PART I: DONATIONS

d) Effects:

1] Type of nullity: absolute

2] Scope of nullity: individual disposition only

4 Limitations

a Limitation on magnitude: the disposable portion

1) In general

a) Statement of the rule

Read CC arts. 1494 & 1503. Then read the doctrine that follows:

Frederick Wm. Swaim, Jr. & Kathryn Venturatos Lorio, Successions & Donations § 11.1, at 260-61, in 10 Louisiana Civil Law Treatise (1995)

Forced heirship guarantees to designated heirs a percentage of a decedent’s estate. This “forced portion” is “reserved” for the stipulated heirs, whether the succession is testate or intestate. The remainder of the decedent’s estate is freely alienable or disposable.

5 Marcel Planiol & Georges Ripert, Traité Pratique de Droit Civil Français n° 191, at 279 (André Trasbot & Yvon Loussouarn, revs., 2d éd. 1957)

Every capable person may, in principle, dispose of his goods with regard to any distinction between acts by onerous title and acts by gratuitous title . . . . But the liberty to dispose by gratuitous title is stricken by legislation with a grave restriction for the benefit of the family: after the death of the disposing party, donations and legacies can not produce any effect unless his relatives in the direct line get to keep a “sufficient” part of the deceased’s estate. In this respect, there is a conditional and partial indisposability of the entire patrimony [of the deceased].

The part of the goods that must necessarily come to the heirs . . . is the “reserve.” The part of which one can dispose is the “disposable portion.”

In the light of these authorities, the “limitation” that the law of “forced heirship” places on one’s power to dispose of his property by donation can be stated in either of two of ways, both of which amount to the same thing: (i) no donation may exceed the “disposable portion” and (ii) no
donation may impinge on the “forced portion” (or “reserve” or “legitime”). But what do these special terms of art mean?

b) Definitions (CC art. 1494):

1] Forced portion (legitime, reserve)

What is the “forced portion”? The “legitime”? The “reserve”? Read CC arts. 1494 & 1495.

2] Disposable portion

What is the “disposable portion”? Re-read CC art. 1495.

c) History & raison d’être

Whence did the law of forced heirship come? What purpose(s) was (were) it originally supposed to serve? What purpose(s) does it serve today? Read the following jurisprudence:

Succession of Lauga,
624 So.2d 1156 (La. 1993)

KIMBALL, J. (dissenting).

Louisiana was originally colonized by French settlers in the early 1700s. These settlers brought with them the laws of France, particularly the Custom of Paris. These laws are believed to have been the origin of the institution of forced heirship in Louisiana. In the mid-1700s, France ceded Louisiana to Spain. Spanish law, which had its own concept of forced heirship, reigned over the Territory for nearly forty years thereafter. Then, in the early 1800s Spain agreed to return the Territory to France. Before this transfer from Spain to France took place, however, France sold the Territory to the United States.

Thus, Louisiana's concept of forced heirship is a result of the French and Spanish rule over the Territory. Because Roman Law is the earliest source of the institution of forced heirship and the framework from which all other legal systems' versions of the doctrine evolved, including the French and the Spanish, this analysis necessarily begins with consideration of that system.

1 Early History of the Institution of Forced Heirship: Exposition

1.1 Exposition

1.1.1 Roman Law

The Roman institution of forced heirship traces its roots to two very important concepts in early Roman society: the familia and the sacra. The familia, the Roman concept of family, consisted of the paterfamilias (head of family) and those who, by male relationship, were under his power. The familia was the basic unit of society, and its preservation was considered essential to maintaining societal order. To foster the
maintenance of this unit, the pater was granted very extensive powers over the family, including the vesting of all rights and property acquired by any member of the family. Clothed with such extensive powers, there was no room for restrictions on the paterfamilias' absolute power of disposition over familia property; thus, the pater had unrestricted freedom to distribute his estate in legacies to anyone. If the pater died intestate, however, his children were first in line to inherit.

