the Trust Property Control Act.

C. Forced Heirship

The Louisiana Civil Code provides for forced heirship. Article 1494 of the Code stipulates that a forced heir may generally not be deprived of the *legitime*—the portion of the decedent's estate reserved for him or her. Is there any tension in Louisiana between forced heirship on the one hand, and the trust on the other hand? Nabors, writing in 1939, cautioned that Louisiana's policy regarding forced heirship significantly negates the common-law trust's flexibility because it restricts the trust's use for the economic protection of the family.[137] The erstwhile Trust Estates Act was, moreover, not adequately integrated (at least initially) with the provisions of the Louisiana Civil Code dealing with forced heirship.[138] A settlor who wished to establish a trust for the financial security of his or her children might, consequently, have refrained from doing so because those children are also descendant forced heirs whose ultimate economic protection would be ensured under the Civil Code's imperative inheritance dispensation. This (potential) predicament necessitated some accommodation of forced heirship and trusts in the Louisiana Trust Code.[139] Before turning to the Trust Code, it

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136. *See, e.g.*, *Schaumberg v. Stark* 1956 (4) SA 462 (A). The testator bequeathed his entire estate to his wife but placed the administration of the estate in the hands of a trustee. He determined further that, upon the death of his wife, the estate may be realized in favor of their three children. The court had to determine, *inter alia*, the nature of the interest that vested in the testator's widow under the trust. Centlivres C.J. found that the testator's widow held a fiduciary interest and that their three children were fidei commissaries. *Id.* at 468G.

137. Eugene A. Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 179-80 (1939).

138. Oppenheim, *supra* note 70, at 621.

139. Lorio, *supra* note 6, at 1735.

must be noted that article 1496 of the Louisiana Civil Code stipulates that "[n]o charges, conditions, or burdens may be imposed on the *legitime* except those expressly authorized by law, such as a usufruct in favor of a surviving spouse or the placing of the *legitime* in trust." Article 1841 of the Trust Code specifies that the *legitime* may be placed in trust (subject to a number of provisos). Article 12, section 5 of the Louisiana Constitution of 1974 also expressly permits the placement of the *legitime* in trust, and Louisiana courts have sanctioned the placing of the entire *legitime* or any heir's individual forced portion in trust.[140] Wisdom proclaims, therefore, that the introduction of the trust to Louisiana has left "the great rock of forced heirship" untouched, except insofar as the *legitime* may validly be left in trust.[141]

Similar concerns did not appertain to the trust's introduction to South Africa. Forced heirship formed part of the Roman-Dutch law in effect at the Cape in 1806, but all manifestations of imperative inheritance law were abolished statutorily by the British in the aftermath of the second occupation.[142] Economic liberalism and a high regard for freedom of testation were determinative to the statutory abolition of the legitimate portion and all the other restraints that the civilian Roman-Dutch law imposed on testators.[143] In *Carelse v. Estate De Vries*[144] it was accepted, however, that a deceased parent's minor child has a common-law claim for maintenance against the parent's estate. This claim is not automatic or compulsory, but is based on the child's financial need.[145] This claim is frequently obviated by virtue of the fact that a parent has made provision for the economic protection of his or her minor children through the use of either an *inter vivos* or a testamentary a trust. Du Toit notes that both the *inter vivos* and testamentary trusts are ideally suited for the management and conservation of property on behalf of minors and/or persons of limited capacity or those who are otherwise incapable of managing their own affairs,[146] and this is indeed a frequent and popular application of trusts in South African legal practice.[147] If, upon a parent's death, it is anticipated that the income and/or principal from a trust that

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140. *Id.* at 1736.

141. Wisdom, *supra* note 7, at 82.

142. M.M. CORBETT, H.R. HAHLO, GYS HOFMEYR & ELLISON KAHN, THE LAW OF SUCCESSION IN SOUTH AFRICA 13 (1st ed. Supp. 1994).

143. *Id.*

144. *Carelse v. Estate De Vries* (1906) 23 SC 532; *see also Glazer v. Glazer* 1963 (4) SA 694 (A).

145. CORBETT, HOFMEYR & KAHN, *supra* note 131, at 42.

146. DU TOIT, *supra* note 42, at 177.

147. Francois du Toit, *Current Trends in Testamentary Succession*, 25 OBITER 336, 353 (2004).

such a parent has created for his or her minor child will be inadequate to meet that child's future maintenance needs, any shortfall can be supplemented through the aforementioned common-law maintenance claim against the deceased's parent's estate. Therefore, no tension exists in South African law between the trust on the one hand, and the legal mechanisms for the economic protection of the family, and minor children in particular, on the other hand—they (can) operate in an entirely complementary manner to meet a dependent child's maintenance needs.

