in Vietnam. The specific contract negotiated with the government will pro-
vide the best legal safeguard.

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EDITOR'S NOTE: Firms in the United States or that are owned by nationals
or residents of the United States are prohibited from investment in Vietnam
by United States Government regulations.

TANG THI THANH TRAI LE

The Puerto Rico Trust Code

Introduction

The Commonwealth of Puerto Rico, through its industrial incentive and
tax exemption laws of recent years, "Operation Bootstrap," has skillfully
raised its standard of living to the highest level of any country south of the
Rio Grande. By contrast, Puerto Rico's laws relating to express trusts have
remained underdeveloped. As a result, profits and capital gains realized on
investments attracted to Puerto Rico by Operation Bootstrap are often
moved out of Puerto Rico for portfolio investment through express trusts in
jurisdictions whose laws are more hospitable. Express trusts hesitate to
invest funds in Puerto Rico because of uncertainty as to the applicable law.
These points struck this writer with some force when he sought to make use
of express testamentary and inter vivos trusts as part of the estate plan of a
client who settled in Puerto Rico after building up a successful business
there with the help of Operation Bootstrap.2

Present Puerto Rican Law of Express Trusts

Since Columbus's discovery of Puerto Rico in 1493, the basic source of
the domestic civil of Puerto Rico has been Spanish law; Spanish law, in its
turn, was profoundly influenced by Roman law as embodied in the Code of
Justinian. The second most important source of the civil law of Puerto Rico
has been the Civil Code of Louisiana. There was no specific authority in
the jurisprudence of Puerto Rico for express trusts until 1928, when the

2See Segall, Kelley & McConnell, Estate Planning Comes to Puerto Rico, 55 A.B.A.J. 464
(1969). Following the adoption of new estate and gift tax laws by Puerto Rico effective January
1, 1969 (Act No. 167, approved June 30, 1968), it was anticipated by the authors that "estate
planning techniques developed by stateside lawyers" would be encouraged. They noted, how-
ever, that "Puerto Rico has borrowed the federal system of taxing gifts and estates but has
retained its civil law system of property descent and distribution." 55 A.B.A.J. 464, 469
3See, e.g., Civil Code of Puerto Rico, tit. 31, §§ 1, 14-21, 131 et seq. (absence), 221 et seq. (marriage), 321 et seq. (divorce), 441 et seq. (paternity and filiation), 1501 et seq. (usufruct); see also Dart, The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana, 6
TUL. L. REV. 83 (1931); Tucker, Source Books of Louisiana Law, 8 TUL. L. REV. 396 (1934).
common law concept of an express trust was introduced by Chapter 221 of the Civil Code, entitled "Constitution of Trusts (Fideicommissa)." 4

These provisions were derived from a trust code enacted three years earlier in Panama, a civil law jurisdiction not otherwise noted as a fountainhead of jurisprudence for common law subjects such as trusts. 5 Louisiana is a jurisdiction whose civil jurisprudence, like that of Puerto Rico, originated in the Spanish Civil Code. (Unlike Puerto Rico, though, Louisiana’s laws show the influence of the Code Napoleon). Louisiana’s experience with engrafting the common law of express trusts onto its earlier jurisprudence has finally produced a trust code whose provisions serve as a better model for Puerto Rico than does Panamanian law.

The concept of the fideicommissum is recognized by Justinian. It is a sort of trust without a trustee that is similar to a common law life estate. Section 2541,6 the first section of the present Puerto Rico Trust Code, defines a trust in terms that relate the new concept being engrafted on the old law directly to the civil law terminology of the old law of Justinian’s Civil Code: “A trust (fideicommissum) is an irrevocable mandate whereby certain property is transferred to a person, named the trustee (fiduciario), in order that he may dispose of it as directed by the party who transfers the property, named constituent (fideicomitente), for his own benefit or for the benefit of a third party, named the beneficiary (cestui que trust) or (fideicomisario).” 7

Express trusts have been a part of the law of Puerto Rico since enactment of §§ 1-41 of the Act of April 23, 1928, No. 41, page 294. This Act was incorporated into the Civil Code of Puerto Rico by the final provisions of the Code, as amended April 28, 1930, No. 48, page 358, § 9. It is now §§ 2541 through 2581 by Act of May 8, 1953, No. 211, page 504, effective May 8, 1952. See LAWS OF PUERTO RICO ANNOTATED, 2d ed. 1967 (Engl.), Vol. 7A, Civil Code, Table 31, Subtitle 4, Obligations and Contracts, Chapter 221, entitled “Constitution of Trusts (Fideicommissa).”

