LOUISIANA CIVIL LAW: DONATIONS & SUCCESSIONS

A COURSEBOOK

by

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This work represents my attempt to integrate into a single, systematically-ordered volume the diverse materials that I’ve heretofore used in teaching the Successions & Donations course at the LSU Law Center, namely, (i) the textbook prepared by Professors Samuel, Spaht, and Picou (Successions & Donations: Cases and Readings); (ii) excerpts from the works of various domestic and foreign civil law scholars that I’ve collected or translated, as the case might be, over the past several years; (iii) excerpts from a few cases that are not included in the “textbook”; (iv) excerpts from my still unfinished “commentary” on the law of donations; (v) various “research notes” that I’ve written on miscellaneous topics over the years; (vi) detailed outlines of my lectures; and (v) innumerable “hypotheticals” I’ve developed for use in class. Many thanks to the authors of the “textbook,” in particular, Katherine Spaht (under whom I first learned the law of successions and donations), for graciously consenting to permit me to use their work as the foundation for mine.

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I Donations

A Introduction to “donations”

Please read the following text, which, as you can see, is an excerpt from a 19th century French civil law treatise on the law of donations. It provides a helpful introduction to the philosophical foundations of and the raison d’être for that law.

1 Raymond Troplong, Droit Civil Expliqué: des Donations Entre-Vifs et des Testaments
n° 1, at 5-6; n° 4-7, at 8-11; n° 9, at 12; n° 10, at 14-15; n° 12, at 16 & 19;
n° 13, at 20-21, 22, & 23; n° 14, at 24 & 25-26 (1855)

1. If one studies man according to the designs of nature, one finds that he is as submissive to the voice of benevolence and liberality as he is careful to conserve the goods that God has given him. Avarice is no less a corruption [of human nature] than is dissipation. Both one and the other are the objects of ridicule and scorn, for they take their places in the hearts of men only thanks to excess. Liberality and benevolence, on the contrary, are honored as virtues, as much as is economy: everyone understands that only those who practice these virtues are on the true road of nature. Economy, which is the foresightful and moderated use of the goods of this world, contributes to the development of private wealth, to the strengthening of the family, and to the general prosperity. Liberality and benevolence impart to others the goods that we possess and draw closer the lines of affection and sociability; they fortify concord among citizens and add to the harmony of justice the accord that proceeds from the love of humanity.

4. Men are sensitive to good treatment. Benevolence attracts benevolence. Even the animals are grateful for the care rendered them by the friendly hand of man [Seneca]: their ferocious nature is sweetened before the guardian who provides them with their nourishment or who flatters and pets them. The services rendered by benevolence, then, are among the most powerful ties of society. Their number is infinite and their variety equal that of the needs of men. But the law could not possibly embrace all of them within its provisions; rather, the law directs its attention only on those that take the form of contracts or that contain dispositions of last will. When a traveler who is lost asks the way of him whom he meets; when one neighbor comes to light his fire from the fire of another; when a helpful person leads a sheep that is lost back to its master, who has been looking for it in vain, etc. -- these are incontestable services and acts of fraternity that contribute to the rapprochement of men. But the law does not intervene in these services, where everything takes place with good harmony, from good will, and without the idea of right or constraint. It is only when benevolence is translated into an obligation or where, by certain positive acts, it touches on the order of successions that the law is then
forced to get involved. And in that case, one of the most grave matters of the law is opened.

5. . . . [C]ontracts of benevolence . . . are those in which one contracts an obligation to the end of rendering some service to another: such as a loan, of which Paul rightly said, *Voluntatis et officii magis quam necessitatis est commodare*; such as a mandate, which the same Paul described this way -- *Originem ex officio atque amicitia trahit* -- and whereby an obliging person renders to another person the service of doing what that person cannot do himself; such as a deposit, the essence of which is to be gratuitous and in which the depositary binds himself out of friendship or [at least] in order to render a disinterested service; such is suretyship, which is a service of friendship, an act of devotion -- *bonitas et humanitas.*

These contracts belong to the same order of benevolent dispositions as do donations. They are inspired by benevolence. And one can apply to a lender, a mandator, a depositary, or a surety these words of Paul -- *qui beneficium tribuit* --, for they accord a benefit and render a service to the borrower, to the mandator, to the depositor, to the secured debtor.

6. But the benefit that results from these contracts is less great than that which is attached to the donation. Whatever may be their advantages for those to whom they bear aid, the donation has the greatest benefits. For example, the borrower is no doubt very happy to find that his friend has the money of which he has need, but he must still return it to him. The donee, on the contrary, keeps what has been given to him, and the donor loses all his rights on the thing of which he has deprived himself. The depositor receives a service by virtue of the good will of the depositary, but he does not become richer and his patrimony is not augmented as is that of the donee. It is the same with the mandator, who, though he obtains a service, receives nothing from the mandatary that passes from the mandatary's patrimony into his own. Finally, suretyship is only a means of credit that, in effect, has been loaned to the debtor; the debtor, however, is none the less obligated to indemnify the surety for that which the surety pays for him.

In a nutshell, in contracts of benevolence, the benefactor does not intend for his service to impoverish him. That is why the principle rule of relations between persons is this: *no one ought to enrich himself at the expense of another.* It is otherwise in the case of a donation. The donor deprives himself irrevocably; he enriches the donee; he prefers the donee to himself.

The [Civil] Code is in accord with these essential distinctions, for it treats the subject of donations separately from that of contracts of benevolence.

7. The testament has a different character. The liberality of which it is the source has nothing current in it; the benefactor defers the liberality until the hour of his passing.

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1 Translation: “That which is of good will and of service is more commodious than that which is of necessity.”

2 Translation: “It draws its origin from service and friendship.”

3 Translation: “Goodness and humanity.”

4 Translation: “He who bears a benefit.”
away. He does not want to deprive himself during his lifetime; he gives and transmits only after his death.

9. It requires no great effort to prove that the donation *inter vivos* is a natural consequence of the right of ownership and that, for that reason, it pertains to the natural law, as does the right of ownership itself.

10. Now, if [as is true] ownership pertains to the natural law, then one must conclude from it that the donation *inter vivos* also pertains to the natural law. The donation *inter vivos* is, in fact, only one of the means for transmitting to another the right of ownership with which one is invested. The owner, who by virtue of his right can keep his thing within his hands, can also communicate it to another: one is the consequence of the other. *Nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre, ratam haberi.*

This characteristic [pertaining to the natural law] belongs all the more to the donation *inter vivos* inasmuch as it permits persons to satisfy their penchant for benevolence. One praises a citizen who consents to receive a deposit or a mandate gratuitously or to make a loan to an overburdened friend. These, in fact, are services inspired by humanity and in accord with nature. With even greater reason does the donation deserve praise -- [an act] that attests to so high a degree the kindliness innate in the heart of man, [an act] that satisfies so fully the precept of the natural law that man ought to be kindly toward those like him!

12. With respect to the testament, the question [does it pertain to the natural law] is more controversial. [Several authors, including Puffendorf, Merlin, Toullier, Proudhon, and Grenier, maintain that it is a "creation of the civil law."]

13. But other men who are of equal stature, both in ancient and in modern times, have supported the contrary opinion, which places the legitimacy of the right of testation in the natural law.

Cujas [the earliest French Romanist], after having recalled this same opinion, declares that he agrees with it . . .: it is in fact equitable, he adds, that each person stand watch over his posterity and over that which will be after he is gone.

It is in this same sentiment, according to Cicero, that the origin of the testament lies. . . . He does not deny . . . that the *making* of the testament pertains to the civil law; it is the civil laws, in fact, that trace the form of testaments. . . . But it is none the less certain that the principle of the right of testation is inherent in nature and is [grounded] in an innate sentiment [that we ought to] provid[e] for those who will survive us.

. . . [Others who are of this opinion include Grotius, Leibnitz, and Donellus.]

14. If one carefully investigates the most numerous acts of the life of man, one will be convinced that they are dominated by a hope for the future that does not stop just at the limits of existence. One plants not only for oneself; one hopes to procure shade for one's

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5 Translation: “Nothing is more agreeable to natural equity than that the will of an owner, wanting to transfer his thing to another, should be granted fulfillment.”
descendants. Why does man experience the lively desire to have children, to propagate his name . . .? Is it not to prolong, in the future, the life of memories and to make this other life succeed to the real life that he will have left behind? Nothing is more natural than this sentiment, for it reigns among all men by . . . unanimous consent . . . .

But it is not only for ourselves that we have this foresight of the time at which we will no longer exist. It is also for our children, for our [other] relatives, for those who by their friendship have gained before us a place that is greater than that given by familial relation. The head of the family will never believe that he has done enough for his child if, to the gift of life, he does not add education, well-being, and a secure existence for the time at which he will have quit this life.

This is nature. And so, when one pretends that man should be indifferent to what will happen after he is gone, one raises oneself up against the most self-evident law of the creation of this world and of society. . . .

B  Common regime

1  Definition of "donation"

What is a “donation”? Read CC arts. 1467, 1468 & 1469. Then read the following:

Theoretical & Practical Commentary
on
The Law of Donations
(Civil Code, Book III, Title II)
by
J.-R. Trahan
(2000)
the genus as a starting point. The drafters of Chapter 1, unfortunately, skipped the first step.

It falls to us (the interpreters), then, to perform that first step, i.e., to come up with a definition for the genus (donation). Here’s what I propose: A donation is a gratuitous or predominantly gratuitous juridical act whereby one person (the donor) disposes of a thing (the donatum) in favor of another (the donee). The defense of this definition will have to wait for later. For now, I just want to explain it.

1. Intentional element: “predominantly gratuitous”

Every donation is at least predominantly "gratuitous." What that means is that the "cause" of every donation—to be more precise, the cause of the donor—must be, at least in part, to do something "for the benefit of [another], without obtaining any advantage in return." CC art. 1910. A donation made without a desire to bestow a gratuity—without, to use another expression, a “spirit of liberality”—is an oxymoron.

But liberality need not be the sole cause, as the adverb "predominantly" indicates. It is possible for one who wants to transfer something to another to have "mixed motives," that is, to want, at the same time, to "do something nice" for another (the gratuitous motive) and, yet, to "get a little something in return" (the onerous motive). Provided that the will to do something nice "predominates" over the will to get a little something in return, the transfer can be qualified as a "donation."

Precisely how one is to go about determining which motive—the gratuitous or the onerous—is predominant in any given “mixed motive” transfer is a matter that we shall study in detail only later. Suffice it to say for now that in Louisiana, the determination is governed by a clear-cut mathematical criterion, one that requires a comparison of the value of the donatum with the value of the goods or services that the donor receives in return.8, 9

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8 Modern civil law doctrine, following classical Roman terminology, refers to such a “mixed motive” transfer as a negotium mixtum cum donatione, that is, a “sale mixed with a donation.”

7 The approach used in most other civil law jurisdictions is different.

8 This mathematical criterion is established by CC arts. 1524-1526 & 1510-1511.

9 In French doctrine considerable ink has been spilt on the question of precisely how “gratuitous intent” should be gauged. There are two competing schools of thought. One, called the subjectivist or affective school, maintains that there’s no gratuitous intent at all unless the donor, at least at some minimal level, acts from “altruistic” or “non-egoistical” motives. For the adherents of this school, one who purports to make a “donation” to some charitable foundation for the sole purpose of enhancing one’s reputation or “getting to see his name on a building” makes no donation at all. The other, called the abstract or objectivist school, maintains that there’s donative intent so long as the donor has “the consciousness and will not to obtain a [patrimonial] equivalent” for his performance. For the adherents of this school, purported donations to charitable foundations are what they purport to be. See generally Gabriel Marty & Pierre Raynaud, DROIT CIVIL: LES SUCCESSIONS ET LES LIBÉRALITÉS n° 297, at 237 (1983). I could be wrong, but it seems to me that the drafters of our CC art. 1910 gave a nod to both points of view. See CC art. 1910 (a gratuitous contract is one in which one person acts “for the benefit of the latter”—subjectivist theory—and “without obtaining any advantage in return”—objectivist theory).
Some French commentators, charging that the notion of the "disposition of a thing" is too imprecise to be useful, have suggested that this notion be replaced by what's called an "economic criterion." Here it is, stated informally: A donation takes place if and only if the patrimony of one person (the disposer) "goes down" and the patrimony of another person (the donee) "goes up." In other (more technical) words, there must be, at once, (i) an "impoverishment" of the donor's patrimony and (ii) an "enrichment" of the donee's patrimony. For these commentators, then, a donation is any and every gratuitous interaction through which the patrimony of one person is impoverished and that of another is enriched.

But there's a problem with this proposal. Though it's true that every donation entails a "patrimonial shift," it's not true that every gratuitous interaction which entails such a patrimonial shift is a donation. Consider, for example, the so-called "gratuitous credit" interactions, i.e., a gratuitous suretyship, gratuitous pledge, or gratuitous mortgage. When these interactions occur, the patrimony of the beneficiary "goes up" and that of the other party "goes down." And yet none of these interactions is regarded as a donation properly so called.

Vague though it may be, the traditional "disposition of a thing" criterion at least avoids this problem. In none of the gratuitous credit interactions is there any distinct patrimonial "thing" that gets "disposed of," such as a right or a debt. Thus, this criterion serves to exclude gratuitous credit...
B  Commentary on the individual articles of Chapter 1

1  Commentary on CC art. 1467

Though true as a general rule, the proposition set forth in CC art. 1467 is an overstatement. As we will see later on, the donation inter vivos and the donation mortis causa are not the only mechanisms whereby one may dispose of something gratuitously. Suffice it for now to give two examples: (i) a life insurance policy the purchaser of which names someone other than himself (or his estate) as the beneficiary; (ii) a US savings bond purchased by one person for another.

Jacques Flour & Henri Souleau,


*Uncertainties of qualification . . . pertaining to the intentional element*

43. . . . Act presenting a personal interest for the disposing party. – There is, first of all, uncertainty when the disposing party is inspired (even if this is not necessarily his sole motive) by the pursuit of a personal interest.

This situation is imaginable even where no particular clause that concretizes this interest has been inserted into the act. The disposing party may, in fact, anticipate that the consequences of his act will procure for him an advantage that he would not have obtained without it.

This advantage can itself be of a *material* [patrimonial] order or of a *psychological* [extra-patrimonial] order. Two symmetrical examples drawn from the [French] jurisprudence illustrate this duality. One person gives a tract of land to a community so that a church may be constructed on it, because he hopes that this construction, which provides a pretty view from the contiguous tracts of land that he has retained, will cause their value to increase: a material interest. Another person makes the same disposition, but this time for the purpose of putting him in a position to satisfy his religious duties more easily: a psychological interest.

The dominant doctrine makes a distinction between the material interest and the moral interest. The former withdraws from the act its gratuitous character; the latter allows it to subsist.

. . .

44. Evolution of the jurisprudence. – . . . .

The judgments are not easy to interpret. But it is certain that they have not always been based on the distinction set forth above [the doctrinal distinction between material interest and psychological interest]. And it seems that the courts, after having [at one point] adopted the distinction, they did not [thereafter] maintain it.
1) In its earliest phase, the jurisprudence put material interests and psychological interest on the same plane: each one, just like the other, excluded the gratuitousness of the act.

For the material interest, the archetypal judgment corresponded exactly to the hypothesis that we envisioned earlier. The transfer of a tract of land with a view to the construction of a church there is a contract under onerous title if it has been consented to “in view of the enhanced value that the appurtenant lands belonging to the transferor would acquire.”

For the psychological interest, it is appropriate to report a celebrated case. The disposing party had taken at his charge part of the expenses for the reconstruction of the bell tower of the church in his native village. But he had required that it be rebuilt such as it had existed during his youth, “such as he dreamed of it in the vague recollections of his young age, such as he needed it and wanted it for the satisfaction of his fantasy or of his vanity as a millionaire.” The act was qualified as onerous.

This solution has been very widely criticized. Indeed, if one admits that the pursuit of a purely psychological interest excludes liberal intention, one will be led ineluctably to the conclusion that there could never be a donation when the goods are to be dedicated to some determinate purpose, for the disposing party would not impose this dedication if it would not procure a certain satisfaction for him. What’s more, there would never be any donation. If someone gives, it is always because he finds some psychological interest in doing so; if not, he would not do it. This interest consists, at a minimum, in the intimate satisfaction that a generous act provides – in this joy that the moralists say is the most pure –, the joy of this: that one gives to others.

2) That is why, in its second phase, the jurisprudence rallied to the currently dominant doctrinal distinction [i.e., between material interest and moral interest].

This jurisprudence boils down to saying, on the one hand, that a material interest continues to “disqualify” an apparent donation, [making it] an act under onerous title, for the absence of such an interest is pointed out with more or less insistence [in] the judgments [in which the courts found the acts to be gratuitous] . . . . It also boils down to saying, on the other hand, that a psychological interest is no longer incompatible with gratuitousness, for, in nearly all of these cases [i.e., those in which the courts found the acts to be onerous], such an interest shows through clearly . . . .

45. Current solutions. – . . . .

The characterizations of the preceding period have been maintained . . . .

Nevertheless, if it’s possible to think that these [new] judgments mark some sort of evolution, that they constitute a third phase, it is by reason of their rationales.

On the one hand, the Cour de cassation no longer points out the absence of a serious material interest [in cases it which it finds that the acts are gratuitous]. One can deduce from this that the presence of a material interest, in its turn, no longer [necessarily] excludes gratuitousness. This is the greatest novelty [of the new jurisprudence] . . . .

But, on the other hand, a new rationale appears. The Cour de cassation notes that the disposing party does not impose on the gratified [party] any particular condition that it is his own interest. One can deduce from this that the pursuit of a personal interest
would exclude gratuitousness if it were concretized in the clauses of the act, and this
without distinguishing whether it's a matter of a material or a psychological interest.

... [O]ne can describe as follows a particularly meandering development:
In the beginning, both sorts of interest [material and psychological] were always
[considered to be] incompatible with gratuitousness.
In the intermediate phase, material interests, alone, continued to have this effect;
gratuitousness and psychological interest were no longer mutually exclusive.
Today, the solutions are more nuanced. The two types of interest are, in principle
compatible with gratuitousness. But they cease to be so when a particular clause of the
act reveals the existence of this interest.

a Intentional element: predominantly gratuitous

1) Necessity thereof

Does a “donation” require or presuppose a cause that is (at least predominantly)
“gratuitous”? Re-read CC art. 1467.

2) Definition thereof

a) Meaning of "gratuitous"

What does “gratuitous” or, if you prefer the nominative form, “gratuity,” mean? Read CC
art. 1910. Then solve the following hypothetical problems:

DH 1. On the occasion of their 25th wedding anniversary, Pascal gives Julie a necklace,
bracelet, and earrings, all made of silver. Did Pascal make a donation to Julie? In particular,
was Pascal's act "gratuitous"? Why or why not?

DH 2. Olide, who's never been known as a philanthropist, "gives" $10,000 to the
Gueydan Symphony Orchestra. When Clodice, his girlfriend, asks him about it, he gives her
this explanation: "Oh, I don't care two hoots about the orchestra. I've never heard it play and,
God willing, never will. The only reason I gave them the money was so that they'd put my
name at the top of the 'Patrons of the Orchestra' list, which they publish in all of their concert
programs. Since many of my clients attend the concerts, that's good advertising." Did Olide
make a donation to the orchestra? In particular, was Olide's act "gratuitous"? Why or why not?

b) Meaning & significance of "predominantly" (CC arts. 1523-1525)
DH 3. Toward the end of his life, Papère, Pascal’s father, becomes so sick and infirm that Pascal is forced to take him in and care for him. This goes on for several years. Eventually Papère decides that he should return Pascal’s kindness. And so, Papère offers Pascal his alligator farm “as compensation for services you’ve rendered me in the past.” “Mais mon cher père,” Pascal protests, “the services I’ve rendered to you over the years can’t be worth more than $50,000 and yet your alligator farm is worth at least $100,000. You offer me too much!” “That’s alright,” Papère answers, “I still want you to have it.” Has a donation taken place between Papère and Pascal? In particular, should Pascal’s act be classified as “gratuitous,” “onerous,” or something in between? Explain. See CC arts. 1523, 1525, 1760, & 1761, ¶ 2.

b  Material elements

1)  Juridical act

a)  Necessity thereof

Can there be a “donation” without a “juridical act”? Re-read CC arts. 1468 & 1469.

b)  Definition thereof

What’s a “juridical act”? See CC arts. 1757, 395 cmt. (b); 492 cmt. (a); 517 cmt. (c); 544 cmt. (b); 3471 cmt. (c); Boris Starck, DROIT CIVIL [FRANÇAIS]: INTRODUCTION §§ 365, at 150 (1972) (“A juridical act is a deliberate act of the actor, accomplished by him with a view to producing legal effects and, notably, with a view to creating or transmitting a right or giving rise to an obligation. The will of the person who accomplishes the act is, then, the essential ingredient, the "foundation," of the juridical act . . . .”); John E.C. Brierley & Roderick A. Macdonald, QUEBEC CIVIL LAW no 141, at 176-77 (1993) (“A juridical act presumes that a person consciously marshalls a legal institution – such as a contract or a will – so as to project legal consequences for the future. Necessarily, therefore, the event reflected in any juridical act must be voluntary; but it must also be licit . . . .”); 2 Guillermo A. Borda, TRATADO DE DERECHO CIVIL [ARGENTINO]: PARTE GENERAL no 824-25, at 82 (9th ed. 1987) (“Juridical acts are those voluntary, licit acts whose immediate end is to establish juridical relations between persons or to create, modify, transfer, preserve, or annihilate rights. The characteristics of juridical acts follow from this definition: 1) they are voluntary acts; 2) they are licit; 3) their immediate end is the production of juridical effects. This last one is the distinctive characteristic of juridical acts; it enables one to distinguish them from other licit voluntary acts.”); 1 Silvio Rodrigues, DIREITO CIVIL [BRASILEIRA]: PARTE GERAL no 74, at 146 (6th ed. 1976) (“Among the acts that proceed from human activity, . . . [there are] those voluntary, licit acts to which legislation defers the effects desired by the actor. . . . To this kind of juridical event the name ‘juridical act’ is given.”); Symeon Symeonides, “The General Principles of the [Greek] Civil Law,” in INTRODUCTION TO GREEK LAW 61 (Konstantinos D. Kerameus & Phaedon J. Kozyris eds., 2d ed. 1993) (“A juridical act is an act by which a person declares his will to cause certain legal consequences and
to which the law attributes those or other consequences, consisting of acquiring, altering, transferring or terminating rights or legal relations.

2) Disposition of a thing

a) Necessity thereof

Does a donation require or presuppose the “disposition” of a thing? Re-read CC arts. 1468 & 1469.

b) Definition thereof

1] Meaning of "thing"

What's a “thing”? Read CC art. 448. Then solve the following hypothetical problems:

DH 4. Jean Sot, the owner of Terre Lourde, asks Pascal, the owner of Belle Terre, is he can "use the northwest corner of Belle Terre as a passageway to go between Terre Lourde and the highway on the other side." Pascal replies, "Sure, why not?" "But I can't pay you anything," Jean Sot adds. "No problem," says Pascal, "that's what neighbors are for." And so they draw up the necessary paperwork (an authentic act) for the "grant" of the "right of passage." The act, in addition to referring to the right as a “predial servitude,” states that the passageway “shall benefit all owners of Terre Lourde and shall burden all owners of Belle Terre in perpetuity.” Has a donation taken place between Pascal and Jean Sot? In particular, does the grant of right of passage entail the disposition of a "thing"? Why or why not?

DH 5. Olide, who owes Pascal $100 for services Pascal performed a few weeks back, fails to pay. Pascal, who doesn't want the hassle of pursuing Olide himself, asks his son, Ti-Boy, if he'd "like to have the claim." "You're offering it to me for free?" Ti-Boy asks. "That's right," Pascal answers. "Bien sur," says Ti-Boy. And so they draw up the paperwork (an authentic act) for an "assignment" of the claim. Has a donation taken place between Pascal and Ti-Boy? In particular, does the act of assignment entail the disposition of a "thing"? Why or why not?

2] Meaning of "disposition"

What's a “disposition”? Consider the following hypothetical problems:

DH 6. Jean Sot, who owes Pascal $100, is severely injured at the Mardi Gras festivities in Mamou. Wanting to help out, Pascal goes to Jean Sot and says, "Let's just forget about that debt. As of this moment, you owe me nothing." "Bless you," says Jean Sot. Has a donation taken place between Pascal and Jean Sot? In particular, has Pascal "disposed" of anything in Jean Sot's favor? Why or why not?
DH 7. Pascal, who’s about to set out for an extended vacation in Basile, asks Jean Sot if he’ll "take care of Mr. Nutty," Pascal’s pet nutria. Jean Sot agrees. Though Pascal offers to pay Jean Sot, Jean Sot refuses. Two weeks later Pascal returns and picks up Mr. Nutty. Has a donation taken place between Jean Sot and Pascal? In particular, has Jean Sot "disposed" of anything in Pascal’s favor? Why or why not?

DH 8. Olide wants to borrow $100,000 from Bayou Bank to start up a new business. The bank, however, won’t give him a cent until he puts up some security. Since he doesn’t have any to put up, he turns to his friends for help. Clodice helps out by signing a suretyship agreement in favor of the bank; Jean Sot, by giving the bank a mortgage on his farm. Has a donation taken place between Clodice and Olide or between Jean Sot and Olide? In particular, has either Clodice or Jean Sot "disposed" of anything in Olide’s favor? Why or why not?

2 Classifications

a First scheme: time of effectivity / revocability

The first scheme for classifying donations that we must study distinguishes donations on the basis of the time at which they become effective and the extent to which they are revocable. By way of an introduction to this scheme, re-read CC arts. 1467-1469 and then read the following doctrinal materials:

3 Victor Marcadé,
Explication du Code Civil n° 436, at 364
(Carlos Lazarus tr., 7th ed., 1873)

436. At Roman law, there were numerous ways of making gratuitous dispositions viz.: (1) the donation inter vivos; (2) the donation à cause de mort; (3) the institution of heir (direct); (4) the legacy: (also direct); (5) the institution fideicommissary, and (6) the legacy fideicommissary. These last two are included into a generic term fideicommissa which was consequently divided into fideicommissa of inheritance and fideicommissa particular.

(1) The donation inter vivos, or perfect donation, was that whereby the things were given irrevocably, purely and simply; (2) the donation à cause de mort, or imperfect donation (and which could have been more appropriately called donation on condition of death) was made subject to a specific resolutory condition that the donor did not die under particularly contemplated circumstances;* (3) the institution of heir (which was subdivided into principal and secondary, the first retaining the name of institution and the second taking the name of substitution) was the designation, made by testament, of the person or persons whom the deceased wished to have as his universal representatives; (4) the legacy was a particular gratuity which the heir of the deceased was charged with paying; (5) and (6) the fideicommissa (which was originally only a simple prayer or
request, _fideicommissum_, which did not become obligatory until the reign of Augustus) was a disposition whereby the deceased gave to one, subject to the charge of remitting to another, either the totality or a proportion of his patrimony, or a particular thing.

Dispositions of last will were made either by testament or codicil, or even by any manifestation of intention sufficiently expressed. (1) The testament was an act which could contain any disposition of last will, but for the validity of which it was essential that it contain a direct institution of heir, which was done in accordance with rigorous and solemn formalities. (2) The codicil, which was not permitted until the advent of Augustus, was not subject to these formalities, it being necessary only that it be written in the presence of five witnesses; it could contain any disposition other than the institution of heir. (3) For the validity of the _fideicommissa_, it was sufficient that it be contained in a writing of any kind, _e.g._, a letter; and it could even consist of a manifestation of intent either verbally, or by a simple sign, provided it was done in the presence of witnesses.

437. This complicated mass of heterogenous and incongruous rules, once adopted in the provinces of written law, but rejected by the national customs, was completely abrogated by the Code, which substituted therefor a very simple system.

* It is true that the donations which the Romans "denominated" as donations _mortis causa_ (and which should more properly be called donations _sub-mortis conditione_) were all those which were made on condition, either suspensive or resolutory, of the death of the donor or of any other person; a death resulting from a particular accident or in a particular manner, or at a particular time. But the donation _à cause de mort_ generally in use and the one referred to by the Roman jurisconsults was a donation which used the death of the donor occurring under some special circumstances, as a resolutory condition. Such is the donation made by Telemacus to Pirée: "I give you these things now; but if I escape from the danger that threatens me, you will return them to me." (Inst. 1, 2, t. 7, s. 1).

Today, in France, there are only two ways in which gratuitous dispositions, may be made; one whereby the _voluntate viventium_ can be accomplished, _i.e._, the donation between living persons; the one whereby the _voluntate morientium_ can be accomplished, _i.e._, the legacy. Similarly there are only two methods of evidencing these dispositions: the donation is made by an act which carries the same, and the legacy is made by an act which is called a testament. This results from Arts. 893 and 1002 of the Code because the first declares that one cannot dispose of gratuitously except by donation _inter vivos_ or by testament, and the second declares that every testamentary disposition, no matter in what terms it may be made, whether it be under the name of institution of heir, or otherwise, can have effect only as a legacy. Thus, there is no longer a donation _à cause de mort_, institution of heir or _fideicommissa_ (as distinguished from legacies); and with regard to the formalities, there is no longer a codicil, nor a disposition evidenced by any writing whatsoever, much less by a verbal declaration or mute assent.