Although it does not resort under the rubric of forced heirship, it is nevertheless instructive to note that articles 2432 to 2437 of the Louisiana Civil Code provides for a surviving spouse's claim to the marital portion when the deceased spouse died "rich in comparison with the surviving spouse." This is a maintenance-type claim.[148] Article 1851 of the Trust Code (as amended) permits that the marital portion, whether in full property or in usufruct only, or any portion thereof may be placed in trust subject to a number of conditions. The Louisiana legislature has, therefore, achieved some congruence between Louisiana trust law and its law regarding spousal maintenance. In South Africa, the Maintenance of Surviving Spouses Act 27 of 1990 acknowledges that an indigent surviving spouse has a maintenance claim against a deceased spouse's estate. Again, this claim is not automatic or compulsory but is based on the surviving spouse's financial need.[149] This claim is frequently obviated by virtue of the fact that the deceased spouse has made provision for the economic protection of the surviving spouse through the use of either an *inter vivos* or a testamentary a trust. Moreover, the Maintenance of Surviving Spouses Act itself authorizes the use of trusts under its maintenance dispensation. Section 2(3)(d) of the Act provides that the executor of the deceased spouse's estate can enter into an agreement with the surviving spouse and the deceased spouse's heirs and legatees in terms of which assets of the deceased estate, or a right in those assets, are transferred to a trust in settlement of the surviving spouse's maintenance claim. Again, therefore, no tension exists in South African law between the trust on the one hand, and the legal mechanisms for the economic protection of the family, and a surviving spouse in particular, on the other hand.

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148. *See generally* A.N. Yiannopoulos, *From Justinian to Louisiana with Love: The Legend of the Marital Portion*, *in* ESSAYS IN HONOR OF SAÚL LITVINOFF 373 (Olivier Moréteau, Julio Romañach, Jr. & Alberto Luis Zuppi eds., 2008).

149. Maintenance of Surviving Spouses Act §§ 2(1), 3.

IV. OTHER UNIQUE FEATURES OF THE LOUISIANA TRUST AND HOW THE SOUTH AFRICAN LEGAL POSITION COMPARES

Lorio asserts that, in addition to the issues concerning ownership and title, substitutions and the *legitime* discussed in the Article's preceding Part, other provisions of the Louisiana Trust Code render the Louisiana trust a uniquely indigenous product. She lists the following features in this regard: the limitation of a trust's duration; the indestructibility of the trust; the requirement that beneficiaries must be designated at a trust's inception; and the non-recognition of powers of appointment.[150] These features are analyzed hereafter with a comparative exposition on the position in South African law. The objective of this examination is to determine whether the South African trust exhibits the same unique features and, whenever it does not, how and why the South African position differs from that in Louisiana. In so doing, the examination provides instructive perspectives on the manner in which different mixed jurisdictions engage, at least at times, contrastingly with the trust.

A. The Limitation of a Trust's Duration

The common-law rule against perpetuities limits the allowable term of a private trust, in particular by requiring that all interests under a trust become vested not later than the expiration of the period stipulated by the rule.[151] Louisiana's property system, being civilian in nature, does not, however, recognize a rule against perpetuities to prevent the remoteness of vesting.[152] It was, consequently, incumbent upon the Louisiana legislature to establish principles for the vesting of interests under private trusts.[153] The Advisory Committee that prepared the Louisiana Trust Code rejected any duration period for the Louisiana trust based on the common-law rule against perpetuities and, instead, adopted a time period for a trust based on the lifetime of an income beneficiary.[154] Article 1831 of the Trust Code currently limits the duration of a private trust to:

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150. Lorio, *supra* note 6, at 1738-39; *see also* Yiannopoulos, *supra* note 7, at 230-31.

151. Oppenheim, *supra* note 70, at 624.

152. Oppenheim, *supra* note 64, at 208. Note, however, that the rule against perpetuities is increasingly under threat in many of the other American states that derive their legal systems from the English common law. *See generally* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

153. Oppenheim, *supra* note 64, at 208.

154. Lorio, *supra* note 6, at 1738.

- the death of the last surviving income beneficiary or the expiration of twenty years from the death of the settlor last to die, whichever occurs last, if at least one settlor and one income beneficiary are natural persons; or
- the death of the last surviving income beneficiary or the expiration of twenty years from the creation of the trust, whichever occurs last, if none of the settlors is a natural person but at least one income beneficiary is a natural person; or
- the expiration of twenty years from the death of the settlor last to die, if at least one settlor is a natural person but none of the income beneficiaries is a natural person; or
- the expiration of fifty years from the creation of the trust, if none of the settlors and none of the income beneficiaries is a natural person.