See Villella, The Problems of Trust Legislation in Civil Law Jurisdictions: The Law of Trusts in Puerto Rico, 19 TUL. L. REV. 374 (1945); Patton, Trust Systems in the Western Hemisphere, 19 TUL. L. REV. 398 (1945); Patton, El Futuro de la Legislacion de Fideicomiso, 17 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 221 (1948). These essays show that it was Dr. Ricardo J. Alfaro of Panama who drafted the bill which subsequently became Act No. 9 of 1925 for the creation of trusts in Panama, and that Atty. Miguel Guerra Mondragon, while he was Vice-President of Puerto Rico’s House of Representatives, was the author of the bill which later became Act No. 41 of the Puerto Rico Laws of 1928. Act No. 41 was incorporated verbatim into the Civil Code. See Belaval v. Court of Eminent Domain, 71 P.R.R. 246, 251 n.1 & 2.

In Alvarez v. Secretary of the Treasury, 80 P.R.R. 15 (1957), the Supreme Court noted: “The incorporation of some of the principles of the Anglo-Saxon trust into the Panamanian Law was not intended to create an independent civil institution bearing no relation to the rest of the civil system, but a civil institution coming more properly within the civil system.” 80 P.R.R. 15, 40 (1957).

For the most recent comprehensive analysis of Puerto Rico’s Trust Code, see Villella, El Fideicomiso Puertorriqueno III, 37 REV. COL. ABOG. P.R. 417 (1976).

Sections 2541-81, ch. 221, Civil Code of Puerto Rico. Hereafter references to Sections and numbers are to the present Sections of Chapter 221 of the present Puerto Rico Civil Code. This is commonly cited as P.R. LAWS ANN. tit. 31 § 2541 (1955).

The heading of P.R. LAWS ANN. tit. 31, ch. 21, is “Constitution of Trusts (Fideicommissa [sic].”). This tends to confirm that the intent of the statute was to treat the engrafted cion as part of the original stock, not as separate or new and different legal device.
This dovetailing, by use of parentheses of terminology from the common law of trusts with terminology of the analogous civil law concept is a drafting technique that can hardly fail to produce maximum ambiguity. To which of the two systems should one look for precedent to resolve close questions? This question points out a serious defect of the present Puerto Rico Trust Code.

In *Alvarez v. Secretary of the Treasury* and *Belaval v. Court of Eminent Domain*, the Supreme Court of Puerto Rico upheld what were essentially common law trusts created by parents for their minor children against assertions that such trusts were invalid. These were difficult cases to decide. In *Alvarez*, two concurring justices pointed out that "(1) the Puerto Rican trust is not the same as the Anglo-Saxon trust; (2) there is a fundamental difference between a testamentary trust and a trust *inter vivos* under [Puerto Rican] civil law; (3) the Puerto Rican trust is another civil institution within our codified civil system."

The definition of express trust in the Louisiana Civil Code does not make the mistake of defining a common law trust in civil law terms. It provides that "A trust, as the term is used in this Code, is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another." In the proposed new Puerto Rico Trust Code this approach is followed.

The *Alvarez* decision has left lawyers uncertain whether a Puerto Rican trust is a creature of Puerto Rican or "Anglo-Saxon" law. 