Of equal importance to the familia in early Roman society was the sacra, the family cult to the individual household gods. The Romans deemed the continuance of this cult by successive heirs from one generation to the next essential to their society. The continuance of the familia sacra was so important to this society that other areas of the law were tailored with a view to insuring its continuance. Thus, for example, if a man had no child, he was permitted to adopt one so that the sacra could be continued.

In furtherance of these two very important customs, the first Roman wills had for their purpose not the disposition of property but rather the institution of an heir to continue the familia and the sacra. Indeed, any will which failed to institute an heir was held invalid. Moreover, as a protection against the possibility that the instituted heir might not enter the succession, the testator was permitted to name one or more substitute heirs (substitutio vulgaris) who could enter in the event the instituted heir refused to do so.

Despite these efforts to protect and preserve the familia and the sacra, the testator's absolute freedom of disposition by legacy soon became a threat to the vitality of these institutions. That is, because the testator frequently disposed of most or all of his assets by legacies, the instituted heir often refused to enter the succession as all he was left with was the undesirable burden of paying the testator's debts and carrying out any testamentary instructions. As a result, the testator's estate would devolve intestate and there would be no heir to carry on the familia and the sacra.

Seeking to remedy the foregoing problem, there developed in Roman Law certain restrictions on the paterfamilias' absolute power of disposition. One of the most famous of such limitations was the lex Falcidia, which reserved a minimum one-fourth of the testator's estate for the instituted heir (the falcidian portion). Excessive legacies which impinged the falcidian portion were subject to proportionate reduction. Notably, however, this restriction on a testator's absolute freedom of testation was designed solely to protect the institutions of the familia and the sacra—i.e., it was not necessary that the instituted heir be a relation of the testator, only that the instituted heir be a person capable of inheriting.

Although the foregoing limitation on a testator's freedom of disposition was not developed out of a concern for the testator's heirs, there existed at the same time two other restrictions on the paterfamilias' absolute freedom of testation which did have protection of the testator's heirs, including his children, as their purposes. The first such limitation was found in the rules of exheredatio. This limitation reflected the Romans' general disapproval of disinherison by subjecting it to extremely strict formalities. Failure to comply with these formalities would result in the nullity of the will. Importantly, however, this limitation was strictly a matter of form and did not interfere with the testator's power to dispose of familia property as he saw fit. More importantly, it provided no direct assurance that children of the testator would be provided for in the will.

The second limitation on the testator's freedom of disposition was in the querela
inofficiosi testament. The *querela* was based on the principle that a man owed a moral
duty toward certain close relatives, and disinherison of these relatives without just cause
violated this duty. The relatives protected by the *querela* were ascendants and descendants
of the decedent, whenever they had been unjustly disinherited, and cousins, brothers and
sisters of the decedent, when the decedent had preferred others of questionable character
or morals.

Initially, if one of these heirs established the requisite conditions, the will would be
declared void and the heir would receive his intestate portion. This sanction was
subsequently changed such that the complainant would receive a reasonable share of the
estate, but the entire will was not disturbed. Later the complainant's portion under the
*querela* was changed again, this time to fix it at one-quarter of an intestate share, and the
complainant could pursue this amount if he received less in the will. Finally this portion
was changed one last time by Justinian, who increased the portion to one-third of the
estate if there were four or fewer children and one-half of the estate if there were five or
more. These latter portions came to be known as pars legitima or the legitime.

**1.1.2 Customary Law**

In contrast to Rome, the regions governed by the customary law, such as France,
operated under a doctrine known as the reserve. Although the origin of the reserve is not
well known, the doctrine is generally viewed as arising from a concept of family
co-ownership of estates and a political notion of preserving this co-ownership. This
stands in stark contrast to the Roman institution of legitime, which was based on a
perceived moral duty which the testator owed to his close relatives.

Because the basis for the reserve was different from that of the legitime, its
application as a limitation on a decedent's freedom of testation was likewise dissimilar.
Whereas the legitime was levied against all of a decedent's property, the reserve operated
only on propres (immovables acquired by inheritance)--acquets, community immovables,
and all movables were freely disposable. Furthermore, while the Roman legitime
preserved a maximum of one-half of the decedent's estate (if he left five or more heirs),
the reserve operated on a much greater portion of the decedent's propres, four-fifths of the
decedent's propres regardless of how many heirs the decedent left. Finally, the reserve
was only a limitation on a decedent's testamentary dispositions; the testator could still
deprive the heirs of the reserve by *inter vivos* donations. Similar to the Roman legitime,
however, the reserve was available to collaterals of the testator as well as the testator's
ascendants and descendants.

