PROPERTY & ESTATE DEVOLUTION UTILIZING
FIDEI COMMISSUM DE RESIDUO: FINDING RESIDUAL

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I. INTRODUCTION

In 2001, article 1520 of the Louisiana Civil Code was amended, thereby reviving a term from its French heritage. The *fidei commissum*, commonly referred to as the “prohibited substitution,” now appears in the official comments to article 1520. *Fidei commissa* provide for a double disposition in full ownership to one legatee (the institute) with a charge to preserve the thing and deliver it at his death to a second legatee (the substitute). Although article 1520 mandates the nullity of any *fidei commissum* provision in a testament, it fails to mention how to probate a testament utilizing a *fidei commissum de residuo*. The *fidei commissum de residuo* is distinguishable from the *fidei commissum* because the former does not include a charge to preserve the thing given, whereas the latter requires preservation of the donated property. Thus, in a *fidei commissum de residuo*, the initial recipient of the donation mortis causa (the first legatee) must merely deliver the remaining balance of the gift at his death to a second legatee. Accordingly, while Louisiana law prohibits the *fidei commissum*, the *fidei commissum de residuo* is a valid disposition for estate planning purposes.

Although the revised Civil Code allows for *fidei commissa de residuo*, it fails to mention how to derive the residual interest. For example, the Code is silent as to whether conversion of the donated property into cash, reinvestment of the gift in an alternate instrument, or receipt of insurance proceeds, constitute an alienation of the gift resulting in a reduction of the residual portion, or a mere change of the property’s form without reduction of the residual portion. If such transactions constitute alienations of the gift, then the gift is no longer part of the residual interest that must be deliv-

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1. 2001 La. Acts no. 825. See also LA. CIV. CODE ANN. art. 1520 (2007). For the history of the *fidei commissum* and the prohibited substitution in both Louisiana and civil law jurisdictions in general, see FREDERICK WILLIAM SWAIM, JR. & KATHRYN VENTURATOS LORIO, 10 LA. CIVIL LAW TREATISE: SUCCESIONS & DONATIONS § 12.7 (3d ed. 2004).

2. LA. CIV. CODE ANN. art. 1520 cmt. c (2007).

3. Although the standard prohibited substitution was the French *fidei commissum*, an error in translation resulted in Louisiana improperly barring both substitutions and *fidei commissum de residuo*. See id.

4. *Id.* This Article will use the terms “institute” and “substitute” for references to the first and second legatees in a *fidei commissum*, or prohibited substitution. Alternatively, this Article will use the terms “first legatee” and “second legatee” to refer to the first and second legatees in a *fidei commissum de residuo*, which is allowed under article 1520.

5. *Id.* art. 1520.

6. *Id.* cmt. c.
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ered at death to the second legatee. Conversely, if such alienations or conversions of the donated property were considered a mere change of form, the value would remain a part of the residual interest that must be delivered at the death of the first legatee. These issues are not expressly answered by the Civil Code. Thus, this Article suggests methods of interpreting the makeup of the residual interest in a fidei commissum de residuo as well as the rights of the second legatee in this residual portion.

This Article proposes that Louisiana courts should analyze the alienation of property subject to a fidei commissum de residuo either (1) under the existing statutory scheme, which, similar to Quebec law, results in the second legatee's entitlement to the property in the first legatee's patrimony plus any proceeds not yet received; or (2) by enacting default provisions based on the likely intent of the average testator.

The Article reaches these conclusions by first discussing in Part II the French heritage of the fidei commissum and distinguishing it from the fidei commissum de residuo. Part III utilizes a comparative approach by analyzing how property subject to a fidei commissum de residuo would devolve based on current legal schemes. Specifically, a comparative analysis of the civil law of Quebec reveals methods for interpretation of the composition of residual interests in fidei commissa de residuo. Additionally, this comparative section analyzes the possible outcomes of treating testamentary language providing for a fidei commissum de residuo as creating a usufruct and naked ownership, a trust, or a double conditional disposition. Ultimately, however, Part III notes that these analogous mechanisms differ in important ways from the fidei commissum de residuo. Part IV of this Article analyzes possible default provisions that would likely correspond to the average testator's intent. This section first discusses the testator's likely intent in using a fidei commissum de residuo in lieu of a usufruct or a trust. This analysis requires determination of whether a testator intended for alienation of the donated property to be at the will of the first legatee, and whether the first legatee can effectively revoke the second donation of the residual interest through alienation of the property. Next, this section assesses how to compute the residual interest when the property is alienated, and whether the property should be treated as lost or expropriated. Finally, this Article discusses possible alternative default provisions that can provide a uniform determination of residual interests when the testament is silent.

II. BACKGROUND

The fidei commissum originated in Roman and French law as a request by the testator for his successor (the institute) to bequeath his legacy to a
third person upon the successor’s death. Originally, this request was carried out at the institute’s option and was not legally enforceable. Subsequently, the Roman emperor Augustus made the request legally binding and enforceable upon the institute. Accordingly, this modification required the institute to donate the property to a third person at the time specified in the testator’s will.

The legal enforceability of the testator’s request eventually led to the prohibition of the fidei commissum because it took the property out of public commerce. The institute’s mandatory duty to leave the property to another required the institute to preserve the thing during his life and deliver it to the specified third person (the substitute) at the institute’s death. Thus, the fidei commissum took the property out of commerce for the lifetime of the institute since he could not alienate, dispose of, or encumber the property left to him in the fidei commissum.

However, as time passed, the French recognized that the fidei commissum de residuo was distinct and significantly different from the fidei commissum. A fidei commissum de residuo does not include a charge to preserve the donated property, and it merely requires the first legatee at his or her death to pass whatever remains of the donated property to a second legatee. Thus, the property can be alienated, disposed of, or encumbered by the first legatee, and therefore remains in public commerce. As such, the fidei commissum de residuo did not yield the negative public policy outcomes that had led to the prohibition of the fidei commissum. Accordingly, in 1825, the French distinguished the fidei commissum de residuo from the fidei commissum and declared it a legally valid bequest.

Louisiana adhered to the French tradition of prohibiting the fidei commissum. Prior to the 2001 Revision, Louisiana Civil Code article 1520 provided that “substitutions and fidei commissa are and remain prohibited.” According to some jurisprudence, this article also prohibited the

8. Swaim & Lorio, supra note 1, at § 12.7.
10. Swaim & Lorio, supra note 1, at § 12.7.
11. 3 Planiol & Ripert, supra note 7, No. 3272, at 590.
12. 3 Planiol & Ripert, supra note 7, No. 3272, at 590.
13. 3 Planiol & Ripert, supra note 7, No. 3293, at 599.
14. 3 Planiol & Ripert, supra note 7, No. 3293, at 599.
making of a *fidei commissum de residuo*.\textsuperscript{17} However, in subsequent amendments to the Louisiana Civil Code, article 1520 was rewritten\textsuperscript{18} and the words *fidei commissa* were taken out\textsuperscript{19} of the text of the article.\textsuperscript{20} Today, article 1520 provides in full:

A disposition that is not in trust by which a thing is donated in full ownership to a first donee, called the institute, with a charge to preserve the thing and deliver it to a second donee, called the substitute, at the death of the institute, is null with regard to both the institute and the substitute.\textsuperscript{21}