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1. *Alvarez v. Secretary of the Treasury*, 80 P.R.R. 15 (1957). The Supreme Court conceded that in the above cited definition (P.R. LAWS ANN. tit. 31, § 2541) "The phrase 'irrevocable mandate' was used in an effort to couch the trust concept in terms familiar to civilistas. The wisdom of describing the law of trusts in terms of mandate has been questioned." 80 P.R.R. 15, 19 n.4 (1957). The holding of the court was that the settlor of the trust was liable for the income tax on accumulated income claimed by the Secretary of the Treasury on "Clifford" principles.
2. *Belaval v. Court of Eminent Domain*, 71 P.R.R. 246 (1950): The error committed by the lower court is evident in holding that for the investment of the property held in trust the trustee should follow the procedure provided by §§ 614 et seq. of the Code of Civil Procedure, wherein, according to the Civil Code, the parents or the tutors of minors or of incapacitated persons need judicial authorization to do anything relative to the keeping of said minors or incapacitated persons or their property. These cases deal with property belonging to minors or incapacitated persons. In trusts the property which belonged to the settlor has been conveyed to the trustee, who has all rights and interest corresponding to the *full ownership*, with the only restriction that the transfer is made in accordance with the mandate of the settlor for the benefit of the beneficiary. ... The title to the property transferred in trust is vested on the trustee and it is so recorded in the Registry of Property subject to the terms of the trust and not on the beneficiary minors in this case. 71 P.R.R. 246, 253 (1950), cited with approval, *Alvarez v. Secretary of the Treasury*, 80 P.R.R. 15, 20 (1957).
As the concurring opinion in *Alvarez* pointed out, Chapter 221 of the Civil Code in Puerto Rico's civil law regime is either subordinate to such important and distinctive features of Puerto Rican jurisprudence as forced heirship, the *patria potestas*, the usufruct, community property and the *fideicommissa* itself, or else, if not, is "floating in the air," in a limbo unrelated to other parts of the civil law.\(^{12}\)

The provisions of the present Code following the definition of trust of Section 2541 confirm the view of the concurring opinion in *Alvarez* that the Puerto Rican trust is not the same as an Anglo-Saxon trust, and that instead there is an "identity of essence" of Puerto Rican trusts with other Puerto Rican civil law concepts such as *fideicommissary* substitutions, usufructs, disqualification to succeed, tutorships, etc. All of this is unfamiliar to lawyers learned in the common law jurisprudence of trusts. The unresolved relationship of the present Puerto Rico Trust Code to the alien provisions of Puerto Rican civil law makes it difficult for Puerto Rican lawyers to explain Puerto Rican trust law to their common law counterparts, and leads most to advise Puerto Rican clients who wish to make use of common law trusts to take their business elsewhere.

In the present Trust Code, words and phrases are used that are not part of familiar common law trust terminology: "constituent," "pension" (Section 2555), "artificial person," "extinction of trust," and "the confounding of the quality of sole *cestui que* trust with that of sole trustee." (Section 2559(7))

The present Code provides that "[A]ny condition upon which the execution of a trust depends" and which "is not fulfilled within thirty years" from date of acceptance by the trustee, "shall be considered as lapsed" (except for charitable trusts) (Section 2548) and that "a trust providing for a usufruct, income, or pension in favor of an artificial person shall not last more than thirty years." (Section 2555) By contrast, Section 2553 prohibits "an order of succession extending beyond the lives of two persons in being." The distinction drawn here between a "condition upon which the execution of a trust depends," which "lapses" if not "fulfilled" within thirty years, and "an order of succession" extending beyond two lives in being is not clear. A wide definitional gap is left for disputes between income beneficiaries and remaindermen eager to accelerate interests in principal into possession.

