than his client to recognize foreign law questions. Furthermore, he is often better able to deal with foreign counsel. There is, I think, a not unreasonable presumption that the lawyer, not his client, should bear the responsibility for recognizing foreign law and, if he assumes the risk, for either dealing with it or having foreign counsel deal with it.

The lawyer's position as a single-system legal specialist sometimes faced with responsibility for foreign law calls out for more regular and extensive education in foreign law and foreign legal systems. Because more and more transactions involve foreign law for which they will be, to an extent, responsible, U.S. lawyers should, as a matter of course, be prepared to recognize and, to a degree, deal with foreign legal systems. Such preparation can come in law school, in continuing education, or by independent study, but, for an increasing number of practitioners, such preparation is becoming ever more necessary.

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Trusts and Estate Planning in France after *Epoux Courtois* and *Dame B*

I. Introduction

The trust is an institution unknown to French law. Nonetheless, with a sizable Anglo-Saxon community established in France, and with Frenchmen becoming increasingly aware of the versatility of the common law trust, the occasions for determining its practical effects under French law have begun to multiply. This trend is evidenced by recent attempts on the part of the French tax administration and the French legal profession to analyze the tax treatment of trust income[1] and the gift and inheritance tax consequences of trust transfers[2] under French law. It is evidenced as well by a relatively recent shift in French judicial attitudes which has created a new aura of respectability for the trust in its contacts with the French legal system. Particularly illustrative of this shift are two recent court cases

[1]See particularly the French tax administration's Note of 25 March 1981, 14 B-2-81, in which it presents an analysis of U.S. income tax treatment of trust income and outlines how such income will be treated in the hands of a resident of France under the French-U.S. income tax treaty.

[2]Delattre, Joseph and Tripet, François, *Trust Inter Vivos Irrévocable et Succession Soumise à la Loi Française, Considerations Civiles et Fiscales*, Art. 56091, JOURNAL NOTARIAL 521 (1981).

which are the subject of this article.[3]

Even though the earlier of these cases dates from 1970, in a court system which has occasion to deal with trust questions as infrequently as the French (in a recent article there were found to be only twenty-seven such cases since 1855),[4] these two cases represent an extremely important guide to the current treatment of trusts under French law. Parting from the tradition of denying the trust its unique characteristics by trying to compare it to a variety of French legal institutions,[5] these two cases illustrate the current tendency of the French courts to allow the trust, albeit within certain limits, to accomplish in France the purposes it is designed to accomplish under common law. Because both cases arose in the estate context they are particularly useful as a guide to the international estate planning practitioner. It is, therefore, primarily with these practitioners in mind that this article has been developed in the hope that a brief outline of the holdings and limitations of these cases will prove useful.

II. *Epoux Courtois*

The first of the two cases, *Epoux Courtois*, decided by the Paris Court of Appeals in 1970, involved a revocable *inter vivos* trust created in 1926 before the American Consul General in Paris by a French citizen and resident, the wife of the Count of Alsace. The trust corpus consisted of a portfolio of American stocks and bonds located in the United States at the time the trust was created and administered by a Philadelphia insurance company as trustee. The settlor retained a life income interest in the trust and, having no children, left the corpus plus any appreciation at her death to various nieces and nephews.

Several years after the settlor's death, two of the beneficiaries, who were also the settlor's heirs, challenged the validity of the trust in the hope of obtaining a larger share of the settlor's estate. They contended that since the settlor was domiciled in France both at the time the trust was created and at the time of her death, it was necessary to determine the legal nature of the trust agreement under French law.[6] Viewed from that perspective, the trust, according to the petitioners, was properly considered as a transfer the primary purpose of which was the transmission of the trust corpus upon the settlor's death.[7] It therefore followed that the settlor could not validly dispose of her personal property in this manner since a transfer in trust

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[3] *Epoux Courtois et autres c. Consorts de Ganay*, Cour d'Appel de Paris (1er Ch.), 10 January 1970, Revue Critique du Droit International Privé [R.C.D.I.P.] 518 (1971) (hereafter, *Epoux Courtois*); and *Dame B . . .* , Tribunal de Grande Instance de Bayonne (Prés.), 28 April 1975, R.C.D.I.P. 33 (1976) (hereafter, *Dame B*).