The article now defines what is known as a prohibited substitution, which is null under Louisiana law.\textsuperscript{22}

Louisiana courts have interpreted article 1520 to require three elements for a disposition mortis causa to be deemed null as a prohibited substitution:

(1) . . . a double disposition in full ownership, of the same thing to persons called to receive it one after another; (2) [a charge] upon the first beneficiary . . . to preserve and transmit the succession property; and (3) . . . a successive order that causes the property to leave the inheritance of the burdened beneficiary and enter into the patrimony of the substituted beneficiary.\textsuperscript{23}

All three of these elements must be met for a court to find that the bequest is a prohibited substitution.\textsuperscript{24} If any one element fails, the bequest is not a prohibited substitution and remains effective.\textsuperscript{25}

\textsuperscript{17} See Succession of Johnson, 67 So. 2d 591 (La. 1953) in which a testator left a bequest to his wife and “what was left” at her death to a third party. The court found that the “what was left” clause constituted a *fidei commissum* in violation of Louisiana Civil Code article 1520, which at the time prohibited *fidei commissa*. Id. at 597. Thus, the Johnson court repudiated the “what was left” clause as not written. \textit{Id.}


\textsuperscript{19} There was no need to continue utilizing the term *fidei commissum* once the trust code was enacted because there were no longer public policy considerations against the *fidei commissum*. See 11 LEONARD OPPENHEIM & SIDNEY PUGH INGRAM, \textsc{La. Civil Law Treatise: Trusts} § 4 (1977).


\textsuperscript{21} \textit{Id.}

\textsuperscript{22} Baten v. Taylor, 386 So. 2d 333, 336 (La. 1979).

\textsuperscript{23} \textit{Id.} See also Succession of Moran, 479 So. 2d 350, 352 (La. 1985).

\textsuperscript{24} Baten, 386 So. 2d at 336. Courts have avoided finding a prohibited substitution by interpreting the language as creating a trust or a usufruct a naked ownership. See infra Part III.A.

\textsuperscript{25} Baten, 386 So. 2d at 336.
This change in the law makes it clear that the *fidei commissum de residuo* is valid under Louisiana law since such a bequest does not include a charge on the first legatee to preserve and deliver the thing to the second legatee, thus failing the second element of a prohibited substitution.\(^{26}\) The 2001 revision comments to article 1520 recognize the validity of *fidei commissa de residuo*.\(^ {27}\) The first legatee is free to alienate, dispose of, or encumber the thing at his will, and thus the property is not taken out of public commerce.\(^ {28}\)

Despite the apparent validity of a bequest containing a *fidei commissum de residuo*, neither the Louisiana Civil Code nor the jurisprudence has directly addressed what constitutes the residual interest in a *fidei commissum de residuo*. Thus, one very large unsettled question exists in Louisiana law: at the end of the first legatee’s life, what property will be considered the residuum of a bequest subject to a *fidei commissum de residuo*? In other words, what is residual? For example, if the property is sold, do the proceeds comprise the residual portion? If the first legatee uses the proceeds to buy another piece of property, does the new property make up the residual portion to which the second legatee is entitled?

**III. THE RESIDUAL INTEREST**

Two methods exist to determine the composition of the residual portion under a *fidei commissum de residuo*. First, the residual interest may be derived by analyzing rules similar to those under existing laws. Alternatively, enacting default provisions that correlate with the likely intent of the average testator may be a successful method of determining the residual portion computation.

**A. A COMPARATIVE APPROACH UTILIZING EXISTING SCHEMES**

**1. THE LAW OF QUEBEC**

The current civil law of Quebec, which like Louisiana law descends from the French Code Civil,\(^ {29}\) provides the framework for a possible solu-

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28. Planiol & Riptet, supra note 7, No. 3293, at 599.
29. See Justice Quebec, Historical Note, http://www.justice.gouv.qc.ca/english/ministere/ histoire.htm#french (citing Pierre E. Audet, Les Officiers de Juriste, des origines de la colonie jusqu'a nos jours (Wilson and Lafleur Ltd., 1986)). Quebec's Civil Code descends from the French legal system because of the French Regime that was in effect from 1608 to 1760. Id. The King of France in 1621 revoked the sole legal authority of the founder of Quebec, Samuel de Champlain, and instructed him to appoint assessors. Id. In 1663, a period of time referred to as
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The Conquest, the implementation of a judiciary system began that was similar to that utilized in France. *Id.*

30. Because the Quebec Civil Code utilizes the terms “institute” and “substitute” in the provisions governing substitutions, the discussion of these provisions in this Part will designate these parties as “first legatee/institute” and “second legatee/substitute.” These designations will serve to properly reference the Quebecois law while maintaining the consistent distinction throughout this Article between the institute/substitute designations in prohibited substitutions as opposed to the first legatee/second legatee designations of the valid *fidei commissum de residuo*.


32. Although the term “*fidei commissum*” is not used in the Quebec Civil Code, the concept of substitutions does exist. See generally QUE. CIV. CODE, tit. IV, ch. II, arts. 1218-55 (2007).

33. QUE. CIV. CODE, tit. IV, ch. II; see also QUE. CIV. CODE art. 1218 (“Substitution exists where a person receives property by a liberality with the obligation of delivering it over to a third person after a certain period. Substitution is established by gift or by will; it shall be evidenced in writing and published in the registry office.”).

34. See *id.* art. 1223 (“Before the opening of a substitution, the institute is the owner of the substituted property, which forms, within his personal patrimony, a separate patrimony intended for the substitute.”).

35. See *id.* art. 1229 (“An institute may alienate the substituted property by onerous title or lease it. He may also charge it with a hypothec if that is required for its upkeep and conservation or to make an investment in the name of the substitution.”).

36. See *id.* art. 1244 (“The institute shall . . . render account to the substitute and deliver over the substituted property to him. Where the substituted property is no longer in kind, the institute delivers over whatever has been acquired through reinvestment or, failing that, the value of the property at the time of the alienation.”).

37. See *id.* art. 1246 (“Where the substitution affects only the residue of the property given or bequeathed, the institute delivers over only the property remaining and the price still due on the alienated property.”). The statute unfortunately does not mention what happens when money is the object of the substitution. However Aubry and Rau indicate that money may not be a valid object of a substitution under the theory that imposing a charge on the donee to deliver a sum of money to a third person does not constitute a substitution. AUBRY & RAU, supra note 26, § 694, at 317.
tee/substitute is not entitled to the paid proceeds from the sale or any property that the institute acquires with the proceeds. But if the buyer has not paid the first legatee/institute, the second legatee/substitute is entitled to that money or the unpaid balance of the purchase price.\(^\text{38}\)

2. **FIDEI COMMISUM DE RESIDUO: TREATMENT AS A TRUST**

Similar to Quebec, Louisiana has used trust rules when assessing *fidei commissa*/prohibited substitutions. Despite the Civil Code's prohibition of the *fidei commissum*, Louisiana courts have sometimes chosen to interpret testamentary language that would apparently create a prohibited substitution as instead creating a trust\(^\text{39}\) in which the institute is the trustee and the substitute is the beneficiary.\(^\text{40}\) The property is put in the name of the trustee/institute to administer as a fiduciary for the benefit of the substitute/beneficiary.\(^\text{41}\)

Although language indicating a prohibited substitution may be interpreted as creating a trust, it would be difficult for the courts to interpret a *fidei commissum de residuo* in this manner because the first legatee in a *fidei commissum de residuo* has no fiduciary duty to the second legatee.\(^\text{42}\) The first legatee owes no fiduciary duty to the second legatee because the first legatee is not charged to administer the thing for the benefit of the second legatee; the first legatee must only deliver what is left of the property at his or her death to the second legatee.\(^\text{43}\) Thus, the language of a *fidei commissum de residuo* seems to indicate that the first legatee can alienate the property without accounting to the second legatee for the alienation.