There are only (1) the donation _inter vivos_, which is evidenced by the solemn act the form of which will be subsequently given (Art. 931 and others), and (2) the legacy, resulting from a testament, the forms of which will likewise be subsequently indicated.
To begin with, there no longer are donations à cause de mort. It is true that not all donations are subject to identical rules, and that not all of them have identical characteristics; and it is also true that there are two species (donations of future things and donations between spouses) which differ considerably from the ordinary donation inter vivos, and which very much resemble the ancient donation à cause de mort. But nonetheless, under the system of the Code, they are donations inter vivos in which in the absence of special rules, the cases arising thereunder must be decided by the general rules governing the ordinary donation inter vivos, and not in accordance with the ancient laws governing donations à cause de mort, because those laws no longer exist. Merlin's opinion to the contrary (Rep., Donation, Sec. X) as well as Toullier's (V, 11) has been effectively refuted by Grenier (Donat., No. 1), M. Duranton (VIII, 6), M. Dalloz (V. Disposit. entre viifs et testament), and M. Coin-Delisle (Art. 893, Nos. 3-7).

There is no longer institution of heir; the will of man can create simple legatees only, and there are no heirs other than those who come ab intestato, by the effect of law and, pursuant to the rules explained in the title Of Successions. It is very true that a legatee can well be called, not only to take particular objects, but also to the universality of the patrimony, in the same manner as the instituted heir at Roman law and in the provinces of written law; but in such cases, he is nothing but a legatee, a simple successor to the property, and never a representative of the person of the deceased; from which it necessarily follows that a successor who is called to the succession by virtue of a testament cannot be held for the debts ultra vires bonorum. This truism that the testament can create legatees only and never heirs, which stems from Art. 1002, becomes still clearer when a comparison is made of the developments followed by the Institutes of Justinian with those of the Code. * * *

There is no longer fideicommissa in the sense that every disposition which could have been valid as such according to Roman law, will not be valid with us, except to the extent that it constitutes a real legacy and fulfills the characteristics and the formalities required by law for this kind of disposition. There is, moreover, a kind of fideicommissa which is prohibited expressly by the Code under the name of Substitutions (Art. 896). * * *

438. When it is said that there is no longer any act of last will other than the testament, and that our legislation does not recognize the codicil, the statement is true only with reference to the words and terminology adopted by the Code; actually, our testament is precisely the codicil of the Romans, so that, from this point of view, we have only codicils and no testaments. In effect, the testament of the Romans was a solemn act necessarily containing an institution of heir; the codicil, on the contrary, was an act without solemnity which could have no institution of heir.

Our French testament can never contain an institution of heir (since there is no such thing under our law) and there is no form required for the creation thereof; it is clear, therefore, that the testament is, in substance, the codicil of the Romans. Be that as it may, since we must adopt the language of the Code, we will say that we have testaments only, bearing in mind, however, that they are the codicils of the Romans.

439. The provision of our article that one cannot make a gratuitous disposition inter vivos except by donation and in the form subsequently indicated, is true only as a general
rule. It cannot be considered as an absolute rule, but, on the contrary, as a rule subject to certain observations and restrictions which will be presented under Art. 931.

Jean Domat, *LES LOIS CIVILES DANS LEUR ORDRE NATUREL*

bk. 1, tit. 10, preface, pars. 1-3,
in *ŒUVRES DE JEAN DOMAT* at 298 (J. Rémy éd., nouv. éd. 1835)

One calls "donations *inter vivos*" those that have their effect during the lifetime of the donor in order to distinguish them from those that are made "*mortis causa*" and that have their effect only after the death of him who gives. There are two essential differences between these two sorts of donations. First, donations *inter vivos* are contracts that are passed between the donors and donees, which renders them irrevocable, whereas, on the other hand, donations *mortis causa* are dispositions . . . that depend solely on the will of those who give them and that, for this reason, can be revoked. The other difference between donations *inter vivos* and donations *mortis causa* is a consequence of the first and consists of this: he who gives *inter vivos* deprives himself of that which he gives and he who gives only *mortis causa* prefers to keep that of which he deprives himself and remains the owner of that which he gives up until his death, with the right [until then] of depriving the donee of it and of disposing of it as he pleases. Thus, whereas the donation *inter vivos* deprives the donor, the donation *mortis causa* merely deprives his heir.

1) Enumeration

a) Donation *inter vivos*

Re-read CC art. 1468. Then read the following:
I. Commentary on Chapter 1

B. Commentary on the individual articles of Chapter 1

2. Commentary on CC art. 1468

The purported “definition” of donations inter vivos is deficient in several respects. First, it’s incomplete. Second, it’s misleading.

a. Respects in which the definition is incomplete

1) It doesn’t specify the kind of “act” that every donation inter vivos entails: bilateral (contract).

The purposed “definition” of donations inter vivos is deficient in several respects. First, it’s incomplete. Second, it’s misleading.

CC art. 1468 describes a donation inter vivos as an “act,” which, one would suppose, means “juridical act.” Though that statement is undoubtedly true, it’s not as specific as it could and should be. You see, every donation inter vivos entails a certain kind of juridical act, namely, a bilateral one or, to use the more common term, a contract.

That a donation inter vivos entails such a juridical act cannot be gainsaid. That was, to start with, the nearly unanimous opinion of the commentators on the law of the French ancien regime. See, e.g., Jean Domat, LES LOIS CIVILES DANS LEUR ORDRE NATURAL pt. 1, bk. 1, tit. 10, sec. 1, in OEUVRRES DE DOMAT 310 (J. Remy ed., nouv. ed. 1835) ("The donation entre vifs is a contract what is made by reciprocal consent between the donor . . . and the donee . . . .")

"The donation entre vifs is a convention . . . ."); Robert J. Pothier, TRAITÉ DES DONATIONS ENTRE-VIFS prelim. art., in OEUVRRES DE POTHIER 1 (Antoine-Philippe Merlin ed., nouv. ed. 1831) ("The donation entre vifs is a convention . . . .").

Commentary on the French Civil Code has always been and still is to the same effect. Interpreting French Civil Code art. 894, the immediate source of the ultimate domestic source of CC art. 1468 (1870)--Digest bk. 3, tit. 2, art. 2 (1808)--, French jurists have unanimously concluded that a donation inter vivos involves a contract. See, e.g., 3 C.-B.-M. Toullier, DROIT CIVIL FRANÇAIS n° 4, at 3 ("The donation entre vifs is a contract . . . ."); & n. (1) (6th ed. 1848) ("[A] donation entre vifs is a convention, since it is perfected only by the consent of two parties. It is a contract . . . ."); 3 Victor Marcadé, EXPLICATION THÉORIQUE ET PRATIQUE DU CODE CIVIL n° 440, at 369 (7th ed. 1873) ("A contract is, in general, the accord of two wills on the same object . . . ; this accord clearly is present between the donor and the donee who accepts; the donation is, then, a contract."); 11 François Laurent, PRINCIPES DE DROIT CIVIL FRANÇAIS n° 99, at 125 (2d ed. 1876) ("[I]n article 1103 [it] is written: A contract is unilateral when on person is obligated for the benefit of another . . . This definition by its letter applies to the donation. It is, then, certain that a donation is a contract."); Gabriel Baudry-Lacantinerie & Maurice Colin, DES DONATIONS ET DES TESTAMENTS n° 13, in 9 TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 5 (2d ed. 1905) ("The donation entre vifs is an act, our article says. It would have been better to have said a contract, for this donation necessarily presupposes the concourse of the wills of the donor and donee, and the definition that
article 1101 gives to 'contract in general' fits it perfectly.'

10 Charles Aubry & Charles Rau, Droit Civil Théorique Français n° 646, at 409 n. 1 (Paul Esmein rev., 6th ed. 1954) ("[I]t has constantly been recognized . . . that the donation is a contract."); Jacques Flour & Henri Soileau, Droit Civil: Les Libéralités n° 1, at 3 (1982) (The donation is the contract whereby the donor rids himself of a thing . . . ."); Gabriel Marty & Pierre Raynaud, Droit Civil: Les Successions et Les Libéralités n° 329, at 260 (1983) ("The donation is a contract. . . . [T]he contractual character of the donation is obvious, since article 894 itself requires the acceptance of the donee . . . ."); François Terré & Yves Lequette, Droit Civil: Les Successions–Les Libéralités n° 427, at 416 (2d ed. 1988) ("The donation is a contract whose conclusion . . . ."); 2 Henri & Léon Mazeaud et al., Successions–Libéralités n° 1331, at 549 (Laurent Leveneur & Sabine Mazeaud-Leveneur rev., 5th ed. 1999) (The necessity of this concourse of wills is clear in . . . donations entre vifs, which are contracts. . . . [T]he donation is a bilateral act in its formation like all contracts . . . .")

Even in Louisiana, where the contractual character of donations inter vivos seems not to have been widely recognized, many legal scholars have made the same observation. See Frederick Wm. Swaim, Jr. & Kathryn V. Lorio, Succession & Donations § 9.1, at 210, in 10 Louisiana Civil Law Treatise (1995) ("[A] donation inter vivos is a contract between the parties[,] . . . acceptance by the donee of the object offered is required."); Carlos E. Lazarus, Successions & Donations: Cases & Reading Materials 1 (rev. ed. 1970) ("It must thus be concluded that a donation inter vivos is a contract, unilateral contract to be sure, but a contract which binds the donor irrevocably towards the donee who accepts.")

Finally, one would be hard pressed to find a single modern Civil Code in which donations are classified as anything other than contracts. See, e.g., Código Civil Brasileiro art. 1165 ("A donation is considered to be the contract whereby one person, out of liberality, transfers goods or advantages from his patrimony to that of another, who accepts them."); Code Civil Éthiopien art. 2427 ("Donation is the contract whereby one party, the donor, cedes one of his goods or assumes an obligation with a view to gratifying another person, called the donee."); Codice Civile Italiano art. 769 ("Donation is the contract whereby one party, in a spirit of liberality, enriches the other . . . ."); Código Civil Mexicano art. 2332 ("Donation is a contract whereby a person transfers to another, gratuitously, a part or the totality of his present goods."); Code Civil du Québec art. 1806 ("Donation is the contract whereby one person, the donor, transfers the ownership of a thing by gratuitous title to another person, the donee . . . ."); Polish Civil Code art. 888 (Olgierd A. Wojtasiewicz tr. 1994) ("By the contract of donation the donor shall assume the obligation to make a gratuitous performance for the benefit of the donee at the expense of his property."); Гражданский Кодекс Российской Федерации [Civil Code of the Russian Federation] ст. 572 (Jason Kilborn tr. 2001) ("By a contract of donation, one of the parties (the donor) gratuitously [i] transfers or binds himself to transfer to the other party (the donee) [a] a thing into that party’s patrimony, [b] a patrimonial right (demand) against himself or a third party, or [ii] frees or binds himself to free a thing [of the donee] from a property right owed to himself or a third party."); see also Código Civil Argentino arts. 1789 et seq. (the title that concerns “donation,” like those that concern “sale,” “lease,”

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and the like, is situated in the part of the code that is entitled “of the obligations that are born from contracts”); Código Civil Peruano arts. 1466 et seq. (the title that concerns “donation,” like those that concern “sale,” “lease,” and the like, is situated in the part of the code that is entitled “of the diverse kinds of contracts”); Code Suisse des Obligations arts. 239 et seq. (the same as the Peruvian Civil Code).

This characteristic of donations inter vivos is important for at least two interrelated reasons. First, because donations inter vivos are bilateral juridical acts, they are necessarily (i.e., by definition) subject to the general rules on contracts (e.g., formation, execution, nullity), just like and no less so than are contracts of any other kind, such as sale, lease, and mandate. Second, because donations inter vivos are bilateral juridical acts, their effectivity is contingent upon the concurrence of two wills. What that means is that a donation inter vivos is not effective unless and until the donee signifies his consent. The donor’s act, standing alone, is but an offer of donation; if the donee does not respond with an acceptance, then there’s no donation.

2) It contains no reference to the most fundamental characteristic of donations inter vivos: liberality.

The definition of donation inter vivos set out CC art. 1468, curiously enough, omits any express reference to what, in the unanimous judgment of civil law scholars, is foremost among the distinctive features of this kind of contract, namely, that it has a "gratuitous cause." See CC art. 1967, ¶ 1 (defining cause). Comparable articles in modern civil codes, by contrast, uniformly define donations inter vivos, in express terms, as gratuitous. See, e.g., Código Civil Brasileiro art. 1165 (“A donation is considered to be the contract whereby one person, out of liberality, transfers goods or advantages from his patrimony to that of another, who accepts them.”); Codice Civile Italiano art. 769 ("Donation is the contract whereby one party, in a spirit of liberality, enriches the other . . . ."); Código Civil Mexicano art. 2332 (“Donation is a contract whereby a person transfers to another, gratuitously, a part or the totality of his present goods.”); Code Civil du Québec art. 1806 ("Donation is the contract whereby one person, the donor, transfers the ownership of a thing by gratuitous title to another person, the donee . . . .’’); Гражданский Кодекс Российской Федерации [Russian] ст. 572 (Jason Kilborn tr. 2001) (“By a contract of donation, one of the parties (the donor) gratuitously [i] transfers or binds himself to transfer to the other party (the donee) [a] a thing into that party’s patrimony, [b] a patrimonial right (demand) against himself or a third party, or [ii] frees or binds himself to free a thing [of the donee] from a real right owed to himself or a third party.’’)

b) Respects in which the definition is misleading

1) The requirement that the disposition be made “at present”

CC art. 1468 (1870) provides that the "deprivation" entailed in a donation inter vivos must be made "at present." Though this proposition is true in the highly technical sense in which its authors understood the terms “at present,” it is not true in the sense in which the typical "man on the street" understands them.

There are, in fact, a number of gratuitous dispositions that qualify as donations inter vivos and yet do not involve a “present” deprivation, at least in the common sense of the
word. One example is a donation subject to a suspensive term, e.g., “I give you my car, effective two years from now.” Another example is a donation subject to a suspensive condition, e.g., “I give you my house if your ailing father dies of his illness.” Most laypersons would undoubtedly say that dispositions such as these take place “in the future.”

For one trained in legal theory, these examples, of course, present no problem. Such a person understands (i) that, in the case of an obligation subject to a suspensive term, the obligation itself already exists in full and it is only the execution (performance) of the obligation that is postponed and (ii) that, in the case of an obligation subject to a suspensive condition, even though the obligation is not yet “mature,” it nonetheless exists, if only in inchoate form. In both cases, such a person would say, there is an “at present” obligation on the part of the donor.

It is in this sense that the “at present” requirement must be understood. All that is necessary is that the donor bind himself (or, in other words, that he undertake an obligation) right now to give and ultimately to deliver a thing. It is not necessary, however, that possession or even ownership of that thing be transferred right now.

2) The requirement that the disposition be made “irrevocably”

CC art. 1468 (1870) provides that the "deprivation" entailed in a donation inter vivos must be made "irrevocably." This proposition, like the last, is misleading. The problem here, however, is not so much equivocation as it is incompleteness.

The problem comes into focus when one sets the text of CC art. 1468 alongside that of CC art. 1559. Whereas the former states that a donor inter vivos must, of necessity, bind himself “irrevocably,” the latter states that a donation inter vivos can be “revoked or dissolved.” We seem to have a contradiction.

As it turns out, however, the contradiction is one of appearance only. The source of the problem is that the term “irrevocable” is used in quite different senses in the two articles. “Irrevocable” in CC art. 1468 means irrevocable at will whereas “revocable” in CC art. 1559 means revocable for cause. Between the proposition “the donor can’t revoke at will” and “the donor can revoke for cause,” there is, of course, no contradiction.

The article 1468 “irrevocability” requirement, then, comes down to this: If the would-be donor reserves to himself the power to “unbind” himself at his unfettered discretion, then there’s no “donation.”

1] Definition (CC art. 1468)

What’s a donation inter vivos? Re-read CC art. 1468.

2] Distinctive characteristics

What are the distinctive characteristics of donations inter vivos, in other words, how are they different from donations mortis causa?
a) Characteristics of the juridical act: multilateral

What kind of juridical act is entailed in a donation *inter vivos?* What does CC art. 1468 suggest? Why does it matter? Consider this hypothetical:

DH 9. Pascal, a widower, executes an authentic act that reads in part as follows: "I, Pascal, do hereby donate my house and lot to my daughter, Lil-Fille." He then gets Jean Sot, his courier, to run the act over to Lil-Fille's place. Before Jean Sot gets there, Pascal dies of a stroke. Has a donation taken place between Pascal and Lil-Fille? Why or why not?

b) Characteristics of the transfer

1) Effectivity: at present

A donation *inter vivos* must be effective "at present." CC art. 1468. What does that mean?

* Transfer subject to a temporal modality

What should one say of a purported donation *inter vivos* that is subject to some sort of temporal modality, e.g., a term or a condition? Is it effective "at present"? Why or why not? Consider the following hypotheticals:

† Terms

DH 10. Pascal wants to give Ti-Boy his antique car effective upon his (Ti-Boy's) death. Instead of making out a will, Pascal makes out an authentic act of donation, in which he purports to give Ti-Boy the car as of the moment of Pascal's death. Ti-Boy, in turn, makes out an authentic act of acceptance. Is this a valid donation *inter vivos?* In particular, does it entail an "at present" disposition? Why or why not?

† Conditions

‡ Suspensive

DH 11.1 A wants to give B his antique car effective upon his (A's) death, provided that B survive him. Instead of making out a will, A makes out an authentic act of donation, in which he purports to give B the car as of the moment of A's death, on the condition that, at that moment, B shall still be alive. B, in turn, makes out an authentic act of acceptance. Is this a
valid donation *inter vivos*? In particular, does it entail an "at present" disposition? Why or why not?

‡ Resolutory

DH 11.2 A wants to give B his antique car now, but wants to get the car back upon B’s death so he can enjoy it thereafter. A makes out an authentic act of donation, in which he purports to give B the car, but provides for resolution of the donation if B predeceases A. B, in turn, makes out an authentic act of acceptance. Is this a valid donation *inter vivos*? In particular, does it entail an "at present" disposition? Why or why not?

2} Reversibility: irrevocable except for cause (CC arts. 1468 & 1559 et seq.)

According to CC art. 1468, a donation *inter vivos* must be effectively “irrevocable.” Really? What does that mean? Consider the following hypotheticals:

DH 12.1. Out of affection for his son Renard, Olide gives Renard his best pirogue (which Olide delivers to Renard by hand). As Olide hands the pirogue over to Renard, however, Olide makes this stipulation: “I reserve the right to come get this back from you any time I want to.” A few weeks after the “donation” is made, Olide dies. He is survived not only by Renard, but also by his daughter, Lapin. Lapin, claiming that the pirogue still belonged to Olide when he died, demands half of it. Renard, claiming that the pirogue belonged to him when Olide died, refuses. Who’s right? Why? See CC art. 1468.

DH 12.2. Out of affection for Renard, his son, Olide, by authentic act, donates his estate, Terre Puante, to Renard. Renard, in turn, accepts the donation, also by authentic act. A few weeks after the donation is made, Renard and Olide have an argument, during the course of which Renard curses, strikes, and shoots Olide, evidently with the intent to kill him. Olide now wants to get his estate back from Renard can he do it? Why or why not? See CC arts. 1468, 1559, & 1560.

b) Donations mortis causa (legacies)

Re-read CC art. 1469. Then read the following:

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*Theoretical & Practical Commentary on The Law of Donations*  
(Civil Code, Book III, Title II)
One should note, however, that scholars in the French civil law tradition have long proposed that the rules on contracts should be applied “by analogy” to unilateral juridical acts, a proposal that the courts in jurisdictions within that tradition (including those in Louisiana) have in the main accepted.

Caveat: If we followed this reasoning to its logical conclusion, then we would say that the act of renunciation itself constitutes a disposition of a thing, so that it might be treated as a donation of sorts.

11 One should note, however, that scholars in the French civil law tradition have long proposed that the rules on contracts should be applied “by analogy” to unilateral juridical acts, a proposal that the courts in jurisdictions within that tradition (including those in Louisiana) have in the main accepted.

12 Caveat: If we followed this reasoning to its logical conclusion, then we would say that the act of renunciation itself constitutes a disposition of a thing, so that it might be treated as a donation of sorts.
2) It doesn’t specify that every donation mortis causa is a formal juridical act.

There’s another characteristic of the “act” entailed in every donation mortis causa about which CC art. 1469 is strangely silent: the act must be “formal.” Unlike donations inter vivos, some of which can be accomplished without any formality, all donations mortis causa depend for their effectivity upon the accomplishment of some formality (called a “testament”). There is, then, no such thing as an “oral” or “tacit” or “manual” donation mortis causa.

b The definition contains no reference to the most fundamental characteristic of donations mortis causa: liberality.

Just like the definition of donations inter vivos set forth in CC art. 1468, that of donations mortis causa set forth in CC art. 1469 makes no mention of the most fundamental requirement for such a donation, namely, that it spring, at least in part, from a “gratuitous cause.” The drafters of modern civil codes have avoided this mistake. See, e.g., Québécois Civil Code art. 1806 (“The testament is a unilateral juridical act . . . by which the testator disposes, by liberality, of all or part of his goods . . . .”)

1] Definition

What is a donation mortis causa? Re-read CC art. 1469.

2] Distinctive characteristics

What are the distinctive characteristics of donations mortis causa, in other words, how are they different from donations inter vivos?

a] Characteristics of act: unilateral juridical act

What kind of juridical act is entailed in a donation inter vivos? What does CC art. 1468 suggest?

b] Characteristics of transfer

1) Effectivity: at death

A donation mortis causa is effective at death. CC art. 1469. A startling revelation!

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on its own. But here the logical rigor of our law breaks down. According to CC art. 954, when a donee renounces a donation mortis causa, he is deemed (fictitiously) never to have been a donee. This is the so-called principle of the “retroactivity” of renunciations. Lex non logica, sed lex.
2) Reversibility: freely revocable

DH 13. Ti-Boy and Desirée, who are very much in love, decide to marry. As a token of their love for one another, each promises the other, in writing, (i) that, once they are married, he/she will make out a testament in which he/she will leave all of his/her property to the other and (ii) that he/she will “never, ever, ever, never” thereafter change that testament. In due course, they are married and they make out the promised testaments. But then the marriage sours and, before long, Desirée leaves Ti-Boy and moves in with her “personal trainer” at the gym, Arnold. Not long thereafter, Desirée makes out a new testament in which she (i) revokes all her prior testaments and (ii) leaves of her property to Arnold. Then Desirée dies. When Arnold attempts to probate the second testament, Ti-Boy (i) objects, asserting that the second testament was “invalid” because, in making it out, Desirée “breached her contract with me not to change her first testament” and (ii) demands that the first testament be probated instead. What result? Why?

c) Donations à cause de mort

1] Definition

Read the following doctrinal material:

10 Charles Aubry et Charles Rau, DROIT CIVIL FRANÇAIS
§ 645, at 11-12 (6th ed. 1954; Carlos Lazarus tr. 1969)

Of donations à cause de mort

As a general rule, gratuitous dispositions of all or of a part of one's patrimony, or of individual things contained therein, can be made only by donation inter vivos or by testament. In other words, a disposition by gratuitous title, regardless of the subject matter thereof, is invalid unless made with the exterior solemnities and the intrinsic conditions prescribed for donations, inter vivos and testaments: Art. 893.

Thus, the law no longer recognizes the donation à cause de mort as formerly understood, that is to say, as constituting a kind of gratuitous disposition different from the donation inter vivos and from the testament.

In Roman law, the donation à cause de mort was a donation which became definitive only upon the death of the donor prior to that of the donee, and which was deemed as never having been made if the donee predeceased the donor. The prior death of the donor could be stipulated as a suspensive condition, and his survivorship as a resolutory condition of the donation. In the first case, it conferred only an eventual right; in the second, it conferred an actual right subject however, to resolution.

In the absence of a stipulation to the contrary, the donation à cause de mort was essentially revocable at the pleasure of the donor. A stipulation providing for its
irrevocability, however, did not divest it of its character as a donation à cause de mort if the effectiveness thereof remained subordinated to the prior death of the donor. If not, it was considered as a donation inter vivos in every respect.

The regions of written law had recognized the donation à cause de mort with the characteristics and effects above stated. But in the great majority of states governed by customary law, these donations were not regarded as constituting a special kind of disposition. They were there classified, in form and in substance, with the legacy, and could not be valid as a revocable donation at the will of the donor by reason of the maxim donner et retenir ne vaut. It was from this point of view that donations à cause de mort were rejected by the redactors of the Civil Code.

It follows from this historical sketch that the provisions of the Code cannot be considered as prohibiting a donation made subject to the suspensive condition that the donor predeceases the donee, or subject to the resolutory condition that the donor survives the donee, if in addition there is no stipulation providing for the revocation thereof at the pleasure of the donor. But it should also be noted that a donation, whether or not subordinated to the prior death of the donor, will be stricken with nullity, not so much as a donation à cause de mort, but as contrary to Art. 944 [La. Civ. Code art. 1529] if the donor has reserved to himself the faculty of revoking it at will . . .

2] Distinctive characteristics

a] Characteristics of act: multilateral juridical act

b] Characteristics of transfer:

1} Effectivity: at death

2} Reversibility: revocable

3] Illustrations

DH 14. Three persons, A, B & C, buy a savings certificate from Bank. The certificate, which describes the holder as "A and/or B and/or C," directs Bank "to act pursuant to any one or more of the joint [owner's] signatures and . . . to any one or the survivor or survivors at any time." In addition, the certificate indicates that the joint owners and the Bank agree that "any funds placed in or added to the account by any one of the parties are and shall be conclusively intended to be a gift and delivery at that time of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account." Sometime later A and B die together in a freak boating accident. C, as sole survivor, claims to own 100% of the certificate. Is C right? Why or why not? See the jurisprudence that follows.

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Succession of Grigsby v. Hamilton,
219 So.2d 832 (La. App. 2d Cir. Mar. 3, 1969)

BOLIN, JUDGE

On January 3, 1967, a $15,000 savings certificate was purchased from First Federal
Savings & Loan Association of Winnfield and placed in the name of 'Mr. or Mrs. Lee J.
Grigsby and/or James Hamilton'. At the time of purchase Mr. and Mrs. Grigsby were
married and Mr. Grigsby bought the certificate with community funds. On June 26, 1967,
Mr. Grigsby died and his wife died on July 16, 1967. Each spouse died testate but there
was no disposition made of the savings certificate. The succession of Mr. Grigsby was
opened and the tableau of distribution was filed listing the certificate as community
property and as an asset of the succession. James Hamilton filed an opposition claiming
ownership of the certificate. For oral reasons the trial judge overruled the opposition and
Hamilton appeals.

Hamilton's claim is based on an alleged written contract entered into between First
Federal and the payees named in the certificate at the time of the purchase. The sole issue
is whether the certificate should be included as an asset of the succession of Mr. Grigsby
or should be held to belong to James Hamilton.

The pertinent provisions of the contract relied on by opponent are as follows:

'As joint tenants with right of survivorship and not as tenants in common, and
not as tenants by the entirety, the undersigned hereby apply for a savings
account in First Federal Savings and Loan Association of Winnfield and for the
issuance of evidence thereof in their joint names described as aforesaid. You
are directed to act pursuant to any one or more of the joint tenants' signatures,
shown below, in any manner in connection with this account and, without
limiting the generality of the foregoing to pay, without any liability for such
payments, to any one or the survivor or survivors at any time. * * * It is agreed
by the signatory parties with each other and by the parties with you that any
funds placed in or added to the account by any one of the parties are and shall
be conclusively intended to be a gift and delivery at that time of such funds to
the other signatory party or parties to the extent of his or their pro rata interest
in the account.'

The thrust of appellant's argument is that this is a suit on a contract; that by the
provisions of the contract Hamilton became the owner of the certificate upon the death
of Mr. and Mrs. Grigsby; and that the power of parties to contract is limited only by
Louisiana Civil Code Article 2031, which provides:

Every condition of a thing impossible, or contra bonos mores (repugnant to
moral conduct) or prohibited by law, is null, and renders void the agreement
which depends on it.

The only Louisiana statute cited authorizing payment to alternative persons under
similar savings certificates is La.R.S. 6:751:

When shares have been subscribed for, or shall hereafter be subscribed for, or
when any certificate of any class or evidence of indebtedness shows the
investment of funds in any association, in the names of two or more persons,
payable to either, or payable to either or some of the survivors, such funds or
any part of them or any interest or dividend on them may be paid, on due
delivery of the certificate, book, or other evidence of indebtedness, to either of
the persons, whether the other or others are living or not; and the receipt or
acquittance of the person paid is a complete release and discharge of the
association for any payment made, with respect to anyone.

This statute is solely to protect the associations making payments of accounts listed
in alternative names and makes no change in the laws relating to inheritance or donations
inter vivos or donations mortis causa. In Re Mulqueeny's Succession, 156 So.2d 317
(La.App. 4 Cir. 1963 writ den.).

Counsel for appellant concedes in brief the savings certificate is an 'incorporeal
thing'. It was undisputed that Mr. Grigsby did not make a donation mortis causa of the
certificate to Hamilton in conformity to the Louisiana law. Therefore, we think that any
act purporting to transfer ownership of the savings certificate to Hamilton must comply
with the following articles of the Louisiana Civil Code:

Art. 1468. A donation inter vivos (between living persons) is an act by
which the donor divests himself, at present and irrevocably, of the thing given,
in favor of the donee who accepts it.