Article 1832 of the Code determines that a trust instrument that stipulates a longer term than is permitted shall be enforced as though the maximum allowable term had been stipulated. Martin points out that, despite the aforementioned codal limitation of a Louisiana trust's duration, it is quite possible for such a trust to last for a very long time. This is by reason of the fact that the Trust Code designates the term of a trust that has been established for multiple beneficiaries as governed by the death of the last of those beneficiaries. Martin surmises, therefore, that a class trust for the settlor's children and grandchildren, established when the first child is born and lasting until the death of the last surviving grandchild, could easily have a term in excess of 100 years.[155]

Does South African law impose any comparable limitation on the duration of a trust? The short answer to this question is no. It is important to note, first, that the common-law rule against perpetuities does not constitute part of South African trust law.[156] Secondly, neither South African statute law nor South Africa's common law limits the remoteness of vesting of an interest in the trust principal. In *Ex parte Estate Vincent*,[157] for example, the testator directed that certain estate assets had to be placed in trust and that the trustees had to pay the interest derived therefrom to his children and thereafter to his grandchildren. The trust principal had to be paid to the testator's great-grandchildren as soon

155. Martin, *supra* note 12, at 519-20. Note, however, that class trusts constitute an exception to article 1831 and article 1832 of the Trust Code and are governed by article 1891 to article 1906 of the Code.

156. OLIVIER, *supra* note 135, at 98; DU TOIT, *supra* note 42, at 141.

157. *Ex parte Estate Vincent* 1964 (2) SA 99 (C).

as the youngest great-grandchild turned twenty-one years of age.[158] In *Ex parte Mostert: In re Estate Late Mostert*[159] the testator established a trust in respect of, among others, a farm. The trust's named beneficiaries were the testator's two sons, four daughters and a grandson. Each beneficiary was required to occupy a portion of the farm, and, upon failure to do so, would forfeit his or her portion. The testator also provided that, should any beneficiary die prior to forfeiture, the bequest shall descend in perpetuity to the eldest surviving male descendant or, in the absence of male descendants, to the eldest surviving female descendant. The trust was, therefore, designed to continue in perpetuity.[160] Nothing in South African law prevents trusts of such lengthy or even perpetual durations.

Section 8(1) of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 directs that any restriction on the alienation of immovable property imposed by means other than a *fidei commissum* is limited to the time of vesting of a right to such property, or its proceeds, in the third successive beneficiary. Section 8(2) provides that, after any restriction against the alienation of immovable property has ceased in terms of section 8(1), such immovable property shall thereafter in all other respects continue to be subject to the terms, conditions and trusts contained in the will or other instrument relating to such immovable property. This provision does, therefore, not establish a rule against perpetuities in South African trust law, nor does it limit the duration of trusts in South Africa. It merely imposes a limitation on the operational effectiveness of any restriction on the alienation of immovable property imposed other than by means of a *fidei commissum*. Although such a restriction may be imposed under a trust, South African trust founders usually refrain from curtailing trustees' powers to alienate trust property; on the contrary, they usually invest trustees with extensive powers to alienate trust property. Restrictions of the nature envisaged by section 8(1) of the Immovable Property (Removal or Modification of Restrictions) Act are, therefore, rarely encountered in regard to South African trusts and the effect of section 8 of the Act in the trust context is, consequently, negligible.[161]

The unique feature of the Louisiana trust, namely the limitation of its duration in terms of the Trust Code, is, therefore, entirely, absent from its South African counterpart. This absence is not, however, uncontroversial—South African trust-law scholars have voiced concerns

158. *Id.* at 100A-C.
159. *Ex parte Mostert: In re Estate Late Mostert* 1975 (3) SA 312 (T).
160. *Id.* at 313A-G.
161. DU TOIT, *supra* note 42, at 142.

regarding long-term trusts, in particular because they may become socially and economically undesirable over time.[162] However, the South African legislature has to date not heeded these concerns.

B. Trust Indestructibility

The judgment in *Claflin v. Claflin*[163] established the American doctrine of trust indestructibility, which essentially entails that a trust can be terminated only if all the beneficiaries are competent and consent to the termination, and no material purpose of the settlor remains to be accomplished. The first part of the doctrine represents the English common law, and the *Claflin* case added the second part.[164] The *Claflin* doctrine does not preclude termination by the beneficiaries, even if the trust has a material purpose, when the settlor is alive and consents to the termination.[165] Louisiana incorporated a much stricter approach to trust indestructibility in its Trust Code. Article 2028 (as amended) provides that, except as otherwise provided by law or the trust instrument, the consent of all the settlors, trustees, and trust beneficiaries shall not be effective to terminate a trust or any disposition in trust. A settlor can reserve for him- or herself, or for the beneficiaries, the right to terminate a trust, but, in the absence of such a reservation, the trust cannot be terminated even when the settlor, the trustee, the beneficiary, or all three collectively, think it desirable to do so.[166] The Louisiana indestructibility doctrine is controversial (as indeed is the *Claflin* doctrine), and Chase proposes that article 2028 "could stand reconsideration, to allow 'some measure of indestructibility' by consent of the settlor and beneficiaries."[167]

The South African position differs significantly from that in Louisiana and corresponds more to the first part of the American doctrine of trust indestructibility. Before comparing the South African common-law position on the termination of *inter vivos* trusts with article 2028 of the Louisiana Trust Code, a number of other ways in which trusts can be brought to their end in terms of South African law deserve mention: a settlor can reserve (in the trust instrument) the right to

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162. OLIVIER, *supra* note 135, at 99; DU TOIT, *supra* note 42, at 142.

163. Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889).

164. 11 CHASE, *supra* note 70, at 235. Note that some American jurisdictions have begun to relax the *Claflin* doctrine. *See also* UNIF. TRUST CODE art. 411 (UNIF. LAW COMM'N 2000); RESTATEMENT (THIRD) OF TRUSTS art. 65 (AM. LAW INST. 2003) (proposing more liberal approaches to trust termination).

165. 11 CHASE, *supra* note 70, at 237.

166. *Id.* at 238.

167. *Id.* at 240-41.

terminate or to vary an *inter vivos* trust unilaterally during his or her lifetime;[168] a trustee can terminate a trust, whether *inter vivos* or testamentary, if empowered by the trust instrument to do so;[169] and testamentary trust beneficiaries, if of full age and capacity, can bring a testamentary trust to an end provided they are between them immediately entitled to the trust *corpus* and they all agree to the termination.[170]

Of greater significance to the present discussion is the South African legal position regarding the termination of an *inter vivos* trust by means of agreement between the settlor, trustee, and beneficiary in the event that the trust instrument contains no directives on termination. In *Crookes v. Watson*[171] the Appellate Division, applying Roman-Dutch law to address the issue of the variation of an *inter vivos* trust, typified the contract that establishes an *inter vivos* trust as a *stipulatio alteri*—a contract for the benefit of a third party.[172] The Appellate Division, and latterly the Supreme Court of Appeal, subsequently affirmed this characterization of an *inter vivos* trust's founding document as a *stipulatio alteri* on numerous occasions.[173] An important implication of the association of an *inter vivos* trust's trust instrument with the *stipulatio alteri* is that certain aspects of an *inter vivos* trust are governed by the law of contract, in particular the contractual rules that apply to the *stipulatio alteri*.[174] Trust termination is one of these aspects.[175] Brand J.A. formulated the applicable rules as follows in *Potgieter v. Potgieter*:

> [A] trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a *stipulatio alteri*. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed. But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent. The reason is that, as in the case of a *stipulatio*

168. *Groeschke v. Trustee, Groeschke Family Trust* 2013 (3) SA 254 (GSJ) § 12; CAMERON, DE WAAL, WUNSH & SOLOMON, *supra* note 35, at 492; DU TOIT, *supra* note 42, at 49.

169. CAMERON, DE WAAL, WUNSH & SOLOMON, *supra* note 35, at 492, 504; DU TOIT, *supra* note 42, at 47, 53.

170. CAMERON, DE WAAL, WUNSH & SOLOMON, *supra* note 35, at 509; DU TOIT, *supra* note 42, at 46-47.

171. *Crookes v. Watson* 1956 (1) SA 277 (A).

172. *Id.* at 285F.

173. *See, e.g.*, *Hofer v. Kevitt* 1998 (1) SA 382 (SCA) at 386E; *Potgieter v. Potgieter* 2012 (1) SA 637 (SCA) § 18.

174. M.J. de Waal, *Die Wysiging van 'n Inter Vivos Trust*, J. SOUTH AFRICAN L. 326, 330; DU TOIT, *supra* note 42, at 51.

175. *Id.*

> *alteri*, it is only upon acceptance that the beneficiaries acquire rights under the trust . . . .[176]

The third party's acceptance of a contractual benefit under a *stipulatio alteri* and, equally, a beneficiary's acceptance of a trust benefit under an *inter vivos* trust create, according to *Crookes v. Watson*, a *vinculum juris* between the third party and the *stipulans* or *promittens* (in the case of a *stipulatio alteri*) and between the beneficiary and the settlor or trustee (in the case of an *inter vivos* trust).[177] The beneficiary is not vested with any right to the trust income or the trust principal prior to acceptance; hence, the settlor and trustee can agree to terminate the trust without the beneficiary's concurrence. The beneficiary's acceptance of the trust benefit vests the beneficiary with a right to that benefit and renders his or her consent, along with the settlor's and the trustee's consent, essential to the *inter vivos* trust's termination. South African trust law, therefore, invokes its Roman-Dutch common law to deal with the (in)destructibility of the *inter vivos* trust, and the South African position, based on consensual trust termination, is certainly more flexible and potentially more accommodating of the wishes of the parties to an *inter vivos* trust than is article 2028 of the Louisiana Trust Code.