Similarly, under Quebecois law, if the first legatee/institute sells the property and collects the funds, those funds belong to him.\(^\text{44}\) In a way, the first legatee/institute owes no enforceable obligation to the second legatee/substitute because he is allowed to alienate the thing subject to the second legacy at any time. Upon this alienation, the first legatee/institute can-

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40. In *Payne*, the court noted that both a trust and a prohibited substitution interpretation might apply to the will at issue. *Id.* at 804. However, the court chose to apply the trust interpretation under the theory that a will should be upheld if it can possibly be given valid effect. See *id.* at 806; see also Succession of Moran, 479 So. 2d 350, 352 (La. 1985) (“When the terms of a disposition attacked as a prohibited substitution are susceptible to interpretation in two ways—one that the disposition contains the elements of a prohibited substitution, and the other that it does not contain them—it is preferable to uphold the interpretation that maintains the disposition.”).
42. *AUBRY & RAU*, supra note 26, § 694, at 317.
43. *PLANIOL & RIPERT*, supra note 7, No. 3293, at 599.
44. *Qué. CIV. CODE* art. 1246 (2007).
not be required to perform the second legacy because nothing remains of the property. Thus, if the first legatee/institute has alienated the property and no residual portion exists, then the first legatee/institute has no enforceable obligation as to the second legatee/substitute.

The lack of a duty to account in the fidei commissum de residuo makes this structure crucially different from a fidei commissum and incompatible with a trust interpretation. In United States jurisdictions, a trust in which the trustee has no enforceable obligation or fiduciary duty to the beneficiary is an invalid trust. Thus, a fidei commissum de residuo would be invalid as a trust because the first legatee does not have an enforceable obligation or fiduciary duty to the second legatee.

3. FIDEI COMMISSUM DE RESIDUO: TREATMENT AS A USUFRUCT AND NAKED OWNERSHIP

Although Louisiana courts sometimes utilize trust principles to uphold a legacy that arguably establishes a prohibited substitution, many of its courts have treated testamentary language that could be interpreted as a fidei commissum or a prohibited substitution as establishing a usufruct in favor of the ostensible institute with the naked ownership in favor of the ostensible substitute. However, a fidei commissum de residuo is distinguishable from a usufruct in the sense that the usufructuary cannot normally alienate an immovable subject to a usufruct and must account to

45. See Ponzelino v. Ponzelino, 26 N.W.2d 330 (Iowa 1947) (invalidating a trust in which the trustee had no enforceable obligation and no real fiduciary duty because the trustee was only required to pay the beneficiaries at his discretion). See also Cox v. Cox, 357 N.W.2d 304 (Iowa 1984) (holding that a contingent remainderman was entitled to an accounting from the trustee because a trustee’s unbridled discretionary powers are improper in trusts, and no trust is created if there is no imposition of enforceable duties upon the transferee).

46. It should be noted that some common law jurisdictions will impose a trust, if the trustee is willing to accept responsibility, even when there is no beneficiary to enforce the obligation. For instance, honorable trusts have been created when money is left to care for a pet animal. See In re Searight’s Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950). Alternatively, in Louisiana, the beneficiary must be a natural person or legal entity that possesses the capacity to receive, and thus an honorable trust is ostensibly prohibited under Louisiana law. See LA. REV. STAT. ANN. § 9:1801 (2008). However, in the general situation of a fidei commissum de residuo, a trust interpretation would be difficult given the general prohibition against trusts with unenforceable fiduciary duties.

47. PLANIOL & RIPERT, supra note 7, No. 3293, at 599.


49. See Fisk v. Fisk, 3 La. Ann. 494 (La. 1848) (holding that language in a testament which could be interpreted as a fidei commissum actually bequeathed a usufruct and naked ownership). See also In re Courtin, 81 So. 457 (La. 1919) (holding that a bequest which was contended to be a fidei commissum was a usufruct and naked ownership).

50. LA. CIV. CODE ANN. art. 539 (2007).
the naked owner for the value of the thing as of the inception of the usufruct. These restrictions do not apply to the fidei commissum de residuo, in which the first legatee can alienate the property and need not account to the second legatee for the property’s value at the time of the secondary disposition. The second legatee is only entitled to the remainder of the property at the first legatee’s death.

Although the duties of non-alienation and accounting are standard rules applicable to usufructs, the grantor of a usufruct can empower the usufructuary to alienate an immovable subject to a usufruct and dispense with the duty to account for the value of the thing at the inception of the usufruct. This set of circumstances closely parallels the operation of the fidei commissum de residuo. In this situation, the usufructuary/first legatee can alienate the thing subject to the usufruct, or fidei commissum de residuo, and has no duty to account to the naked owner/second legatee, for the value of the thing at the termination of the usufruct, or at the point of the secondary disposition. Nevertheless, under the Louisiana Civil Code, the naked owner/second legatee would be entitled to the proceeds received from the alienation of the property and can require that the usufructuary invest the proceeds. Application of this usufruct rationale to property subject to a fidei commissum de residuo appears to result in a more equitable outcome for the second legatee than the result reached by the law of Quebec.

However, applying this usufruct rationale raises questions as to whether the second legatee does indeed have rights similar to those of the naked owner against a usufructuary. For example, when property is subject to a usufruct, the naked owner can terminate the usufruct if the usufructuary has committed waste or abuse of the property subject to the usufruct. This right is not consistent with a fidei commissum de residuo, which allows the first legatee to commit waste or abuse the property subject to the secondary disposition without any recourse for the second legatee. The first lega-

51. LA. CIV. CODE ANN. art. 538 (2007)
52. PLANIOL & RIPERT, supra note 7, No. 3293, at 599.; AUBRY & RAU, supra note 26, § 694, at 317.
53. AUBRY & RAU, supra note 26, § 694, at 317.
54. AUBRY & RAU, supra note 26, § 694, at 317.
55. LA. CIV. CODE ANN. art. 539 (2007).
56. Id. art. 545.
57. Id.
58. Id. art. 538.
59. Id. art 618.
60. See supra notes 29-37 and accompanying text.
62. PLANIOL & RIPERT, supra note 7, No. 3293, at 599; AUBRY & RAU, supra note 26, § 694,
tee's only obligation is to bequeath what is left of the property at his death to the second legatee. However, this non-waste principle of usufruct can be reconciled with the unlimited right of alienation in the *fidei commissum de residuo* in light of the holdings by some Louisiana courts in which the usufructuary's simple alienation of a thing subject to a usufruct has not constituted waste or abuse. Nonetheless, in such cases, the naked owner can still require the usufructuary to invest the proceeds from the alienation. Conversely, the second legatee in a *fidei commissum de residuo* does not have the power to demand investment of proceeds because the first legatee is not required to account to the second legatee for the value of the thing at the time of the secondary disposition.