With the passage of time, influenced by Roman law, the customary law began to
recognize a paternal duty to provide for the maintenance of one's children and other
descendants. This recognition culminated in the customary law's adoption of a form of
legitime. The legitime adopted in these regions was available only to descendants of the
decedent and only when the reserve was insufficient to adequately insure the descendant's
welfare. In its earliest stages, the adequacy of the reserve was determined on a
case-by-case basis and when it was found inadequate, the legitime was set at an amount
designed to allow the heir to live reasonably. As it developed, the customary law's
legitime became fixed at one-half of an intestate portion and the determination of
adequacy consisted of a comparison of the reserve to the legitime. If the latter was greater
than the former, then the legitime was available. Like the Roman legitime, the customary law's legitime protected the heirs against *inter vivos* dispositions and was imposed without distinction between the various types of property.

Later, during the French revolution, the desire in France was to break up the large estates and prevent their reconstitution. The Law of 17 nivose an II (January 6, 1794) was passed as a social tool to accomplish this end by drastically limiting the disposable portion (to one-tenth if there were linear heirs; one-sixth if only collaterals). This law forced the partition of the testator's estate into at least as many separate tracts as there were children in the family, thereby breaking up the estate and preventing its reconstruction. Moreover, even the small disposable portion which remained could not be left to a single heir. This law had severe, adverse consequences and was soon liberalized, restoring to the testator a greater freedom of testation.

### 1.1.3 Spanish Law

The final source of forced heirship doctrine for consideration is the Spanish law. The Spanish laws of forced heirship were of more or less direct Roman origin. Although the evolution of forced heirship under Spanish law is long and involved, a review of this history reveals three basic points of interest about the Spanish law of forced heirship at the time the Territory of Louisiana was under Spanish rule. First, the only persons entitled to the legitime under Spanish law were ascendants and descendants; similar to French law, collaterals were excluded but, unlike French law, ascendants were included. Second, the children's legitime was four-fifths of the parent’s estate, although this amount could be decreased to one-third when this one-third was donated for the betterment of the children of the testator. The ascendant-parent's legitime under Spanish law was two-thirds of the child's estate. Finally, the Spanish law recognized the doctrine of *mejora*, by which the testator could give one child one-half of the forced portion, splitting the remainder among the other children. The Spanish recognition of *mejora* is interesting because it is completely contrary to the French notion requiring equality of treatment of all children.

### 1.2. Analysis of Early History

Although the history of forced heirship in Roman, French and Spanish law is somewhat obscure, there are several general observations to be discerned from it. First, although restrictions on the testator's freedom of disposition were recognized in early Roman, French and Spanish laws, there was never an agreement among the various bodies of law regarding who the beneficiaries of these restrictions were. This disagreement is, at least in part, a consequence of the varying purposes which these restrictive laws sought to achieve. In particular, in Rome, the falcidian portion was used to insure the instituted heir would enter the succession and continue the *familia* and the *sacra*, while the Roman legitime was used to compel a decedent to provide for certain close relations to whom the decedent was perceived as owing a moral duty. By contrast, the French legitime had the dual purposes of enforcing a perceived moral duty owed by the testator to certain close relations, as well as compelling the testator to provide for the maintenance and support of his descendants. Finally, the purpose behind the French reserve differed wholly from the legitime under either Roman or French law, the reserve having for its object the continuation of family estates (although this purpose varied briefly when the reserve was
used to break up large family estates).

In addition to variations in the beneficiaries under each of these systems (which were based on the correlative variations in the purposes behind the limitations), the amount of the reserved portion has also varied. Moreover, the variations in the amount of the reserved portion are found not only between each of these societies but also within each of these societies. Importantly, this observation regarding the forced portion holds true not only for the early legal systems from which we derived our institution but also for Louisiana's system of forced heirship as well.