C. Beneficiaries Must Be Designated at a Trust's Inception

The Louisiana Trust Code requires the designation of trust beneficiaries at a trust's inception. In so doing, the Code rejects the common-law notion of a contingent remainder for which the holder has not been identified or for which a condition precedent must be fulfilled;[178] moreover, so-called "dynasty trusts"—trusts that continue over several generations—are prevented as a result.[179]

Article 1802 of the Trust Code determines that a beneficiary must be designated in the trust instrument; moreover, that this designation is sufficient if the identity of the beneficiary is objectively ascertainable solely from standards stated in the trust instrument. This requirement generally precludes the later selection of trust beneficiaries through the exercise of a power of appointment.[180] Article 1802 does not require, however, that beneficiaries be identified by name in the trust instrument; it is sufficient for the trust founder to stipulate objective criteria for the

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176. *Potgieter* 2012 (1) SA § 18.
177. *Crookes* 1956 (1) SA at 288A.
178. Lorio, *supra* note 6, at 1739.
179. Martin, *supra* note 12, at 512; Yiannopoulos, *supra* note 7, at 230-31.
180. 11 CHASE, *supra* note 70, at 113.

identification of the beneficiaries.[181] It is, furthermore, not required that all beneficiaries, whether income or principal beneficiaries, be identified at a trust's inception—article 1802 requires that "a beneficiary" must be designated in the trust instrument, and the designation of either an income or a principal beneficiary is sufficient to validate a trust.[182]

Article 1803 of the Code states that a beneficiary must be in being and ascertainable on the date of the trust's creation; moreover, that an unborn child is deemed a person in being and ascertainable if he or she is later born alive. Chase provides a number of examples to illustrate the operation of article 1803. One of these examples will be used hereafter to illustrate the difference between the Louisiana and South African legal positions on point: S establishes a trust to pay income to A for life, then to A's first child for the life of that child, and thereafter the trust principal to B. A and B are alive at the trust's effective date, but A has no children. The gifts of income to A and principal to B are valid, but the gift of income to A's first child, who is not in being at the trust's inception, is invalid.[183]

The Trust Code contains a number of exceptions to these provisions. Class trusts are the most important of these exceptions for the purpose of this discussion. Article 1891 of the Code determines, *inter alia*, that a person may create an *inter vivos* or a testamentary trust in favor of a class of beneficiaries consisting of some or all of the children, grandchildren, great-grandchildren, nieces, nephews, grandnieces, grandnephews, and great-grandnieces and great-grandnephews of the settlor or of the settlor's current, former, or predeceased spouse, or any combination thereof. The article stipulates, moreover, that, provided at least one member of the class is in being at the trust's inception, the other members of the class need not be in being at that time.

How does the South African position compare? One of the requirements for establishing a valid trust under South African law is that the trust object must be defined with reasonable certainty in the trust instrument.[184] Private trusts are usually established to benefit one or more persons or classes of person. South African law consequently requires, in conformity with the position in Louisiana law, that the beneficiaries, whether as individuals or as members of a class, must be designated in the trust instrument. Such designation can occur with reference to

181. *Id.* at 114.
182. *Id.*
183. *Id.* at 115.
184. *Administrators, Estate Richards v. Nichol* 1996 (4) SA 253 (C) at 258E-F.

objectively determinable criteria stated in the trust instrument.[185] Should the persons or class or persons intended as trust beneficiaries not be adequately determined or determinable, the trust will fail for want of a certain object.[186] This requirement, unlike article 1802 of the Louisiana Trust Code, does not, however, preclude the later selection of trust beneficiaries through the exercise of a power of appointment.[187]

South African law also does not impose a requirement akin to that contained in article 1803 of the Trust Code, namely that a trust beneficiary must be in being at the trust's inception. Cameron *et al.* declare that any person, born or unborn, may be a trust beneficiary;[188] therefore, a trust founder can validly make provision for the benefitting of persons not yet conceived or born at a trust's inception.[189] In Chase's aforementioned example (where S established a trust to pay income to A for life, then to A's first child for the life of that child, and thereafter the trust principal to B; A and B were alive at the trust's inception but A had no children) the gifts of income to A and to A's first child (should A eventually have one) as well as the gift of principal to B are valid in terms of South African law.