Furthermore, if the *fidei commissum de residuo* is treated as a usufruct in which the naked owner does not have to account for the value of the thing at the inception of the usufruct, the first legatee may not be required to give the secondary legatee any of the proceeds from alienation of the property subject to the secondary disposition unless the second legatee can affirmatively prove that the money he claims is the same money that was paid to the first legatee and is not part of the first legatee's patrimony. If the first legatee places the proceeds in a bank account with the rest of his money, it is impossible to distinguish between the proceeds from the sale and the first legatee's own money in the account. Thus, the money that the first legatee spends may be the proceeds or it may be money in his own patrimony. Therefore, it would seem that the second legatee would only be entitled to the proceeds not yet paid on the alienated property due to the difficulty in determining which funds are a part of the first legatee's patrimony and which funds came from the alienation of the property subject to the *fi-

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64. See Rosenthal v. Rosenthal, 436 So. 2d 670 (La. Ct. App. 1983) (holding that a usufructuary's alienation of a car subject to a usufruct was not waste or abuse of enjoyment); see also Magee v. Gatlin, 51 So. 2d 154 (La. Ct. App. 1951) (holding that "the mere fact that said property was sold, without any allegation to show waste, abuse, or mismanagement on the part of the usufructuary, would not show sufficient right or cause of action as to terminate the usufruct").

65. LA. CIV. CODE ANN. art. 618 (2007).


67. See LA. CIV. CODE ANN. art. 545. cmt. b (2007) (noting that the grantor of a usufruct may relieve the usufructuary of the obligation to account for the value of things in a usufruct over consumables).

68. See PLANIOL & RIPERT, *supra* note 7, No. 3293, at 599 (stating that the first legatee is only required to render to the second legatee what remains of the property at the first legatee's death). If the exact proceeds from the sale of the property subject to the substitutions are still in the institute's patrimony, this could be interpreted as what remains of the property.
Thus while the *fidei commissum de residuo* at first glance shares similarities with the usufruct, including the power of alienation and removal of the duty of accounting, the two mechanisms diverge at the point of the secondary legatee’s rights of investment of and entitlement to proceeds.

4. *FIDEI COMMISSUM DE RESIDUO: TREATMENT AS A DOUBLE CONDITIONAL DISPOSITION*

An additional method of analyzing the second legatee’s rights in the residual interest in a *fidei commissum de residuo* may be through a comparison to the double conditional disposition. Planiol wrote of the double conditional disposition, which the French found to be a valid legacy in situations that did not result in a prohibited substitution. Here, the testator leaves a legacy to a first donee on the resolutory condition that if an event or condition happens, that first donee must bequeath the legacy to a second donee. The second donee’s legacy is therefore subject to two suspensive conditions, namely the happening of the condition or event and the second donee’s surviving the first donee.

This idea of a double conditional legacy may apply to the interpretation of a *fidei commissum de residuo*. In the *fidei commissum de residuo*, the testator donates property *mortis causa* to a first legatee subject to the resolutory condition that if any of the donated property is left at the institute’s death, he must bequeath it to a second legatee. The second legatee’s legacy would thus be subject to two suspensive conditions: (1) his surviving the first legatee and (2) a residuum of the property the testator bequeathed to the first legatee remaining at the first legatee’s death. If the first legatee sells the property prior to his death, his legacy to the second legatee has not

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69. See infra Part IV.B.2 for a more detailed discussion of the concept of “tracking” the funds in one’s patrimony and for a full analysis of the second legatee’s right to the proceeds of a sale by the first legatee of the property subject to a *fidei commissum de residuo*.

70. PLANIOL & RIPERT, supra note 7, No. 3295, at 601-02.

71. PLANIOL & RIPERT, supra note 7, No. 3295, at 601.

72. PLANIOL & RIPERT, supra note 7, No. 3295, at 601.

73. AUBRY & RAU, supra note 26, § 694, at 317; PLANIOL & RIPERT, supra note 7, No. 3295, at 601.

74. See LA. CIV. CODE ANN. art. 1589 (2007) (providing that if a legatee predeceases the testator the legacy has lapsed). Thus, if the substitute predeceases the institute, the legacy has lapsed and the property subject to the *fidei commissum de residuo* will devolve according to the laws of accretion.

75. AUBRY & RAU, supra note 26, § 694, at 317; PLANIOL & RIPERT, supra note 7, No. 3293, at 599.
been revoked;\textsuperscript{76} rather the property could be viewed as having been lost or expropriated.\textsuperscript{77} Therefore, the second legatee would not be entitled to proceeds from the alienation of the property.\textsuperscript{78} He would only be entitled to the remainder of the original property that is still in the first legatee’s patri-mony or the proceeds from the alienation that have not been collected by the first legatee.\textsuperscript{79}

5. **Summary**

In sum, the laws of Quebec, which share a French pedigree with Louisiana law, provide that if the property subject to a *fidei commissum de residuo* is alienated, the second legatee is only entitled to proceeds that have not yet been paid. However, some Louisiana courts have attempted to treat language indicative of a *fidei commissum de residuo* as a trust.\textsuperscript{80} Such an interpretation stretches the law of trusts, however, because the first legatee in a *fidei commissum de residuo* has no fiduciary duty to the second legatee, and a trust is invalid in the absence of a binding fiduciary obligation.

Alternatively, Louisiana courts have attempted to treat language indicative of a *fidei commissum de residuo* as a usufruct and naked ownership.\textsuperscript{81} The *fidei commissum de residuo* most closely parallels a usufruct in which the usufructuary has the power to alienate. However, unlike a naked owner, the second legatee does not have the power to force reinvestment because a *fidei commissum de residuo* carries neither a prohibition on waste or abuse, nor any duty on the first legatee to preserve the subject property. Thus, unless the proceeds received from the alienation can be directly tracked, which is difficult due to commingling of funds, the second legatee would only be entitled to the proceeds not yet paid on the alienated property.

Finally, the *fidei commissum de residuo* is analogous to a double conditional legacy in which the eventual bequest to the second legatee is contingent on two conditions, namely the first legatee’s preserving the donated property, and the second legatee surviving the first legatee. In this analysis, if the first legatee alienated the property subject to the *fidei commissum de*

\textsuperscript{76} A detailed discussion of the treatment of alienated property as lost or expropriated and the reasons why such property is not considered "revoked" is provided infra at Part IV.B.1.

\textsuperscript{77} \textsc{aubry} \& \textsc{rau}, supra note 26, at § 694, at 317; \textsc{planiol} \& \textsc{ripert}, supra note 7, No. 3295, at 601.

\textsuperscript{78} \textsc{see} \textsc{la. civ. code ann.} art. 1597 (2007).

\textsuperscript{79} \textsc{see} \textsc{la. civ. code ann.} art. 1597 (2007).