Art. 1536. An act shall be passed before a notary public and two
witnesses of every donation inter vivos of immovable property or incorporeal
things, such as rents, credits, rights or actions, under the penalty of nullity.

Art. 1538. A donation inter vivos, even of movable effects, will not be
valid, unless an act be passed of the same, as is before prescribed. Such an act
ought to contain a detailed estimate of the effects given.

Art. 1539. The manual gift, that is, the giving of corporeal movable
effects, accompanied by a real delivery, is not subject to any formality.

As the above articles were not complied with, any provisions of the contract in
conflict therewith are null and Hamilton acquired no title to the savings certificate. The
argument as to the legal effect flowing from a 'joint tenancy' under the common law is not
relevant in the face of positive Louisiana law on the subject.

DH 15. By authentic act, A donates a farm to B. The act provides that if B shall die before
A, then ownership of the farm shall revert to A. B accepts by authentic act. Is the donation a
prohibited donation à cause de mort? Why or why not?

DH 16. By authentic act, A donates a farm to B. The act provides that the donation is
contingent on B's outliving A. B accepts by authentic act. Is the donation a prohibited donation
à cause de mort? Why or why not? See the jurisprudence that follows.

Succession of Sinnott v. Hibernia Nat'l Bank,
105 La. 705, 30 So. 233 (June 3, 1901)
PART I: DONATIONS

Syllabus by the Court

1. There can be in Louisiana no legal manual gift cause mortis of a movable, whether it be a corporeal or an incorporeal movable.

2. Donations causa mortis differ from donations mortis causa. The former are not authorized in Louisiana by its law. Property can neither be acquired nor disposed of gratuitously unless by donations inter vivos or mortis causa.

NICHOLLS, C. J.

Mrs. C. Otto Weber, as the testamentary executrix and residuary legatee of Miss Emily C. Sinnott, claims that the ownership of certain 12 shares of stock of the Hibernia National Bank is in the succession of Miss Sinnott, and that the certificates for said shares are in the possession of Mrs. Langtry, who asserts ownership of the shares themselves. She brings this suit to have said ownership decreed to be in said succession, and to have Mrs. Langtry directed to deliver the certificates to her in her said capacity. Mrs. Langtry claims ownership of the shares under alleged gift to her from Miss Sinnott prior to her death.

Mrs. Langtry, as a witness on the stand, testified: That she was the owner of the shares of stock claimed, covered by certificates Nos. 50 and 128. That she had been in possession of the certificates since July, 1896, uninterruptedly. That they were handed and given to her by Miss Sinnott, and she had them in her possession from that time up to the time of testifying. That she and Miss Sinnott had a conversation with reference to the certificates. Miss Sinnott told witness she should keep them, and she gave them to her, saying: 'They are yours. At least, after my death they are yours.' During Miss Sinnott's lifetime witness did not consider she had anything to do with them. She said, 'After my death I want you to have them,' and she gave them to witness. That was in 1896. The ownership of this stock was to become absolute in witness at the time of Miss Sinnott's death, but before that she had nothing to do with same. Witness collected no dividends paid upon the stock. Mrs. Weber was aware that the certificates were in witness' possession before she became executrix. She became aware of that fact about a year before Miss Sinnott's death, in 1897 or 1898. She saw them in witness' possession. She knew that she had them. . . . Miss Sinnott lived with witness from 1878 up to six months of the time of her death. She boarded with witness, and paid her board. . . . Witness was not related to her, nor was Mrs. Weber. She was an old friend of witness, and had known witness since childhood. Witness paid her every attention when she lived with her. There was scarcely a day that she was out of her sight. She was with her all the time. She was very fond of witness, and went to live with her by preference. In addition to this property, Miss Sinnott gave her a bedroom set and some table silver, which she said should be witness' after her death. That also was in witness' possession. She had possession of it during Miss Sinnott's life. A part of it was taken during Miss Sinnott's life, but, no matter what she asked for, witness would have given it to her during her lifetime. Mrs. Weber knew witness also had the movables and silver. On cross-examination witness produced the certificates and handed them to counsel of the
executrix. They were in the same condition all the time. There were several dividends declared on these certificates while they were in witness' possession. She [Langtry] made no effort to collect any of them. Witness recognized them as belonging to Miss Sinnott. After her death they belonged to witness. Before her death, of course, they did not. Miss Sinnott, or somebody else for her, collected the dividends, because it was understood they were not witness' until after Miss Sinnott's death, just as the bedroom set and the silver. She (Miss Sinnott) said to witness, 'I will give them to you after my death.' Naturally, she [Sinnott] was at liberty to take them [the certificates] at any time. It was understood between witness and Miss Sinnott that the title of the stock remained with her [Sinnott] until she died, and that witness' right arrived at the moment of her death. There was no mistake about that. . . . She [Sinnott] went into witness' room and said: 'Anna, I want to do something for you when I die. I want you to keep these, and when I die this bedroom set and silver, and anything else that is in your possession when I die, you can keep.' They spoke about it several times, witness said. 'I want you to keep them,' Miss Sinnott said. This was given to witness some time after Miss Sinnott had made her will. . . . Witness did not expect Miss Sinnott would have a clause in her will to carry out this intention. She gave them to witness just as she did the silver and the bedroom set. Being asked whether the certificates were given to her only in the contingency that they should be witness' after her (Miss Sinnott's) death, she answered, 'That is right.' Witness did not know who they belonged to if witness had died first. That was not discussed. . . .

The executrix (appellant here) urges . . . that a donation inter vivos must divest in the present and irrevocably the interest of the donor, in behalf of the donee. Any reservation of interest or retention of control by the donee nullifies the donation. Rev. Civ. Code, arts. 1467, 1468, 1529-1533; Fuzier-Hermann Code Civil Annote, art. 946, notes 1, 2, 5; 14 Am. & Eng. Enc. Law (2d Ed.) p. 1015; Dawson v. Holbert, 4 La. Ann. 36; Haggerty v. Corri, 5 La. Ann. 433; Carmouche v. Carmouche, 12 La. Ann. 721; Tillman v. Mosely, 14 La. Ann. 710; Maduel v. Tuyes, 31 La. Ann. 485; Fontain v. Manuel, 46 La. Ann. 1378, 16 South. 182. That, when it is stipulated that ownership is not to pass until the death of the donor, it is a donation mortis causa, and, being verbal, such a transaction is an attempt to make a verbal will, and hence nugatory. Rev. Civ. Code, arts. 1467, 1574, 1576, 1595; Hart v. Clark's Ex'rs, 5 Mart. 614; Rost v. Henderson, 4 Rob. 468. . . .

Counsel [for appellee Langtry] further say: 'It may be well to note here that the donation causa mortis of the common law is not the donation mortis causa of our law,—the civil law. With us the donation mortis causa can be made only by last will and testament. Under the common law, however, three kinds of donations are made known: (1) The donation inter vivos; (2) the donatio causa mortis; (3) that by last will and testament. The second is a gift during life, but in expectation of death, and not to take effect until after the death of the donor.'

It will thus appear that the donatio causa mortis of the common law is but the donation inter vivos established by our Code with this exception: that the first was not complete until the death of the donor, while the second becomes effective at once. There is nothing, however, in our law which prevents a donor from imposing upon his donation inter vivos the condition that it should not be effective until after the death, as was
perhaps done in the present case; and we therefore have a case before us in which all the doctrines of the cited cases as to whether a certificate of stock is such a chattel as may be the subject of a donation inter vivos without other formality than the mere giving, accompanied by delivery, apply with full force. Counsel contends that the words used by Miss Sinnott, referring to the certificates, 'After my death they are yours,' giving them the greatest weight, have simply the effect of imposing upon a donation inter vivos what might be termed a suspensive condition. . . .

Under the heading of 'Donations Inter Vivos (between Living Persons)' and 'Mortis Causa (in Prospect of Death),' the Code declares in article 1467 that property can neither be acquired nor disposed of gratuitously, unless by donations inter vivos or mortis causa, made in the forms hereafter established. It then declares (article 1468) that a donation inter vivos (between living persons) is an act by which the donor divests himself at present and irrevocably of the thing given, in favor of the donee who accepts it; that a donation mortis causa (in prospect of death) is an act to take effect when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable. Article 1469. Article 1570 declares that 'no disposition mortis causa shall henceforth be made otherwise than by last will and testament. Every other form is abrogated.' And article 1576, that the custom of making verbal testaments (that is to say, resulting from the mere deposition of witnesses who were present when the testator made known to them his will, without having committed it or caused it to be committed to writing) is abrogated. Article 1536 provides that an act shall be passed before a notary public and two witnesses, of every donation inter vivos of immovable property or incorporeal things, such as rents, credits, rights, or actions, under the penalty of nullity; and article 1538 provides that a donation inter vivos, even of movables, will not be valid unless an act be passed of the same as is before prescribed. Such an act ought to contain a detailed estimate of the effects given. But article 1539 declares that the manual gift (that is, the giving of corporeal movable effects, accompanied by a real delivery) is not subject to any formality.

The French writers inform us that formerly the French law, in addition to donations inter vivos and mortis causa, authorized another form of gratuitous disposition of property,—the donation causa mortis,—but that this character of donation had been abrogated. We quote on this subject from Dalloz & Verge, under article 893 of the Code Napoleon:

'L'ancien droit, outre la donation entre vif et le testament, admettait encore une autre forme de disposer,--la donation a cause de mort.' Cette liberalite participait a la fois du testament, en ce qu'elle etait faite en vue de la mort, et en ce que, toujours revocable, elle ne devenait definitive qu'au deces du donateur, et de la donation, en ce qu'elle etait faite sous la forme d'un contrat bilateral, et pouvait etre faite avec tradition. Le Code Civil ne reconnaissant que deux modes de disposer de ses biens a titre gratuit, la donation entre vifs et le testament, a, par cela meme, . . . proscrit les 'donations a cause de mort.' Mais si un acte qualifie 'donation a cause de mort' presentait les caracteres et les formes d'un testament, il vaudrait comme tel, quelle que fut son analogie avec l'ancienne 'donation a cause de mort.' En
supposant qu’une donation à cause de mort, faite et acceptée dans un testament en forme authentique, soit valable, d’après la règle, ‘Utile per inutile non vitiatur,’ elle ne vaudrait que comme disposition testamentaire, et la même raison, par conséquent, ne peut s’étendre au don manuel à cause de mort, l’écriture étant de l’essence due testament. Si la donation à cause de mort, faite par un acte en forme, est radicalement nulle, il en doit être ainsi, a plus forte raison, du don manuel à cause de mort, qui n’est qu’une donation à cause de mort, moins la garantie de l’écriture et de l’authenticité.”

A verbal donation causa mortis of a movable, whether it be a corporeal movable or an incorporeal movable, is invalid under our laws. According to the version given by Mrs. Langtry herself, this was the character of the donation made to her by Miss Sinnott. Appellee claims that the donation was a manual donation inter vivos, but it cannot be at one and the same time a donation inter vivos and a donation causa mortis. In order to have been a manual gift inter vivos, it was essentially necessary that the donor should have ‘divested herself at once and irrevocably of the thing given, in favor of the donee who accepted it.’ The moment the effect of the donation was to be postponed to the death of the donor, it became an unauthorized donation causa mortis. It is a mistake to suppose that, because an understanding should have been reached between two living persons that the ownership of the property of the one should vest at her death in the other, the agreement evidenced a donation inter vivos. It is the thing done by the living persons, and not the fact that what was done should have been transacted between living persons which gives character to the act.

* * *

We are constrained to recognize that the ownership of the shares of stock here involved has never passed from Miss Emily C. Sinnott, and that the same is now in the succession of Miss Sinnott. Matters are not before us in such a manner as to authorize us

13 Translation: “The law of the ancien régime recognized alongside the donation inter vivos and the testament still another form of disposition – the ‘donation à cause de mort.’ This liberality partook, at once, [i] of the nature of a testament, in that it was made in view of death and that, because it was always revocable, it became definitive only upon the death of the donor, and [ii] of the nature of a donation inter vivos, in that it was made in the form of a bilateral contract and could be made with delivery. The Code Civil, which recognizes only two modes whereby one may dispose of one’s goods gratuitously – the donation inter vivos and the testament –, in so doing prohibits donations à cause de mort. But if an instrument entitled “donation à cause de mort” were to exhibit the characteristics and the form of a testament, it would be valid as such [i.e., as a testament], whatever may be its similarity to the old ‘donation à cause de mort.’ Supposing that a donation à cause de mort, made and accepted in a testament in authentic form, would be valid (according to the rule “that which is useful is not vitiated by that which is not useful”), it would be valid only as a testamentary disposition. As a consequence, the same rationale cannot be extended to a manual gift à cause de mort, for the writing is of the essence of a testament. If the donation à cause de mort, though made in an instrument in the form [of a donation inter vivos], is radically null, it must be the same a fortiori with a manual gift à cause de mort, which is nothing but a donation à cause de mort without the guarantees of a writing and of authenticity.”
to deal with the rights of Mrs. Otto Weber as residuary legatee. Her rights are reserved, to be determined hereafter.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the succession of Miss Emily C. Sinnott is the legal owner of the shares of stock of the Hibernia National Bank of New Orleans which form the subject of this litigation; and it is further ordered and adjudged that Mrs. Annie Thompson, wife of George Langtry, defendant herein, be, and she is hereby, ordered to deliver the certificates for said shares of stock to Mrs. Otto C. Weber, as executrix of the succession of Miss Emily C. Sinnott. . . .

2) Prescription & proscription

Whereas donations inter vivos and mortis causa are generally permitted and only extraordinarily prohibited, donations à cause de mort are generally prohibited and only extraordinarily permitted. Under current law, donations à cause de mort may be made only in “marriage contracts.” See CC arts. 1735 & 1736.

b Second scheme: degree of gratuity

Donations can be classified on the basis of the degree (extent) of gratuity (liberality) that they involve. Though it is possible for a donation to spring from a gratuitous cause and nothing else, it is also possible for a donation to spring from mixed causes, that is, to have, at once, both a gratuitous and an onerous cause. In the latter case, however, the gratuitous cause must be predominant; if it is not, then the act of disposition does not deserve the label “donation.”

1) The scheme of the Civil Code

a) Description

This second scheme, as it is developed in the Civil Code, is found in articles 1523-1526. Divided up on this basis, “donations” fall out into two categories: purely gratuitous and not purely gratuitous (in other words, mixed).

1} Purely gratuitous (CC art. 1523, ¶ 1)

a} Definition

A purely gratuitous donation is one in which the donor has no cause other than to confer a gratuity or, to put the point negatively, in which he is not motivated by the desire to receive (or to pay for) some quid pro quo.
b) Illustration

DH 17. D gives his son, S, a car for his 18th birthday, with no strings attached. Like most 18 year old sons, S has done nothing for D in the way of providing uncompensated services. Is there any doubt that this is a purely gratuitous donation? Why or why not?

2) Not purely gratuitous

a) “Onerous” donations

1/ Definition

What, according to CC art. 1523, ¶ 3, is an “onerous” donation?

2/ Illustration

DH 17.1. D gives his son, S, a car, but with this proviso: that he must take care of G, his grandmother (D’s mother), “until her death.” The value of the car is $10,000. The estimated cost of caring for D is $10,000. And, as it turns out, that is precisely how much caring for G ends up costing. Was the disposition of the car by D to S a “donation”? If so, what kind was it? See CC art. 1523, ¶ 3.

b) “Remunerative” donations

1/ Definition

What, according to CC art. 1523, ¶ 4, is a “remunerative” donation?

2/ Illustration

DH 17.2. D gives his son, S, a car. The motive behind the donation, according to D, was “to repay you for all the help you’ve given me at the office these past few years.” (S had answered telephones, picked up deliveries, etc., all for “free”.) The value of the car is $10,000. The value of the services that S rendered is also $10,000. Was the disposition of the car by D to S a “donation”? If so, what kind was it? See CC art. 1523, ¶ 3.

b) Criticism, condemnation, & rejection

Theoretical & Practical Commentary
on
The Law of Donations

-33-
B Lack of proper systematization

There is yet another problem with the scheme, one that, to my mind, is far more serious: the scheme reflects poor legislative technique, so poor, in fact, that it is apt to cause confusion. The cause of the trouble is that the second and third of the three "kinds of donations" inter vivos, unlike the first, includes contracts that are not really donations inter vivos at all or, at the very least, don't "behave" at all like such donations, that is, don't obey any of the special rules for "donations inter vivos" that one finds in Book III, Title 2, Chapter 5 of the Civil Code. To put it another way, it turns out that some "onerous donations" and some "remunerative donations," despite what one might at first assume--the Civil Code calls them "donations," doesn't it?--aren't governed by the rules on donations after all! That this is so becomes clear once one reads CC arts. 1524, 1525, and 1526, the upshot of which is that only some “onerous donations” and only some “remunerative donations” (i) are “real donations,” CC arts. 1524 and 1525, and (ii) as such, are subjected to the “rules peculiar to donations.” CC art. 1526.

One is entitled to ask what is the point of affixing the label "donation" to something that, at the end of the day, falls entirely outside the domain of the special rules for "donations." It is as if someone, having set out to establish special regulations for some phenomenon $x$ (which he calls "donations"), decided on the following plan. First, establish a category so broad that it refers not only to phenomena that will be subjected to the special regulations (contracts that obey the rules for donations, including contracts that involve the giving of a thing subject to a charge or in gratitude for past services rendered), but also to phenomena that, though perhaps closely related to the first, will not be subjected to those regulations (contracts that involve the giving of a thing subject to a charge or in gratitude for past services rendered, but that, nonetheless, do not obey the rules for donations). Second, divide this category into several subcategories, some of which entail only phenomena that will be subjected to the special regulations ("pure donations") and others of which entail some phenomena that will and other phenomena that will not be subjected to those regulations ("onerous donations" and "remunerative donations"). Third, establish a cross-cutting subcategory called real $x$ ("real donations") that entails (i) the phenomena in the first of the subcategories in toto ("pure donations") and (ii) those phenomena in the other subcategories of the first set of subcategories that will be subjected to the special regulations ("onerous donations" and "remunerative donations" that obey the rules for donations). Fourth, establish a criterion for distinguishing real $x$ ("real donations") from pseudo-$x$ ("onerous transfers") within the subcategories in the first set of subcategories (other than the first subcategory). Fifth, apply the special regulations to the cross-cutting subcategory only--real $x$ ("real donations"). Wow! To call such a scheme Kafka-esque is to indulge in understatement.

This scheme could, perhaps, be justified if it were impossible to construct a scheme that is simpler, more attuned to the natural working of the mind, and more conformed to common usage. But it is not impossible! Indeed, an alternative scheme has been
available, or at least imaginable, since the Classical Period of the Roman civil law! Here it is. First, use the label “mixed contracts of disposition” (the Romans called them negotium mixtum cum donacione, i.e., sale mixed with donation) to refer to all contracts in which at least one of the parties acts from “mixed motives,” that is, is motivated in part by the desire to “do something nice” and in part by the desire to “get something in return.” (Note that these contracts would include all those that today are confusingly called “remunerative donations” and “onerous donations.”) Second, reserve the label “donation inter vivos” for only those mixed contracts in which the desire to “do something nice,” i.e., the gratuitous cause, is “predominant.” (Note that these contracts would include all those that today are confusingly called “real donations.”) Third, establish some criterion for determining when the gratuitous cause in a mixed contract “predominates” (e.g., the “exceeds by one-half” formula of CC art. 1526).

2) The scheme as scientifically reconstructed

a) Categories of "mixed" acts of disposition in general

Our legislation, following traditional civil law doctrine, distinguishes two types of “not purely gratuitous” or “mixed” dispositive acts: onerous and remunerative.

1] Onerous

What is an “onerous” mixed contract? What is a "charge"? Read CC art. 1523, ¶ 2 and its source, Toullier:

3 C.-B.-M. Toullier, DROIT CIVIL FRANÇAIS n° 185, at 112-13
(J.-B Duvergier rev., 6th éd. 1848)

185. Onerous donations are those that are made under charges imposed on the donee as a condition for the donation. The donor can impose on the donee such charges as he judges to be appropriate, provided that they contain nothing contrary to law or to good morals.

... [Unless "the value of the object notably exceeds that of the charges imposed on the donee,"] it is a true exchange, it is an innominate contract -- do ut des [I give so that you will give] or do ut facias [I give so that you will do] --, which is not subjected to the solemnity requirements for the validity of donations, such as the necessity of a notarial act . . . and of an express acceptance . . . The Code does not submit these dispositions to revocation . . . for the cause of ingratitude, because they are not liberalities: like all [other] contracts, it can be revoked only on account of the nonperformance of the charges that are the condition for it . . . .
When the value of the object given notably exceeds that of the charges imposed on the donee, it is a mixed contract that participates in the nature of contracts under gratuitous title . . . . And if the disposition is made in fraud of the forced heirs or of the law, so as to elude the dispositions regarding the quotient of the disposable portion or those regarding the incapacities of persons, there will be a reduction of the disposition up to the excess value of the object that is given.

a] Obligation that benefits the donor himself

There can be no doubt that an obligation the performance of which would provide a direct economic benefit to the donor himself would suffice. That is the case, for example, with what might fairly be termed the “classic” onerous donation, namely, that in which the donation is made subject to the stipulation that the donee take care of the donor for the rest of the donor’s life.

But what if, though there’s undeniably some benefit to the donor, the only immediate benefit is merely “moral” or “social” and, if there’s any economic benefit at all, it is only indirect, e.g., “free” advertising? Consider, for example, the case in which a corporation donates money to some governmental entity, public institution, or charitable organization to fund the construction of a building, to defray the cost of putting on a certain public event, etc. on the condition that the building, event, etc. be named after it. Shouldn’t such a “donation” (mixed act?) be considered “onerous”? Why or why not?

Jacques Flour & Henri Soileau,

[1. The problem. – ] An act that presents a personal interest for the disposing party. – There is uncertainty [regarding proper classification] . . . when the disposing party is inspired by the quest [to promote] a personal interest, even if that is not necessarily his sole motive. This kind of situation is imaginable even though no clause that concretely expresses this interest has been inserted into the act. The disposing party may, in fact, anticipate that the consequences of his act will procure for him an advantage that he would not have obtained without it, an advantage that can itself be of either a material order or a moral order.

Two symmetrical examples, both drawn from the jurisprudence, illustrate this duality. [i] A particular person gives a tract of land to a community for the construction of a church because he hopes that this construction, by creating a pleasant view from the contiguous tracts of land that he has kept, will cause those tracts to increase in value: a material interest. [ii] Another disposing party does the same thing [donates land for the construction of a church], but this time for the purpose of enabling him to satisfy his religious duties more easily: a moral interest.
[2. The solution. – ]

[a. Doctrinal. – ] The dominant doctrine makes a distinction between material interest and moral interest. The former removes the gratuitous character of the act; the latter allows it to subsist.

The authors apply their criterion in particular to “offers of cooperation” (offres de concours). This term designates a contract whereby a person engages himself to furnish a performance to a public collectivity with a view to the realization of some public work.

[b. Jurisprudential. – ] The most numerous decisions concern primarily these offers of cooperation and, more generally, liberalities that are made to artificial persons and that bear on goods that are affected to a determinate use, a use that will present for the disposing party one or the other sort of interest. The judgments are not easy to interpret. It is certain, however, that they are not always founded on the distinction noted previously [the doctrinal distinction]. In addition, it seems that the jurisprudence, though it [at one point] adopted that distinction, has not stuck with it.

[i.] Evolution of the jurisprudence. –

[α.] First phase. – [At first] . . . material interest and moral interest were put onto the same plane, so that both one and the other excluded the gratuitousness of the act.

As for material interest, the typical case corresponded exactly to the hypothesis that was envisioned earlier. The cession of a tract of land in view of constructing a church there was [considered to be] an onerous contract if it was consented to “in view of the enhanced value that the other lands that belonged to the grantor would acquire.” Civ. 19 juillet 1894.

As for moral interest, it is appropriate to relate a celebrated case. The disposing party had taken on himself the obligation to pay for part of the cost of repairing the bell of the church in his native village, but he required . . . that it be re-established as it had existed in his youth, “. . . for the satisfaction of his fantasy or his millionaire vanity.” The act was characterized as onerous. Req. 24 avril 1863.

This [latter] solution has been very widely criticized. In fact, if one admits that the pursuit of a purely moral interest excludes liberal intention, one will be led ineluctably to the conclusion that there would never be a donation when the goods must be given a determinate affectation, for the disposing party would not impose this affectation unless it would procure for him a certain satisfaction. What is more, there would never be any donations [at all]! If someone gives something, it is always because he sees some moral interest in doing so; if he did not, he would not do it. This interest consists, at a minimum, in the intimate satisfaction that a generous action procures – that joy which the moralists say is the most pure[, i.e.,] the joy of giving to others.

[β.] [S]econd phase. – That is why the jurisprudence, in a latter period, rallied to the currently dominant doctrinal distinction.

Thus took place, with respect to offers of cooperation, a reversal that is not well known. For such an offer to be qualified as a donation, the courts settled on . . . a double prerequisite: [i] that the disposing party draw no serious material advantage from it and [ii] that the funds be employed conformably to the end for which the public establishment that had received them was gratified. Civ. 8 nov. 1911; Req. 17 nov. 1922; Civ. 19 juillet
1921; Toulouse, 14 janvier 1911. That boils down to saying, on the one hand, that a material interest continues to “disqualify” an apparent donation [and to require that it be classified as] an onerous act, for the judgments, with more or less insistence, note the absence of this interest. Civ. 8 nov. 1911. It also boils down to saying, on the other hand, that a moral interest is no longer incompatible with gratuitousness, for, in nearly all of these cases, such an interest clearly showed through: the acts of disposition were consented to by a priest in view of the construction of a church or a presbytery. Toulouse, 14 janvier 1911.

[γ.] Current solutions. – The most recent judgments have involved not offers of cooperation, but rather dispositions for the benefit of associations that were required to affect the goods to their activities. In fact, whereas the absence of any material interest of the disposing party was certain, the existence of a moral interest was less so. Thus, the “givens” of the legal problem have not been modified, and the qualification of the preceding period has been maintained: the acts in question were [found to be] not onerous. Civ. 20 janvier 1930, Civ. 24 février 1932.

If, however, one could think that these judgments mark an evolution – that they open a “third” phase —, it is by reason of their rationales.

On the one hand, the Cour de cassation, in denying the onerous character [of such acts], no longer notes the absence of a serious material interest. One can infer from this, in turn, that the presence of a serious material interest no longer excludes gratuitousness. That is the great novelty. Today, a judgment like that of 19 juillet 1894 [see supra] would, no doubt, no longer be rendered.

On the other hand, a new rationale has appeared. [In each of these cases,] the Court notes that the disposing party did not impose on the gratified association any particular condition in his own interest. One can infer from this that the pursuit of a personal interest would exclude gratuitousness if it is concretized in the clauses of the act and that this is so regardless whether the interest is material or moral.

b) Obligation that benefits others (?)

What about an obligation the performance of which would benefit not the donor himself, but rather some third person(s)? Or the “public” at large? Should a donation subject to such a charge be regarded as “onerous”? Why or why not?

DH 18. T makes a gift to Our Lady of the Bayou Catholic School "on condition that the said property should be used exclusively for educational purposes and that the school should always be under the direction and control of the Jesuit Fathers." Then T dies. T's son, S, then seeks to "reduce" his dad's "donation" to the school, arguing that it "inpinges on his legitime" (see CC arts. 1495 & 1503). This argument will fly, of course, only if the gift really is a "donation." Is it? Why or why not? Consider the jurisprudence that follows.
THOMPSON, J.

The plaintiffs are the widow and the forced heirs of Philip Thompson, who died in this city on April 21, 1917. They bring this suit to annul a certain instrument executed by said Thompson in favor of the defendant on December 30, 1889, conveying certain described property situated in this city . . . .

As the character of the instrument and its legal effect is the sole question in the case, we shall insert here the pertinent provisions, omitting the description of the property and unimportant details:

That in consideration of the interest he [Thompson] takes in the education of the children of this community and in the promotion of learning, he does by these presents, convey, transfer, assign, set over and deliver under title of a conditional donation, unto the Société Catholique d'Éducation et Littéraire, domiciled in this city and duly incorporated under and by virtue of an act of the legislature approved April 30, 1847 * * *

To have and to hold the same unto the said donee, its successors and assigns forever by virtue hereof, subject to the following expressed terms, conditions and stipulations, to wit:

1. That said property shall be used exclusively for educational purposes.
2. That said school shall always be under the direction and control of the Jesuit Fathers.
3. That in case the said property shall at any time cease to be so used, or shall cease to be under the control of the Jesuit Fathers, ipso facto, it shall revert to said Philip Thompson, or his heirs.'

It is admitted in the petition that the defendant went into actual possession of the property immediately after the act of so-called donation, and has continued in such possession without interruption, making use of said property for the purposes intended by the grantor.

The particular ground of nullity alleged by the plaintiffs is, that the instrument on its face evidences a gratuitous donation in violation of article 2404 of the Civil Code, which declares that the husband can make no conveyance inter vivos by a gratuitous title of the immovables of the community, unless it be for the establishment of the children of the marriage. From which it is argued that the act as a donation was null ab initio for the whole of the property attempted to be conveyed.

The contention assumes that the conditions, charges, or burdens stipulated and imposed upon the alleged donee were not such as to constitute the donation an onerous one and to take it out of the category of a gratuity of liberality. . . .

ON REHEARING
OVERTON, J.