The laws regarding limitations on freedom of disposition have never been static. Rather, these laws have varied among as well as within each society based on the different mores of that society and the changes which it has undergone. Thus, it is easy for me to see that the people may have intended a change in our forced heirship system in 1974.

2. Forced Heirship as it Developed in Louisiana

2.1 Early Law

As a possession of the United States, the vast Territory of Louisiana was broken into smaller territories with approximately what came to be the State of Louisiana being declared the Territory of Orleans. The first legislature of the Territory of Orleans was appointed by Congress and, in turn, this legislature appointed commissioners to codify the existing laws then in force in the Territory. The commissioners' completed compilation, "A Digest of the Civil Laws now in Force in the Territory of Orleans with Alterations and Amendments Adapted to its Present Form of Government," was adopted by the legislature in 1808. This original version of the Civil Code largely reflected the French laws on forced heirship with the notable exception that the Spanish laws on quantum of the legitime were codified. Specifically, La.Civ.Code art. 22 (1808) provided that a parent's donations could not exceed one-fifth of his property to the prejudice of his children and those of a child could not exceed one-third to the prejudice of the parents. The Civil Code of 1808 also adopted the Spanish rules regarding disinherison, but omitted any reference to the Spanish concept of mejora.

This original version of the Louisiana Civil Code was revised in 1825. The 1825 revisions increased the disposable portion and, now tracking the French Civil Code, graduated this portion based on the decedent's number of children. With respect to the increased disposable portion, the reasons for the amendment state: "D'apres le voeu generalement manifeste de laisser aux peres plus de libertes dans la disposition de leurs biens, nous avons augmentee considerablement la portion disponible," or "We have increased considerably the disposable portion in consequence of the general wish in favor of parents having more liberty in the disposition of their property." Thus, as was the case with each of the legal systems from which Louisiana drew its forced heirship laws, this state demonstrated early on that the institution of forced heirship was not a static concept, but rather was subject to revision to foster varying social desires or concerns.

Following these changes in the disposable portion, the laws relating to forced heirship generally remained unchanged until the Civil Code was again revised in 1870. With the 1870 revision, La.Civ.Code art. 916 (1870) was enacted, introducing the surviving spouse usufruct into Louisiana law. While Article 916 did not further enlarge the disposable portion, it did diminish the descendant-forced heir's legitime by allowing
part of it to be encumbered with a usufruct, thereby depriving the forced heir of his right of immediate possession of the legitime.

After the turn of the century, in another change to Louisiana's doctrine of forced heirship, the Louisiana legislature essentially reduced the forced portion by enacting 1914 La.Acts No. 189. Therein, the legislature exempted the "proceeds and avails" of life insurance policies from claims of heirs of the insured when the policy was made payable to a designated beneficiary. Under this provision, a testator could name a non-forced heir as the beneficiary of a life insurance policy and the testator's forced heirs would not be able to seek reduction of the life insurance proceeds. See, e.g., Succession of Dumestre, 174 La. 482, 141 So. 35 (1932).

Six years later, the Louisiana Legislature allowed, as with the surviving spouse usufruct, for further deprivation of immediate possession of the legitime with 1920 La.Acts No. 107. In this Act, the Louisiana Legislature introduced a limited form of trust into Louisiana law. The trusts authorized by Act 107 allowed a testator to have a third party administer the legitime for the benefit of the forced heir with the forced heir only entitled to receive the income from the trust annually. Moreover, Section 8 of Act 107 expressly repealed any laws regarding the legitime insofar as those laws conflicted with the purpose of the Act.