New York and most other jurisdictions that once adopted the statutory "two lives in being" perpetuities limitation have repealed it in favor of a rule of "lives in being plus twenty-one years." Where Puerto Rican trusts with noncharitable income beneficiaries and charitable remaindermen fit into this scheme is unclear. Section 2552 makes "null and void" a trust "in

\(^{12}\)See 80 P.R.R. 15, 41-43 (1957). To the concurring justices the trust instruction was not "floating in the air," it was "an additional typical contract, as in pledge, deposit, antichresis . . . if we understand it correctly, without losing our heads . . ." 80 P.R.R. 15, 40-41 (1957).
favor of a nonexisting person, excepting only future children of the constituent.” This seems to rule out the use of a trust for the “constituent’s” future grandchildren and more remote descendants, parents and other ascendants, collaterals, friends, acquaintances, strangers, or spouses. Section 2542 provides that “A trust may be constituted by will, to have effect after the death of the constituent,” (constituent is the Puerto Rican English word for the more usual trust word settlor, grantor, creator or trustor). Section 2543 provides that “a trust inter vivos must be constituted by public deed,” while Section 2545 provides that “a trust upon real property must be constituted by public deed, and such public deed must be recorded.” What distinction is intended by the difference in language is not clear.

Section 2553 provides that “Trusts constituted to the detriment or impairment of the rights of heirs at law as prescribed in this title,” are “prohibited and null.” This rules out the use of trusts which impinge on the legitim (forced share, usually two-thirds) to which forced heirs are entitled and specifies no effective way for affected heirs to waive such a defect, even though the impinging trust would provide equivalent or greater benefits. It fails to make clear the time as of which the detriment or impairment of the legitim is to be measured: whether the time of creation of the trust, the death of the constituent of the trust, or the time of the claim by the heir.13

Section 2551 prohibits a “secret trust.” The typical common law express inter vivos trust is not required to be publicly recorded, and is usually kept private by the lawyer-client privilege. However, if requested, copies must be furnished to the Internal Revenue Service and to securities transfer agents and are usually recorded with trust conveyances of real property. Some states of the United States require recording of any trust instrument for public notice, but recording is not a prerequisite to the validity of the trust itself.14 Just what “secret” means in the context of Puerto Rico’s present trust code is not clear.15

The Proposed Puerto Rico Trust Code

The proposed Puerto Rico Trust Code and the accompanying draft Report of the Committee on the Puerto Rico Trust Code were drafted and submitted by this writer to Raymond L. Acosta, then Chairman of the Trust Committee of the Puerto Rico Bankers Association, President of the Estate Planning Council of Puerto Rico, and a member of the Pension and Profit Sharing Council of Puerto Rico and Society of Financial Analysts of Puerto Rico. He and his committee, and Eva Silen of the Banco Popular, Mr. Acosta's successor as Chairman of the Trust Committee of the Puerto Rico Bankers Association, received the drafts with enthusiasm and have circulated them for comments and suggestions. It is reported that the Secretary

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of the Treasury of Puerto Rico is in favor of adoption of the Trust Code as a useful complement to the Industrial Incentive Act. For political reasons it might be retitled the Puerto Rico Trust Incentive Act.

The proposed Puerto Rico Trust Code is intended to replace present Chapter 221 of the Civil Code with a new Chapter 221 consisting of fourteen sections entitled "Express Trusts."

The proposed code is intended to make clear that a Puerto Rican trust is essentially similar to a common law trust, not something different, and that it is not a new civil institution within Puerto Rico's civil law system. It is intended to free Puerto Rican trust law from the shackles of its Panamanian antecedents and civil law nomenclature, and bring it into line with the nomenclature and case law precedent furnished by the corresponding provisions of the Civil Code of Louisiana and the several American model and uniform acts governing trustees, powers, principal and income, and related matters.

The proposed Code is not intended to make material changes in Puerto Rico's present substantive law of successions, wills, estate administration, donations \textit{inter vivos} or \textit{mortis causa}, forced heirship, \textit{patria potestas}, usufructuary rights, or community property. It is intended to create another legal device to complement them.