\textsuperscript{80} \textsc{see}, e.g., \textit{succession of payne}, 524 So. 2d 803 (La. Ct. App. 1988); \textit{succession of moran}, 479 So. 2d 350, 352 (La. 1985). \textit{see also supra} text accompanying notes 39-40.

\textsuperscript{81} \textsc{see}, e.g., \textit{fisk v. fisk}, 3 La. Ann. 494 (La. 1848); \textit{in re courtin}, 81 So. 457 (La. 1919).
residuo, the property would be treated as lost or expropriated vis-à-vis the second legatee, who would only be entitled to the remainder of the property or uncollected proceeds of the alienation.

**IV. DEFAULT PROVISIONS**

Although the current legal schemes described above may be used to derive the composition of the residual portion in a fidei commissum de residuo, each scheme suffers problems and inconsistencies. As such, Louisiana should enact default rules, subject to modification by the testator, that determine the rights of the second legatee and the composition of the residuum in a fidei commissum de residuo. These default provisions should correlate with the likely intent of the average testator. Allowing the testator to stipulate around these default provisions will ensure that the testator’s intent determines the disposition of his property. The testator’s intent will prevail because the testator could remain silent in the testament, thereby utilizing the default rules, or state his or her wishes, thereby stipulating around these default provisions. In either case, the testator’s intent will dictate the outcome.

The aforementioned problem of tracking commingled proceeds from the first legatee’s alienation of the property may be resolved by including default provisions that dictate when monies are deemed spent. A default rule should be stipulated in the Civil Code stating that funds in an account resulting from the alienation should be deemed to have been spent last or even first. Another possibility would be to avoid the tracking issue altogether by enacting laws that provide that once the thing is alienated, the second legatee should be entitled to nothing except unpaid proceeds. Determining which of these solutions is best requires an analysis of the intent of the average testator in leaving a legacy subject to a fidei commissum de residuo.82

When interpreting a testament, Louisiana courts must give effect to the intention of the testator as embodied in the words and language of the testament.83 Can it really be argued that the testator in a fidei commissum de residuo intended for the second legatee’s benefit from the bequest to be entirely subject to the will of the first legatee? The answer is yes. If the testator wished to ensure that the second legatee would receive a benefit from the bequest, he could easily do so by bequeathing a usufruct and naked ownership.84

82. LA. CIV. CODE ANN. art. 1611 (2007).
83. Id.
84. Id. arts. 538-39.
A. LIMITED AND UNLIMITED RIGHTS OF ALIENATION AND THE RIGHTS OF THE SECOND LEGATEE

1. USUFRUCT AND NAKED OWNERSHIP

The average testator does not likely intend to ensure that the second legatee receive a benefit from the bequest in a fidei commissum de residuo, but, rather, intends the second legatee's receipt of the legacy to be subject to the whim of the first legatee. If the testator intended otherwise, he could ensure that the second legatee receive property, or at least the value of the property at inception, by bequeathing a usufruct and naked ownership in lieu of a fidei commissum de residuo.\(^8\)

Additionally, under the Civil Code articles governing usufructs, the testator can even give the usufructuary the right to alienate the property subject to the usufruct, thus converting it into a usufruct over money.\(^6\) Furthermore, the testator can also dispense with the usufructuary's obligation to account for the entire value of the thing subject to the usufruct by only requiring him to account for a fraction of the value of the thing, or what is left of the thing at the end of his life, when he is allowed to alienate a certain fraction of the thing during specified periods of time.\(^7\)

Accordingly, if the testator intends to give the first donee\(^8\) the right to alienate the thing and ensure that the second donee receives a benefit from the bequest, he could simply bequeath a usufruct and naked ownership with special provisions that state his exact wishes on how much the usufructuary

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\(^6\) See id. arts. 539 cmt. c. See also id. art. 545.
\(^7\) See In re Courtin, 81 So. 457, 457 (La. 1919), in which a testator bequeathed all of his property to his sister and what remained of it at her death to a third person. The testament also provided that the decedent’s assets were to be liquidated and the funds placed in an account from which his sister could only withdraw the interest earned plus $40 per month. Id. The court interpreted this as bequeathing a usufruct to the sister and the naked ownership to the third party. Id. See also Succession of Weidig, 96-1214, p. 4 (La. App. 1 Cir. 2/14/97); 690 So. 2d 134, 136 (holding that a testator can modify the default rules of usufruct as long as the modification does not violate public policy). Included among the modifications that do not violate public policy are termination of a usufruct at remarriage of usufructuary, dispensing with usufructuary’s requirement to account to the naked owner for the value of nonconsumables, and limitation of usufructuary’s enjoyment to certain uses. Id.
\(^8\) In the next four paragraphs of this Part, the terms “first donee” and “second donee” will be used to describe the two recipients of a legacy involving the various hypothetical substitution scenarios described, including the fidei commissa substitution of Roman law. See infra text accompanying notes 89-94. The terms “first donee” and “second donee” are used to distinguish these hypothetical substitution scenarios from the fidei commissum de residuo substitution that is the focus of this Article and that is described throughout in terms of the “first legatee” and “second legatee.” See supra note 4.
must account for to the naked owner.\textsuperscript{89} Alternatively, it should be assumed that a testator’s intent in leaving a \textit{fidei commissum de residuo} is to have the second legatee’s receipt of property subject to the whim of the first, and thus the second legatee should only be entitled to the proceeds of the property not yet paid and any residuum of the original property that remains in the first legatee’s patrimony at his death.

Conversely, the possibility exists that the testator’s intent is not to grant the first legatee an unlimited right of alienation as described in the above scenario. While bequeathing a usufruct and naked ownership could accomplish the desired result if the testator intended for the first legatee to be able to alienate the property at his wish, perhaps this unlimited right of alienation was not the testator’s true intent. It is difficult to believe that a testator in providing some legacy in favor of a second donee would intend for the second legatee to receive nothing if the first donee decides that he would rather have money instead of the property or that he wants to donate the property to a third person. Maybe the testator only intended for the first legatee to be allowed to alienate the property if he needed to do so to sustain himself. Should there be any limitations on the first legatee’s right to alienate the property? Should the first legatee have to account for any value of the thing at all if he decides to sell the property?