The legislature's approval of trusts in 1920 was regarded by many as an infiltration of common law doctrines into Louisiana to the detriment of civil law principles prohibiting substitutions and fidei commissa. So strong were these sentiments for one Louisiana legislator that one year after the passage of Act 107, he proposed a constitutional amendment limiting the legislature's authority to approve of trusts in Louisiana. As somewhat of an incidental matter, the proposed amendment also provided constitutional protection for the institution of forced heirship. Although that portion of the proposal addressing trusts was substantively amended before passage, the prohibition of the abolition of forced heirship was included in the 1921 Constitution with only minor editorial changes. Thus, forced heirship became a constitutionally protected institution under La. Const. Art. IV, Sec. 16 (1921).

d) Comparative law

Virtually unknown in “common law” jurisdictions and systems, the law of “forced heirship” is ubiquitous in “civil law” jurisdictions and systems. Some form of that law survives today in nearly every such jurisdiction or system. Examples include (i) from Europe: France (C.C.F. arts. 913-930), Germany (B.G.B. §§ 2303-2338a), Greece (Αστικος Κωδικς αρθς. 1825-1845), Italy (C.C.I. arts. 536-564), Poland (C.C.P. arts. 991-1011), Portugal (C.C.P. arts. 2156-2178), Russia (Гражданский Кодекс Российской Федерации [Russian] ст. 1149), Spain (C.C.E. arts. 806-822), Switzerland (C.C.S. arts. 470-480); (ii) from the Americas: Argentina (C.A. arts. 3591-3605), Brazil (C.C.B. arts. 1721-1728, 1741-1745), Chile (C.C.C. arts. 1181-1211), Louisiana (L.C.C. arts. 1493-1514, 1617-1626), Mexico (C.C.M.D.F. arts.), Peru (C.C.P. arts. 723-733, 742-755), Puerto Rico (C.C.P.R. arts. 2361-2376, 2023, 2051-2053), and Venezuela (C.C.V. arts. 1239-1269); (iii) from Africa: Ethiopia (C.C.E. arts. 1025-1036 & 2468 - 2470; (iv) from Asia: Japan (J.C.C. arts.
1130-1146), Philippines (P.C.C. arts. 886-923), Turkmenistan (C.C.T. arts. 1188-1199), and Uzbekistan (C.C.U. arts. 1141-1142). One notable exception is Québec, which, under English pressure, abolished its law of forced heirship in the early 19th century. See Quebec Civil Law: An Introduction to Quebec Private Law n° 336, at 332-33, & 337, at 334 (John E.C. Brierley & Roderick A. Macdonald eds., 1993).

e) Characteristics of the limitation

1) Public order

a] Statement

b] Rationale

c] Effects (CC art. 1494 & 1496)

1} No direct impingement permitted

2} Nor even any indirect impingements

DH 46. T has two children, A and B, both of whom are young minors. T makes out a testament in which he leaves 1/4 of his estate to A and 3/4 to B (he gives more to B because he's "slow"). The testament further provides that the estate shall be "kept together" for 5 years, at the end of which time it shall be sold, the proceeds shall be placed into T-bills, and the T-bills shall be distributed to A and to B when each shall turn 21. Then T dies. When B's tutor tries to probate the testament, A intervenes, demanding her legitime in full ownership and immediately. What result? Why? See the jurisprudence that follows:

Succession of Turnell, 32 La. Ann. 1218 (1880)

FENNER, J.

The decedent left, as forced heirs, two sets of grandchildren, who may be designated as the Blakeley children and the Hutchinson children.

Each set of children were, under the law, entitled, as a legitime or forced portion, to one-fourth of his estate. He left a testament, by the terms of which, with the expressed intention of complying with the requirements of the law, he bequeaths to the Hutchinson children exactly one-fourth of his estate, and gave the balance thereof to the Blakeley children. He then directs as follows:

"All of my property shall be kept together, and be administered by my executors for five years after my death, when the same shall be sold, and the proceeds thereof be invested by my executors in U.S. bonds, and as my grandchildren severally arrive at the age of twenty-one years, they shall receive their share. Until the property be divided in the above proportions among my said grandchildren, the revenues therefrom shall be paid
to them half yearly."

The natural tutor of the Hutchinson children, who are minors, presents this petition in their behalf, averring, substantially, that they are forced heirs of the decedent for the one-fourth part of his whole estate, that the decedent could encumber the said legitime with no conditions that the clauses above quoted from the will are null and void, and praying that they be so declared.