A reconsideration of this case satisfies us that the provision in the act of conveyance herein, to the effect that the property donated should be used exclusively for educational purposes, and that the school to be maintained on it should be always under the direction and control of the Jesuit Fathers, imposes conditions, charges, and burdens upon the donee. The more serious question, however, in our view, is: Are the conditions, charges, and burdens such as to make the donation, in reality, an onerous one within the contemplation of the Civil Code?

It was strenuously urged on the application for a rehearing that the conditions and charges mentioned are not such as to make the donation onerous, in that they did not and could not inure peculiarly to the benefit of the donor as the head and master of the community of acquests and gains that existed between him and his wife, and, as that community received nothing in return for the donation, that the donation cannot be considered as onerous but merely as gratuitous, within the contemplation of the Code. This position, taken by plaintiffs on the application for a rehearing, caused doubts to arise in the minds of at least a majority of us, and a rehearing was therefore granted. A reconsideration of the case, however, satisfies us that the charge or burden, to make the donation an onerous one, need not be one in favor of the donor, but it may be one in favor of a third person, or even of the public or the community at large. We think this follows from the following articles of the Civil Code, to wit:

Article 1774. Any thing given or promised as a consideration for the engagement or gift, any service, interest or condition, imposed on what is given or promised, although unequal to it in value, makes a contract onerous in its nature. * * *

Art. 1890. A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.' (Italics ours.)

Hence we think it follows that it is not necessary that the charge imposed be in favor of the donor, but may be one in favor of a third person, whether in favor of a single individual, a class of persons, or the general public. Where the charge or burden imposed is in favor of a large class of individuals or of the public, the presumption is that such class or the public accepts the advantage. In this instance, the property has been used for school purposes, in accordance with the terms of the donation, for a number of years.

For the reasons assigned, it is ordered that our original opinion and decree herein be reinstated and made the judgment of this court.

O'NEILL, C. J. (dissenting).

Article 2404 of the Civil Code forbids a man to give away his wife's share of the property belonging to the marital community. Article 1493 of the Code forbids a person to give away his property to the prejudice of his forced heirs—or beyond the disposable portion. The purpose, of course, is to protect the wife or widow and heirs. Accordingly, under article 1526, this rule, which forbids a man to make a donation to the prejudice of his wife or forced heirs, does not apply to an onerous donation if the value of the charges
imposed upon the donee amount to more than half of the value of the property donated. The reason for this exception to the rule is that an onerous donation is regarded not as a donation at all, but as a commutative contract “if the value of the object given does not manifestly exceed that of the charges imposed on the donee.” Article 1524. The idea is that, “if the value of the object given does not manifestly exceed that [meaning the value] of the charges imposed on the donee,” the wife, as partner in community, or the forced heirs, as the case may be, are not imposed upon, because they are compensated with the value of the charges imposed on the donee. That means, of course, charges imposed in favor of the donor—not charges ‘in favor of a third person, or even of the public, or the community at large,’ as the majority opinion in this case holds.

I cannot reconcile my mind to the proposition that, although the Code says that a man cannot by donation, deprive his wife or widow of her share of the community property, or deprive his forced heirs of their legitime, nevertheless a man may, by donation, deprive his wife or widow of her share of the community property, and deprive his forced heirs of their legitime, provided he imposes upon the donee a charge ‘in favor of a third person, or even of the public, or the community at large.’ How is the wife or widow, or the forced heir, of the donor, protected or compensated by a charge being imposed by the donor upon the donee ‘in favor of a third person, or even of the public, or the community at large’—as the author of the majority opinion expresses it?

The court has confused the onerous donation with what is called a donation for pious uses. Donations or legacies for pious uses “are those which are destined to some work of piety, or object of charity and have their motive independent of the consideration which the merit of the legatees [or donees] might procure to them.” Domat, lib. 4 tit. 2, § 6, No. 2. “The term 'pious uses' includes not only the encouragement and support of pious and charitable institutions, but those in aid of education and the advancement of science and the arts.” State v. Executors of McDonough, 8 La. Ann. 246, citing Makelday on the Roman Law, No. 145. See, also, N. O., M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 490; Succession of Meunier, 52 La. Ann. 87, 26 So. 776, 48 L. R. A. 77; Act 124 of 1882.

The donation in this case was not even a donation for pious uses, because the stipulation that the property should be used for educational purposes did not require or mean that it had to be used for free or public education.

But that is not the point, for, even if this donation had been a donation for pious uses, it would have been none the less a gratuitous donation, not an onerous donation. The articles of the Code make it as plain as can be that an onerous donation is one in which the burden imposed upon the donee is in favor of the donor—not 'in favor of a third person, or even of the public, or the community at large.' What other meaning can article 1524 have, when it compares the value of the object given with the value of the charges imposed? Why speak of the value of the charges imposed if the charges be not in favor of the donor? And what other meaning can article 1773 have, viz.:

To be gratuitous, the object of a contract must be to benefit the person with whom it is made, without any profit or advantage, received or promised as a consideration for it. It is not however the less gratuitous, if it proceed either
from gratitude for a benefit before received, or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. (The italics are mine.)

It seems to me that what this court said in Bister v. Menge, 21 La. Ann. 217, which was very much like this case, ought to decide this case, viz.:

Article 2373 [now 2404] of the Civil Code obviously limits the power of the husband to dispose of the real estate of the community to acts of alienation by sale or otherwise, where an equivalent in value is impliedly received for the community property disposed of.

The second paragraph of that article strictly prohibits him from making any conveyance inter vivos of the immovables of the community by gratuitous title. The fourth paragraph construed in connexion with the second, can only be taken to contemplate a recourse of the wife against the heirs of the husband in cases where he has alienated the immovables of the community by onerous title in fraud of her rights. The case of the disposal of the immovables of the community by gratuitous title is provided for in the second paragraph by absolute prohibition. The prohibition is unconditional and wholly independent of the interest of the husband in making the donation.' (The italics are mine.)

Even the Act 124 of 1882, which declares that the laws against fidei commissa and prohibited substitutions shall not apply to donations or legacies in favor of educational, charitable, or literary institutions, says in its title 'that nothing in this act shall be construed to affect the law in regard to the disposable portion.' And, in fact, there is nothing in the statute that could be construed as allowing a man to make a donation of his wife's share in the community property, or a donation of the legitime reserved to his forced heirs.

Stated broadly, but accurately, the doctrine of the majority opinion is this: A man cannot give away his wife's share of the community property, or his forced heirs' legitime, by a donation in favor of some one else, unless he imposes upon the donee a charge in favor of a third party; but, if he does that, he may give away his wife's share of the community property and his forced heirs' legitime, by making both the donation and the charge in favor of outsiders. That could not have been the intention of the writers of the Code.

The reference to article 1890 of the Civil Code does not strengthen the decision in this case. The article merely means and declares that, where a person makes an onerous donation, legally, as, for example, when he does not give away his wife's share of the community property or his forced heirs' legitime, he may impose upon the donee a charge or stipulation in favor of a third person, just as he may do in a commutative contract. Here is the language of the article, viz.:

A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.

That does not mean that, by making a stipulation in favor of a third person, a man may give away his wife's share of the community property or his forced heirs' legitime. As far as the wife and the forced heirs are concerned, the donor's making a stipulation in favor of a third person does not make the donation less gratuitous.
It seems to me there are two errors in the majority opinion in this case. The first error--and the least important--seems to be in regarding the donation in contest as a donation for pious uses. The second error is in holding that a donation for pious uses--or a donation containing a stipulation or charge in favor of a third person--is not a gratuitous but an onerous donation. It is a gratuitous donation as far as the donor and his partner in community and his forced heirs are concerned. The law favors and encourages philanthropic donations--donations for pious uses, as they were known in the civil law--but it does not allow, much less encourage, a man to be philanthropic with his wife's share of the community property, or with his forced heirs' legitime.

Loyola University v. Deutsch,
483 So. 2d 1250 (La App. 4th Feb. 14, 1986)

LOBRANO, Judge.

This is an appeal from a lower court judgment which homologated the tableau of distribution in the Succession of Eberhard Deutsch. That judgment, in effect, held that there were no residual assets in the estate to distribute, hence the residual bequest to Loyola University cannot be satisfied. Loyola has perfected this appeal.

Eberhard Deutsch died on January 16, 1980. He was survived by his only son, Brunswick G. Deutsch, the executor herein. . . . The last will and testament provided for the following dispositions:

. . .

5) Naked ownership of the residue, subject to the usufruct to Brunswick G. Deutsch, was left in equal portions to Tulane and Loyola Universities.

. . .

Loyola asserts several arguments in opposition to the tableau. The only one that need be addressed is the argument that charitable inter-vivos gifts should not be fictitiously added to the mass of the estate in determining the legitime. . . .

These are clever arguments, but we find they have no merit. At the time of decedent's death, La.C.C. Article 1505 provided:

To determine the reduction to which the donations, either inter vivos or mortis causa are liable, an aggregate is formed of all the property belonging to the donor or testator at the time of his decease; to that is fictitiously added the property disposed of by donation inter vivos, according to its value at the time of the donor's decease, in the state in which it was at the period of the donation.

The sums due by the estate are deducted from this aggregate amount, and the disposable quantum is calculated on the balance, taking into consideration the number of heirs and their qualities of ascendant or descendant, so as to regulate their legitime portion by the rules above established.

Loyola argues that as a matter of law all charitable donations are onerous donations and therefore are not subject to the provisions of Article 1505. [CC art. 1526] The thrust of their contention is that because gifts to charity must, in effect, be used for charitable purposes to qualify for tax exempt status, they therefore are burdened with conditions that
make them onerous. In support of this argument, the only authority cited is the 1925 case of Thompson v. Societe Catholique D'Education, 157 La. 875, 103 So. 247 (1925). That case dealt with the provisions of Article 2404 as it read at that time. The plaintiffs in that suit were seeking to annul a gift made by a husband. The court held, based on the facts before it, that there were sufficient conditions to the gift to conclude that it was onerous.

That decision is clearly distinguished from the instant case. It dealt with a community property article, and an attempt to nullify a donation. In the instant case we are dealing with the forced heirship provisions of our law. We certainly cannot interpret Thompson to hold that all charitable gifts are onerous. Article 1523 provides for three kinds of donation and describes the onerous donation as that which is burdened with charges imposed by the donee. Article 1524 further states: "The onerous donation is not a real donation, if the value of the object given does not manifestly exceed that of the charges imposed on the donee."

There is no evidence of any charges, conditions, or burdens attached to decedent's charitable inter-vivos gifts so as to classify them as onerous. The mere fact that the tax laws require that the gifts be used for charitable purposes is not sufficient to satisfy the codal requirements for an onerous donation. Furthermore, there are no codal provisions which prohibit a charitable organization from receiving a true inter-vivos donation. In fact, the opposite is true for Article 433 expressly recognizes the right of corporations, as defined by Article 431, to receive legacies and donations. There are numerous examples in our jurisprudence in which transfers to charitable and public institutions are treated as gratuitous donations. See, for example, Hutchinson v. Tulane University of Louisiana, 171 La. 653, 131 So. 838 (1931); Lord v. District VIII Baptist Convention, 391 So.2d 942 (La.App. 2nd Cir.1980).

We hold that the tableau of distribution is correct insofar as it shows that there are insufficient assets to satisfy the executor's legitime, and hence there is no residue for disposition to Loyola. AFFIRMED.

2] Remunerative

What is a "remunerative" mixed contract? Read CC art. 1523, ¶ 3, and its source, Toullier:

3 C.-B.-M. Toullier, DROIT CIVIL FRANÇAIS no 186, at 117, 118
(J.-B Duvergier rev., 6th éd. 1848)

186. A remunerative donation is that which is made to compensate for certain services rendered to the donor or to those close to him . . . . If the value of the thing given does not notably exceed that of the services, it is a true "giving in payment" [see LCC arts. 2655 & 2659] a datio in solutum [giving something as payment], a species of contract that, though it has its own peculiar rules, closely resembles a contract of sale. It is not subjected to any of the rules that are peculiar to donations properly so called . . . . The
"giving in payment," by contrast, is an onerous contract, one that is not imputable onto
the disposable portion and that can be made for the benefit of an incapable person . . . .

Thus, the Code does not annul [such] remunerative donations [i.e., those that are
really "givings in payment"] that are made to incapables . . . . The Code has not submitted
[such] remunerative donations to revocation on account of ingratitude . . . . [A]re [such]
remunerative donations submitted, under penalty of nullity, to the solemnity requirements
for donations properly so called, such as the necessity of a notarial act and of an express
acceptance[?] We can't possibly think so. We have seen that their nature is different from
that of liberalities nullo jure cogente factae [not made by virtue of legal compulsion, i.e., true
gratuities] . . . .

b) Subcategories of "mixed" contracts of disposition

1] Enumeration: predominantly gratuitous v. not predominantly gratuitous

In every mixed contract, the gratuitous cause will, depending on the circumstances, be or
not be the predominant one. If it is, the mixed contract can be called “predominantly
gratuitous”; if it is not, the mixed contract can be called “not predominantly gratuitous.” The
trick, of course, is to figure out whether the gratuitous cause is or is not predominant.

2] Means of classification

In Louisiana, that “trick” is performed by comparing the value of the donatum with the
value of the quid pro quo that the donor will receive or already has received. Here’s the basic
test: if the value of the donatum does not “manifestly exceed” the value of the quid pro quo,
see CC art. 1524, or, to put another way, if the value of the quid pro quo is only “little inferior”
for the value of the donatum, see CC art. 1525, then the gratuitous cause is not considered to
be predominant.

But when should one say that the value of the donatum does not “manifestly exceed” the
value of the quid pro quo or that the value of the quid pro quo is only “little inferior” to the
value of the donatum? Though the legislature could have left the resolution of this issue to the
more or less unfettered discretion of the trier of fact, it did not. In fact, the legislature did quite
the opposite; to be precise, it chose to tie the notions of “manifest excessiveness” and “little
inferiority” to a rigid mathematical criterion, one that leaves the trier of fact little, if any, real
discretion.

a] Alternative statements
This mathematical criterion can and has been stated in two different manners. The classic statement appears in CC art. 1526; the modern restatement is reflected in CC arts. 1510 & 1511.

1) Classic statement: value of O "manifestly exceeds" value of C or S if and only if value of O > 1½ times value of C or S

Read CC art. 1526. What does the phrase "the value of the object given exceeds by one-half that of the charges or of the services" really mean?

_Averette v. Jordan,_
457 So.2d 691 (La. App. 2d Cir. Sept. 26, 1984)

NORRIS, Judge.

In this action primarily for declaratory relief, the plaintiffs appeal a judgment of the trial court which refused to enforce a reversionary clause in an act transferring certain immovable property in return for the promise of the transferee to care for the transferors for the remainder of their lives and which held the transfer to be a valid onerous transfer. . . . Finding no error in the trial court's ruling in the areas complained of in this appeal, we affirm.

CONTEXT FACTS
. . . [O]n January 6, 1977, the Jordans conveyed to their son Wynes the naked ownership of a 17 acre portion of their 38 acre tract in return for his agreement to care for them. This conveyance, made in a document entitled "Act of Onerous Donation with Right of Return", contained the following pertinent provisions:

And the said Donors did further declare it to be their purpose, desire and direction to which said Donee agrees, that the donation is burdened and the Donee hereby charged to insure and provide for the health, welfare and safety of the Donors or the survivor for the remainder of the Donors' joint lives. Donors specifically stipulate pursuant to Article 1534 of the Civil Code of Louisiana the right of return of the property which is the subject of this Act of Donation in the event Donors, or either of them, survive Donee alone. . . .

. . .

On March 11, 1977, some two months later, Mr. Jordan died and his succession was opened on May 10, 1977. Contained within the detailed descriptive list of succession property was the remaining 21 acre tract and expressly omitted was the 17 acre tract made the subject of the earlier act of conveyance. The joint petition was signed by all of his five children, including Wynes. . . .

On March 27, 1978, Wynes and his wife as well as Mrs. Jordan conveyed a 25 foot strip of the 17 acre tract to a neighbor. Mrs. Jordan appeared in this instrument to
evidence her purpose to quit-claim her reversionary interest which the "appearers" acknowledged to exist.

... Wynes died on September 6, 1980.

... On March 16, 1982, the succession of Wynes Jordan was opened. In those proceedings, his widow and three children listed as his separate property potential forced heirship rights to the 21 acre tract and as community property full interest in the 17 acre tract less the 25 foot strip of property earlier sold to the neighbor and were sent into possession of that property.

On August 26, 1983, this action was initiated by the plaintiffs alleging among other things that Wynes received before his death income from sales of timber and mineral leases on the 17 acre tract and sold the 25 foot strip to the neighbor without giving any of the proceeds to his mother, Mrs. Jordan, who was usufructuary of the property; that when he participated in the filing of the succession of his father, he waived any right to inheritance therein; that by recording the judgment of possession from Wynes' succession, a cloud has been placed on the titles of the plaintiffs to the 21 acre tract; and that items of furniture in the family home have disappeared into the possession of the plaintiffs. This action specifically sought an accounting to the usufructuaries for all sums which Wynes received as income from the 17 acre tract and an accounting of the furniture from the family home; a declaratory judgment determining the ownership of the 17 acre tract; a declaratory judgment determining the ownership of the 21 acre tract remaining after the act of conveyance; an order ejecting the defendants from the 17 acre tract and damages.

Defendants' answer, among other things, admitted the sale of the timber and mineral leases but contended that Mrs. Jordan had donated her portion of the proceeds to Wynes; alleged that the act of donation was an onerous donation excluded from the provisions of La.C.C. Art. 1526 thereby nullifying the provisions of the donation insofar as concerns the "Right of Return"; alleged compliance with the provisions of the donation; and that the doctrine of detrimental reliance and/or unjust enrichment entitled defendants to the ownership of the property. Defendants prayed for rejection of the plaintiffs' demands; in the alternative for damages; and in reconvention, that the three children of Wynes be placed into possession of their father's legitime in the succession of Amos Jordan and that the transfers from Mrs. Jordan to the other plaintiffs be declared null.

ACTION OF THE TRIAL COURT

In written reasons for judgment, the trial court refused the plaintiffs' demand to enforce the reversionary clause finding that the act was an onerous donation of the naked ownership of the 17 acre tract reserving separate usufructs to Mr. and Mrs. Jordan and attempting to create a right of return should the donee fail to survive the donors. The trial court further found that Wynes had fulfilled his obligation to Mr. Jordan prior to his death and that upon his death any right of return had terminated. Insofar as it affected Mrs. Jordan's interest in the 17 acre parcel, the trial court found that because this was an onerous donation the right of return was inapplicable because the value of the object given did not exceed by one-half the value of the charges or services rendered by Wynes to Mrs.
Jordan prior to his death. The trial court also found that the plaintiffs were entitled to no accounting and rejected the defendant's claim to the forced heirship rights of Wynes in his father's succession as well as any damages, specifically finding that the consent judgment of possession joined in by Wynes precluded their assertion of any further claims to Mr. Jordan's succession. Plaintiffs' claim for an order of eviction was denied.

Accordingly, the judgment of the trial court recognized the defendants as full owners of an undivided one-half interest in the 17 acre tract and as naked owners of the remaining one-half interest, subject to the usufruct of plaintiffs, J.C. Jordan, Florene Jordan McDaniel, and Violet Jordan Averette, and denied defendants' claim as forced heirs.

ASSIGNMENTS OF ERROR

Plaintiffs appeal, contending that the trial court committed reversible error: . . . (2) By finding the Donation was not a "real" donation . . .

. . .

REVERSIONARY RIGHTS

In connection with this issue, the plaintiffs principally assert that a right of return was contained in the act of donation and that it should be given effect under La.C.C. Art. 1534 which allows a donor to stipulate a reversionary right in an act of donation. In the alternative, the plaintiffs contend that even if the act in question was not a true donation, then principles of contract law require that an undivided one-half interest in the property revert back to Mrs. Jordan because of the inability of the obligor under the contract to complete the performance of the charge or condition contained within the contract.

The resolution of this issue requires a multi-tiered analysis including the resolution of the classification of the act in question, the determination of the operative codal provisions and the application of the proper codal articles.

Three types of donations inter vivos are recognized by the Louisiana Civil Code: the gratuitous donation which is made without condition; the onerous donation which imposes charges upon the donee; and the remunerative donation which compensates for past services rendered. La.C.C. Art. 1523. La.C.C. Art. 1524 provides that an onerous donation is not a true donation if the value of the object given does not manifestly exceed the value of the charges. A remunerative donation is not a true donation if the value of the services to be recompensed as appreciated in money, are "little inferior" in value to that of the gift. La.C.C. Art. 1525.

The general rules stated in Articles 1524 and 1525 are specified by the "mathematical formula" of La.C.C. Art. 1526 which provides:

In consequence, the rules peculiar to donations inter vivos do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services.

See, Lazarus, Succession and Donations, The Work of the Louisiana Appellate Courts for the 1978-1979 Term, 40 La.L.Rev. 559 (1980). See also Oppenheim, The Donation Inter Vivos, 43 Tul.L.Rev. 731, at 751 (1969); J. Denson Smith, Conventional Obligations, The Work of the Louisiana Supreme Court for the 1958-1959 Term, 20 La.L.Rev. 224, at 225 (1960); Comment, Personal Services About the Home, 23 La.L.Rev. 416, at 432 (1963). However, the correct mathematical meaning of this codal mandate has been a "constant source" of jurisprudential confusion. [FN5] Under the proper application of
Article 1526, an onerous or remunerative donation is not a true donation unless the value of the object given exceeds the value of the charge or service by at least half the value of the charge or service. *Whitman v. Whitman*, 206 La. 1, 2, 18 So.2d 633 (La.1944); *Personal Services About the Home*, supra at 432-433, note 78. Conversely, where the value of the charge or service exceeds two-thirds the value of the gift, the transfer is not a true donation. *Whitman v. Whitman*, supra; *Clarke v. Brecheen*, 387 So.2d 1297 (La.App. 1st Cir.1980); *Personal Services About the Home*, supra. The significance of this valuation is underscored by La.C.C. Art. 1526, which specifically provides that only true donations are governed by the "rules peculiar to donations inter vivos."

FN5. As one commentator has noted, the correct mathematical meaning of Article 1526 has been a constant source of confusion in the jurisprudence. The article clearly states that the rules peculiar to donations apply only when the value of the thing given exceeds by one-half the value of the charge or service, i.e., the former is at least one and one-half times greater than the latter. . . . The opinion in *Whitman v. Whitman*, 206 La. 1, 18 So.2d 633 (1944) several times states the rule in this manner. E.g., "the services rendered by the donee in this instance . . . greatly exceeded two-thirds of the value of the property donated; which is the same as to say that the value of the property donated did not amount to one and one-half times the value of the services rendered by the donee." Id. at 22, 18 So.2d at 640. The *Whitman* case is probably the clearest jurisprudential example of the correct application of Article 1526. Other cases correctly stating the rule of the article include *In re Andrus*, 221 La. 996, 60 So.2d 899 (1952); *Rowlus [Bowlus] v. Whatley*, 129 La. 509, 56 So. 423 (1911); (not a case of personal service rendered about the home); *Pulford v. Dimmick*, 107 La. 403, 31 So. 879 (1902) (same); *Placid Oil Co. v. Frazier*, 126 So.2d 800 (La.App. 2d Cir.1961); *Hearon v. Davis*, 8 So.2d 787 (La.App. 2d Cir.1942); *Robinson v. Guedry*, 181 So. 882 (La.App. 2d Cir.1938); *Steen v. Louisiana Central Lumber Co.*, 2 La.App. 39 (2d Cir.1925). Frequent misstatements of the rule are that the value of the services rendered or charges imposed must exceed one-half the value of the object given for the rules peculiar to donations to be inapplicable; and that the rules peculiar to donations will be applied if the value of the thing given is double that of the services or charges. E.g., *Castleman v. Smith*, 148 La. 233, 86 So. 778 (1920); *Latour v. Guillory*, 130 La. 570, 58 So. 341 (1912); *Succession of Dolper v. Feigle [Feigel]*, 40 La. Ann. 848, 6 So. 106 (1888); *Lagrange v. Barre*, 11 Rob. 302 (La.1845); *Bordelon v. Brown*, 84 So.2d 867 (La.App. 2d Cir.1956); *Lemoine v. Lemoine*, 27 So.2d 650 (La.App. 2d Cir.1946); *Lafield v. Balzrette*, 21 So.2d 156 (La.App. 2d Cir.1945). That in all these cases the court, immediately prior or subsequent to its incorrect statement of the rule, either quoted or paraphrased Article 1526 indicates failure to realize there was any difference between the rule as misstated by the court and as laid down by Article 1526. The difference is easily illustrated. Assume that the value of the thing given is $9,000. If the article is correctly
interpreted, the value of the services appreciated in money (pretermittting fractions of dollars) would have to be at least $6,001 in order that the rules peculiar to donations would not apply; whereas, under the usual incorrect interpretation the services would only have to be valued at $4,501. Although the case was decided correctly on other grounds, Moore v. Sucher, 234 La. 1068, 102 So.2d 459 (1958), illustrates a situation where this different result would follow. The Moore case is discussed in The Work of the Louisiana Supreme Court for the 1957-1958 Term--Sales, 19 La.L.Rev. 319, 322 (1959).

One case even stated the rule to be that the rules peculiar to donations are applicable only if the value of the thing given exceeds one-half of the value of the services. Succession of Spann, 169 La. 412, 417, 125 So. 289, 291 (1929). Fortunately, this seems to be the only instance of such an interpretation of Article 1526. Comment, Personal Services About the Home, 23 La.L.Rev. 416, at 432-433, note 78.

Additionally, when ascertaining the value of the gift for purposes of making the determination of whether the act of conveyance is a true donation under Article 1526, the gift should be valued as of the date of the donation. Steen v. Louisiana Central Lumber Co., 2 La.App. 39 (La.App. 2d Cir.1925). [The court then explains the two alternative methods that have been devised for valuing the "charge," i.e., the a priori ("prospective") method and the a posteriori ("after the fact") method].

The trial court made a specific finding that the value of the property donated insofar as it related to Mrs. Jordan's interest in the property was the same or greater than the value of the charges imposed on Wynes and that the act was not a true donation. As will be shown, the record supports the proposition that the transfer is not a true donation not only under a post hoc analysis but also under a prospective analysis.

The plaintiffs' expert appraiser valued the 17 acre tract including its improvements at approximately $36,000. As noted by the trial court, this valuation more closely scrutinized reflects the value of the property at the time of trial in 1983 rather than at the time of the donation some six years earlier in 1977. Whereas the $36,000 appraisal incorporated a $1300 per acre evaluation, the adjoining 21 acre tract which possessed very similar characteristics was valued in 1977 at $690 per acre. This evaluation is reflected in the descriptive inventory filed in the Succession of Amos Jordan. Moreover, the valuation provided by the plaintiffs' expert established the value of full ownership of the tract, when in fact the donated property was subject to a usufruct in favor of both Mr. and Mrs. Jordan which undeniably diminished the value of the donation.

Thus, given that the plaintiffs' estimate was made six years after the donation, that a significantly lower evaluation was given to adjoining similar acreage by both sides to this litigation at the time of the donation and that there was both the usufruct and right of return burdening the property donated to Wynes, the trial court could have reasonably

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14 The details of these two methods are examined below at pp. 51-53.
found that the donation of the naked ownership in the 17 acre tract was worth $22,000-$24,000 at the time of the donation. Therefore, its finding that the value of the one-half interest belonging to Mrs. Annie Jordan was $11,000-$12,000 at the time of the donation is not clearly wrong.

... [T]he charges imposed on Wynes insofar as they related to his mother could have reasonably been found to have been equal to or greater than the value of her interest in the property which she transferred.

In terms of a prospective analysis of the value of the charge of personal care as of the time of the donation, the following factors are operative. Wynes assumed under the act of conveyance the obligation to care for two donors, both of whom were 86 years old at the time of the donation. Under the mortality table of La.R.S. 47:2405, each of these donors had a life expectancy of some two and one-half years. Wynes' obligation of care was, of course, intended to be commensurate with the duration of both donors' lives and their health. Mr. Jordan's health was fundamentally infirm, thereby necessitating the assumption of a greater degree of concentrated care than would have been the case had he been considerably more vigorous. Mrs. Jordan's health was comparatively better at the time, and so her life expectancy was relatively indefinite. In fact, Wynes actually provided care for his mother for a period in excess of her life expectancy prior to his death.

In terms of a retrospective or post hoc analysis of the charge of support and the extent of Wynes' obligation to care for Mrs. Annie Jordan, the following factors are operative. In order to provide that care, Wynes and his wife Mamie sold their home and the one acre lot on which they had lived outside of Calhoun for 23 years, purchased a mobile home, and established their residence on the 17 acre tract adjoining the land of the Jordans some fifteen yards away. Wynes cared for his father from the date of the donation until the time of his death. Because Mr. Jordan was rapidly losing his eyesight during this time, Wynes or his wife were required to spoon feed him. Also, Mr. Jordan would become so upset and confused that his wife could not control him and Wynes would have to spend the night with him to calm and subdue him. While we recognize that the value of the services which Wynes provided on his father's behalf are not at issue in this appeal as they relate to the value which Mr. Jordan received from these services, we feel that Mrs. Jordan also received value from the services which Wynes performed on behalf of his father in that Mrs. Jordan was relieved of certain obligations in regard to his care and that she received the benefit of the additional security provided by knowing that her husband was going to be properly cared for by Wynes.