Section 1 [2541] of the proposed Puerto Rico Trust Code follows the definition of a trust found in \textit{Restatement of Trusts}, 2d, Section 2: "a trust," when not qualified by the word "resulting," or "constructive," is "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held as trustee to the duty to deal with the property equitably for the benefit of income and principal beneficiaries, which arises as a result of a manifestation by will, deed, or other written instrument, of an intention to create it." Section 1 of the proposed Code further provides that "[A] trust may be testamentary or \textit{inter vivos}, irrevocable or conditionally or unconditionally revocable, gratuitous or onerous, for any purpose and subject to any condition not contrary to law. A trust not revocable by its terms is irrevocable. A trust that is not testamentary is deemed to be an \textit{inter vivos} trust."

The proposed Section 2541, like the corresponding provisions of the Louisiana Trust Code,\textsuperscript{16} omits civil law terms entirely and uses only common law trust terms. This is intended to make it clear that the common law concept of a trust, and nothing else, is what is being adopted by the proposed Code. Civil law concepts will remain in force and will be available to the same extent they have always been under existing law.

For example, the civil law "\textit{fiduciario}" is an entity still available in Puerto Rico, although it is little used, which results from the appointment of a legatee who is charged with the preservation and administration of the property solely for the benefit of another, to whom he is obligated to deliver

it as provided by the testator. The function of the *fiduciario* is different and narrower than that of a typical common law trustee; however, the *fiduciario* would continue to be available for use if desired.

The concept of the substitution, or *sustitucion fidei comisaria*, is embedded in any legal system derived from Roman law. The essential elements are that a testator makes a double disposition of the same property to two designated heirs. Upon the expiration of the term set by the testator, or when the trustee dies, the trust beneficiary comes into full possession. The beneficiary, or substitute heir, acquires equitable ownership at the testator's death but does not obtain legal title until the expiration of the term or the trustee's death. The trustee must be a descendant, or forced heir, because such a trust burdens his *legitim* (*mejora*). ¹⁷

The definition of a "trust" in Section 1 of the proposed Code makes it impossible to classify a trust as a substitution merely because the trustee has a continuing fiduciary relationship toward an unlimited number of beneficiaries, subject only to rules applicable to the creation of future interests such as the Rule in *Shelley's Case* and the Rule against Perpetuities. He administers the property not for himself but as fiduciary for others. It has always been possible in Puerto Rico to have successive usufructuaries, so permitting a trust to have an unlimited number of successive beneficiaries should not be objectionable on either practical or policy grounds. Section 14 [2554] of the proposed Code entitled "Validation of Trusts" provides that a disposition by way of express trust, power of appointment, or contingent, postponed, uncertain or future interests in income or principal, or substitution, or an interest subject to divestiture, that would or might be prohibited if given free of trust, may be made in trust. This leaves intact traditional Puerto Rican and Spanish property interests and concepts such as forced heirship, usufruct, and community property. ¹⁸

**Other Significant Features of the Proposed Trust Code**

The proposed Code is intended to be as brief as possible but, in defining the trust entity for a civil law jurisdiction, it is necessary to be explicit. When attempting to set a common law overlay on a civil law jurisprudence, resort to common law or case law tradition cannot be relied on to fill definitional gaps. Some features of common law trusts that could have been dealt with by an express provision in the proposed Code (such as are found

¹⁷ *P.R. LAWS ANN.* tit. 31, § 2549 envisions the creation of a trust granting a usufruct to a beneficiary for life and a fee simple estate to another. But under this Section a disposition giving successive fee simple estates in trust is null and void. The proposed code sweeps away this difficulty.

¹⁸ For a learned defense of Louisiana's forced heirship system — a distinctive feature of Puerto Rican civil law as well as Louisiana's, see Lemann, *In Defense of Forced Heirship*, 52 *TUL. L. REV.* 20 (1977). See *P.R. LAWS ANN.* tit. 31, §§ 1501-08 (1955) for provisions govern ing the prevailing concept of usufruct.
in New York’s Estates Powers and Trusts Law and Surrogate’s Court Procedure Act) are omitted because it is believed that the subject matter may be left to the free choice of the draftsman, and dealt with by properly drawn provisions of the trust instrument.