These questions of intent were answered in Roman law by a default mechanism mandating and defining the first donee’s obligation of accounting to the second donee in a \textit{fidei commissum}. In this Roman legal construct, the first donee was required to either preserve a fourth of the property for the second donee or pay him the value of a fourth of the property.\textsuperscript{90} This requirement, commonly known as the Trebellian Fourth, was eventually abandoned by the French,\textsuperscript{91} but restrictions on the first donee’s rights of alienation and disposal were recognized as valid.\textsuperscript{92} In certain substitutions, the first donee could alienate the thing only if he proved necessitous circumstances.\textsuperscript{93} He could not gratuitously dispose of the property \textit{inter vivos}, nor could he donate it \textit{mortis causa}.\textsuperscript{94} Thus, the second donee was guaranteed some benefit of the bequest unless the first donee needed to sell the property to sustain himself during his lifetime. Legal commentators, such

\textsuperscript{89} In \textit{re Courtin}, 81 So. at 457.
\textsuperscript{91} AUBRY & RAU, supra note 26, § 694, at 317-18.
\textsuperscript{92} AUBRY & RAU, supra note 26, § 694, at 316-17.
\textsuperscript{93} AUBRY & RAU, supra note 26, § 694, at 318.
\textsuperscript{94} PLANIOL & RIPERT, supra note 7, No. 3293, at 600.
as Aubry and Rau, indicate that these same restrictions could be placed on the *fidei commissum de residuo* today.\(^{95}\)

Restrictions on the alienation rights of the first legatee in a *fidei commissum de residuo* do not necessarily result in a charge to preserve and render the property to the second legatee.\(^{96}\) If the first legatee cannot *gratis* donates the thing *mortis causa* or *inter vivos*, he can still alienate it by *onerous* title.\(^{97}\) If the first legatee can only sell the thing to a family member, he may still sell it to someone.\(^{98}\) If the first legatee must account to the second legatee for one fourth of the value of the property at the inception of the secondary disposition, he can still alienate it;\(^{99}\) and if the first legatee must prove necessitous circumstances to alienate the property, he can nonetheless alienate it when he proves such circumstances.\(^{100}\) Under all of these restrictions, the first legatee still retains some power of alienation.\(^{101}\) Thus, these restrictions are not charges to preserve and render the thing to a specific person,\(^{102}\) and the second requirement of a prohibited substitution is not fulfilled, making the restricted bequest valid.\(^{103}\)

Perhaps placing such restrictions on the *fidei commissum de residuo* would be a more effective way of enforcing the testator’s intent in making such a bequest. The testator in a *fidei commissum de residuo* did not likely intend for the first legatee to alienate the thing immediately after receiving it from his succession and thus deprive the second legatee of any and all benefit from the intentional double legacy. Likewise, the testator likely did not intend for the first legatee to have to account to the second legatee for the value of the thing from the assets of his own patrimony. If he did, he would not make the first legatee eventually account for the value or a portion of the value of the property at the inception of the *fidei commissum de residuo*, but would instead phrase his testament in terms of usufruct and naked ownership with special provisions.\(^{104}\) However, if the first legatee were only allowed to alienate the property after proving necessitous circumstances, the second legatee would be guaranteed to receive a benefit from the testator’s bequest unless the first legatee needed the proceeds from the

\(^{95}\) Aubry & Rau, supra note 26, § 694, at 316-17.

\(^{96}\) Aubry & Rau, supra note 26, § 694, at 316.

\(^{97}\) Planiol & Ripert, supra note 7, No. 3293, at 600.

\(^{98}\) Aubry & Rau, supra note 26, § 694, at 316.

\(^{99}\) Voet, supra note 90, § 54, at 117.

\(^{100}\) Aubry & Rau, supra note 26, § 694, at 319.

\(^{101}\) Aubry & Rau, supra note 26, § 694, at 316.

\(^{102}\) Aubry & Rau, supra note 26, § 694, at 316.

\(^{103}\) LA. CIV. CODE ANN. art. 1520 (2007); Baten v. Taylor, 386 So. 2d 333, 336 (La. 1979).

\(^{104}\) See, e.g., LA CIV. CODE. ANN. arts 538-39 (2007).
property to sustain himself. This result is likely more consistent with the
testator's true intent in leaving the double bequest than the result of allowing
the second legatee to collect only the proceeds unpaid at the first lega-
tee's death, or requiring the first legatee to account for an arbitrary one
fourth of the value of the property.

2. TRUSTS

In considering possible default rules for the fidei commissum de residuo, the testator's intent to limit alienation by the first legatee should also be analyzed in the context of the legal mechanism of the trust. A testa-
tor can limit the circumstances in which the first legatee may alienate the
thing by bequeathing a trust with special provisions allowing the trustee to
invade the principal for the benefit of an income beneficiary. The Louis-
ianan Trust Code allows a trustee to pay principal to an income beneficiary
for support, maintenance, education, medical expenses, or pursuant to an
objective standard set out in the trust instrument. Furthermore, the trus-
tee and the income beneficiary may be the same person. Therefore, the
principal beneficiary is guaranteed a benefit unless the principal of the trust
is alienated by a person who is the trustee and income beneficiary in accor-
dance with an objective standard provided in the trust instrument. Thus,
since Louisiana law currently provides for and regulates the trust mecha-
nism, which guarantees the beneficiary (the equivalent of the second legatee
in a fidei commissum de residuo) a benefit from the testator's bequest
unless the principal beneficiary (the equivalent of the first legatee in a fidei
commissum de residuo) must use the donated property to support himself,
the intent of the testator in a fidei commissum de residuo is not likely to cre-
ate a traditional trust.

B. TREATMENT OF ALIENATED PROPERTY — DETERMINING THE
RESIDUAL PORTION

1. LOSS OR EXPROPRIATION

If the average testator's intent in a fidei commissum de residuo is to
grant a right of alienation, or if the property subject to the fidei commissum
de residuo is in fact alienated, Louisiana should enact default rules to de-
termine the composition of the residual portion when the property is thus
alienated. Treating the property as lost or expropriated is a logical default

106. Id.
107. Id. § 9:1783.
108. Id. § 9:2068.
rule given its non-conflicting nature with other codal sections. Further, treating alienated property as lost or expropriated results in the second legatee’s entitlement to the property that remains in the first legatee’s patrimony and the funds not yet paid to the first legatee.

In the _fidei commissum de residuo_, the property leaves the patrimony of the testator and goes into the patrimony of the first legatee. From the patrimony of the first legatee, the property enters the patrimony of the second legatee at the point of the secondary disposition. By accepting the testator’s legacy, the first legatee, not the testator, has undertaken to bequeath the property to the second legatee. Thus, the second legatee takes the property from the succession of the first legatee by virtue of the original testator’s _fidei commissum de residuo_.

Thus, the first legatee’s interest in the property subject to the _fidei commissum de residuo_ is circumscribed by the obligation to render the residuum to the secondary legatee at his death. As a result, the secondary legatee has some interest in the property subject to the _fidei commissum de residuo_ even while it remains with the first legatee. As such, the property under a _fidei commissum de residuo_ may be subject by analogy to the Louisiana Civil Code articles governing the rights of legatees in _mortis causa_ dispositions upon the loss or destruction of donated property prior to the testator’s death.

The Louisiana Civil Code provides that if property is lost, extinguished, or destroyed prior to the testator’s death, then the legatee is entitled to any part of the property that remains and any uncollected insurance proceeds. However, the first legatee’s alienation of the property subject to a _fidei commissum de residuo_ does not in fact result in the loss, extinction, or destruction of the donated property. Thus, if the first legatee alienates the property, it is as if the legacy has been revoked. Therefore, under the Louisiana Civil Code, the second legatee would not be entitled to the property, proceeds, or any uncollected proceeds from the sale.