Furthermore, Wynes devoted well over three years of care and support to his mother from the date of the donation until shortly prior to his death. Both Wynes and his wife did Mrs. Jordan's shopping, built fires for her, lit her gas heaters in the early morning hours, and cleaned her house. Meals were fixed for Mrs. Jordan and brought to her. Her garbage was emptied and burned. Mrs. Jordan was provided with fresh vegetables out of a garden cultivated by Wynes and his wife and eggs were provided from their laying hens.

In accordance with the wishes of his mother, Wynes expended many hours clearing her property of briars, underbrush and weeds, thereby improving considerably the appearance
of her property. On one occasion when Mrs. Jordan broke her arm, Wynes and his wife provided constant live-in care for a period of two to three weeks.

To the value of these specific services are also added equally significant intangibles. After the relocation of Wynes and Mamie, they were rarely absent from the property overnight. The value to an older person of the security provided by constant and responsible presence is surely inestimable. This becomes particularly significant after the death of Mr. Jordan when Mrs. Jordan was left to live alone. An additional factor which augments the value of the services provided by Wynes and his wife is the fact that they uprooted themselves from their home of 23 years and relocated in order to provide care for the Jordans. *Fenger v. Cagnolatti*, supra.

In light of the foregoing analysis, the trial court did not err in its determination that the value of charges was equal to or exceeded the value of the gift. Because the value of the object given did not exceed the value of the services by one-half it is not a true donation. La.C.C. Art. 1525; 1526.

For the foregoing reasons, the judgment of the trial court is affirmed in its entirety. Costs of this appeal are cast against appellants.

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**NOTE**

1. According to CC art. 1526, a mixed dispositive act is a donation (and therefore is to be subjected to the rules on donations) only “when the value of the object given exceeds by one-half that of the charges or of the services.” This rule, clearly enough, requires one to compare the value of the object (O) with the value of the charge (C) or service (S), as the case might be. It is also clear that, in the process of comparison, one value or the other has to be adjusted “by one-half.” But precisely how is this adjustment to be done? *Which value* – the O or the C / S – *gets adjusted?* And *in what sense* does it get adjusted “by one-half”?

2. To understand the correct answer to this bundle of questions, it is helpful, first of all, to identify the incorrect answers. (i) Let’s begin with the most “popular” wrong answer, that is, that one our errant courts have most often given. That answer is this: “The value that must be adjusted is the O, not the C or the S, and it (the O) must be adjusted by dividing it (the O) by 2, so that what one compares is (a) $\frac{1}{2}$ of the value of the object ($\frac{1}{2}$ O) with (b) the unadjusted value of the charge or service (C / S), as follows: ‘Is $\frac{1}{2}$ O > C (or S)?’ If it is, then you’ve got a donation; if it’s not, then you don’t.” Sounds okay, doesn’t it? But trust me, it ain’t right. (ii) Here’s another incorrect answer, one that at least one errant court has fallen for: “The value that must be adjusted is the C or the S, not the O, and it (the C or the S) must be adjusted by dividing it (the C or the S) by 2, so that what one compares is (a) the unadjusted value of the object (O) with (b) $\frac{1}{2}$ of the value of the charge or service ($\frac{1}{2}$ C / S), as follows: ‘Is O > $\frac{1}{2}$ C (or S)?’ If it is, then you’ve got a donation; if it’s not, then you don’t.” This, too, sounds pretty good, doesn’t it? But this one is just as wrong as the first.
3. - What, then, is the correct answer? Using the format we’ve already established for the incorrect answers, we might put it this way: “The value that must be adjusted is the C or the S, not the O, and it (the C or the S) must be adjusted by adding ½ of it (the C or the S) to itself, so that what one compares is (a) the unadjusted value of the object (O) with (b) the value of the charge or service (C / S) plus another ½ of that value (½ C / S) (or, more simply, since [1 x C / S] + ½ [C / S] = 1½ C / S, then with 1½ C / S), as follows: ‘Is O > 1½ C (or S)?’ If it is, then you’ve got a donation; if it’s not, then you don’t.”

4. - Now, how do we know that the first two answers are incorrect and the third correct? Well, for one thing, there’s the weight of authority. Re-read Averette, in particular, footnote 5 ( supra pp. 47-48). That footnote, in addition to stating that the first two answers are wrong and the third right, gives beaucoup jurisprudential authority for those statements. Then, consider the following excerpt from Frederic Wm. Swaim & Kathryn Venturatos Lorio, Successions & Donations sec. 9.14, at 229-30, in Louisiana Civil Law Treatise (1995), the leading treatise on Louisiana donations law:

“...[C]ourts... have frequently misstated the rule. Some have interpreted the article [CC art. 1526] as requiring that the value of the services rendered or charges imposed must exceed one-half the value of the object given for the rules peculiar to donations to be inapplicable; others have suggested that the rules peculiar to donations will be applied if the value of the thing given is double that of the services or charges. Each failed to recognize the difference between the rule as misstated and as dictated by Article 1526.

5. - The truth is, however, that we don’t really need this authority to sort out right from wrong here. Rather, all we need to do is to read the words of CC art. 1526 very carefully. Those words, again, are “when the value of the object given exceeds by one-half that of the charges or of the services.” The form of this formula, abstractly stated, is this: “if a (one value) exceed b (another value) by c (some fraction or percentage).” Now, this is a very common form of expression indeed! We find it in everything from company reports (“We will expand our operations into the Pacific Rim if our profits this year exceed our profits last year by (at least) 10%.”) to law school reports (“We will proceed to renovate the classrooms if our state budget allocation next year exceeds by 20% our state budget allocation this year.”) But what do such statements mean? Take, for example, the first statement (from the company report). And assume that the profits last year amounted to $100. What would you say is the company’s “break point,” that is, how much does it need to make this year if it’s going to expand (given the condition set

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15 Of the wrong answers set forth above, this is the first.
16 Of the wrong answers set forth above, this, too, is the first. It is simply stated in altered form.

How so? Here’s the proof:

\[
\begin{align*}
O / 2 & > C \ (or \ S) \\
2 \times (O / 2) & > 2 \times (C \ (or \ S)) \\
O & > 2 \ C \ (S)
\end{align*}
\]

Given
Multiplication property of inequalities
Simplification
I base this bold assertion on what admittedly may be a shaky generalization, namely, the answers given by my wife and my older daughter (age 10). When I presented them with this question in precisely these words, each – independently of the other – answered “$110.”

That’s the functional equivalent of the first wrong answer above.

That’s the functional equivalent of the second wrong answer above.

in the report)? Most, if not all, folks would say, “$110.” And that’s entirely correct. Now, I ask you, how does one arrive at that conclusion, given the premises? Do you get it by dividing the $a$ value by 10? I don’t think so; hce, we don’t even know what the $a$ value is yet! Do you get it by dividing the $b$ value by 10? No way, Jose.: that gives you $50, not $110. Then how? Isn’t it clear that you get it by (a) starting with the $b$ value ($100$) and (b) adding to it the product of $c$ (here 10%) and $b$ (here $100$) (in other words, $c \times b$)? Of course it is. What that tells us, then, is that a statement in the form of “if $a$ (one value) exceed $b$ (another value) by $c$ (some fraction or percentage)” means “if $a > [b + (b \times c)]$.” So it is with the formula in CC art. 1526. There the $a$ variable is $O$, the $b$ variable is $C$ or $S$, and the $c$ variable is $\frac{1}{2}$. And so, what one must do in any given case is to compare $O$, on the one hand, with $C$ (or $S$) plus $\frac{1}{2} C$ (or $S$) – in other words, $1\frac{1}{2} C$ (or $S$) –, on the other. If $O > 1\frac{1}{2} C$ (or $S$), then, CC art. 1526 tells us, the special rules for donations apply; but if $O$ is not $> 1\frac{1}{2} C$ (or $S$) (or if, in other words, $O < 1\frac{1}{2} C$ (or $S$)), then, CC art. 1526 again tells us, the special rules for donations do not apply (so that the general rules of contracts do).

DH 20α. Olide donates to Jean Sot a tract of land worth $12,000, subject to the “condition” that Jean Sot assume a $7,000 debt that Olide owes Pascal. Jean Sot agrees to these terms. Then Jean Sot moves onto the land and pays the debt. Sometime later, Olide sues Jean Sot to revoke the donation for ingratitude (see CC art. 1559 et seq.) Jean Sot defends on the ground that the deal is not a true donation, to be more precise, that it’s a primarily non-gratuitous “mixed” contract of disposition (to be more precise, a “sale at a low price”) and, as such, is not susceptible of revocation on that basis. What result? Why? Is the mixed act of disposition (what the redactors of CC art. 1523 would have misleadingly called an “onerous donation”) really a donation? Explain.

DH 20β. The elderly Papère, who, for the past five years, has lived with and been cared for by his son, Pascal, wants to “do something nice” for Pascal in return. And so Papère gives Pascal a tract of land worth $100,000 “in recompense for the free lodging, food, nursing care, etc. that you’ve given me these last few years.” The fair market value of those services is $80,000. Not long after the donation is executed, Papère dies. At that point, Papère’s daughter (and Pascal’s sister), who is “permanently disabled” for purposes of CC art. 1493(A) and, as such, qualifies as Papère’s “forced heir,” sues to “reduce” what she calls the “donation” that Papère had made to Pascal, arguing that it “impinges” on her “legitime” (forced share), see CC art. 1494 & 1503. In his defense, Pascal argues that the transfer was not a true donation, to be more precise, that it was a primarily non-gratuitous “mixed” contract of disposition (to be

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17 I base this bold assertion on what admittedly may be a shaky generalization, namely, the answers given by my wife and my older daughter (age 10). When I presented them with this question in precisely these words, each – independently of the other – answered “$110.”

18 That’s the functional equivalent of the first wrong answer above.

19 That’s the functional equivalent of the second wrong answer above.
more precise, a “sale at a low price”) and, as such, is not susceptible of reduction. Is the mixed
dispositive act between Papère and Pascal (what the authors of CC art. 1523 would have
misleadingly called a “remunerative donation”) really a donation or not? Explain.

2} Modern restatement: value of O "manifestly exceeds" value of C or S if and only if value
of C or S < 2/3 value of O

Read CC arts. 1510 & 1511. What, according to these articles, is the criterion for
separating predominantly gratuitous from not predominantly non-gratuitous mixed dispositive
acts?

Using the same “answer” format established earlier when we considered the meaning of
CC art. 526, the answer to this question can be expressed as follows: “The value that must be
adjusted is the O, not the C or the S, and it (the O) must be adjusted by multiplying it (the O)
by 2/3, so that what one compares is (a) the unadjusted value of the charge (C) or the service
(S) with (b) 2/3 of the value of object (O), as follows: ‘Is C (or S) < 2/3 O?’ If it is, then
you’ve got a donation; if it’s not, then you don’t.”

But is this statement of the “formula” really equivalent to that found in CC art. 1526?

Our judges and scholars seem to think so. See, e.g., Averette v. Jordan, n. 5 (“Another,
and perhaps clearer, statement of this rule [i.e., that of CC art. 1526] is that the rules peculiar
to donations do not apply if the value of the charges imposed or the services rendered exceeds
two-thirds of the value of the thing given.”); Swaim & Lorio, supra p. __, § 9.14, at 229 (“In so
holding, the [supreme] court [in Whitman v. Whitman, 18 So. 2d 634 (La. 1944)] provided
another, and perhaps clearer, statement of the rule set forth in Article 1526. The court held that
the rules peculiar to donation do not apply if the value of the charges imposed or the services
rendered ‘exceeds two-thirds of the value of the property donated.’”)

This opinion is undeniably correct, for the two formulae are, in fact, mathematically
equivalent. Here’s the “proof” of it:

\[
\begin{align*}
1 & \quad O > 1.5 S (or C) \\
2 & \quad O > 3/2 S (or C) \\
3 & \quad O (x 2/3) > 3/2 S (or C) (x 2/3)
\end{align*}
\]

Proof:
the Formula “\( O > 1.5 S \) (or C)”
is Mathematically Equivalent to
the Formula “\( S \) (or C) < 2/3 O”

1 Given
2 Conversion of mixed number (1
5/10) to improper fraction (3 / 2)
3 Multiplication property of
inequalities
Now, to test the thesis that the two statements of the formula are equivalent, go back to DH 20α and DH 20β and re-work them, this time using the statement of the formula found in CC arts. 1510 & 1511. Do you get the same results or not?

2} Timing of evaluation

At what point(s) in time should the variables in the CC art. 1526 formula – S (or C) and O – be valued?

a} Value of donatum (O)

The donatum should be valued as of the date of the donation.

b} Value of services already rendered (S) or charge to be performed (C):

1/ S (remunerative donations)

In the case of a remunerative donation, the value of the services rendered can and should be determined as of the date on which they were rendered.

2/ C (onerous donations): a posteriori v. a priori

But in the case of an onerous donation, when should the value of the charge be determined? Louisiana’s doctrine & jurisprudence have identified two possibilities: the a posteriori method and the a priori method.

Averette v. Jordan,
457 So.2d 691 (La. App. 2d Cir. Sept. 26, 1984)

... [I]t has been suggested that the charges or services should also be valued as of the date of donation for purposes of making the determination under Article 1526. G. LeVan, The Louisiana Estate Planner, Vol. 8 at 250 (1982). See also Garcia v. Dulcich, 237 La. 359, 111 So.2d 309 (1959); Thielman v. Gahlman, 119 La. 350, 44 So. 123 (La.1907); J. Denson Smith, supra, at 225, Personal Services About the Home, supra, at 440 note 119. While several commentators have suggested that mortality tables be
utilized to project the probable duration of the donor's life at the time of donation and thereby estimate the value—as of the time of the donation—of the charge or condition to care for the donor or donors for the remainder of their lives [J. Denson Smith, supra, at 225; Personal Services About the Home, supra at 440, note 119] a prospective determination of the value of caring for a living donor until his or her death is extremely problematic given the uncertainty as to the duration of his or her life and uncertainty as to the kinds of services health will require. Thus, for pragmatic reasons, courts have used a post hoc or a posteriori evaluation in innumerable instances to determine the value of the charge or condition to care for an aged or ailing donor unto death. Almond v. Adams, 221 La. 234, 59 So.2d 132 (La.1952); Whitman v. Whitman, supra; Landry v. Landry, 40 La.Ann. 229, 3 So. 728 (La.1888); Victorian v. Victorian, 411 So.2d 473 (La.App. 3d Cir.1982); Succession of Danos, 359 So.2d 679 (La.App. 1st Cir.1978); Bell v. Bell, 339 So.2d 1333 (La.App. 3d Cir.1976); Fenger v. Cagnolatti, 292 So.2d 901 (La.App. 4th Cir.1974); Manuel v. Hebert, 236 So.2d 880 (La.App. 3d Cir.1970); Robinson v. Guedry, 181 So. 882 (La.App.1938). . . [A]n after the fact assessment of the services actually rendered and a determination of the duration, extent, and type of services actually provided may be utilized to ascertain the content and value of the donee's obligation of care.

In Averette, as it turns out, both methods led to the same result. The court, therefore, was able to use both methods without having to choose between them. But which did the court seem to prefer? Why?

Now, try to resolve the following hypothetical problem using both methods. Do the two methods lead to the same result? If not, which method should be preferred in such a case? Why?

DH 21α. Toward the end of his life, Philippe, Olide's father, becomes so sick and infirm that he can no longer care for himself. To help persuade Olide to take him in and care for him, Olide makes him this offer: "I'll give you my alligator farm, worth $100,000, on condition that you take care of me until I die." Before accepting the offer, Olide has his accountant run some numbers. Here's what the accountant reports: if Philippe lives out a normal life span (i.e., realizes his "life expectancy"), the total cost of caring for him should be $60,000 tops. Olide accepts Philippe's offer. The years pass, but to Olide's chagrin, Philippe lives on, and on, and on. By the time Philippe finally dies, the cost to Olide of caring for him exceeds $120,000. Not long thereafter, Bastille, Olide's brother, seeks to force Olide to "collate" the "donation" of the alligator farm "back into the succession" so that it can be divided between the two of them. See CC arts. 1227 & 1229. Olide opposes Bastille's demand, arguing that the supposed "donation" was, in fact, a predominantly onerous mixed contract and, as such, is not subject to collation. Who should prevail? Why?
DH 21β. The same as DH 21α, except that Philippe is still very much alive, it’s he who is attacking the donation, and the basis for the attack is that Olide has been guilty toward him of “ingratitude.” See CC arts. 1559 & 1560. At this juncture, is it even possible to use the a posteriori method? If not, then are we “stuck” with the a priori method?

2) Scope of classification

Is the division of donations into “pure,” “remunerative,” and “onerous” applicable to donations inter vivos only or to all donations, including donations mortis causa? Consider this hypothetical.

DH 22. During the last nine years of her life, T, a widow, lives under the care of one of her children, C. In her testament, which she executed shortly before her death, T made a universal legacy to C. The basis of the legacy, she explained, was her "desire that my son should be compensated for his labor and affectionate attention to me, and that he should be repaid the cost and expense that my support has been to him." Then T dies. When C files the testament for probate, the other children sue to “reduce” the legacy. C defends on the theory that the supposed legacy was not, in fact, a legacy at all, but rather a “remunerative donation” that, under the applicable law, was not governed by the special rules on donations IV, in particular, reducibility. The opponents rebut that argument, contending that “remunerative donations” can be made only inter vivos, not mortis causa. What result? Why? See Cynthia Samuel, Katherine S. Spaht & Cynthia Picou, Successions & Donations: Cases & Readings 396 (Fall 2000) (note on Succession of Henry, 158 La. 516, 104 So. 310 (1925), the court concluded that it was possible to make a remunerative donation by last will and testament. The testatrix expressing her desire in her will to compensate her son who had cared for her and rendered services to her for the last nine years of her life made him her universal legatee. The other forced heirs sought to reduce the legacy, arguing that the donation was excessive. The court dismissed the action of the other heirs after determining that the value of the son’s services exceeded the value of the legacy, and a remunerative donation can never be reduced below the value of the services.”); Graves v. Graves, 10 La. Ann. 212, 212 (1855) (refusing to “reduce” a “remunerative donation” that had been made “by the terms of the will”); Succession of Fox, 2 Rob. 292, 293 (La. 1842) (“If a remunerative donation exceed the disposable portion, . . . the legacy will be reduced if he [“the donee or legatee”] do not show that his services are worth the amount bequeathed to him. On the other hand, if the value of his services be equal to, or greater than, the bequest, no reduction can be made.”)

3) Significance of the classification

Why does it matter whether a given act of disposition is purely gratuitous or mixed and, if it’s the latter, whether it is predominantly gratuitous or not? The answer to this question may vary depending on whether the act of disposition is inter vivos or mortis causa.

-58-
a) For inter vivos acts of disposition

1] Statement (CC art. 1526)

a] Purely gratuitous inter vivos contracts

b] Onerous & remunerative "mixed" contracts of disposition

Re-read CC art. 1526. Then re-read the excerpts from Toullier’s treatise – the original source of CC arts. 1523-1526 – regarding “onerous donations” and “remunerative donations” that are reproduced supra at pp. 33-34 & pp. 42-43.

1} Classification

2} Consequences

a} Predominantly gratuitous

b} Predominantly non-gratuitous

2] Exposition of variable effects

a] Formation requirements

1} Different capacity requirements

DH 23.1. For the past year X, a widow, has performed a number of services, e.g., transportation, paying bills, and providing occasional meals, for Y, a girl who’s 16 and who’s been living on her own ever since she was emancipated at age 12. To repay X for what she’s done, Y gives X a set of china that she inherited from her mother. Sometime later, Y changes her mind and demands the china back. X refuses. Can Y sue to annul the "donation" on grounds of incapacity? Why or why not? Assume that the china was worth $1,000 and the services, $500. See CC arts. 1476 & 1918.

DH 23.2. The same as before, except that it was the other way ’round, i.e., that china was worth $500 and services, $1,000. What result now? Why?

2} Different consent requirements

DH 24.1. M, an elderly widow in poor physical health, is under the care of her daughter, D, a conniving and manipulative devil. D effectively isolates M from the rest of her family, e.g.,
tells them she can't come to the phone when they call and, when they leave messages, fails to
tell M. D also repeatedly encourages M to give her, D, rather than her other children, her
property. At first, M resists. But D keeps after, accusing her of "not appreciating me" and "being
as ungrateful to me as your other kids are to you." Eventually, M gives in and, by donation IV,
gives D a tract of land. Sometime later, M is sprung from D's prison, whereupon M wants to get
the land back. Can M sue to undo the "donation" on grounds that her consent was vitiated by
undue influence? Why or why not? Assume that the land was worth $10,000 and the services,
$5000. See CC arts. 1479 & 1918.

DH 24.2. The same as before, except that it was the other way 'round, i.e., that land was
worth $5000 and services, $10,000. What result now? Why?

3} Different object requirements

DH 25.1. A, who's about to go hunting, says to B, a friend who just helped A build a new
barn and big fan of venison, "To repay you for your kindness, I'll give you the first 10-point
buck I kill today." They shake on it. Out at the hunting club, it proves to be a slow day for A,
who manages to kill only one 10-point buck. Since it's his only one, he wants to keep it himself.
And so, when he returns home, he refuses to turn it over to B. B then sues A to get the buck.
Can A defend on the ground that the purported "donation" was an invalid donation of "future
property" under CC art. 1528? Why or why not? Assume that the value of the buck was $300
and the value of B's services, $100. See CC arts. 1528 & 1976.

DH 25.2. The same as before, except that it was the other way 'round, i.e., the buck was
worth $100 and services, $300. What result now? Why?

4) Different form requirements

DH 26.1. Near the end of his life, Papère gives his son, Pascal, a tract of land worth
$100,000, "in return," the act says, "for the many kindnesses he has shown me these past few
years." The gift is evidenced by an act under private signature. Is the purported "donation"
valid? In particular, is it in proper form? Why or why not? Assume that the "kindnesses" Pascal
had shown him consisted of services worth $50,000. See CC arts. 1536, 1839, & 2440.

DH 26.2. The same as before, except that it was the other way 'round, i.e., the land was
worth $50,000 and the services, $100,000. What result now? Why?

b] Modalities: resolutory condition of survivorship
(reversionary rights)

DH 26α. T, the elderly wife of the equally elderly, but ailing H, donates several acres of
her land to one of her 4 children, A, on condition that he, A, care for her (T) and H for the rest
of their lives. The act of donation also specifies that, in the event that A should predecease her
(T), then ownership of the land would revert to her. Not long after the donation, A takes out a loan from Bayou Bank, which he secures with a mortgage on the land. A few months later H dies. After that, A continues to care for T for several years. And then A dies, survived by T and by A’s son, S. T, invoking the resolutory condition of survivorship, then successfully sues to recover the land. Then A defaults on his loan, at which point the bank forecloses on the mortgage. T opposes the foreclosure, arguing that the land returned to her "free" of any mortgages attached to it by the donee, A (see CC art. 1534 & 1535). The bank disagrees, arguing that (i) the "donation" was, in fact, a primarily non-gratuitous onerous donation and (ii) as such, was exempt from the rules peculiar to donations, including that which "purges" donee-created mortgages when the donor to recovers the thing given pursuant to a resolutory condition of survivorship. What result? Why? Assume that the value of the land was $12,000 and the value of the services, at least $10,000.

c) Others: collation & reduction

DH 26β. In consideration of services that his son, Renard (aged 18), had rendered to him over the last months of his life–services worth $1,000–, Olide gave Renard a deluxe pirogue worth $1,000. When Olide died a weeks later, Lucille demanded that Renard “collate” the pirogue back to the succession, so that its value could be redistributed between them evenly. Is the “donation” of the pirogue subject to collation at all? Why or why not? See CC arts. 1227, 1228, 1235, 1526.

DH 26γ. The same as DH 26β, except that this time Lucille demands not the collation, but the “reduction” of the “donation” of the pirogue, which “donation,” she maintains, “impinges” on her “legitime” (i.e., her “forced heirship” rights). Is the “donation” of the pirogue subject to reduction at all? Why or why not? See CC arts. 1508, 1510, 1526.

b) For donations mortis causa

1] Exemption from “reduction”

Are predominantly onerous “donations” mortis causa reducible? Review DH 22.

2] Exemption from other requirements (?)

Should the “rule” of the cases noted in DH 22 – that predominantly onerous “remunerative” or “onerous” dispositions mortis causa are not subject to reduction – be extended to other institutions of donations law? Should such transfers, for example, also escape the special capacity and / or consent and /or form requirements for donations? Why or why not?

3 Formation & validity
a In general

Like every other juridical act, the donation, whether *inter vivos* or *mortis causa*, is, as we have already noted, subject to diverse requirements, requirements that must be satisfied if it is to be validly formed. Two of those requirements—those that concern the will—are capacity and consent. But there are others, namely, cause and object. It’s to the study of these requirements that we now turn our attention.

b Requirements

1) Capacity

   a) In general

      1] Definition

      The capacity to make and the capacity to receive donations are but two particular species of a larger genus of capacities, namely, the capacity to enter into juridical acts. See CC art. 28. These capacities, then, are analogous to “capacity to contract,” which you studied in your Obligations course. See CC art. 1918 *et seq*.

      2] General rule: capacity

      All other things being equal, what should one assume about the capacity of “persons,” properly so called, to make and to receive donations? Read CC art. 1470.

      3] Characteristics of donative incapacities

         a] Common characteristics

            1} General

            2} Absolute

         b] Variable characteristic

      b) Classifications

         1] Incapacity to receive (active incapacity)

            a] Cause(s) of incapacity
1} Admitted cause: nonexistence

a} General rule: existence is necessary

Read CC arts. 1474, 24, & 25. Then read the following opinion:

Fisk v. Fisk, 3 La. Ann. 494 (May 1848)

EUSTIS, C.J.

The plaintiff, who is the natural tutor and guardian of his minor children, residing in the territory of Wisconsin, seeks to recover from the executors of the late Abijah Fisk, the sum of $100,000, being the amount of a legacy alleged to be left to them under the will of their deceased uncle, Stebbins Fisk, who died in June, 1837. One of the executors, Alvarez Fisk, resists this demand, and claims the amount as belonging to the Succession of Abijah Fisk, of whom he is the residuary legatee.

The rights of the parties before us depend upon the construction of this clause in the will of the late Stebbins Fisk:

"To my brother, Abijah Fisk, I give, devise, and bequeath the sum of $100,000, for his sole use and benefit, without any security whatever, during his natural life. At his death it shall be divided and given equally to the children of Sereno Fisk, my younger brother."

Under this clause Abijah Fisk received the $100,000, which he retained till his death, which took place, in New Orleans, in December, 1845.

At the time of the death of the testator, Stebbins Fisk, but two of the children of Sereno Fisk, were in esse, and it is urged by the learned counsel that, the three of the present plaintiffs in interest, born since, are necessarily excluded from all participation in the legacy. The terms of the will are: "At his death, it shall be divided and given equally to the children of Sereno Fisk, my younger brother." At the decease of Stebbins Fisk, in June, 1837, but two of the plaintiffs were born, or conceived; Mary Elizabeth, born in 1834 and Newton, born in 1836. The next in age, Caroline, was not born until September, 1838. Under the terms of the will, and in accordance with the provisions of the Civil Code, Arts. 1457, 1458, 1459, 1469, we think that the children living at the decease of the testator can alone take under his will.

The learned judge before whom this cause was tried, at the instance of the counsel for the tutor, abstained from determining this question, as to which of the children this legacy belonged. The same request has been made in this court, but we do not feel ourselves at liberty to decide the case adversely to the residuary legatee and the succession of Abijah Fisk, represented by the executors without determining to whom the money in dispute of right, belongs. The judgment of the District Court will have to be changed in this respect.
b) Definition

1/ Natural persons

a/ Existence has begun

1° Born

2° Conceived? or conceived & implanted?

Read CC art. 1474 and the comments thereto; then re-read CC art. 25 and the comments thereto. When, according to these authorities, does “existence” begin? Are the authorities consistent?

b/ Existence has not ended

When does existence end? Read CC art. 24 cmt. (c); La. Rev. Stat. 9:111; CC arts. 30 & 54.

2/ Artificial persons

a/ Existence has begun

1° General rule: existence must have begun

a° Corporation: when incorporated

DH 27a. X has a favorite nephew, A, to whom he wants to leave a large bequest. But because A’s creditors are after him, X proposes that A set up a business corporation. A promises to do so. X then makes out a testament in which he leaves $100,000 to "A’s new corporation." A, however, drags his feet, and before he completes the paperwork necessary to incorporate the corporation, X dies. As soon thereafter as he can, A completes the paperwork and files it with the secretary of state. A then seeks to probate the will. In addition to A, X left behind a son, S, who’s interested in challenging the legacy. What arguments might he try? Why?

b° Partnerships: when formed
DH 27β. The same as DH 27a, except that X proposed that A set up a partnership with A’s brother, B, who, as yet, knows nothing of the plan; X makes the bequest to “A and B’s new partnership”; and A doesn’t get around to talking to B about setting up the partnership until X is dead and gone. What result now? Why>

c° Unincorporated associations: when formed

DH 28a. The Turkey Creek Baptist Church is "a number of individuals who had associated themselves together" and had bought "a house in which they worshipped." The church was not, however, incorporated. T, the president of the WMU (Women's Missionary Union) at the church, makes out a will in which she leaves "all the property of which I die possessed to Turkey Creek Baptist Church." She then dies. Sometime later, the church finally incorporates. T's only surviving relative, her grandniece, N, wants to attack the legacy. What arguments might she try? Why? See La. Rev. Stat. 9:1051.A ("Corporations unauthorized by law or by an act of the legislature enjoy no public character, although these corporations may acquire and possess estates and have common interests as well as other private societies. Unless otherwise provided by its constitution, charter, bylaws, rules, or regulations under which it is organized, governed, and exists, any unincorporated nonprofit association may alienate or encumber title to immovable property to any person.") and the jurisprudence that follows:

Ermert v. Hartford Ins. Co.,
559 So. 2d 467 (La. Mar. 12, 1990),

DENNIS, J.