South African trust founders frequently use class trusts to benefit future generations. In *Hofer v. Kevitt*,[190] for example, the settlor designated the following beneficiaries in the trust instrument: the settlor himself; the settlor's brother, H; and the brother's two children, C and E. He furthermore identified C and E's children and, thereafter, their grandchildren as successive classes of beneficiaries. The scheme of devolution envisaged in the trust instrument was that the trustees had to pay the trust income to the settlor and, upon his death, to H. Upon H's death the trust income had to devolve in equal shares on C and E. Upon C and E's respective deaths, the income that devolved upon each of them had to accrue to their issue *per stirpes*. On the death of the last of H's grandchildren, the trust principal had to devolve *per stirpes* upon such grandchildren's issue.[191] South African law, unlike article 1891 of the Louisiana Trust Code, does not restrict the possible classes of beneficiaries that a trust founder can designate, but, as *Hofer v. Kevitt* illustrates, South African founders do indeed generally designate one or

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185. DU TOIT, *supra* note 42, at 31.

186. *Id.*; *see also* DE WAAL & SCHOEMAN-MALAN, *supra* note 104, at 172.

187. See *infra* Section IV.D.

188. CAMERON, DE WAAL, WUNSH & SOLOMON, *supra* note 35, at 553.

189. DU TOIT, *supra* note 42, at 113; DE WAAL & SCHOEMAN-MALAN, *supra* note 104, at 12, 114.

190. *Hofer v. Kevitt* 1998 (1) SA 382 (SCA).

191. *Id.* at 384B-E.

more of the classes identified in article 1891 of the Code. South African law does not, moreover, impose a requirement comparable to that laid down in article 1891 that at least one member of a particular class must be in being at a trust's inception. Therefore, if not one of H's great-grandchildren had been conceived at the time of the trust's effective date in *Hofer*'s case, the gift of trust principal to that class would nevertheless be valid.

South African law protects the interests of the *nasciturus*—someone conceived but as yet unborn—through the common-law *nasciturus* principle: *nasciturus pro jam nato habetur quotiens de commodo eius agitur.* This principle entails that a child who has been born alive is fictitiously vested with a right to trust benefits from the moment of conception.[192] Where, therefore, a testator appoints all her grandchildren who are alive at the time of her passing as the income beneficiaries under a trust established in terms of her will, the right to trust income of a grandchild who has been conceived at that time is kept in abeyance until he or she is indeed born alive, at which time the right to share in the trust income will vest in that grandchild.

Section 2D(1)(c) of the Wills Act 7 of 1953 lays down an interpretation rule for wills (and hence testamentary trusts) that incorporates the common-law *nasciturus* principle into legislation. It stipulates that, unless the context of a will indicates otherwise, any benefit allocated to the children of a person or to the members of a class of persons mentioned in a will, shall vest in those children or those members of the class of persons who are alive at the time of the devolution of the benefit or who have already been conceived and who are later born alive. The right to trust income of the grandchild mentioned in the foregoing example will, therefore, be held in abeyance also in terms of the interpretation rule contained in section 2D(1)(c) of the Wills Act.

D. Powers of Appointment

The Louisiana Trust Code does not recognize the bestowal of powers of appointment on testamentary trustees to select income and/or principal trust beneficiaries or to determine the shares in trust income and/or principal that those beneficiaries shall receive. Powers of appointment, well known to the common law, are generally regarded as incompatible with civilian legal theory on the non-delegation of

192. DE WAAL & SCHOEMAN-MALAN, *supra* note 104, at 12.

testamentary power;[193] moreover, they are inconsistent with the requirement, discussed earlier,[194] that beneficiaries be identified and vested at a trust's inception.[195] Powers of appointment are prohibited by article 1572[196] of the Louisiana Civil Code insofar as this provision nullifies, subject to some qualifications, testamentary dispositions committed to the choice of a third person. This prohibition of powers of appointment is not uncontroversial, and commentators who favor the recognition of such powers under Louisiana law point in particular to the estate-planning advantages that powers of appointment yield.[197]

The Trust Code does allow, notwithstanding the Civil Code's aforementioned prohibition, the bestowal of discretionary powers on trustees in particular circumstances. For example, article 1961 of the Code provides, *inter alia*, that a settlor may give a trustee who is not a trust beneficiary the discretion to allocate income in different amounts among a trust's income beneficiaries or to allocate some or all of the income to principal. Similarly, article 2068 of the Code allows the invasion of trust principal for an income beneficiary: it states, *inter alia*, that a trust instrument may direct or permit a trustee to pay trust principal to an income beneficiary for support, maintenance, education, or medical expenses, or, pursuant to an objective standard, for any other purpose. Moreover, articles 1899 and 1963 of the Code authorize a settlor to bestow on a trustee the discretion to determine the time and frequency of distributions of trust income.[198] Some commentators maintain that these provisions of the Trust Code do not amount to powers of appointment,[199] but others are of the view that these provisions bestow "a power of appointment of sorts" on a trustee[200] and, therefore, that a measure of tension exists between these provisions of the Trust Code on the one hand, and the Civil Code's prohibition of powers of appointment on the other hand.[201]

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193. Lorio, *supra* note 6, at 1739.