[4] The entire list appears at Delattre and Tripet, *supra*, at 534.

[5] See particularly, Trib. civ. Seine, 1 July 1949, R.C.D.I.P. 664 (1949); Trib. civ. Seine, 28 June 1901, Clunet, 812 (1901), Dalloz, 361 (1902-2), Gazette du Palais, 772 (1901-2); and Trib. civ. Seine, 6 August 1888, Clunet, 635 (1889).

[6] *Epoux Courtois*, at 521.

[7] *Id.* at 522.

results in a splitting of interests in property which is unknown to French law and since the trust is not one of the ways provided by French law for transferring property in contemplation of death.[8]

The Paris Court of Appeals disagreed. Noting that the settlor had transferred the corpus of the trust in consideration for the trustee's various promises to manage and pay over the corpus and income in accordance with the settlor's wishes, the Court held that the trust was essentially contractual in nature.[9] It therefore followed that the validity and effect of the trust agreement were to be determined not under the law which otherwise governed the succession of the settlor-decedent, but by the law which the parties intended to govern the agreement.[10] Since the instrument was in English, was executed before an American consul general, and was designed to regulate the administration by a Pennsylvania corporation of assets physically located in Pennsylvania, the court concluded that the contracting parties intended for Pennsylvania law to apply.[11]

The court then went on to hold that, since the agreement was intended to produce its effects within the framework of the American law, all the court was required to do was to determine whether the rights created by the trust were incompatible with French notions of *ordre public*, and particularly the French rules on forced heirship.[12] If not incompatible, it was no concern of the court that the institutional framework of those rights was foreign to French law, for in that case the intent of the parties outweighed any coutervailing interests of French law or public policy.[13] Since the settlor-decedent had no heirs entitled to a share of her estate under France's forced heirship laws (hereafter referred to as reserved heirs), the court felt that it was perfectly proper to uphold the validity of the trust and to insist that its terms be given their intended effect.[14]

In so holding, the Paris Court of Appeals legitimized the common law *inter vivos* trust as an acceptable will substitute for persons domiciled in France.

The limitations of the holding should be noted, however. First of all, although the Paris Court of Appeals is certainly the most prestigious appeals court in France, its holdings do not have the same precedential value as a decision of the Cour de Cassation, France's supreme court in matters of private law. The latter court has yet to speak with such conviction on the subject. Secondly, the court suggests two situations in which the same trust, though valid under the law of Pennsylvania, might not have been given its intended effect in France. This could have been the case had

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 522-23.
[13] *Id.*
[14] *Id.*

the trust assets been transferred directly from France into the foreign trustee's care,[15] or had the distribution of corpus in anyway impinged on French notions of *ordre public*, most notably France's forced heirship laws.[16]

The apparent reason for the limitation concerning the situs of the assets is that the transformation in ownership that property undergoes when it is transferred from one party to another must, according to traditional French views, be determined under the law of the situs of the property at the time of transfer.[17] Since French law does not provide for a split between legal and equitable ownership, it would be impossible to recognize a transfer in trust of French situs property. While this reasoning seems questionable in light of the second case which this article will discuss, French domiciliaries contemplating the transfer of French situs property to a common law trust should, nonetheless, take the precaution of transferring that property to the country where the trust itself will be located at some point in time prior to transferring it to the trustee. How long the property needs to be physically present in the common law country prior to being transferred in trust is not clear.