The major questions in this case in which a duck hunter negligently shot a companion are (1) whether a juridical entity in the nature of an unincorporated association had been formed between the negligent hunter and his hunting friends (presenting the possibility that the association and its members could be held liable) and (2) whether the negligent hunter was acting in the scope of his employment at the time of the accident so as to render his employer vicariously liable. The trial court held that the negligent hunter's employer was vicariously liable but that his hunting friends were not, although they were members of an unincorporated association with him. The court of appeal reversed, holding that the negligent hunter was not acting in the scope of his employment at the time of the accident but that his hunting friends who were present at the time of the accident were vicariously liable as members of an unincorporated association with him. Ermert v. Hartford Ins. Co., 531 So.2d 506 (La.App. 4th Cir.1988). We reverse and reinstate the trial court's judgment. None of the tortfeasor's hunting friends was guilty of any fault that caused the victim's injury, and they had not formed an unincorporated association because the group did not intend to create a separate juridical entity. The negligent hunter was acting within the scope of his employment because as chief
executive and majority stockholder of his corporate business he had established the practice of using the camp and his relationship with his hunting friends for the purpose of furthering his employer's business interests.

In an explicit statement of traditional civilian doctrine and ideas inherent in the Louisiana Civil Code of 1870, the 1988 revision of Civil Code article 24 identifies two kinds of persons: natural persons and juridical persons. La.C.C. art. 24 and comments (a)-(c). The article provides in pertinent part:

A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership. The personality of a juridical person is distinct from that of its members.

Comment (b) to the article states that an unincorporated association may possess legal personality for certain purposes. The comment is consistent with other provisions of the Code, other statutes, and our jurisprudence. An unincorporated association may acquire and possess estates and have common interests as well as other private societies; it may alienate or encumber title to immovable property to any person, unless otherwise provided by its constitution, charter, by-laws, rules or regulations under which it is organized. La.R.S. 9:1051 (formerly La.C.C. art. 446, redesignated as R.S. 9:1051 pursuant to 1987 La.Acts No. 126, § 2); United Brotherhood of Carpenters Local 1846 v. Stephens Broadcasting Co., 214 La. 928, 39 So.2d 422 (1949); Le Blanc v. Lemaire, 105 La. 539, 30 So. 135 (1901). It has the procedural capacity to sue and be sued in its own name. La.C.C.P. arts. 689, 738. An unincorporated association may become a party to a contract of partnership, as may any other juridical person, such as a corporation, a partnership or a natural person. La.C.C. art. 2801 and comment (a). It may be involuntarily dissolved and liquidated subject to supervision by a court as provided by law. La.R.S. 12:501-505; Levy v. Bonfouca Hunting Club, 223 La. 832, 67 So.2d 96 (1953). An unincorporated association may also be liable in tort for defects in property owned by it or for the negligence of its servants. Vredenburg v. Behan, 33 La.Ann. 627 (1881). From these authorities, one can conclude that an unincorporated association possesses full capacity. As one commentator has noted, "Corporate attributes of a limited kind have a tendency to proliferate towards producing the complete legal person." H. Ford, UNINCORPORATED NON-PROFIT ASSOCIATIONS 113 (1959); see also F. Lawson, A. Anton & L. Brown, AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 55 (3rd ed. 1967); 1 M. Planiol & G. Ripert, TRAITE ELEMENTAIRE DE DROIT CIVIL No. 3016 (La.St.L.Inst. trans. 1959).

The most commonly regulated form of unincorporated association has been the partnership. The 1980 revision of the partnership articles of the Civil Code regulates the incidents of juridical personality of partnerships. La.C.C. arts. 2801-2807. The provisions of the Louisiana Civil Code of 1870 regulating corporations, La.C.C. arts. 427-442, 444-447 (1870), which formerly served as the general law of Louisiana regulating the incidents of juridical personality, have been repealed or redesignated. 1987 La.Acts No. 126. Nevertheless, courts may refer to the principles underlying those articles, insofar as consistent with current law, along with traditional civilian conceptions, doctrine and jurisprudence. See generally, A. Yiannopoulis,
PART I: DONATIONS

LOUISIANA CIVIL LAW SYSTEM 105-109 (1977). Except to the extent modified by special legislation, we apply these principles, along with those from the current partnership articles that are applicable by analogy, to determine the law applicable to the creation of other juridical persons.

Under both civilian and common law theory, an unincorporated association is created in the same manner as a partnership, by a contract between two or more persons to combine their efforts, resources, knowledge or activities for a purpose other than profit or commercial benefit. See United Brotherhood of Carpenters Local 1846 v. Stephens Broadcasting Co., 214 La. at 938, 39 So.2d at 425 (the charter, constitution and by-laws of an association "constitute and are the contract between the members and the association"); 2 M. Planiol & G. Ripert, supra, No. 1988; E. Church, BUSINESS ASSOCIATIONS UNDER FRENCH LAW § 1, at 3 (1961); H. Smith, THE LAW OF ASSOCIATIONS 18 (1914); cf. La.C.C. art. 2801 ("A partnership is a juridical person ... created by a contract"). Except as otherwise provided by law, the contract of association is governed by the Civil Code provisions pertaining to conventional obligations. 2 M. Planiol & G. Ripert, supra, No. 2007; cf. La.C.C. art. 2802. Planiol describes the essential nature of the contract as follows:

The association is the contract by which several persons put in common their activity and in case of need, revenue or capital with a purpose other than to share in the benefits. This contract permits the attainment of a purpose or the exercise of influence, which for individual persons acting alone would be more difficult or even impossible.


Under the French Law of 1 July 1901, an association may acquire juridical personality by complying with certain formalities of registration; if these formalities are not met, then the resulting association has no legal capacity. 1 M. Planiol & G. Ripert, supra, No. 3042; 2 id. Nos. 2015-2016; E. Church, supra, §§ 11-15. Thus the members of an association can express their intent for the association to be a separate entity by complying with these registration requirements.

The common intent of the parties is the controlling factor in interpreting a contract. La.C.C. art. 2045. Although our law does not provide for a public display of the parties' intent as does the French statute, we nevertheless conclude that for an unincorporated association to possess juridical personality, the object of the contract of association must necessarily be the creation of an entity whose personality "is distinct from that of its members." La.C.C. art. 24. Unless such an intent exists, the parties do not create a fictitious person but instead simply incur obligations among themselves. Consequently, an unincorporated association, as a juridical person distinct from its members, does not come into existence or commence merely by virtue of the fortuitous creation of a community of interest or the fact that a number of individuals have simply acted together; there must also be an agreement whereby two or more persons combine certain attributes to create a separate entity for a legitimate purpose. While the parties need not specifically intend or have knowledge of all the legal ramifications of juridical personality, they must at least conceive of their creation as a being or thing separate from themselves. See, e.g., Succession of Fisher, 235 La. 263, 274, 103 So.2d 276, 280 (1958); Lord v. District VIII
Baptist Convention, 391 So.2d 942, 944 (La.App. 2d Cir.1980); cf. La.C.C. art. 2801 comment (a).

The six duck hunters never drew up a contract, constitution, by-laws, or any written instrument. There was no testimony that they entered an oral agreement to create an entity separate from themselves. The hunters had established such a rapport and were in such accord that they had no need even for written hunting rules. When they had been part of a larger group that hunted at the two previous sites, they had reduced a dozen or so simple safety rules into writing, but they did not include any provisions for governing their relationship. When they reduced the size of the group and moved to Larrieu's camp, however, they found even those rules unnecessary because they all got along well and knew that each individual was familiar with common sense hunting safety. There was no name given to their group, no officers elected or appointed and no formal meetings held, because the six friends did not consider that they had created any fictional being separate from themselves that required any government.

Larrieu's testimony in this regard epitomizes that of his friends and, for that matter, all of the evidence on this subject:

Well, there really wasn't any such thing as a club. There was no officers. There was no president, no secretary. It's just a group of guys that we--when we first started we were going to lease some pond in another location, okay. And that was going to be it. As soon as the hunting season was over that was going to be the end of the little get together..... [T]he hurricane came and we built camp number 2 and that is how this thing originated, turned in to be a group of guys going to a camp and hunting. There was never no club really actually formed. It was just a group of guys that started out to go hunting. And then in 1975 I decided to go and build this other camp and that is how we continued. Actually it wasn't a club. It's a group of guys that go hunting, fishing, and go down and do a little bunch of cooking or whatever.

The sum and substance of their community of interest was that of leasing a hunting site; building duck blinds prior to the season; hunting, eating, drinking and socializing together during the duck season; sharing the expense of groceries after each hunt (each man brought his own alcoholic beverages); and discussing plans for the next hunt.

These parties did not intend to form an unincorporated association. Rather, the evidence is clear that each of the hunters had an agreement with Larrieu by which in exchange for his help and a small sum of money to cover expenses, Larrieu allowed him to use the camp. The parties to such a contract do not incur any vicarious liability for one another's tortious acts. Since the parties did not agree to create an association, no association existed, and we need not consider the issues of an unincorporated association's vicarious liability for the torts of its members and the members' personal liability for the debts of such an association. See Morris, Developments in the Law 1985-86--Business Associations, 47 La.L.Rev. 235, 247-48 (1986). Similarly, we pretermit the question of the applicability of La.R.S. 9:2791. Since Larrieu, Cummings, Brumfield, Caillouette and Bourcq have no vicarious liability based on any membership in an unincorporated association with Decareaux, and since there is no allegation or proof that Decareaux was
the servant of any of them, these individuals are not secondarily liable for the negligence of Decareas in shooting Ermert's foot.

b/ Existence has not ended

b) Exception: existence is not necessary: posthumously conceived children

DH 28β. Pascal and Julie, husband and wife, having had no luck producing children the "normal" way (though not for want of trying), turn for help to the caring "assisted conception" professionals at Théophile's Fertility Clinic. In due course, each of them makes a "deposit" of his / her respective gametes at the clinic. Not long thereafter, but before the clinic's first attempt at uniting the couple's gametes in the lab, Pascal learns that he has an advanced case of inoperable brain cancer, one that will take his life within a few weeks. At Julie's request, Pascal then (i) writes a letter to the clinic that reads, in part, as follows -- "I authorize Julie to go forward with the assisted-conception procedure after my death, that is, to use my sperm to fertilize her eggs in vitro and then to implant the resulting embryos in her womb" -- and (ii) makes out a valid testament in which he leaves all his property to his "children." Five days later Pascal dies. A few months after that, Théophile, at Julie's direction, unites Pascal's sperm with Julie's eggs in vitro and then implants the embryos thereby produced in Julie's uterus. Nine months later (one year from Pascal's death), Julie gives birth to twins -- one boy and one girl --, whom she names Ti-Boy and Lil-Fille, respectively. Are Ti-Boy and Lil-Fille entitled to the legacy that Pascal left to his "children"? Why or why not? See La. Rev. Stat. 9:391.1 (added by Acts 2001, No. 479).

2) Other possible causes(?): minority, interdiction, mental defect (?)

Are "minority," "interdiction," and "mental defect" (e.g., "deprived of reason" or "deficient comprehension") causes of incapacity to receive? Why or why not? See CC arts. 1470 comment (c) & 1475 comment (a).

DH 29. X executes an act of donation of a tract of land worth $100,000 to C, a ten-year old child. The donation is subject to a suspensive condition, namely, that C complete college. It's also subject to a charge, i.e., that C pay off X's existing debts, which total $20,000 and all of which are now due. C, acting on his own, accepts in an authentic act of donation. when M, C's mother, learns of what's happened, she's furious, because she knows that C doesn't have $20,000 lying around. Can she, acting for C, now upset the donation? Why or why not?

b) Distinctive characteristic: an incapacity of enjoyment

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c] Time of determination

1} Donation inter vivos

In the case of a donation *inter vivos*, at what time must the donee have capacity to receive? Read CC art. 1472.

2} Donation mortis causa

In the case of a donation *mortis causa*, at what time must the donee have capacity to receive? Read CC art. 1472.

d] Proof

1} Evidence: anything relevant to existence, including conception & implantation

2} Burden of proof (?)

e] Effects

What's the effect of a donation that's made in favor of a putative person who, it turns out, lacked capacity at the critical moment? See CC art. 1475. Is the nullity “absolute” or merely “relative”? Why? See *Pope v. Kinney*, 13 La. Ann. 538 (1858) (“The incapacity of a person accepting a donation is a relative nullity, of which the donee may avail himself . . . .”); *Badillo v. Tio*, 6 La. Ann. 129 (1851) (“[T]he disposition in favor of a person incapable of receiving shall be null . . . . This is not an absolute, but a relative, nullity, to be declared when persons interested claim that the nullity should be pronounced.”); Laurie Dearman Clark, Comment, *Louisiana’s New Law on Capacity to Make & Receive Donations: “Unduly Influenced by the Common Law?*, 67 Tul. L. Rev. 183, 196 (1992) (“Generally, donations made . . . . by an incapable person were only relatively null, the incapacity having been created for reasons of private interest.”); 5 Marcel Planiol & Georges Ripert, *TRAITÉ PRACTIQUE DE DROIT CIVIL FRANÇAIS* no 191, at 279-80 (André Trasbot & Yvon Loussouarn, revs., 2d éd. 1957) (“In all cases, is it not, therefore, preferable to adhere to the mean – simple annulability [relative nullity] –, which sufficiently protects the author from the act, but still allows him, as well as his heirs, the possibility of executing the donation voluntarily? This opinion is generally endorsed by the judgments . . . . that have been rendered in cases relative to donations.”); id. no 251, at 345 (“In principle, when a liberality is stained with incapacity, the sanction is nullity. This nullity, like every [other] nullity for incapacity, is simply a relative nullity . . . .”)
a) Causes of incapacity

1) Minority

a) Donations inter vivos

1/ Rules:

a/ General rule: no capacity

b/ Exception: capacity to donate in favor of spouse or children

2/ Illustration

DH 30.1. A few weeks after Ti-Boy, aged 15, and his girlfriend, Gigi, elope, she bears him a son, Bijoux. The next day, Ti-Boy makes three gifts by way of donations inter vivos: (i) to Lil-Fille, his sister, $50; (ii) to Gigi, some stock certificates; (iii) to Bijoux, the old “footy” pajamas he’d used as an infant. A few days later, Ti-Boy, having changed his mind about all three donations, wants to get the things back. Can he attack any of the donations on the ground of “incapacity”? Why or why not?

2/ Donations mortis causa

a/ Rules

1° Under 16

a° General rule: no capacity

b° Exception: capacity to donate in favor of spouse or children

2° 16 up to 18: full capacity

b/ Illustrations

DH 30.2. The same as DH 30.1, except as follows: (i) Ti-Boy makes the gifts by way of donations mortis causa (i.e., in a testament); (ii) Ti-Boy dies immediately after executing the
testament; and (iii) it’s Bastille, Ti-Boy’s illegitimate son who wants to challenge the donations on the ground of “incapacity.” What result now? Why?

DH 30.3. The same as DH 30.2, except that, at the time of his death, Ti-Boy is 17, not 15, years old. What result now? Why?

2} Interdiction

What is “interdiction”? Read CC arts. 389, 390, & 392.
Is interdiction a cause of incapacity to give? All kinds of interdiction or just some? First, read CC arts. 1477 & 1482; next, read CC art. 395; then, consider this hypothetical:

DH 31α. Not long after her interdiction (a “full” interdiction, see CC art. 389), Clodice (i) donated a tract of farmland, by authentic act, to Olide (which he duly accepted in proper form) and (ii) made out a testament, in proper form, in which she left her house and lot to Olide. Two weeks later, Clodice died. Clodice’s son (and erstwhile curator), Renard, then initiated succession proceedings. When Olide intervened in the proceedings, seeking to have the testament probated, Renard opposed him, arguing that the legacies set forth therein were null. Not only that, but Renard, arguing that the donation of the farmland, too, had been null, brought suit against Olide, demanding that he return the farmland to the succession. Will Renard prevail, either in his opposition to the probate of the testament or in his suit to recover the farmland? Why or why not?

DH 31β. The same as before, except that this time, Clodice’s interdiction was “limited,” to be precise, the order of interdiction took away from Clodice (and gave to her curator) only the power to deal with her farmland. What result now? Why?

DH 31γ. The same as before, except that this time, the order of interdiction took away from Clodice (and gave to her curator) only the power to deal with her house and lot. What result now? Why?

3} Inability to understand

a} Statement

Under what circumstances is one considered to be “mentally” incapable of making a donation? What, precisely, is the standard for assessing “mental competency” in this context? Read CC art. 1477.

b} Source
From which legal tradition – the civil law or the common law – was this standard for assessing mental capacity taken? Read CC art. 1477 cmt. (b).

1/ Analysis

a/ Able to comprehend

What’s the significance of the use of the expression “able to comprehend” as used in article 1477? Read CC art. 1477 cmt. (c).

b/ Generally (id. comment (e))

What’s the significance of the use of the expression “generally” as used in article 1477? Read CC art. 1477 cmt. (e).

c/ Nature

What is meant, in article 1477, by the expression “the nature . . . of the disposition that he is making”? What’s the “nature” of a donation? Read CC art. 1477 cmt. (d).

d/ Consequences (id. comment (d))

What is meant, in article 1477, by the expression “the consequences of the disposition that he is making”? What are the “consequences” of a donation? Read CC art. 1477 cmt. (d).

2/ Illustration

DH 31. One day Meau Sot, Jean Sot’s 25-year-old, mentally-retarded son (mental age of 6), “gives” Olide, whom Meau has just met in the park, his entire collection of Pokémon cards, worth $1000. Meau, to whom Jean Sot has since explained the consequences of the gift, now wants to get the cards back. How would you evaluate his chances? Why?

b] Distinctive characteristic: incapacity of exercise

c] Time of determination

1} Donation inter vivos

In the case of a donation inter vivos, when must the donor have capacity to give? Read CC art. 1471.
2) Donation mortis causa

In the case of a donation mortis causa, when must the donor have capacity to give? Read CC art. 1471; then work the following hypothetical:

DH 31.1. Back in December of 2000, Papère, an experienced businessman in good physical and mental health, donates his farm just outside of Gueydan to his son, Pascal. The offer and acceptance of the donation are memorialized in authentic form. Two months later, in February of 2001, Papère suffers a debilitating stroke, one that destroys a good part of his cerebral cortex (the part of the brain that’s responsible for higher order “thinking”). As a result of his injuries, he is committed to long-term, round-the-clock nursing care. While confined to the nursing home, Papère, according to the notes of his nurses and doctors, is “chronically disoriented” and “never knows where he is or why he is here.” During his confinement he nevertheless manages, with the assistance of Anna-Nicole, his “new” (post-stroke) girlfriend, to make out a testament, in proper form, in which he leaves “all of my property, including my farm in Gueydan, to Anna-Nicole.” Who is entitled to Papère’s property, including the farm in Gueydan? Why?

d} Proof

1) Burden of proof (CC art. 1482)

a} General rule

1/ Bearer

Who, as a general rule, bears the burden of proof on the issue of inability to understand? Read CC art. 1482, sent. 1.

2/ Standard

What is this person’s standard of proof? Read CC art. 1482, sent. 1.

b} Exceptions

There are, however, two exceptional cases to which this general rule does not apply. The only thing they have in common is that both involve so-called “limited interdiction.” Beyond that, they are quite different.

1/ Explication
Part I: Donations

a/ Exception 1: donations inter vivos or mortis causa of property not covered by the limited interdiction order (1482.C, sent. 2)

1° Bearer

Who, in this exceptional case, bears the burden of proof on the issue of capacity? Read CC art. 1482.C, sent. 2.

2° Standard

And what “standard of proof” must that person meet? Read CC art. 1482.C, sent. 3.

b/ Exception 2: donations mortis causa of property covered by the limited interdiction order (1482.C, sent. 1)

1° Bearer

Who, in this exceptional case, bears the burden of proof on the issue of capacity? Read CC art. 1482.C, sent. 1.

2° Standard

And what “standard of proof” must that person meet? Read CC art. 1482.C, sent. 3.

2/ Illustration

DH 32α. A few months back, Olide, who had been displaying signs of mental perturbation, was placed under limited interdiction. The interdiction order deprived Olide of (and confided to his curator) the power to deal with Olide’s vast holdings in stocks and bonds. Today Olide makes several donations: (i) to his son Renard a donation inter vivos of a tract of land; (ii) to his daughter Desirée a donation inter vivos of stock; (iii) to his friend Pascal a donation mortis causa (legacy) of his boat; (iv) to his friend Jean Sot a donation mortis causa (legacy) of bonds. After making the donations, Olide drops dead. Which donations, if any, might possibly be upset on the ground that Olide lacked the “ability to understand” required by CC art. 1477? Who would bear the burden of proof? What standard would he have to meet?
2) Evidence: anything relevant to mental capacity

DH 33. Celeste, Pascal’s sister, was a bit “odd.” One day she ran up on the roof, trying to escape imaginary robbers. Another day she burned her clothes and bedding, for no evident reason. Further, she occasionally suffered from delusions, including that Pascal had killed 7 men, cut ’em up, and put ’em down the well, and strange phobias, including that her son, Niles, was going to boil her in a large kettle. Expert psychologists who had examined her described her condition as "mania," but denied that she was “imbecilic” or “demented.” Though Pascal and Niles had once tried to have her interdicted, the attempt failed. After Celeste’s death, Niles seeks to upset a donation that Celeste made to Pascal on the ground of “incapacity.” How would you evaluate his chances? In particular, do you think he’s got enough evidence to meet his burden of proof? Why or why not? See the jurisprudence that follows:

Chandler v. Barrett,
21 La. Ann. 58 (1869)

HOWE, J.

The only question in the case, in the view we have taken of it, is, whether Christina Chandler, on the twenty-fourth day of July, 1855, had testamentary capacity, or whether on the contrary she was intestate by reason of unsound mind? The question, we must say, is not very clearly presented by the pleadings, but it seems from the whole record to have been the main point issue. And here we may remark that, while it is true as stated by this court in Aubert v. Aubert, 6 Ann. 106, and urged by plaintiffs at bar, that testaments are more easily avoided than contracts on the ground of unsoundness of mind, yet this distinction applies to such matters as those of notoriety and interdiction and not to the amount of intellect required in a testator. So far as the latter is concerned, a will may well be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain. It would be unreasonable to require that a testator should have more mental vigor and a more lucid memory than a person who makes a contract....

In considering the question of her alleged unsoundness of mind at the time her will was made there are some elementary principles which may guide us to a just conclusion.

"The Roman law," says Com. Delisle (Donations et Testamens, page 82), "furnished rules on this point: which still deserve to be followed. If the testament present but a series of wise and judicious dispositions, it is for the heirs who attack it, to prove unsoundness of mind at the date of the testament. If it contain dispositions such as would insanity to be presumed, although susceptible of being justified by peculiar circumstances, it is for the legatee to prove by witnesses the sanity of the testator as against the terms of the testament. But if by facts occurring near the time of the date of the testament, and
preceding and following it, the heirs have proved an habitual state of insanity, we are constrained to think that then, and notwithstanding the wisdom of the act, the legatee should be held to prove the existence of soundness of mind during the intermediate time. If, however, the acts of insanity were rare and occurred at periods distant from each other and from the date of the testament, the testament would sustain itself, and would be presumed to have been made in a lucid interval, at least if the act was not destitute of good sense and betrayed no insanity."

"The presumption," says Toullier, "is always in favor of the act. Insanity is never presumed. The advanced age of the donor, the forgetfulness of his family, the largeness of the legacy, the low rank of the legatee, will not of themselves suffice to decide that: the testator is not of sound mind." Droit Civil, vol. 3, p. 44. See also Marcade, vol. 3, p. 403, Duranton, vol. 8, p. 167.

"The presumption of sanity does not cease," says Troplong, "because the testator has experienced some transitory intellectual derangement at a time anterior to the testament." Donations et Testamentes, vol. 2, p. 56. And the same writer animadverts with characteristic energy upon the tendency he has observed "to transform a morbid susceptibility, an ephemeral, excessive excitement, a superficial trouble, into one of those profound alterations which destroy the reason." * * *

Turning the evidence in the record we find the principal acts of folly relied upon by plaintiffs to be that about the year 1850 or 1851, the testatrix, Christina Chandler, ran up on the roof of a house as if trying to escape from an imaginary robber; that about 1856 she had a delusion that her brother had killed seven men and cut them up and thrown them in a well; that "some time before the war" she took all her bed clothing and her clothes and burned them; that about 1863 she informed one of the witnesses that her son and a young lady had bought a large kettle and she believed it was their purpose to boil her up in it; * * *.

The Plaintiffs also rely on the opinions of experts, but the experts do not seem to agree as to what was the character of Mrs. Chandler's mental aberration. They do not appear to have considered her imbecile nor afflicted with dementia. In their opinion the unsoundness took the form of mania of some kind. The judge of the court who recused himself and was called as a witness, thought her of unsound mind; that she seemed to distrust everybody except the judge of the second District Court, to have a morbid fear of being robbed and cheated, and to have "a mania for penurious conduct." He thought, however, that she knew how to keep her money, that she was not violent, and he did not deem it his duty to interdict her....

That she was very penurious and very eccentric is plain enough, but that she was habitually insane is something we cannot affirm. She had in former years, without doubt, on occasions separated by long intervals of time, suffered from irritation of the brain, but from the evidence we must deem it to have been of the transitory kind, which occurring long anterior to the time of the testament, does not cause the presumption of sanity as to that act to cease. If the plaintiffs had shown that before these isolated acts of folly occurred her habits of mind were different, and that these acts indicated a permanent and morbid change, if they had shown that the delusions which visited her at various times continued to manifest themselves in some form down to the time she made her will, as

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if the result of a chronic state, in short if they had brought themselves within the rule that where the insanity is proved to have been habitual, the burden of proof is shifted on the legatee, the result might have been different. But as the case comes to us, it seems to fall under the rule we have cited, that if the acts of insanity are rare and occur at periods distant from each other and from the date of the testament, the testament, if not destitute of good sense, and betraying no folly on its face, will sustain itself to be pressed to have been the offspring of a healthy volition and a lucid memory.

For the reasons given it is ordered and adjudged that the judgment appealed from be reversed and avoided, and that there be judgment in favor of defendants with costs in both courts.

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DH 34. T, who's up in years, executes a testament while in the hospital. Testimony from interested lay witnesses regarding whether T was confused and disoriented around the time of execution is conflicting. The nurses' notes indicate T was alert and oriented. Though T's doctor testifies that T was so out of it he could not have understood business transactions, he admits that he accepted from T a consent-to-surgery form. T's successors now want to upset the donations mortis causa in the testament on the ground of "incapacity". How would you evaluate their chances? In particular, do you think they've got enough evidence to meet their burden of proof? Why or why not?

DH 35. T, a former soldier who developed PTSD (post-traumatic stress disorder) during the Vietnam War, returns home. T takes psycho-tropic drugs for his condition, which he administers to himself. He handles day-to-day matters himself, e.g., bathes himself; dresses himself; feeds himself; walks to church, to the store, and to the recreation center by himself. All B does for him is to keep his room, wash his laundry, and prepare his meals. He appears "normal" to friends, but has some memory problems, in particular, forgets to return phone calls to his son, S. Years pass. Then T makes out a will in which he leaves all of his property to B, save for a farm he'd inherited, which he leaves to his son, S. The setting in which he does so is a bit curious. It is on the occasion of a birthday party that B throws for her daughter at her house. After eating his supper in the kitchen, T goes into the living room, where the party is already underway, and joins the festivities. A short while later he says, "Now would be a good time to make a will, while there are people here to witness it." B then gives him some paper and a pencil, whereupon he writes out his testament. T has a bit of trouble making it out, e.g., misspells simple words, so much so that B has to ask him to redraft it twice. But T does it Weeks later, T dies. When B tries to have the testament probated, S intervenes, contending that the testament was null in that T lacked capacity, in particular, did not comprehend what he was doing. His theory? General mental incompetence. Is T right? Why or why not? See Succession of Cole, 618 So. 2d 554 (La. App. 4th Cir. 1993) (finding, on similar facts, that the donor's capacity was proved by clear and convincing evidence).

DH 36. T, a former soldier who developed PTSD (post-traumatic stress disorder) during the Vietnam War, returns home. Years pass. Then T makes out a will in which he leaves all of
his property to B, save for a farm he'd inherited, which he leaves to his son, S. A friend who witnesses the testament asks him, "Hey, T, what you got besides yore house?" T replies, "Well, me, I'm not exactly sure. I know I got some furniture here in my room in B's house; some stocks an' bonds; some old cat'chisms an' missals; an' some Cajun music LPs." The friend then asks, "And 'bout how much dat worth?" T replies, "Well, me, I'm not exac'ly sure. De furniture, maybe $500; de stocks an' bonds, maybe $5000; de books, le Bon Dieu only know; an' de Cajun music CDs, 'bout $10." It turns out that T was not entirely correct about the extent or value of his holdings. He neglected to mention two of them, namely, his old 1970 Ford Fairlane, worth $200, and some old shotguns and rifles, worth $500. And he grossly underestimated the value of his stocks and bonds, which were in fact worth $10,000. Weeks later, T dies. When B tries to have the testament probated, S intervenes, contending that the testament was null in that T lacked capacity, in particular, did not comprehend what he was doing. His theory? T didn't know enough about what or how much he owned. How would you rate B's chances? Why? See CC art. 1477 cmts. (c) & (d) & Succession of Cole, 618 So.2d 554, 557 (La. App. 4th Cir. 1993) ("[T]his argument appears to have been disposed of by the comments to La. C.C. Art. 1477 . . .: 'a person must have a general and approximate understanding of the nature and extent of his assets to be disposed of . . .' Id. cmt. . . . (c). . . . Thus, even if Cole did not know the exact extent of his holdings, such knowledge was not requisite for donative capacity.")