194. See *supra* Section IV.C.

195. Martin, *supra* note 12, at 520-21.

196. Formerly LA. CIV. CODE art. 1573.

197. *See, e.g.*, Michael R. Schneider, *Louisiana Civil Code Article 1573—Revised, Improved, but Not Perfected*, 57 TUL. L. REV. 123 (1982); *see also* Nabors, *supra* note 137, at 182-83 (on the position under the Trust Estates Act).

198. Note, furthermore, that article 2031 of the Trust Code allows a settlor to delegate the right to modify trust provisions in order to add or remove beneficiaries if all of the affected beneficiaries are descendants of the person given the power to modify. It is submitted that this power functions in a manner similar to a (limited) power of appointment.

199. *E.g.*, Oppenheim, *supra* note 70, at 628-29.

200. Martin, *supra* note 12, at 521; *see also* Yiannopoulos, *supra* note 7, at 231.

201. Schneider, *supra* note 197, at 132-35.

South African law also adheres to the principle that a testator must exercise his or her testamentary power him- or herself; consequently, a testator may, as a general rule, not delegate this power to someone else to exercise it on his or her behalf.[202] South African courts have accepted, however, that the South African common law permits the valid conferral of powers of appointment on a fiduciary[203] and a usufructuary.[204] This conferral did not, however, extend to a testamentary trustee; that is, not until the seminal judgment on point in *Braun v. Blann & Botha*.[205] *In casu* the testatrix purported to confer a power of appointment on her trustees to select income and principal beneficiaries from groups of beneficiaries designated in the will and to determine the share that each beneficiary would receive. The testatrix added to this stipulation that, should any of the potential principal beneficiaries be deceased leaving lawful issue surviving him or her, the trustees were empowered to apply such a portion of the trust principal as they determined to the creation of a trust for such lawful issue, for such a period, subject to such terms and conditions, and under the control of such trustees as her original trustees determined.[206] The appellant, one of the beneficiaries under the testatrix's will, challenged the validity of the clause purporting to create the trust on the basis that it sought impermissibly to confer powers of appointment on the testatrix's trustees.[207] The first respondents—the executors testamentary of the testatrix's estate—contended that the conferral of the common-law powers of appointment on fiduciaries and usufructuaries should be extended to testamentary trustees.[208]

Joubert J.A. concurred with the first respondents' contention. He reasoned that the law must keep pace with changing societal conditions. In Joubert J.A.'s view, the conferral of the common-law powers of appointment on testamentary trustees to select income and/or principal beneficiaries from a group of potential beneficiaries designated by the testator would be "a salutary development of our law of trusts."[209] It is evident that Joubert J.A. founded his aforementioned view on the developmental role that the South African courts have played, and continue to play, in crafting a uniquely South African trust and trust law

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202. *Estate Watkins-Pitchford v. Commissioner for Inland Revenue* 1955 (2) SA 437 (A) at 458H-459A; *Estate Orpen v. Estate Atkinson* 1966 (4) SA 589 (A) at 593G-594B.

203. *Westminster Bank Ltd. v. Zinn* 1938 AD 57.

204. *Commissioner for Inland Revenue v. Lukin's Estate* 1956 (1) SA 617 (A).

205. *Braun v. Blann & Botha* 1984 (2) SA 850 (A).

206. *Id.* at 856B-C.

207. *Id.* at 856F-G.

208. *Id.* at 866D-E.

209. *Id.* at 866H.

by adapting the trust idea to the principles of South African law.[210] It must be noted, however, that Joubert J.A. restricted the power of appointment that can validly be conferred on the trustee of a testamentary trust to a so-called "specific power of appointment"—one where the trust founder has pre-designated a group of potential beneficiaries from which the trustee must make a selection; a so-called "general power of appointment"—one where a testamentary trustee has an unfettered discretion as to the selection of beneficiaries—remains impermissible with regard to testamentary private trusts under South African law.[211]

Joubert J.A. ruled, in light of his foregoing finding, that the powers of appointment that the testatrix sought to confer on her trustees regarding the selection of income and principal beneficiaries from pre-designated groups were indeed validly conferred.[212] The testatrix's attempt to provide for the creation of a so-called "pour-over trust" in favor of the lawful issue of predeceased principal beneficiaries was, however, disallowed. Joubert J.A. held that the testatrix effectively left the appointment of the trustees of the new trust as well as the determination of that trust's essential terms regarding payment of income and/or principal entirely to the discretion of her original trustees. This amounted, according to Joubert J.A., to a delegation of will-making power that exceeded the scope of a specific power of appointment. He held, therefore, that the testatrix's attempt to establish a pour-over trust was invalid.[213]