The proposed Code expressly introduces a useful common law concept: the power of appointment.\(^9\) Although present Puerto Rican law does not prohibit the creation of such a power, since the donee of a power of appointment may exercise it in favor of unidentified members of a class described by the trust instrument which creates it, the ultimate beneficiaries may be unidentified. Without the express validation of it provided in the proposed Code, such a power might be invalid as a prohibited substitution.

The proposed Code makes clear what may be doubtful under present law: there can be accumulations of income,\(^2\) the duration of a trust can be lives-in-being plus 21 years,\(^2\) and there can be spendthrift provisions,\(^2\) the interests of forced heirs, the patria potestas, and usufructuary and community property interests, can be placed in trust, subject to appropriate provisions which recognize and preserve the special nature of such property interests.\(^2\) A set of choice of law rules is set forth in the statute to make clear the scope and limitation on application of Puerto Rican law and the law of other jurisdictions to interests placed in trust.\(^2\) The trustee’s duties, responsibilities and powers are set forth in detail\(^2\) in basically the same form in which they appear in corresponding provisions of the New York Fiduciaries Powers Act, the Uniform Trust Act, the Revised Income and Principal Act, and in the Restatement of Trusts, the Restatement of Property, and the Restatement of Conflict of Laws.

There is no express provision in the proposed Code for class gifts or for incorporation by reference. There is no fixed scale of trustee commissions. Such provisions would greatly lengthen the proposed Code, and introduce specifics which are controversial in traditional common law jurisdictions. These matters can for the most part be dealt with by properly drawn provisions in the trust instrument. After the basic structure of the proposed Code has been enacted, such provisions can be added if a need for them is felt.

As noted above, Section 14 [2554] of the proposed Trust Code provides that it is to be given a liberal construction in favor of freedom of disposition by the use of an express trust, and that whenever the new Code is silent, resort shall be had to the Civil Code or other laws, but that neither the Civil Code nor any other law shall be invoked to defeat a disposition expressly or impliedly sanctioned by the new Trust Code.

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\(^9\)Section 6 [2546].
\(^2\)Section 4(e) (5) [2544].
\(^2\)Section 4(e) (5) [2544].
\(^2\)Section 5(a) (2) [2545].
\(^2\)Section 5 [2545].
\(^2\)Section 8 [2548].
\(^2\)Sections 9[2549], 12[2552].
The Proposed Trust Code and Community Property

The use of a common law trust to hold community property presents problems that have by no means been entirely solved under the laws of the eight community property states of the United States. This is particularly true in the case of a deceased spouse who purports to dispose by will of all the community's property, both his and his spouse's one-half interest. In such a case, the surviving spouse has a right to elect against the deceased spouse's disposition to take her interest outright.

The proposed Code requires that the community property nature of property be preserved when it is conveyed to a trust. By acknowledging that community property may be made part of an express trust, the proposed Code is similar to the laws of such states as California, Texas, Arizona and Louisiana. These states clearly permit community property to be dealt with under the management of a trustee in a way which assures to both spouses the maximum possible benefit and tax saving. This can be done through use of the United States estate tax marital deduction and through the right of the surviving spouse either to claim her share of the community property outright, or to elect to have her interest in the community property passed to a trust provided under the husband's will, or created by the terms of a revocable trust effective as of the date of his death. If the wife elects to acquiesce in the provisions of the husband's will, she is usually treated as having exchanged her remainder interest in her half of the community property assets transferred to the trust for a life estate in her husband's half. The funding of such an exchange allows the wife to subtract the actuarial value of the life estate in the husband's property from the value of the remainder in her property in determining her net gift. At the wife's death, the value of the wife's community interest in the trust, which is included in

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36See, e.g., O'Connell, Estate and Tax Planning Using a Revocable Trust Funded with Community Property, 1 ESTATE PLANNING 110 (1974).