What is the effect of a defect in capacity to give? Among the CC articles that concern "donative capacity," is there any counterpart to CC art. 1475 (which concerns only incapacity to receive) for incapacity to give? If not, then where should one look for the answer? More importantly, what is the answer? See CC art. 2031; State v. Martin, 2 La. Ann. 667 (1847) ("[N]ullities in a testament, growing out of . . . a want of capacity in the testator, are not absolute, but relative, and therefore cannot be set up by all persons . . ., but by those only to whom the succession would devolve should the testament be annulled.") (citing Philippe Antoine Merlin, Nullité, § 3, n° 12, in Répertoire de Jurisprudence (1826)); Laurie Dearman Clark, Comment, Louisiana’s New Law on Capacity to Make & Receive Donations: “Unduly Influenced” by the Common Law?, 67 Tul. L. Rev. 183, 196 (1992) (“Generally, donations . . . received by an incapable person were only relatively null, the incapacity having been created for reasons of private interest.”); Philippe Malaurie & Laurent Aynès, COURS DE DROIT CIVIL: LES SUCCESSIONS, LES LIBÉRALITÉS n° 306, at 175 (4th éd. 1998) (“[M]ental insanity leads to the relative nullity of the act, never to its nonexistence.”); 5 Marcel Planiol & Georges Ripert, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 251, at 345 (André Trasbot & Yvon Loussouarn, revs., 2d éd. 1957) (“In principle, when a liberality is stained with incapacity, the sanction is nullity. This nullity, like every [other] nullity for incapacity, is simply a relative nullity . . . .”)

2) Consent

a) Definition
“Consent,” as used in this context, is but a particular kind of “consent to a juridical act.” The only thing distinctive about consent here is, of course, the kind of juridical act involved, namely, a donation. Thus, with this one exception, the term consent has here the same meaning it has in the context of “consent to contracts,” which you studied in your Obligations course. See CC art. 1921 et seq. & 1948 et seq.

b) Characteristics

What are the characteristics of (requirements for) valid donative consent? The answer to this question should, in principle, be the same as is the answer to the question, posed in your Obligations course, “What are the characteristics of (requirements for) valid consent to a contract?”

c) Formation: offer & acceptance

1] Requirements

a] Donation inter vivos

Does a donation inter vivos presuppose an “offer” and an “acceptance”? See CC arts. 1468 & 1540.

b] Donation mortis causa

But what about a donation mortis causa? Does it, too, presuppose an “offer” and an “acceptance”? Isn’t the relationship between offer and acceptance considerably more complicated, conceptually speaking, in the case of a donation mortis causa than it is in the case of a donation inter vivos? See CC arts. 1469, 935, ¶ 1, 937, 947, & 954.

2] Effects of absence of consent

What are the consequences of an absence of consent? The answer to this question should, in principle, be the same as is the answer to the question, posed in your Obligations course, “What are the consequences of an absence of consent to a contract?”

d) Vices of consent

1] Types of vices

a] Fraud

1} Recognition
Is fraud a recognized vice of consent in the domain of donations? Why or why not? See CC art. 1478.

2) Definition

What does “fraud” mean in this context? In principle, it should have here the same meaning it has in the context of contracts in general. See CC art. 1953.

3) Proof

a) Evidence: anything relevant

b) BOP (CC art. 1483)

1/ Bearer

Who bears the burden of proof with respect to the issue of fraud? See CC art. 1483, sent. 1.

2/ Standard

And what is that person’s burden, i.e., what is the “standard” of proof? See CC art. 1483, sent. 1.

a/ General rule

What is that standard in the typical (normal) case? See CC art. 1483, sent. 1.

b/ Exception

There is, however, an exception to this general rule. What is it? Note that there are two elements to (requisites for) this exception. What are they? See CC art. 1483, sent. 2.

4) Illustrations

DH 37α. D’s 2-year old son, TD, is trapped inside a burning house. H, risking his own life, runs inside and rescues the child. When D arrives at the scene, she is informed about the fire and, further, is told by one of the firefighters that “someone” (the informant did not know who) had rescued TD from it. D then asks her next door neighbor, L, who was also present at the scene, “Who saved my boy? I want to give him a big reward.” Lying through his teeth, L says, “Why, I did it!” And so, D hands L $100 cash, which L gladly pockets. A few weeks later, D learns what really happened and, understandably enough, wants to get the money back from
L and then give it to H. If she sues L for the return of the money on the ground of fraud, what will be her burden of proof? Why? Will she be able to meet it? Why or why not?

DH 37β. The same as before (DH 37α), except that L, in addition to being D’s next door neighbor, is also her professional psychoanalyst. What will be D’s burden of proof now? Why?

DH 37γ. The same as before (DH 37β), except that L, in addition to being D’s next door neighbor and professional psychoanalyst, is also her first cousin. What will be D’s burden of proof now? Why?

DH 37δ. The same as DH 37β, except that L, in addition to being D’s next door neighbor and professional psychoanalyst, is also D’s husband’s first cousin (in other words, D and L are cousins-in-law). What will be D’s burden of proof now? Why?

b] Duress

1} Recognition

Is duress a recognized vice of consent in the domain of donations? Why or why not? See CC art. 1478.

2} Definition

What does “duress” mean in this context? In principle, it should have here the same meaning it has in the context of contracts in general. See CC art. 1959.

3} Proof

a} Evidence: anything relevant

b} BOP (CC art. 1483)

1/ Bearer: party alleging duress

2/ Standard:

a/ General rule: C&CE

b/ Exception: preponderance, if

1° relationship of confidence existed

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between donor and defrauder

2° donor and wrongdoer and defrauder were not related by affinity, consanguinity or adoption

4) Illustrations

DH 38. A discovers that B, a preacher, has been cheating on his wife. And so A confronts B and tells him that, if he doesn't want the news of his affair spread around the church, he'd better donate his bull, Grande Homme, to him. B agrees. Not long thereafter news of the affair gets out anyway. Now B wants to get his bull back. Does he have a shot? Why or why not? See CC art. 1962.

DH 39. Mamère

Tante Michelle Suzanne

Agnes Ernestine Diane

Christine

Tragedy recently struck Ernestine and her family. First, her mother Michelle got sick, so sick that Ernestine had to put her in a nursing home. Second, the school at which Agnes, her retarded sister, had been placed shut down, requiring that Ernestine take her in. Third, Ernestine’s aunt and best friend, Tante, died. Fourth, Ernestine developed an intensely painful kidney disorder. Then, in the midst of all this trouble, Ernestine had to deal with her jealous cousin, Diane. Tante, it turns out, left all of her property by testament to Ernestine. Diane, insisting that she had just as much “right” to a share of that property as Ernestine, threatened to sue Ernestine “to have Aunt Tante’s testament nullified” unless Ernestine “signed over” some of that property to her. At first, Ernestine resisted. But Diane persisted, calling Ernestine every day to ask her “when are you gonna give me my share?” And so, Ernestine finally relented. On Diane’s demand, Ernestine, without her own attorney with her (Diane had told Ernestine not to tell Ernestine’s attorney what was going on), showed up at Diane’s lawyer’s office to draw up a donation to Diane. There Ernestine found Diane’s lawyer, his secretary, and Diane smoking cigars and drinking beer. Because Ernestine believed tobacco and liquor are the work of the devil, she thought she had stepped into the bowels of hell and, consequently, was dreadfully
upset. Nevertheless, she still went ahead and signed the papers the lawyer handed her. Not long thereafter Ernestine died. Christine, her daughter and sole heir, brought suit to nullify Ernestine’s donation to Diane. Her theory? Duress. How would you rate her chance of success? Why? See the jurisprudence that follows:

_**Poole v. Ward, 576 So.2d 1089 (La. App. 3d Cir. 1991)**_

In the instant matter, the trial court found the continuing demands upon [Ernestine] to execute the “donation” [to] Diane . . ., the defendant, combined with [Ernestine’s] medical problems and personal tragedies, were sufficient to invalidate the contract under La. C.C. art. 1959. After reviewing the record, we find no error in the trial court’s finding of fact, nor in his application of the law . . .

APPENDIX

[trial court’s reasons for judgment]

The record of these proceedings establishes that Ernestine . . . was under considerable pressure at the time of the execution of the documents in question. She had extremely serious personal medical difficulties, her mother’s health and sister’s well-being were constantly on her mind, and she was grieving the loss of her much loved and respected aunt. Added to this was the constant pressure of Diane . . . to reject the specific wishes of her aunt and divide the money with them and the other . . . children. A specific example of the effect of this pressure was the fact that Ernestine . . . was encouraged not to tell her own lawyer what was going on and she actually succumbed to this encouragement. The actions under which the documents in question were executed further added to her discomfort and distress . . .

Given this factual situation, the court finds that the plaintiff is entitled to the relief prayed for, and the donation _inter vivos_ . . . [is] hereby revoked, set aside in full, and declared null and void.

c] Undue influence

1) Recognition

Is undue influence a recognized vice of consent in the domain of donations? Why or why not? Is it even a vice of consent, properly so called?

Has undue influence always been a ground for upsetting a donation? Why or why not? See the doctrine that follows:
Cynthia Samuel, Katherine Spaht, & Cynthia Picou,
*SUCCESSIONS & DONATIONS: CASES & READINGS* 253-54 (Fall 2000)

Prior to the 1991 amendments to Articles 1470-1483, no proof could be offered of a disposition having been made on account of anger, hatred, suggestion or captation. See La. Civ. Code art. 1492 (repealed Sept. 6, 1991). Captation was generally understood to be the equivalent of undue influence. Rather than permit such evidence which would taint the memory and reputation of the deceased, the Civil Code chose to prohibit donations to those who might exercise such influence, such as ministers and doctors who attended to the deceased during his last illness, by designating the donee as incapable of receiving. The rule was certain and fixed, eliminating the most obvious persons who might have “undue” influence over the deceased. This result was accomplished without the necessity of a trial so as to determine whether the deceased was actually influenced. In *Zerega v. Percival*, 46 La. Ann. 690, 15 So. 476 (1894), the court quoted from the opinion of the lower court about the type of litigation fomented by disappointed relatives of the deceased who will “upon the most frivolous pretext exhume the testator, and heap upon his memory the most insulting accusations. His private life, his habits, his secret thoughts, nothing is respected, but everything assumes, at the will of an ardent polemic, the most odious coloring.” Then the court concluded that the Louisiana redactors, unlike the French, must have intended “… to forever banish from the courts a species of litigation which, except in very rare instances, originates in disappointment, rancor, or covetousness, which offers a strong temptation for perjury and subornation of perjury, which feeds on scandal and calumny, and which penetrates within the charnel house to pour obloquy upon the ashes of the departed. Our state reports, be it said to the credit and honor of the people, and in proof of the wisdom of our lawgivers, are almost barren of cases of the description.”

When the legal context in which the proof of captation or undue influence was prohibited is understood, it is clear that the prohibition was inextricably related to the limited but absolute protection afforded family members of the deceased: the surviving spouse who is entitled to one-half of the former community property, a legal usufruct over the deceased’s one-half interest in former community property, and the right to the marital portion; the children who as forced heirs were reserved a certain percentage of the deceased’s property which he could not dispose of to others. Family members intimately connected to the deceased were protected (surviving spouse and children); thus, absent lack of capacity the deceased was permitted to dispose of the rest of his property as he saw fit. Nonetheless, even before 1991, courts increasingly permitted evidence of undue influence to establish that the deceased was “of weak mind” thus lacked capacity to donate. . . .

With the general repeal of forced heirship, ultimately effective January 1, 1996 (see La. Civ. Code art. 1493) despite efforts in 1989 and 1990, only children under the age of twenty-four or children who are permanently incapable of caring for their persons or their property due to mental or physical incapacity are forced heirs. Therefore, all other children of the deceased who previously had been reserved a percentage of the deceased’s property were no longer protected from disinherison. Proof of undue influence, it was argued, should be permitted so that children of the deceased could be protected from
dissipation of the deceased’s estate and from unjust disinherison, resulting from manipulation of the deceased by other parties. In fact undue influence is the legal device afforded children in common law jurisdictions to protect them from unjust disinherison by their parent.

2} Definition (CC art. 1479)

a} What’s required:

1/ Substitution of volition (comment (b))

2/ By donee or third person (comment (c))

b} What’s not required:

1/ Knowledge by donee of third person's pressure (comment (c)).

2/ Pressure contemporary with the execution (comment (d))

3} Proof

a} Evidence: anything relevant

b} BOP

1/ Bearer

Who bears the burden of proof on the issue of undue influence? See CC art. 1483, sent. 1.

2/ Standard

a/ General rule

And what is that burden, i.e., what is the “standard of proof,” at least as a general rule? See CC art. 1483, sent. 1.
Does the BOP on the issue of undue influence shift to the defender of the donation in case of interdiction? Why or why not? See the jurisprudence that follows:

Succession of Cole,
618 So.2d 554, 556 (La. App. 4th Cir. 1993)

Under the plain wording of La. C.C. Art. 1479, the party challenging a will on the basis of undue influence must provide “proof that it is the product of influence by the donee.” Accordingly, Appellant proceeded as plaintiff at the trial on this matter, attempting to show that Donee exercised undue influence. As part of his case, Appellant introduced exhibits showing that Cole had been judicially declared mentally incompetent [i.e., interdicted]. Under La. C.C. Art. 1482, this showing [admittedly] shifted the burden of proof to the Donee to prove that Cole had the capacity to make a donation mortis causa. However, nothing in La. C.C. Art. 1479 indicates that a showing of mental infirmity shifts the burden on the issue of undue influence; in fact, the comments to La. C.C. Art. 1477 draw a clear distinction between the two issues . . . .

b/ Exception

But there’s an exception to this general rule, is there not, just as there are exceptions to the general rules for fraud and duress? What is the exception? See CC art. 1483, sent. 2.

4) Illustrations

DH 41. Tante, a single woman with no children, is getting up in years (82). Finding she can no longer care for herself, she moves in with Nancy, one of her many nieces. The following year, at age 83, she executes a testament in which she leaves a disproportionate part of her property to Nancy and Nancy’s children. A year later, however, she rethinks that decision. That year Tante’s sister, Clara, dies, leaving behind a testament that, like Tante’s, favors some of her nieces over others. A virtual legal bloodbath ensues, in which the disfavored nieces try every means possible of having the testament nullified. Tante, evidently hoping to prevent the same thing from happening after her death, tells various of her relatives that she wants her property to be distributed “equally” among her nieces. But still, she does not draw up a new testament. Then one day the next year, when Jo, one of her “disfavored” nieces is visiting, Tante, then aged 84, tells her she wants to make such a new testament. At that point, Jo advises her that they should consult John, a relative who happens to be a lawyer, regarding what to do. Tante agrees. Jo than calls John and gets instructions. She then relates those instructions, which include putting a standard “revocation” clause in the new testament to revoke the first testament, to Tante. Tante immediately draws up the testament, complete with
revocation clause, with Jo looking on. Then Tante dies. Nancy argues that the second testament is null due to undue influence. What result is appropriate? Why? See Succession of Anderson, 656 So.2d 42 (La. App. 2d Cir. 1995) (finding, on similar facts, that the opponent of the testament had failed to carry his burden of proving undue influence by “clear and convincing evidence”).

DH 42.1. T, a former soldier who developed PTSD (post-traumatic stress disorder) during the Vietnam War, returns and, in fairly short order, is interdicted and placed under the control of his brother, B, who serves as his curator. T takes psycho-tropic drugs for his condition, which he administers to himself. He handles day-to-day matters himself, e.g., bathes himself; dresses himself; feeds himself; walks to church, to the store, and to the recreation center by himself. All B does for him is to keep his room, wash his laundry, and prepare his meals. Sometimes when T refuses to do something for himself that B wants him to do, e.g., go to the hospital for a check-up, B does threaten to “put you out on your own” to get him to comply. On an number of occasions, S, T’s son, calls B and leaves messages for T, saying, “Please have T call me back when he gets a chance.” For some reason, however, S never gets a single return phone call from T. At some point B encourages T to “make a will” and, in so doing, “not to forget me and how much I’ve done for you.” Years pass, during which B from time to time reminds T of this request. Finally, some seven years after B had first begun to ask T to leave him something in his will, T makes out a will in which he leaves everything to her, save for a farm that he’d inherited, which he leaves to S. T has a bit of trouble making out the testament, e.g., misspells simple words, so much so that B has to ask him to redraft it twice. But T does it Weeks later, T dies. S now challenges the bequest to B on the ground of “undue influence.” How would you evaluate S’s chances? Why? See Succession of Cole, 618 So.2d 554 (La. App. 4th Cir. 1993) (finding, on similar facts, that the opponent of the testament had failed to carry his burden of proving undue influence by “clear and convincing evidence”).

DH 42.2. Not long after Clodice, Olide’s wife of many years, died, the elderly (not to mention wealthy) Olide fell in love with his physical therapist (aged 23), Anna-Nicole. Before long they married. Once they were married, Anna-Nicole isolated Olide from the rest of his family, including Renard, the son he’d had by Clodice, and began to pressure Olide (e.g., she repeatedly accused him, through tears, of “not appreciating her” and eventually even threatened to withhold sex from him) to leave her his $1,000,000 yacht. Though Olide resisted at first (he wanted to leave the yacht to Renard), he eventually gave in and, in a codicil to his testament, made a legacy of the yacht in her favor. Not long thereafter he died. Renard then challenged the legacy to Anna-Nicole, arguing that it was the product of “undue influence.” What result would you predict? Why? See the jurisprudence and the doctrine that follow:
Succession of Reeves,
704 So.2d 252 (La. App. 3d Cir. 1997)

SAUNDERS, J.

Robert Roger Reeves, Jr., died in 1992, leaving a statutory will in which he left certain bequests to his second wife, Jarrett Ganey Reeves, with whom he had been married more than eleven years. This appeal arises from the allegation that the bequests to Jarrett Reeves resulted from her undue influence over Reeves before his death. The trial court found that Jarrett Reeves had indeed exerted undue influence and nullified all bequests to her. The trial court further dismissed Ms. Reeves as executrix of the Roger Reeves estate. For the following reasons, we reverse and remand.

Before the couple's 1980 divorce, decedent Robert Roger Reeves, Jr., an attorney and prominent member of the community of Harrisonburg, Louisiana, had ten children by his first wife, Dorothy Dale: Dorothy Ann Reeves Faillace (Ann), Joan Reeves Lossin, Robert Roger Reeves (Bob), Mary Rebecca Reeves (Becky), John Cotton Reeves, Michael Reddick Reeves, Joseph Mc Cleary Reeves, Sophie Sarita Reeves Holland (Sarita), Noah Blackstone Reeves, and Alma Roger Reeves Moss.

Not long after his divorce, Reeves met and began dating Jarrett Ganey Young, an acquaintance of decedent's daughter, Ann, who had recently separated from her husband. Roger and Jarrett were married on July 18, 1981, when Roger was sixty years of age, and Jarrett was thirty-eight.

After being married for approximately nine years, Roger Reeves was diagnosed with prostate cancer in 1990 from which he died on December 10, 1992, at age seventy-two. His statutory will dated September 16, 1992, left approximately one-half of his estate to Jarrett, including a lifetime usufruct over the children's ownership interest in Elmly Plantation. The remaining one-half of his estate was left to nine of his ten children. The will further named Jarrett as executrix and Lawrence Sandoz as the attorney for the succession.

One of the Reeves' children, Bob, was excluded from his father's will, leading him to file the instant suit to annul his father's will on March 15, 1993, alleging alternatively that the will was not properly executed and was a product of Jarrett Reeves' undue influence. A five day trial concerning the alleged undue influence was held in July 1995. Based on the evidence, the trial judge found that Jarrett Reeves had indeed exerted undue influence and rendered judgment nullifying the bequests to his widow. Jarrett appeals this determination of the trial court.

In its written reasons, the trial court concluded that the record contained clear and convincing evidence that the testator's will was the product of Jarrett Reeves' volition rather than his own. Observing that La.Civ.Code art. 1479 offers little instruction as to what factors suggest the presence or absence of "undue influence," the trial court relied upon the following expression of common law jurisprudence in its analysis:
"The elements that are set for in these common law cases have provided the court with substantial guidance in construing Article 1479 in the instant case.

Most courts have listed four (4) elements as establishing a prima facie case of undue influence:

1. Susceptibility—a person who is susceptible of being unduly influenced by the person charged with exercising undue influence.
2. Opportunity—The opportunity of the alleged influencer to exercise such influence on the testator.
3. Disposition—a disposition—a disposition on the part of the alleged influencer to influence the testator for the purpose of procuring an improper favor either for himself or another.
4. Coveted Result—a result caused by, or the effect of, such undue influence."

After listing these four factors, the trial court concluded that Ms. Jarrett Reeves had exerted undue influence which voided the decedent's most recent will. Its finding was based almost exclusively on the opinion of psychiatrist, Dr. George Seiden, a forensic psychiatrist presented as an expert by the Reeves children. In particular, the trial court found that Dr. Seiden's psychiatric testimony supported a finding that decedent was susceptible to undue influence due to his sexual dependency upon Jarrett Reeves and his fear of abandonment. Dr. Seiden opined that Roger Reeves was susceptible to influence due to his extreme need for love and sexual intercourse and, additionally, his need for companionship and his fear of being alone.

To support his conclusion, Dr. Seiden alluded to Roger's self-proclaimed need for intimacy with a woman, as testified to by family and friends, suggested that Roger was particularly vulnerable to the presence of a woman, particularly the type of woman Dr. Seiden characterized as "a rescuing, supportive woman who [would] pretty much [give Roger] what he wanted" because, although Roger offered "an appearance of confidence and assertiveness, but underneath [he had] ... a sense of emptiness and dependency."

Dr. Seiden suggested that decedent's relationship with Jarrett fit the description:

Q: Was he dependent upon Jarrett Reeves for love and sex?
A: Yes, he was.
Q: Would you tell the Court, please, what was the level of Roger Reeves' dependence?
A: It was extreme, to the point that—he at times felt that he could not live without it.

To support his conclusion, Dr. Seiden alluded to Roger's reaction on a few occasions when he and Jarrett had disagreements (i.e. distraught, closed off from others, exhibited suicidal tendencies, etc.).

Initially, we observe that Ms. Jarrett Reeves was the testator's wife of eleven years, and while we are unable to categorically state that the charge of undue influence can never be leveled against a surviving spouse who is the main beneficiary of a testament by her spouse of eleven years, we do believe that a surviving spouse is not the intended target of Article 1479. Compare, e.g., Estate of Larsen, 7 Wis.2d 263, 96 N.W.2d 489 (1959) (Wisconsin Supreme Court: elderly widow showing signs of senility induced to transfer
shares of stock to guardians, who later failed to contact her family in regards to her death and misstated size of estate in order to gain control of it). This is a classic case of undue influence in which the deceased, affectionately referred to as "Aunt Minnie," was prevailed upon to disinherit the "natural object of her bounty" in favor of more distant relatives.

The two closest relationships that exist between persons are the relationship of parent to child and that of husband and wife. Either a spouse or a child is clearly a "natural object of a testator's bounty." Both the comments to La.Civ.Code art. 1479 and the jurisprudence which we have reviewed suggests that the purpose of legislation such as Article 1479 is to protect the "natural object of a testator's bounty" from being cheated out of an inheritance by a person who, in the normal course of events, would have little or no expectation of inheritance but who, by use of devious means, manages to convince the testator to do that which in his heart of hearts he did not will or intend.

In a case such as Estate of Larsen, the elements relied upon by the trial court in the present case, i.e., susceptibility, opportunity, disposition, and coveted results are meaningful and relevant and lead to a reasonable and desired result.

In a case such as the present case, however, where a spouse is the recipient of the testator's bounty, these elements are almost totally meaningless in determining whether a person might have exerted undue influence.

(1) Susceptibility--it is in the nature of a matrimonial relationship that the spouses are mutually bound to one another and should be responsive to the needs, desires and opinions of one another. A spouse is required by the nature of the relationship to be susceptible and sensitive to the desires of his or her mate. In a case such as Larsen where "Aunt Minnie" was staying with more distant relatives, susceptibility would be a meaningful concept. In a marital situation, the element of susceptibility is inherent in the relationship and has no bearing on the issue of use of undue influence.

(2) Opportunity--people who live together as man and wife see each other daily, discuss all manner of business and personal relationships and have unlimited opportunity to influence one another. In a classic case such as Larsen, the opportunity of the outsider to influence the person becomes a very relevant inquiry when the person who inherits has little or no natural claim. In the case of a spouse, the existence of an opportunity to influence once again is inherent in the relationship, not contra bones mores, and is thus not relevant in determining undue influence.

(3) Disposition--the element of disposition requires that the alleged influencer must have a disposition to procure "an improper favor" for himself or another. We would shake the bedrock of matrimonial law if we were to rule that the disposition of one's property to a spouse, to provide for the surviving spouse after the donor's death is in any way an "improper favor." Once again we note that such an inquiry would be meaningful in a classic case where the people who seem intent upon divesting the testatrix do not comprise the "natural object of a testator's bounty." But in the case of a spouse, this position would not be a meaningful inquiry as being cared for after the death of a spouse is not an "improper favor."
(4) Coveted result--this, of course, begs the question as without the result there would be no inquiry in the first place.

A review of these elements suggests that they are meaningful in a case where property is left to a person when the natural object of a testator's bounty is passed over in favor of strangers or persons of much lower claims to consideration. What then would be the proper inquiry as to undue influence on the part of a spouse? Several come to mind: physical abuse, emotional abuse, fraud, deceit, or criminal conduct. Our review of the record suggests that none of these elements are present in this case.

We are told in the trial court's reasons for judgment that the undue influence of the spouse was that she was able to exploit the decedent's sexual dependency and fear of abandonment because of his extreme need for love and sexual intercourse and additionally, his need for companionship and his fear of being alone. A moment's reflection suggests that love, companionship and intimacy are the primary reasons that people marry, ergo, the marital imperatives.

The court would note that had Mrs. Reeves been a paramour rather than a wife of eleven years, the court below might have been correct in finding that the need of the testator for love, companionship and sexual intimacy might have formed a basis for undue influence which might have been a solid ground for invalidating the will. In the case of a spouse, this is not so. The need for love, companionship and intimacy are among the foremost reasons for marriage. Each spouse owes these things reciprocally to one another. Either may and should expect love, intimacy and companionship and either might well be expected to be generous in making donations, either mortis causa or inter vivos, to the other.

In the case before us, we are told that because of his need for love, companionship and sexual intimacy, the testator left his property to the person who gave these things to him--his wife of eleven years. We are told that if he had not been willing to include her in the will, she might have withheld the love, intimacy and companionship upon which he was so dependent. Thus, her desire to be included in the will, coupled with her ever-present ability to withhold intimacy, constituted a force strong enough to substitute her volition for his.

On public policy grounds, we decline to find these grounds adequate for reversing the stated will of the testator. Rather, we hold that the granting or withholding of love, companionship and intimacy are matters reserved to the good judgment of the member of the marriage unit; that either spouse is free at any time to ask for consideration on the part of the other, including the ability to ask for gifts, donations or inclusion in the will; and that ground rules for the granting or withholding of intimacy are best provided by the married couple rather than the civil courts. To be more specific, we hold that the granting or withholding of love, companionship and intimacy, i.e., the marriage imperatives, are matters reserved to the married couple and shall not, standing alone, serve to invalidate a will.

In Succession of Lyons, 452 So.2d 1161, the court of appeal reversed the trial court's finding a will invalid. It differed with the trial court "not on credibility, but on the sufficiency of the evidence"and concluded that the trial court incorrectly found that the
will's opponents had overcome the presumption of statutory capacity by the requisite measure.

We do likewise today, thus giving force to the articulated wishes of the testator.

REVERSED AND REMANDED.

AMY, Judge, dissenting.

I respectfully disagree with the majority decision. In my view, a spouse's manipulation of "the marital imperatives" in an effort to create "resentment toward a natural object of [the] testator's bounty" was contemplated by our legislature when enacting La.Civ.Code art. 1479. Our codal provisions recognize and respect the intimacy shared between a husband and wife. A person challenging a donation mortis causa because of undue influence is required to prove his or her claim by the higher burden of proof, proof by clear and convincing evidence, unless the wrongdoer shares a relationship of confidence with the testator and is not "related to the donor by affinity, consanguinity or adoption." La.Civ.Code art. 1483. As such, any further differential treatment on account of public policy considerations is unwarranted. I believe that the legislature's recognition of the differential burden of proof where the wrongdoer is "related to the donor by affinity, consanguinity or adoption" is a clear expression that the public policy considerations behind La.Civ.Code art. 1479 were intended to include claims such as that brought in the instant case.