However, the first legatee does not have the right to revoke the legacy to the second legatee. When he accepted the legacy, he also accepted the

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109. AUBRY & RAU, supra note 26, § 694, at 320.
110. AUBRY & RAU, supra note 26, § 694, at 320.
111. PLANIOL & RIPERT, supra note 7, No. 3295, at 601.
112. AUBRY & RAU, supra note 26, § 694, at 319.
114. Id. art. 1608.
115. Id.
116. AUBRY & RAU, supra note 26, at 317; PLANIOL & RIPERT, supra note 7, No. 3295, at 601.
resolutory condition that if anything remained of property at his death, he would bequeath it to the second legatee. However, since the first legatee cannot revoke the legacy of the testator, the alienation could be viewed as a loss or expropriation of the property in order to ensure the effect of the testator's intent. As such, the second legatee should be entitled to what remains of the lost or expropriated property and the proceeds that have not yet been paid.

Additionally, the revision comments to Civil Code article 1597 state that the previous principle is consistent with Civil Code article 617, which provides that if property subject to a usufruct is lost, extinguished, or destroyed, the insurance proceeds belong to the insured party who only insured his own interest. In other words, if the usufructuary only insured his usufructuary interest, then the proceeds belong only to him. He does not have to account for these proceeds to the naked owner at the termination of the usufruct. Conversely, if the naked owner only insured his right, then the usufructuary is not entitled to the use of those insurance proceeds. Indeed, in the situation where the usufructuary only insured his interest, if the property subject to the usufruct is lost, the naked owner is not entitled to any insurance proceeds from the loss of the property.

Quebecois law reaches the same conclusion when dealing with a fidei commissum de residuo. If the first legatee alienates the property, the second legatee is not entitled to the proceeds from the property. As stated previously, the first legatee’s alienation cannot produce a revocation of the legacy, but it can produce the same effect as if the property were lost or expropriated. Thus, the second legatee is entitled to a residuum comprised of whatever remains of the property or any uncollected proceeds from the property.

2. Tracking the Funds

Although treatment of alienated property as lost or expropriated may be appropriate, a reasonable argument exists that the second legatee should

117. PLANIOL & RIPERT, supra note 7, No. 3295, at 601.
119. Id. art. 617.
120. Id.
121. Id.
122. Id.
123. QUÉ. CIV. CODE art. 1246 (2007).
124. Id.
125. AUBRY & RAU, supra note 26, at 317; PLANIOL & RIPERT, supra note 7, No. 3295, at 601.
be entitled to a residdum that includes the funds received in the alienation by the first legatee. If the exact money that constitutes the proceeds remains in the first legatee’s patrimony, why should the second legatee be unable to collect those funds at the first legatee’s death simply because the proceeds have been paid into the first legatee’s patrimony? The problem is one of tracking the funds and interpreting the testator’s intent. The tracking problem can be easily solved by requiring the first legatee to place the money in a separate bank account. When the money in that account has been spent, there would be nothing left of the property and thus, no secondary disposition to the second legatee. Additionally, the Louisiana Civil Code should be amended to provide that if funds from the alienation of the property were commingled with funds belonging to the first legatee’s patrimony by placing them in the same bank account, then the proceeds from the alienation will be deemed to have been spent last unless the testator bequeathing the *fidei commissum de residuo* provided otherwise. This would set up an easily interpretable default rule distinct from the institutions of usufruct and trust that allows the testator to utilize the *fidei commissum de residuo* subject to his own intent.

127. See, e.g., QUÉ CIV. CODE art. 1246 (2007). This article provides that in a *fidei commissum de residuo* the second legatee is only entitled to proceeds that have not yet been paid if the thing subject to the substitution is alienated. *Id.* However, if the proceeds are still in the first legatee’s patrimony, it is easy to interpret the funds as the remainder of the proceeds. Thus, the reluctance to award the second legatee the proceeds of the alienation could be a result of the difficulty in determining whether the proceeds are still in the first legatee’s patrimony.

128. See LA. CIV. CODE ANN. art. 1611 (2007) (providing that when interpreting a testament, the court must give effect to the testator’s intent). In the *fidei commissum de residuo*, the proceeds from alienated property subject to the substitution should only be given to the second legatee if this was the testator’s intent when he made the bequest.

129. Another possible and intriguing method of tracking funds from alienated property in a *fidei commissum de residuo* might be borrowed from the provisions of article 9 of the Uniform Commercial Code, as it is commonly referred to in Louisiana. However, difficulty exists in its application to estate devolution because of its intended application to the debtor-creditor relationship. Chapter 9 governs the continuation of a perfected secured interest in, or a secured party’s right to, commingled proceeds and allows the perfected security interest to continue in such proceeds in three situations: (1) if the original collateral was perfected by filing a financing statement, the type of proceeds received could be perfected by filing, and the proceeds were not purchased with cash proceeds; (2) the proceeds are identifiable cash proceeds; or (3) the security interest in the proceeds is perfected within 20 days. *See U.C.C. § 9-315(d) (2000).* The first and last methods of continuation will not operate properly when applied to the devolution of property because there is no security agreement and no method of perfecting the new proceeds. Thus, tracking would be limited to cash proceeds, which correlates with the continuation of the perfected secured creditor’s rights in identifiable cash proceeds. Proceeds that are commingled with other property are identifiable proceeds “to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than . . . .” *See id. § 9-315(b)(2).* Thus, if the second legatee can show by a reasonable means that the proceeds are in the patrimony of the institute, then those proceeds are identifiable. This broad ability to track identifiable proceeds via the application of equitable principles results in an
Also, if the second legatee is entitled to the determinable funds received from the alienation of the property, is the second legatee also entitled to things that are purchased with those funds? The answer to the question lies with the intent of the testator. A *fidei commissum de residuo* is a bequest that charges the first legatee to bequeath what is left of the property at his death to a second legatee. From the language of such a bequest, it would not seem that the testator intended the second legatee to be entitled to property in the first legatee’s possession that was purchased with funds from the alienation of property subject to a *fidei commissum de residuo*. Indeed, this is not the result that the Louisiana Civil Code reaches in the analogous circumstance when a testator bequeaths a usufruct of money. In this situation, the naked owner is only entitled to the value of the usufruct at its inception, not to the items purchased with the money. Applying the same logic, the second legatee should not be entitled to property purchased with funds subject to a *fidei commissum de residuo* or property purchased with funds that were acquired by the first legatee as a result of the alienation of property subject to a *fidei commissum de residuo*.

Furthermore, this same argument can be made against allowing the second legatee to collect the proceeds that have already been paid to the first legatee as part of the residual interest. The first legatee only agreed to bequeath the property subject to the *fidei commissum de residuo* to the second legatee if the bequest states that the second legatee is to have what remains of the property at the first legatee’s death, this may not include money from the alienation of the property. If this is the language of the bequest, the testator never stated that the second legatee would be entitled to the proceeds.