38Family Law Reform Legislation of 1976 changed the previous concept of male supremacy in the conjugal partnership, under which the husband could act as sole administrator. See, e.g., P.R. LAWS ANN. tit. 31, §§ 282-83, 591. The wife is now the co-administrator of all community property. See P.R. LAWS ANN tit. 31, §§ 284, 286. It is often said that in Puerto Rico, a community property jurisdiction, the concept of community property is a rule of property law. Babilonia v. Registrar, 62 P.R.R. 661, 664 (1943). Messrs. Segall, Kelley and McConnell in Estate Planning Comes to Puerto Rico, 55 A.B.A.J. 464 (1969), dispute this. They contend, at page 465 that in Puerto Rico, unlike other community property jurisdictions, the concept "appears to be essentially contractual in nature and is merely a rule applied to marital property of citizens of Puerto Rico in the absence of an antenuptial agreement requiring the application of a different rule . . ." Accordingly, "persons not married in Puerto Rico . . . are not subject to the community property system." Instead, they are deemed to have contracted for the regime of property in effect at the place of marriage absent a contrary antenuptial agreement or a statutory exception according to Segall et al., who cite Gearhart v. Haskell, 87 P.R.R. 53 (1963) and P.R. LAWS ANN. tit. 31, §§ 284, 3671. Some prominent Puerto Rican lawyers dispute the correctness of the foregoing analysis.
her gross estate for estate tax purposes under Section 2036 of the Internal Revenue Code, is reduced by the value of the life estate the wife receives in the husband’s property as partial consideration under Section 2043. Since the wife's estate receives a credit for the gift tax paid, if any, the net effect is that a certain portion of the community assets escape transfer taxation when passed to the next generation.²⁹

The Proposed Trust Code and the Forced Share, the Patria Potestas and the Usufruct

The proposed Code is not intended to make any substantive change in the Puerto Rican law of property relating to the legitim, the patria potestas, or the usufruct. In many situations, the common law trust device will be a more convenient way of holding such interests than the ways available under existing law. Where a usufruct or life interest in one person is imposed on a naked ownership in another, the interposition of a trustee is often the fairest method of providing evenhanded management for preservation of the principal and a reasonable rate of return on principal in the form of income to the usufructuary beneficiary.³⁰

The patria potestas, the power of the parents over the person and property of an unemancipated child, gives the father, or in his absence, the mother, the right to administer the property of the child, as well as the right to the usufruct over the child’s property, including any property the child may acquire by labor or industry or for other valuable consideration.³¹ The income the parent receives as usufructuary of the child’s property becomes part of the parent’s income. A direct gift from a parent to his minor child will not, in itself, shift the income of the property from the parent to the child. In order to shift the income to the child, the parent may renounce his usufruct interest in favor of the child.

The Proposed Trust Code and United States and Puerto Rican Death Taxes

For purposes of estate and gift taxation, residents of Puerto Rico are divided into two classes, depending on the manner they acquired United

²⁹See Comm. v. Siegel, 250 F.2d 339 (9th Cir. 1957); United States v. Gordon, 406 F.2d 332 (5th Cir. 1969).
³⁰Under Puerto Rican law, “Usufruct is the right to enjoy a thing owned by another person and to receive all the products, utilities and advantages produced thereby, under the obligation of preserving its form and substance, unless the deed constituting such usufruct or the law otherwise decree.” P.R. LAWS ANN. tit. 31, § 1501.
³¹See Roig v. Secretary of the Treasury, 84 P.R.R. 141 (1961); 1976 Family Law Reform, P.R. LAWS ANN. tit. 31, §§ 591, 611 introduced a new concept, patria potestad conjunta, under which both parents now exercise their duties jointly.
States citizenship, and classified as "Section 2208 citizens," or "Section 2209 citizens." 