In many instances such a transfer will prove to be impossible due to stringent French exchange control laws which severely restrict the transfer of French assets abroad. For that reason the holding in *Epoux Courtois* is primarily useful to French residents who for one reason or another have accumulated significant amounts of wealth outside of the country. This will often be the case for persons who have moved or are contemplating a move to France after living for some time in a common law country. The American, for example, who moves to France and either intentionally or unintentionally establishes a domicile there, should be able to make good use of the holding in *Epoux Courtois*. By placing all of his U.S. assets in a revocable *inter vivos* trust and withdrawing only so much income and corpus as is needed to provide for living costs in France, such an individual, even though he might be a French domiciliary at the time of his death, and therefore subject to the unorganized estate administration typical of civil law countries, can in this manner provide for an orderly distribution of his estate under rules with which his beneficiaries are more likely to be familiar. By combining the U.S. trust with a simple French will to dispose of any assets in France, the individual's entire estate can be taken care of without the necessity of either translating or proving a foreign will in France, or of probating a will in the United States.

The primary precaution that any such individual need take is to be sure that the French rules on forced heirship are respected by the trust instrument. Thus, unless the settlor's children and descendants are otherwise

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[15] *Id.* at 522.

[16] *Id.* at 522–23.

[17] *See* Note of Prof. Loussouarn analyzing *Epoux Courtois* in *Journal du Droit International* [J.D.I.] 207 (1970).

provided for, the trust instrument should provide that if the settlor has but one surviving child, that child should receive at least one-half of the corpus upon distribution.[18] If there are two surviving children, each should get a third,[19] and if there are three or more surviving children, three-fourths of the trust corpus should be divided evenly among all of them.[20] It should be provided as well that where any child predeceases the settlor, that child's surviving descendants, if any, will divide by representation the share otherwise available to that child.[21] In case there are no surviving children or descendants, the trust instrument should provide for at least one-fourth of the corpus to be divided among the surviving ascendants of each line.[22] An alternative to all of the above would simply provide that distribution shall first be made in accordance with the reserve requirements of Articles 913 et seq. of the French Civil Code with the remainder to be distributed in accordance with a formula of the settlor's choosing. By following these rules the settlor will minimize the chances that the trust could ever be successfully challenged as being violative of French notions of *ordre public*.

A last important limitation of this decision should be noted. The court in *Epoux Courtois* was concerned with an *inter vivos* trust. By founding its decision on the view that the trust instrument was essentially contractual in nature, it effectively precluded extension of its holding to testamentary trusts which a French domiciliary might attempt to create. This view is consistent with two earlier French cases holding that a trust created by will was without effect if French law governed the succession.[23] The only exception to this rule would appear to be the case of the transfer in trust of foreign situs real estate,[24] in which case French conflicts law would consider the law of the situs as the governing law.

III. *Dame B*

While the testamentary trust is not likely to find favor with the French courts when the testator is a French domiciliary, as the second major case to be discussed by this article demonstrates, the opposite is possible when the testator is domiciled in a common law jurisdiction.

The case of *Dame B*[25] involved a testamentary trust established by an English domiciliary who died owning real estate situated in France. He had left his entire estate to an English bank as trustee for two unrelated minor children. The guardian of the children, thinking that French law

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[18]Art. 913, C. Civ.

[19]*Id.*

[20]*Id.*

[21]Art. 913-1, C. Civ.

[22]Art. 914, C. Civ.

[23]Cour d'Appel de Paris, 18 Feb. 1909, Clunet, 1144 (1910); Trib. civ. Rouen, Clunet, 1027 (1928).

[24]Trib. civ. Alpes-Maritimes, 22 Feb. 1928, Clunet, 433 (1929); Cours d'Appel de Paris, 29 Nov. 1952, Clunet, 140 (1953).