V. CONCLUDING REMARKS

Comparing aspects of the Louisiana and South African trusts yields interesting similarities but also juxtapositions. Both trusts derive from the common-law trust. Both trusts have been assimilated successfully into mixed jurisdictions with definitive civilian legal traditions. Louisiana trust law is codified, whereas South Africa's is not. Some may argue that codification not only provides relative certainty regarding the apposite legal rules, but also renders those rules readily accessible. It is interesting to note that Geach and Yeats regard the un-codified state of South African trust law as (potentially) problematic and disadvantageous insofar as it may cause uncertainties, even to the extent that it may not be

210. *Id.* at 867A; *see also supra* Part II.
211. DE WAAL & SCHOEMAN-MALAN, *supra* note 104, at 48.
212. *Braun* 1984 (2) SA at 867C-D.
213. *Id.* at 867D-F.

evident whether a trust has in fact been created in a particular instance.[214] Others may regard the doctrine of *stare decisis,* foundational to the development of South Africa's trust law, as overly cumbersome by reason of the voluminous judicial authority it generates. On the other hand, South Africa's Constitutional Court recently affirmed that "[o]ur law of precedent recognises the possibility of change"[215]—this statement suggests that judge-made law can respond more readily to changing societal conditions and shape the law accordingly.

Louisiana and South Africa faced particular obstacles to the trust's reception in their respective jurisdictions. Both legal systems have circumvented one of the principal obstacles in this regard, namely the duality of ownership that underpins the common-law trust, by conceptualizing the trust in terms of the separation of the trustee's control over trust property from the beneficiary's enjoyment of trust benefits. However, in Louisiana uncertainty remains regarding whether the trustee or the principal beneficiary actually owns the trust property. The South African legislature incorporated both possibilities, namely the ownership trust and the *bewind* trust, under the regulatory ambit of the Trust Property Control Act; consequently, the Act recognizes and governs both owning and non-owning trustees. Some of the obstacles to the trust's reception in Louisiana do not exist in the South African context. This phenomenon can be explained through historical contextualization. South Africa escaped the continental-European codification movement during the nineteenth century, and, therefore, South African trust law did not have to contend with the codal prohibition of substitutions and *fidei commissa* that complicated the trust's introduction to Louisiana. On the other hand, the South African Appellate Division, unbounded by such a prohibition, attempted a Romanist reconfiguration of the trust as a *fidei commissum* in *Estate Kemp v. McDonald's Trustee*.[216] This reconfiguration ultimately proved unsatisfactory but prevailed for seventy years until it was rejected in *Braun v. Blann & Botha*.[217] The fact that the British abolished all Roman-Dutch forms of imperative inheritance laws meant that South African trust law did not have to contend, as its Louisiana counterpart has to, with forced heirship and a potential tension between the *legitime* on the one hand, and using the trust as a device for the economic protection of the family on the other hand. The Louisiana and South African legislatures both attended to the

214. GEACH & YEATS, *supra* note 101, at 207.
215. *Laubscher v. Duplan* 2017 (2) SA 264 (CC) § 86.
216. *Estate Kemp v. McDonald's Trustee* 1915 AD 491.
217. *Braun* 1984 (2) SA 850 (A).

trust as a family-protection device: the former permitted the placement of the *legitime* and the marital portion in trust and the latter incorporated the trust in the spousal maintenance dispensation under the Maintenance of Surviving Spouses Act.

The Louisiana trust corresponds with its South African counterpart in regard to some of the trust's core elements, but the two trusts also differ in important respects. Neither jurisdiction recognizes the common-law rule against perpetuities, but, whereas South African law does not prohibit private trusts that continue in perpetuity, Louisiana law restricts the duration of such trusts. Louisiana adheres to a high degree of trust indestructibility, whereas South African law permits the termination of the *inter vivos* trust in particular through a consensual arrangement between the parties to the trust. The South African position in this regard is founded pertinently on the association of an *inter vivos* trust deed with the Roman-Dutch *stipulatio alteri*. Louisiana and South African law require the adequate designation of trust beneficiaries in the trust instrument, but South African law does not insist on the immediacy of vesting that is required under Louisiana law. Moreover, both jurisdictions treat class trusts accommodatingly and protect the interests of *nascituri* under such trusts. Louisiana continues to resist the conferral of powers of appointment on testamentary trustees, whereas the South African Appellate Division regarded such conferral—albeit limited to specific powers of appointment—as essential to the development of South African trust law in *Braun v. Blann & Botha*.[218]

This Article has shown, through its comparative analysis of aspects of the Louisiana and South African trusts, that, although the two jurisdictions have approached the reception of the common-law trust and its subsequent adaptation to their respective civilian contexts differently, Louisiana and South Africa have succeeded in not only assimilating the trust into their legal systems but also in developing uniquely indigenous trust laws that are appropriately aligned to the two jurisdictions' general legal tenets.

218. *Id.*