130. *AUBRY & RAU*, supra note 26, at 317; *PLANIOL & RIPERT*, supra note 7, No. 3293, at 599.
131. See *AUBRY & RAU*, supra note 26, at 317; *PLANIOL & RIPERT*, supra note 7, No. 3293, at 599. If the bequest states that the second legatee is to have what remains of the property at the first legatee’s death, this may not include money from the alienation of the property. If this is the language of the bequest, the testator never stated that the second legatee would be entitled to the proceeds.
133. The usufructuary takes the usufruct subject to the property rights of the naked owner, which include the obligation to return an accounting or the value to the naked owner. See Stewart v. Usry, 399 F.2d 50, 55 (5th Cir. 1968). The usufructuary is under the obligation to return to the naked owner property of the same quantity, quality, and value. *LA. CIV. CODE ANN.* art. 538 (2007). This maintains the same intent as former article 536 of the Louisiana Civil Code of 1870, which required the value of the property at the termination of the usufruct to be returned to the naked owner. See *id.* cmts a, c.
ond legatee. Therefore, when the first legatee alienated the property, the secondary legatee's legacy should be deemed lost or expropriated. Thus, the second legatee should only be entitled to proceeds resulting from the alienation of the thing that have not been paid to the first legatee at his death. Alternatively, if the intent of the testator was that the second legatee should be allowed to collect funds from the alienation of the thing, amendments to the Louisiana Civil Code should provide default provisions stating either that the first legatee must place the proceeds in a separate bank account, or that the proceeds that are placed in a bank account containing funds belonging to the first legatee's patrimony will be deemed to have been spent last. Allowing the testator to stipulate around the default provisions would allow the testator's intent to be easily determinable from the language of the testament. If the testator did not wish for the result dictated by the default provisions, he would be forced to provide his alternative intentions in case of a sale of the property subject to the fidei commissum de residuo.

3. SUMMARY

The likely intent of the testator in a fidei commissum de residuo is that the second legatee should be entitled to what remains of the property or any uncollected proceeds from the property, and that this residual interest is subject to the will of the first legatee in choosing to alienate or not. The testator likely does not intend to place limitations on the first legatee's right to alienate when using a fidei commissum de residuo because he could have accomplished these limitations by bequeathing a usufruct and naked ownership or by placing the property in a trust. By alienating the property, the first legatee does not revoke the donation to the second legatee because he accepted the donation from the testator subject to the resolutory condition that he would bequeath the residual interest to the second legatee. Thus, because the first legatee cannot revoke the legacy and because the testator's intent should be given effect whenever possible, any alienation should be viewed as a loss or expropriation of the property, which entitles the second legatee to a residual interest consisting of the remainder of the property in the first legatee's patrimony and/or the uncollected proceeds.

An alternative to the above conclusion is to enact default provisions for fidei commissa de residuo to provide that the first legatee must place the proceeds in a separate bank account, or that the proceeds placed in a bank account containing funds belonging to the first legatee's patrimony will be deemed to have been spent last. Allowing the testator to stipulate around the default provisions would allow the testator's intent to be easily determinable from the language of the testament. If the testator did not wish for the result dictated by the default provisions, he would be forced to provide his alternative intentions in case of a sale of the property subject to the fidei commissum de residuo.

134. AUBRY & RAU, supra note 26, at 317; PLANIOL & RIPERT, supra note 7, No. 3293, at 599; PLANIOL & RIPERT, supra note 7, No. 3295, at 501.
135. AUBRY & RAU, supra note 26, at 317; PLANIOL & RIPERT, supra note 7, No. 3293, at 601.
account containing commingled funds of the first legatee’s patrimony will be deemed to have been spent last or first. Allowing the testator to stipulate around the default provisions would accomplish a result in which the testator’s intent would be easily determinable from the language of the testament.

IV. CONCLUSION

If the testator intends to ensure that the second legatee will receive some benefit from the bequest, he can easily accomplish this intent by bequeathing a usufruct in which the usufructuary has the right to alienate the thing, but also the obligation to account to the separate naked owner for all or part of the property subject to the usufruct. Additionally, the testator can produce the same effect by bequeathing a trust with objective standards for invasion of the principal.

If, however, the testator in a double legacy intends only for the second legatee to receive what was left of the original property bequeathed to the first legatee, the law of Quebec, which provides that alienation of the thing only entitles the second legatee to proceeds that have not yet been paid, seems reconcilable with Louisiana law and its Civil Code. By accepting the *fidei comissum de residuo*, the first legatee agrees to bequeath the thing to the second legatee without compromising his right of alienation. The first legatee can alienate the thing, but cannot revoke the legacy to the second legatee. Thus, when the first legatee sells the thing, it can be considered to be lost or expropriated. Consequently, under Louisiana Civil Code article 1597, the second legatee would only be entitled to the proceeds of the alienation that are still owed.

Alternatively, Louisiana could adopt the view that the second legatee in a *fidei comissum de residuo* should be entitled to all traceable proceeds of an alienation by the first legatee of the property subject to the legacy. However, if this approach is adopted, Louisiana should enact default provisions which establish that proceeds from the alienation by the first legatee that are commingled with the first legatee’s patrimonial funds are to be deemed spent first or last. Additionally, since the testator can utilize a usufruct or trust if he wishes to ensure the second legatee’s receipt of property in a double bequest, the second legatee should not be entitled to property

139. AUBRY & RAU, supra note 26, at 317; PLANIOL & RIPERT, supra note 7, No. 3293, at 599.
140. AUBRY & RAU, supra note 26, at 317; PLANIOL & RIPERT, supra note 7, No. 3293, at 599; PLANIOL & RIPERT, supra note 7, No. 3295, at 601.
141. LA. CIV. CODE ANN. art. 1597 (2007).
Utilizing *Fidei Commissum De Residuo*

purchased with proceeds from the first legatee’s alienation if the testator chooses to leave the property subject to a *fidei commissum de residuo*.

Still another solution would be to create a separate institution under the Louisiana Civil Code to govern the *fidei commissum de residuo*. Much like the laws on usufruct, default provisions that the first legatee must follow unless the testator stipulates otherwise may provide an easy way to determine the testator’s intent in his bequest. In his testament, the testator could clearly provide whether he intended for the proceeds of the funds that the first legatee receives from the alienation of the property to be given to the second legatee, or if he only intended for the second legatee to receive the actual property that he bequeathed to the first legatee.

Perhaps the law of Quebec, in which the second legatee is only entitled to of the remainder of the property or the proceeds that have not been paid, is the best solution. This entitlement to the remainder or unpaid proceeds is most easily reconcilable with the provisions of the Louisiana Civil Code, specifically those providing that a donee is entitled to the remainder or unpaid insurance proceeds when donated property is lost, destroyed, or expropriated prior to actual donation. Additionally, this solution could be put into force without enacting additional Civil Code articles to create a new institution. Furthermore, most testators who leave a bequest subject to a *fidei commissum de residuo* likely intend for the second legatee to receive only what is left of the property that the testator originally left to the first legatee. If a testator simply provided in his testament “I leave White Acre to X, and whatever is left of White Acre upon X’s death, I leave to Y,” this would be a simple conclusion. If the testator wanted to ensure that Y would receive a benefit, he could simply have left the usufruct to X and the naked ownership to Y, or a trust with the same parties as principal and income beneficiary, respectively, providing objective standards for invasion of the principal. Thus, this solution reaches the conclusion most in line with both current law and the result that testator likely intended in leaving the double bequest.

Today, however, the courts of Louisiana face a silent Civil Code and no jurisprudence on the issue of what constitutes the residual portion of a bequest subject to a valid *fidei commissum de residuo* or what the second legatee’s rights are in that portion. Any solution is preferable to this silence which leaves the courts with little or no guidance.