The trial court, after hearing extensive testimony, found that Jarrett Reeves had exerted undue influence over her husband so that her volition was substituted for his own, making the bequests to her in his will nullities pursuant to La.Civ.Code 1479. In particular, the trial court found that Dr. Seiden's psychiatric testimony supported a finding that the decedent was susceptible to undue influence due to his sexual dependency upon Jarrett Reeves and his fear of abandonment. Next, the trial court found that there was opportunity to unduly influence the decedent as he and his second wife lived alone and, further, there was evidence indicating that she sought to isolate him by limiting contact with his children. With regard to Jarrett Reeves' disposition, the trial court once again turned to the testimony of Dr. Seiden who opined that "Jarrett Reeves was a strong and opinionated individual with a high and sometimes violent temper who used threats of abandonment to influence Roger Reeves' financial decision making." The trial court also considered Dr. Seiden's opinion that "Jarrett Reeves was clearly preoccupied with obtaining Roger Reeves' assets and that she took pains to exert control over the management of those assets by involving herself repeatedly in decisions about finance."

The trial court stated that "[t]he evidence introduced at trial clearly shows that Dr. Seiden's opinions were true."

Additionally, the record reveals that Jarrett Reeves routinely kept a diary during the second half of her marriage to Leo Young and during the eleven years she was married to Roger Reeves. At trial there was much speculation as to what the eight to ten diaries that Jarrett Reeves burned only five days before the instant suit was filed would have revealed. Jarrett testified that she did not destroy the diaries to avoid their contents being
revealed in court, but instead because she was "bringing a phase of [her] life to a closure." Jarrett further testified that she had no idea suit would be filed and it was a mere coincidence that she burned the diaries shortly before Bob Reeves filed suit to annul the will. However, the trial court was not convinced given the fact that two of the Reeves children contacted the attorney for the succession, to discuss their displeasure and possibility of a suit being filed, prior to the destruction of the diaries. Accordingly, the trial court applied the "theory of spoliation of evidence" which provides for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained.

Also of particular importance to the trial court were several excerpts from Jarrett Reeves' diary which had been misplaced by the Appellant and which the trial court found "disclosed Jarrett Reeves' intent to devise a plan to acquire Roger Reeves' assets, to keep John Reeves out of his father's law practice and to gain ownership of the Harrisonburg home." These excerpts, which were written in 1984, were found in a classroom at Northeastern University where Jarrett Reeves was attending college. These excerpts were found, turned over to Roger Reeves' son, Joe, and kept without the knowledge of Jarrett Reeves. They were entered into evidence and were read into the record by the Appellant.

The trial judge, in his written reasons, stated: "The contents of these fragmented entries that were accidentally left by Jarrett Reeves in a Northeast Louisiana University classroom and the destruction and refusal to produce the vast preponderance of the diaries is very detrimental to the contentions of Jarrett Reeves." It is abundantly clear that the trial judge placed great weight on these expressions of Jarrett's thoughts, and that he found Jarrett's version of the relationship she shared with her husband to be less credible than that presented by the plaintiff.

The majority opinion, citing Succession of Lyons, 452 So.2d 1161 (La.1984), concludes that Bob Reeves did not overcome the presumption of statutory capacity by the requisite measure. However, testamentary capacity of Roger Reeves, a separate basis for nullifying a testamentary disposition, is not presently under review. While Roger Reeves' business associates testified that Jarrett was not present during negotiations for farm leases or bank loans, this does not necessitate a finding that Jarrett's influence was not present during these negotiations. As noted by Dr. Seiden, Jarrett's physical presence was not necessary. He testified that in areas that concerned the children or Roger's assets, Jarrett's influence was present throughout their eleven-year marriage. From the record, it appears that the witnesses in question did not have a familiarity with Roger Reeves on a personal basis, as did several other witnesses, whose testimony the trial judge accepted, who testified as to Roger and Jarrett's interaction at home, around the children, and any change in Roger's personality. Also, a large amount of evidence presented by the defense was directed toward Roger's mental capacity at the time the will was executed rather than the absence of any undue influence. As discussed previously, testamentary capacity is a separate and distinct issue. Furthermore, even with the heightened burden of proof, the official comments to La.Civ.Code 1479 recognize that "the objective aspects of undue influence are generally veiled in secrecy, and the proof of undue influence is either largely or entirely circumstantial."
The testimony of the Reeves' children, their spouses, and several longtime friends revealed that, after his marriage to Jarrett, they observed marked, and unexpected, changes in Roger's personality when interacting with his children. Some examples include: (1) the children had to call for permission before coming over to visit with their father; (2) Bob was required to visit his father at the law office, and was never allowed to visit when Jarrett was present; and, (3) the usual weekday family lunches at the "Granny House" were canceled, even at times Jarrett was away at work.

Also of note was the absolute omission of Bob Reeves from his father's will. It was undisputed at trial that Roger Reeves loved all of his ten children throughout the entire span of his life, and that Jarrett Reeves had problems with Bob and that she did not allow Bob to be around when she was present. There was testimony presented to illustrate Roger's disenchantment with Bob due to Bob's difficulty in farming Elmly and his alignment with his mother, Dorothy Dale, during litigation stemming from Roger Reeves' marriage to Dorothy. However, even accepting the above facts as true, throughout this same period of time, evidence was presented that indicated that Roger Reeves still loved his son and that his absence was because of Jarrett. Roger continued to seek ways to clandestinely preserve Bob's presence in his life. For example, Roger hired Bob to plant trees on sixty acres of Elmly Plantation in 1990, a year after Bob's farm lease was terminated and even longer after Bob was prohibited from visiting Elmly or being around Jarrett. More importantly, in hiring Bob to plant the trees, Roger was forced to do so without Jarrett's knowledge and required receipt and payment be made in the name of Roger Carter so that Jarrett would not find out. Sarita, Roger's daughter, testified that Roger admitted that this was necessary because Jarrett would not let him hire Bob. Additionally, before Bob's lease to farm Elmly was canceled, Dennis Dosher, Roger Reeves' son-in-law, testified that Roger Reeves approached him about farming Elmly with Bob in hopes that Jarrett would be pacified. Dennis testified that Roger told him that "Jarrett wanted to get rid of Bob and [he] was trying to figure out some way to keep Bob on Elmly."

Additionally, Dr. Seiden described Jarrett's behavioral pattern as "random intermittent punishment" with her goals being control of Roger's financial assets and interaction with his children, and, most importantly, Dr. Seiden noted Jarrett's pattern of alienating or isolating Roger from his children. Considering the evidence of the children and others close to the decedent, as well as the overwhelming testimony of the forensic psychiatrist, Dr. Seiden, I conclude that the trial court was not manifestly erroneous in finding that the evidence presented was sufficient to support the claim that the bequests to Jarrett resulted from her undue influence over Roger before his death.

Accordingly, I respectfully dissent.

YELVERTON, Judge, dissenting.

I dissent for the reasons expressed by Judge Amy. I write separately to emphasize my disagreement with the statement in the majority opinion that "a surviving spouse is not the intended target of Article 1479." I think the law does not exclude anyone as a potential undue influencer--certainly not second spouses, and particularly as in this case not a younger, second spouse with six children of her own.
Article 1479 was introduced by House Bill 882 of 1991. The minutes of the House Civil Law and Procedure Committee meeting on May 21, 1991, reveal that "Mr. Max Nathan, representing the Louisiana State Law Institute ... stated that this bill was in response to the change in the law on forced heirship last year." The relationship between this bill and the eventual near-abolition of forced heirship has been studied by scholars. I believe that one of the legislative concerns in creating Article 1479 was "the protection of the donor's family, the 'natural objects of his bounty,' from the harsh effects of disinherition." See Comment, Louisiana's New Law On Capacity To Make And Receive Donations: "Unduly Influenced" By The Common Law? 67 Tul.L.Rev. 183, 184 (1992).

The virtual abolition of forced heirship was a statement of preference for the common law freedom of testation. With forced heirship gone, actions such as undue influence are essentially the only means left to protect the donor and his family. The legislature adopted a common law remedy in providing for undue influence. In an oral presentation made at Loyola University School of Law Forced Heirship Symposium on January 31, 1997, published in 43 Loy.L.Rev. 43, 48, Professor Katherine Spaht put it this way: "Once forced heirship was eliminated for most children, which is what we have, the legislature understood that to avoid the possibility of legalized theft, we would have to do as our opponents of forced heirship had long cried--that is, become like the other forty-nine states, permitting the litigation of undue influence." We should look to the common law for guidance in applying Article 1479. The trial judge did that in deciding this case.

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The trial court conducted a five-day trial, heard 20 witnesses, evaluated the evidence and the credibility of witnesses, and found clear and convincing proof of undue influence. The trial court gave thoughtful and scholarly reasons for judgment. It is our duty to affirm this purely factual, reasonable determination.

Katherine Shaw Spaht,

Complementary to the enactment of the first statute redefining forced heirs as descendants in only two categories, the legislature repealed Civil Code article 1492 which prohibited evidence of undue influence. In 1991 the legislature adopted specific legislation permitting annulment of a donation inter vivos or mortis causa which resulted from undue influence. Clearly, the legislative intent was "to afford some protection to otherwise vulnerable descendants," who had previously been protected from disinherison by the institution of forced heirship. Thus, unlike common law jurisdictions where undue influence had developed first to protect the testator's autonomy and then to protect "family members," the legislature in Louisiana envisioned undue influence as a narrowly targeted protective device. Undue influence constituted the legislature's protective response to the severe curtailment of forced heirship, in other words principally for the sake of otherwise unprotected descendants.
The Third Circuit Court of Appeal in *Succession of Reeves* reversed the decision of the trial judge who had found that the heirs of the testator had proved by clear and convincing evidence undue influence by the testator's second spouse. In the opinion Judge Saunders, writing for the majority, opined that reversal of the trial judge's decision was primarily due to "marital status." Judge Saunders expressed the view that "while we are unable to categorically state that the charge of undue influence can never be leveled against a surviving spouse who is the main beneficiary of a testament by her spouse....", the fact that the alleged "wrongdoer" is married to the testator makes the elements of proof "almost totally meaningless...." Rather, undue influence exercised by a spouse of the testator should require proof of "physical abuse, emotional abuse, fraud, deceit, or criminal conduct." The Louisiana Supreme Court granted writs in *Succession of Reeves*; but before the case could be argued, the parties reached a compromise.

The court in *Reeves* erroneously grafts unto the provisions of Civil Code articles 1479 and 1483 additional requirements for proving undue influence whenever the alleged "wrongdoer" is the spouse of the testator; these jurisprudential requirements seriously undermine the purpose of these articles. These two articles, the former that describes undue influence and the latter that imposes a different burden of proof when there exists a confidential relationship between the testator and the "wrongdoer," clearly establish that a spouse of a testator may indeed exercise influence over the testator that is undue. Article 1479 does not exclude a surviving spouse as the person exercising the influence; and Article 1483 specifically refuses to reduce the burden of proving undue influence, which is clear and convincing evidence, if the person accused of undue influence is "related to the donor by affinity." In fact the comment supports the inclusion of the surviving spouse within the ambit of "wrongdoer": "The Article does not lower the standard of proof where a challenge is made against a confidante who is related to the donor by marriage... because in many instances the most likely persons who would be involved would be a spouse or a child." Furthermore, to require proof of physical abuse, fraud, deceit, or criminal conduct renders Article 1478, which permits the annulment of a donation for fraud or duress, superfluous. The distinction between the conduct mentioned in Article 1478, such as fraud or duress, and undue influence is that the latter involves "psychological manipulation." Other provisions of the Civil Code reflect the distinction: undue influence is only a ground for annulment of a donation inter vivos, and fraud and duress, constitute grounds for annulment of all contracts.

Even though the legislative will in Article 1483 is clearly expressed, the majority opinion in *Reeves* concluded that "where a spouse is the recipient of the testator's bounty, these elements [required to prove undue influence in common law jurisdictions] are almost totally meaningless in determining whether a person might have exerted undue influence." Immediately following this statement, the opinion lists the four traditional elements—susceptibility, opportunity, disposition, and coveted result—and discusses why none apply to a marital relationship. Susceptibility should not apply to spouses because they "should be responsive to the needs, desires and opinions of one another...."; either spouse should be "susceptible and sensitive to the desires of his or her mate...." As to *opportunity*, the court correctly observed that "people who live together as man and wife see each other daily, discuss all manner of business and personal relationships and have
unlimited opportunity to influence one another." Yet, from that observation the court concluded that "[i]n the case of a spouse, the existence of an opportunity to influence once again is inherent in the relationship, not contra bonos mores, and is thus not relevant in determining undue influence." The element of disposition, the court opined, "requires that the alleged influencer must have a disposition to procure 'an improper favor' for himself or another." Then, the court added rather ominously, "[w]e would shake the bedrock of matrimonial law if we were to rule that the disposition of one's property to a spouse, to provide for the surviving spouse after the donor's death is in any way an 'improper favor.'" The fourth element, coveted result "begs the question as without the result there would be no inquiry in the first place." According to the opinion, [a] review of these elements suggests that they are meaningful in a case where property is left to a person when the natural object of a testator's bounty is passed over in favor of strangers or persons of much lower claims to consideration. What then would be the proper inquiry as to undue influence on the part of a spouse? Several come to mind: physical abuse, emotional abuse, fraud, deceit, or criminal conduct.

Obviously, a testator would be susceptible to the influence of his spouse, and she would have the opportunity to exercise influence; however, the influence must be undue, "that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor." If, as the comment to Article 1479 states, "creating resentment toward a natural object of a testator's bounty by false statements..." may constitute the kind of influence that is reprobad by this Article, then a second spouse may well be a wrongdoer. The spouse may create resentment toward the testator's children through false statements of a spouse's legal obligations under Civil Code article 98, that is, the obligations of fidelity, support, and assistance. "Susceptibility" to influence, as Judith Wallerstein explains in her report on her twenty-five year study of children of divorce, can exist in a second marriage when it would not exist to the same degree in a first marriage. The law does not preclude, it in fact permits, evidence of a testator's susceptibility to influence that exceeds mere sensitivity to the other spouse's desires. "Sensitivity" and "susceptibility" are not equivalents. After all, undue influence requires that proof be made by clear and convincing evidence that the wrongdoer has substituted her volition for that of the testator, and mere sensitivity to the desires of a spouse does not mean that the spouse may substitute her will for that of the "sensitive" testator.

Is the court in Reeves correct that the third element, disposition to procure an "improper" advantage, is meaningless when applied to a testator's spouse? Essentially the question posed is, can a second spouse ever be disposed to obtain an "improper" advantage for herself (or others)? A related inquiry in common law jurisdictions requires identifying who are the "natural objects of the testator's bounty." In most common law jurisdictions the "natural object of the testator's bounty" includes both the children and the spouse. As against a more remote relation or a stranger, the classification of "natural object of the testator's bounty" clearly includes both. If the testator dies with both children and a spouse and one benefits to the exclusion or detriment of the other, who is the "natural object of the testator's bounty" becomes more complicated. Nonetheless,
even in common law jurisdictions, "[t]here exists a separate class of cases where a male testator is determined more prone to undue influence by a female: when he chooses to leave the bulk of his estate to his second wife and excludes his children from his first marriage." In these common law jurisdictions courts recognize that the spousal relationship is not "confidential" for purposes of undue influence, thus making proof of such influence more difficult, with one exception: "in the context of second wives." The burden of proving undue influence of the second wife is relaxed if the decedent has disinherited his children of the first marriage; thus, undue influence of a second wife is easier to prove, a position that not even the Louisiana Civil Code adopts.

Described as "a disposition to procure 'an improper favor' for himself or another," can a second spouse who wants to procure a legacy to the prejudice of the testator's children be considered as desiring "an improper favor"? The legislative history of undue influence in Louisiana, which demonstrates an inextricable link to the repeal of forced heirship protection for most descendants, confirms that such a disposition could be "an improper favor." The law of intestate succession supports such a conclusion. The intestate succession law, which is supposed to reflect the presumed intent of the deceased as to the devolution of his property at death, provides that all descendants inherit all of the deceased's property, both community and separate. It is accurate then to state that children, according to the law, have a higher claim to consideration by the deceased than a spouse and that a disposition to his spouse other than a usufruct, in preference to his children can be considered an "improper" favor.

As part of the legislative history, the political circumstances of the repeal of expansive forced heirship also reflect that undue influence as a protection for former forced heirs was designed to protect them not just from strangers but also from a second spouse. The natural resentment that may exist between a second spouse, especially a stepmother, and the children of a former marriage, particularly a marriage terminated by divorce, has been well documented. Research shows stepchildren need protection from undue influence of a stepparent, who as a general proposition, has no natural affection for the stepchild. Even common law treatise writers on the subject of undue influence recognize that there is likely to be a will contest alleging undue influence in "the divided family" situation in which there is a second spouse and children of a former marriage and, as earlier noted, describe a harsh position taken by some common law courts toward a second spouse if the testator has disinherited his children of a former marriage.

Finally, the trial court in Reeves concluded that the second wife's "desire to be included in the will, coupled with her ever-present ability to withhold intimacy, constituted a force strong enough to substitute her volition for his." Yet the court of appeal opined that "[o]n public policy grounds we decline to find these grounds adequate for reversing the stated will of the testator." Apparently, the public policy grounds consisted of the court's refusal to establish "ground rules for the granting or withholding of intimacy" which according to the court, is best left to the married couple rather than the civil courts. Civil courts consider on a regular basis whether a spouse has complied with the positive obligation of fidelity, the obligation to share one's sexual potential with one's spouse. The issue of unjustified refusal of sexual intercourse historically arose in connection with the offended spouse's right to a separation from bed and board for cruel
treatment. Now the issue arises when a claimant seeks spousal support after divorce. Civil courts continue to examine whether the withholding of intimacy is a breach of a spouse's legal obligation of fidelity; the matter is not "reserved to the good judgment of the members of the marriage unit...." Public policy is implicated in the decision of Succession of Reeves, but not for the reason stated in the majority opinion. To immunize a spouse, or anyone else, from an accusation of undue influence permits the possibility of "legalized theft," which was the societal problem specifically addressed by the legislation on undue influence.

In Louisiana, is error a recognized vice of consent in the domain of donations? Why or why not? See CC arts. 1478; 1479 comment (e); 1950 comment (d).

What about in other civil law jurisdictions? Consider the following:

\[ \text{d) Error (?)} \]

1) Recognition?

In Louisiana, is error a recognized vice of consent in the domain of donations? Why or why not? See CC arts. 1478; 1479 comment (e); 1950 comment (d).

What about in other civil law jurisdictions? Consider the following:

\[ \text{\textit{a. The rule in France}} \]

1 Charles Demolombe, \textit{Traité des Donations entre Vifs et des Testaments} 
no 378, at 386, 387-88, & nn° 389-394, at 397-400, 
in 18 \textit{Cours de Code Napoléon} (1876)

378. – Is it necessary to include among the causes that can lead to the nullity of a donation \textit{inter vivos} or a testament the vices that alter the will of the disposing party: violence, fraud, and error? The affirmative is evident!

Every disposition under gratuitous title should be, in its essence, the work of the will of the disposing party. And the vices that destroy this will destroy the disposition itself at its foundation.

... We shall say:

In that which concerns the donation \textit{inter vivos}, that it is a contract, which requires, like all contracts, the consent of the parties and, for this reason, that articles 1109 and following are applicable to it.

In that which concerns the testament, that it is only a manifestation of the will... and that all the vices that can attack the will of the testator attack, as Furgole says, the fundamental principle of the testament itself.

... 10 Charles Aubry & Charles Rau, \textit{Cours de Droit Civil Français} 
§ 651, at 535, & § 654, at 549-50 (Étienne Bartin rev., 5th ed. 1918)
§ 651. By virtue of its inherent nature, a donation [inter vivos] requires, on the part of the donor, a liberty of mind and of resolution more thorough and complete than self-interested contracts and even than contracts of generosity that do not constitute true liberalities. It follows that the principles developed . . . on the vices of consent that invalidate the consent of parties to contracts under onerous title are applicable a fortiorari to donations inter vivos.

A donation is subject to nullification for the cause of error regarding the person of the donee. Even error regarding the quality of a person suffices to produce the nullity of the donation, when the donation has been made less in view of the individual than of the quality that the donor erroneously believed he possessed.

§ 654. Testamentary dispositions ought to be the expression of a will that is perfectly free and clear on the part of the testator. They are susceptible of being annulled if the author has been led to make them only because of an error or by the effect of either fraudulent manoeuvres or acts of violence practiced toward him.


The vices of consent, unlike the health of the mind, are not addressed in the special Civil Code rules for liberalities. They are submitted to the general law of articles 1109 et seq. [counterpart to LaCC arts. 1948 et seq.] This notion is summarized in an expression of Aubry and [172] Rau: “A donation requires, on the part of the donor, a liberty of mind and a resolution more thorough and complete than do self-interested [onerous] contracts.”

303.Error. – When the error bears on the person of the beneficiary, it always constitutes a cause of nullity, for a liberality, by its very nature, is always consented to intuitus personae [in consideration of the person]. If there is only an error regarding the designation of the beneficiary, the courts correct it.

Error also leads to the nullity of the disposition when it bears on the cause, that is to say, the determinative motive and it can be a question of an error of law. The error can, more rarely, bear on the nature of the liberality.


262. – B. – Absence of vice of consent. – The existence of a vice of consent stains the liberality with a relative nullity, in conformity to the usual rules. And so it is by way of the application, indeed, the adaptation, of those rules, such as they have been formulated and interpreted in the matter of contracts, that one proceeds to the subject of liberalities. That is even true of that which concerns the unilateral act that constitutes a testament.
263. – 1° Error. – Regardless of the liberality that may be at issue, the rules that we studied on the subject of error are applicable in the matter.

Gabriel Marty & Pierre Raynaud, DROIT CIVIL:

371. Because the will can be altered by a vice, it is appropriate to apply in the matter of liberalities the general theory of vices of consent, for lack of any particular dispositions concerning acts of gratuitous title. The unique characteristics of these acts can call for certain adjustments with respect to the three vices of consent: error, fraud, and violence.

372. Error. – Article 1110 of the Civil Code [counterpart to LaCC art. 1948] relative to error in contracts is applicable to liberalities, not only when they are contractual, but also if they result from a unilateral act such as a testament.

β. The rule in Germany

BÜRGERLICHES GESTEZBUCH §§ 119 & 2078

§ 119. Recission [of juridical acts] due to error.20
(1) A person who, when making a declaration of intention, is in error as to its content, or did not intend to make a declaration of such content at all, may rescind the declaration if it may be assumed that he would not have made it with knowledge of the fact and with reasonable appreciation of the situation.

§ 2078. Avoidance in case of error . . . .
(1) A testamentary disposition may be avoided in so far as the testator was in error as to the meaning of his declaration, or did not intend to make a declaration of that meaning at all, and in so far as it is to be presumed that he would not have made the declaration if he had known of the state of affairs.

(2) The same applies in so far as the testator has been influenced to make the disposition by the erroneous assumption or expectation of the occurrence or non-occurrence of a circumstance . . . .

γ. The rule in Italy

CODICE CIVILE ITALIANO arts. 624 & 787

20 This article appears in the part of the BGB that concerns juridical acts in general. It is, therefore, applicable not only to bilateral juridical acts (contracts), including donations inter vivos, but also to unilateral juridical acts, such as donations mortis causa.
Art. 624. *Violence, fraud, error.* A testamentary disposition can be impugned by whosoever may have an interest in doing so when it is the effect of error, violence, or fraud.

An error on the motive, be it one of fact or of law, is a cause for annulling the testamentary disposition when the motive is reflected in the testament and it is the only one that has determined [the will of the] the testator to dispose.

Art. 787. *Error on the motive of a donation [inter vivos].* A donation [inter vivos] can be impugned for error on the motive, be it one of fact or of law, when the motive is reflected in the act and it alone has determined [the will of] the donor to accomplish the donation.

#### 5. The rule in Québec


274. – *General theory of the vices of consent and adjustments.* – The will of the testator can exist and yet be vitiated by exterior circumstances. There is, on this subject, no text that it unique to the testament. There is, then, room to apply the general theory of the vices of consent, namely, that set out in regard to contracts. Many of the rules relative to contracts are applied as well to juridical acts in general.

The distinctiveness of the testament, as a unilateral act, nevertheless requires that certain adjustments be made to the general theory of the vices of consent. Because lesion is a notion that is foreign to this subject matter, there are [only] three possible vices of consent to consider: error, violence, and fraud.

A. Error

#### 6. The rule in Switzerland

*Code Civil Suisse* art. 469

Art. 469. All dispositions [mortis causa] that their author has made under the domination of error, fraud, threat, or violence are null. * * * in the event of a manifest error in the designation of persons or things, the erroneous dispositions are rectified according to the true will of their author, if this will can be determined with certitude.
This article appears in the introductory part of the Code of Obligations. It is, therefore, applicable to all obligations created by all of the contracts that are treated in that code, which include donations \textit{inter vivos}.

\textit{Code Suisse des Obligations} art. 23\textsuperscript{21}

Art. 23. A contract does not bind the party who, at the moment at which he concluded it, was in an essential error.

\textbf{2) Definition (CC art. 1949)}

\textbf{3) Proof}

\textbf{a) Evidence:} anything relevant

\textbf{b) BOP}

1/ Bearer: challenger

2/ Standard: ?

\textbf{4) Illustrations}

DH 43. D’s 2-year old son, TD, is trapped inside a burning house. H, risking his own life, runs inside and rescues the child. When D arrives at the scene, she is informed about the fire and, further, is told by one of the firefighters that “someone” (the informant did not know who) had rescued TD from it. D then asks her next door neighbor, L, who was also present at the scene, “Who saved my boy? I want to give him a big reward.” Pointing to H, L says, “That guy over there did it!” But D misreads L’s hand signal. Mistakenly thinking that L had pointed at B, a bystander in the crowd, she walks up to him, hands him $100 cash, says, “Thank you so much!,” and then disappears into the crowd before B, who is stunned, can say anything in reply. B has no idea who gave him the money (he’d never seen D before) or why she gave him the money. Though he tries to find out who she is (he asks a few of the other bystanders), his efforts end in frustration. A few weeks later, D learns what really happened and, understandably enough, wants to get the money back from B and then give it to H. Through a strange series of coincidences, D manages to discover who B is. But by the time she contacts him, he’s had a change of heart and, it seems, is quite content to retain the $100. Can D sue B for the return of the money on the ground of error? Why or why not? If she does so, what will be her burden of proof? Why? Will she be able to meet it? Why or why not?

\textsuperscript{21}This article appears in the introductory part of the Code of Obligations. It is, therefore, applicable to all obligations created by all of the contracts that are treated in that code, which include donations \textit{inter vivos}.

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DH 44. T has two children, S and D. At the time she has a will in which she makes a universal legacy to S and D jointly. One day some of her fine silver disappears. She suspects that S, whom she'd seen looking at the silver just before it disappeared, took it. And so she makes out a codicil to her testament that provides as follows: "Upon my death I leave all of the property of which I die possessed to D. S has already taken his fair share of my stuff by stealing the silver." Then T dies. When D tries to probate the new testament, S attacks it on the ground that T made an error, namely, her erroneous belief that he stole the silver. S has irrefutable proof that D was the thief. Does he have a shot? Why or why not?

2] Effect of vitiation of consent

a] Type of nullity

What is the effect of a vice in the consent to donate? See CC arts. 1478, 1479, 1480 & 2031; see also Philippe Malaurie & Laurent Aynès, COURS DE DROIT CIVIL: LES SUCCESIONS—LES LIBÉRALITÉS n° 302-03, at 173-74 (4th éd. 1998) (“The vices of consent, like insanity of the mind, lead to the relative nullity of the act, never to its non-existence.”); 5 Marcel Planiol & Georges Ripert, TRAÎTE PRATIQUE DE DROIT CIVIL FRANÇAIS n° 191, at 279 (André Trasbot & Yvon Loussouarn, revs., 2d éd. 1957) (“It is certain that if the consent of the disposing party has been stained with error, duress, or fraud, the nullity of the disposition is simply relative. Vices of consent lead only to simple annulability.”)

b] Extent of nullity (severability)

Suppose that the act of donation or the testament, as the case might be, entails several distinct dispositive clauses (e.g., “I give Alpha my horse” followed by “I give Beta my boat”) and, further, that there’s a “vice of consent” problem with respect to only one of these clauses. Is the act of donation or testament as a whole null? Or is the “nullity” limited to the defective clause alone? See CC art. 1480.

3] Cause

a) Definition (CC art. 1967)

b) Requirements (CC art. 1971)

1] Present (existent)

2] True

3] Legal
c) Proof: normal rules

d) Effects:

1] Type of nullity
   a] Absent or false cause: relative
   b] Illegal: absolute

2] Scope of nullity: individual disposition only

4) Object
   a) Definition: equivocal
      1] Object of obligation: performance
      2] Object of performance: thing
   b) Requirements (CC art. 1971)
      1] Existent
      2] Possible (CC art. 1972)
      3] Determined or determinable (CC art. 1973-1975)
      4] Lawful

DH 45. X, while on vacation in Jamaica, phones his buddy Y, back in the United States. Y, a cigar afficionado, asks X if he’s bought any Havanas yet. When X answers, "Yes," Y asks him to bring one back for him. "No problem," answers X, "I've already put one away in a mini-humidor for you." But after X returns, he has a change of heart and refuses to turn the cigar over to Y. At that point Y sues him, seeking specific performance of the donation contract. What result? Why?

c) Proof: normal rules