Under Puerto Rican estate tax law, a United States citizen who is a resident of Puerto Rico, and who has acquired United States citizenship other than by reason of being a citizen of Puerto Rico or by reason of his birth or residence within Puerto Rico, is defined as a "Section 2208 citizen." Typically, this is a United States citizen who was born in one of the fifty states, has moved to Puerto Rico, and has become a bona fide resident to enjoy the full benefits of the Puerto Rico Industrial Incentive Program, "Operation Bootstrap." He is not required to pay both federal and Puerto Rico death taxes and is subject only to federal death taxes. But without being able to make use of an express trust as understood in a common law jurisdiction, he may be deprived of full benefit of the estate tax marital deduction available under the United States federal law. To this objection it is not a complete answer to say that since the marital deduction does not apply to community property, no marital deduction trust is necessary. This overlooks the fact that a Section 2208 citizen may, by antenuptial agreement, inheritance, place of former residence or simple choice, own property that is separate property, and may not wish to risk loss of the marital deduction with respect to the separate property. The same may also be true of a "Section 2209 citizen," a citizen of the United States solely by reason of his birth and residence within Puerto Rico. The uncertainty of present Puerto Rican law as set forth above may deprive both Section 2208 and 2209 citizens of the United States of the opportunity of minimizing the "second tax" on the estate of the surviving spouse through use of a trust that is available to United States citizens of the fifty states. The United States Internal Revenue Code presupposes the existence of, and is adapted to taxation of, common law trusts, but not of Puerto Rican trusts that are not common law trusts. It is thus desirable for Puerto Rico to adopt a fully developed statutory structure for common law trusts to permit both Section 2208 and Section 2209 citizens to take full advantage of all tax benefits available through use of the common law trust device.

The Proposed Trust Code and Employee Benefit Plans

The uncertainties of present Puerto Rican trust law have led Puerto Rican lawyers specializing in trust, estate and succession matters, as well as trust department officials of Puerto Rican banks to recommend that individual and corporate clients wishing to establish express trusts set them up outside

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32Segall, Kelley & McConnell, supra note 2.
33I.R.C. §§ 2208, 2209, 2501(b)-(c).
34"A "2209 citizen" is not subject to gift tax, except with respect to certain property situated in the United States. I.R.C. §§ 2501(b), 2511(b). His gross estate for federal estate tax purposes includes only property which at the time of his death is situated in the United States.
of Puerto Rico. This has become a matter of some importance since the United States Employee Retirement Income Security Act of 1974 (ERISA). Title I of ERISA, the labor provisions administered by the United States Labor Department, basically applies to Puerto Rico, but Title II of ERISA, the tax provisions administered by the United States Treasury Department, basically do not apply to Puerto Rico because Puerto Rico has its own tax structure. Under ERISA, it is customary for an employer to set up an employee benefit trust, make contributions to the trust, and have the trust pay retirement benefits to the employee, whether such benefits take the form of a pension plan, a profit sharing plan, a stock benefit plan, an (ESOP) plan, or some variant of these. So-called Keogh plans also customarily (but not always) involve the use of trusts for purposes of holding and managing the funds contributed, but fully integrated enabling tax legislation for establishment of such funds has not yet been adopted in Puerto Rico. One serious obstacle to setting up such funds in Puerto Rico remains the lack of an up-to-date trust code.

Sources of the Proposed Trust Code

The principal source for the substantive provisions of the proposed trust code is the Louisiana Trust Code. As such things go, Louisiana's Trust Code is relatively modern, having been adopted after extensive study and preparation by the Louisiana State Law Institute. The notes and comments of the revisers and the Louisiana State Law Institute on the Louisiana Trust Code provide valuable historical background for dealing with comparable problems arising under the law of Puerto Rico.

While the sources of Puerto Rico's domestic civil law more nearly resemble the historic sources of the law of Louisiana than they do any other state of the United States, this very similarity can lead to misconceptions in attempting to apply Louisiana precedents to Puerto Rican jurisprudence, unless one vital distinction is observed: After the second Treaty of San Ildefonso in 1800, Louisiana was briefly French, while Puerto Rico never was French. For three years, Louisiana's law was overlaid with the revolutionary Code Napoleon which, among other things, placed prohibitions on "substitutions" and trust-type dispositions that were much more restrictive than anything that had been known either there or in Puerto Rico under the earlier Roman and Spanish jurisprudence. These restrictions lived on in Louisiana even after it had been acquired from France by the United States in 1803.

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