[25]*See supra* note 3.

would not recognize the right of the trustee to take possession of the French realty sought possession of the real estate on behalf of the children, just as if the children were direct devisees of the decedent. Probably to the guardian's surprise, the French court held that the interests of the trustee, in accordance with the desire of the testator, should be fully recognized.[26] It therefore refused to give possession to the guardian without the consent of the trustee.[27]

The court in large measure based its decision on a feeling that where possible the court should comply with the stated intentions of the testator and encourage unity in estate administration.[28] It considered this to be especially true when an estate is potentially subject to two as radically different types of administration as are found in England and France. In England, of course, there is an organized court-supervised administration of estates, while in France a decedent's property falls immediately into the hands of the decedent's heirs and legatees and the administration of those assets is normally unsupervised by the court system. Since the case involved no infringement of French notions of *ordre public* (the testator had no reserved heirs under French law), it was the court's view that there was no reason why the English trustee should be hindered in its efforts to administer the estate in the manner intended by the testator.[29]

After this case one might legitimately ask why it is possible for an English domiciliary to transfer his French real estate by will to a trustee, but not possible for a French domiciliary to do the same thing. Logically there would not seem to be any significant difference between the two cases. But, it is important to remember the concern of the court in *Dame B*. This concern was that only one law, and not two, apply to the practical question of how a decedent's property is to be administered and distributed to his various heirs, legatees, and beneficiaries. Since an English domiciliary's personal property will in any case be administered according to English practices, the court in *Dame B*, without sacrificing the rule that French law governs the devolution of French realty, simply felt that it makes sense, particularly when it is in conformity with the testator's expressed desire, that all of the assets belonging to that English domiciliary's estate should be dealt with as a unit, by one administrator, under one set of rules—those provided by the decedent's domicile.

As in *Epoux Courtois*, the decision in *Dame B* opens up new estate planning possibilities for individuals from common law countries who have contacts with France. Prior to *Dame B* it would have been difficult to advise a common law domiciliary to leave French real estate in trust. More likely the estate planner would either suggest leaving such property outside of the coverage of the will in order that it pass by intestacy, or he would

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[26] *Dame B*, p. 331.
[27] *Id.*
[28] *Id.*
[29] *Id.*

suggest making a specific devise of such realty, either in a common law will or in a separate French will designed to deal only with French situs property. While this will often still be the simplest and most practical way of disposing of French real estate, where the advantages of holding realty in trust are desired, it now seems possible to contemplate advising that even French real estate be handled in this manner, as long as this can be done in conformity with the French rules on forced heirship.

Even more than the decision in *Epoux Courtois*, *Dame B* strikes at the heart of the traditional French resistance to recognition of the common law trust. Whereas in the past the impossibility of dismembering property into legal and equitable interests seemed to be an insurmountable obstacle to holding French real estate in trust, the court in *Dame B* has suggested that what was once considered an impossibility is now only an inconvenience which can be tolerated when overriding considerations dictate that the wishes of the testator be respected. Many practical questions remain unanswered, not the least of which is how the trustee will actually go about obtaining title for himself and later transferring it to the trust beneficiaries. It is likewise unclear what the tax consequences of such transfers will be.[30] That notwithstanding the importance of the case remains that it has opened up the possibility for such transfers under French law, and has, therefore, created the opportunity for finding solutions to these practical problems. Hopefully they will come with time and as the necessity for solutions becomes more acute.

IV. Conclusion

The most encouraging aspect of these two decisions from an internationalist's point of view is the fact that in both cases a French court has shown a willingness not only to try to understand the unique nature of the common law trust, but also to have the trust's intended effects carried out in France even though certain accomodations by French law might be required.

As contacts increase between France and the common law countries, it is only natural that the trust, because of its well-known versatility, will appear more and more frequently on the French scene. While there are still many types of situations for which the trust will be inappropriate, the decisions in *Epoux Courtois* and *Dame B* have considerably weakened the arguments of those who contend that the trust is incompatible with French law. They thus represent dramatic steps in the direction of the complete acceptance of this institution in France. As interest in the trust grows it would not be unexpected to see efforts made to speed up this evolutionary process either by administrative or legislative action. While these efforts are in all likelihood still far away, *Epoux Courtois* and *Dame B* at least breed the hope that practical necessity will, in the not too distant future, produce the con-

[30] *But see* Delattre and Tripet, *supra*, for a proposal in this regard.