Treating this will, as it has been treated by counsel on both sides in their arguments, as a will conferring upon the petitioning minors no right or advantage whatever over and above their legitimate portion, and considering their present action as a waiver of all other rights and advantages which might, under any possible construction of the will, accrue to them thereunder, we find no difficulty in reaching the conclusion that their demand is well founded, and that the conditions imposed in the clauses of the will, so far as they affect the ligne du, the petitioner, are, and should be, declared null and void.

It is true the petitioner declares that "he waives no right, and makes no admission as to the validity or legality of any of the other dispositions of said last will and testament," but we regard this as a reservation of the right to contest the validity of such clauses, and not to claim thereunder advantages additional to the legitime.

We think it clear, on both reason and authority, that where the will bequeaths to the forced heir more than his legitimate portion the testator may attach to the bequest any lawful conditions, and in such case the forced heir must exercise the option of either accepting the bequest as a whole, with the conditions attached, or of renouncing all testamentary advantage, and claiming his legitime only as secured to him by the law independent of the testament. See 12 Laurent; 19 Demolombe, No. 430 et seq.

But where the testator bequeaths to the forced heir nothing beyond his legitime, the only testamentary function he can exercise in reference thereto is that of designating the distinct part of his estate which shall be assigned to the heir in settlement of his legitime, which part so assigned must be accepted by the heir, reserving his right, in case of deficiency in value to satisfy his claim, to have the deficiency made up out of the estate. This right of designation, which has been exercised in this case, results from general principles, and is expressly recognized in our Code. R.C.C. 1302.

In the learned discussions submitted orally and on briefs by counsel, neither side has referred to Art. 1710 of the Revised Civil Code, which expressly declares "that no charges or conditions can be imposed by the testator on the legitime portion of forced heirs." This provision was not included in the Code Napoleon, but the commentators on the Code, and the courts of France upon consideration arising out of the motives, origin and history of the law upon the subject of the legitime had conclusively established and adopted the same doctrine, and had recognized the right of the forced heir as one arising ab intestato, and insusceptible of being controlled, limited or qualified by any disposition of the testator. 12 Laurent, pp. 11-14; 148, 197; 19 Demolombe, Nos, 6-25, 429; 8 Laporte Pand, Francaises, p. 336.

Construing Art. 1710 with Art. 1301 of the Revised Civil Code, it is easy to see that the latter, authorizing the ascendant by his will to delay the partition among his minor children or grandchildren inheriting from him, applies only to cases where they inherit by
virtue of his will, where they are the subjects of his voluntary beneficence, and where, therefore, in conferring the benefit he may attach the condition; but not to a case like the present, where he has only exercised his will-making power for the purpose of depriving them of every interest in his estate of which he could deprive them. Whence does he derive the privilege of imposing conditions upon rights absolute under the law and created by the law even in defiance of his will?

Upon the argument of counsel for the executors, it might, with equal force, be contended that under Art. 1300 the testator could impose a like condition on indivision upon the legitimate portion even of a major heir for the term of five years. * * *

The minors, represented by the plaintiff tutor, are entitled to their legitime, not by virtue of the will, but by virtue of the law, and take it free from conditions imposed by the will.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be reversed, and proceeding to render such judgment as should have been rendered by the lower courts, it is now ordered, adjudged and decreed that the clauses in the will of John A. Turnell, referred to and quoted in the petition herein filed, be declared null and void, so far as they affect the legitimate portion of the minors represented by Thos. W. Hutchinson, natural tutor; and that appellees pay costs of the lower court, and of this appeal.

2] In kind not by value

a] Statement

b] Effects

DH 47.1. T has a son, S (aged 21), and by him, a grandchild, G (aged 1). By testament, T grants G a universal legacy, subject to a usufruct in favor of S and a habitation in favor of T's sister, A. Then T dies. When G and A try to probate the testament, S intervenes, contending that the universal legacy to G and the particular legacy to A impinge upon his legitime. At trial, it is established that the value of the usufruct that T gave S exceeds by a significant margin the value of his legitime, which, at that time, amounted to 1/3 of T's estate. Do T's bequests to S, G, and/or S deny S's right to or impinge upon his legitime? Why or why not? See the jurisprudence and doctrine that follow:

Succession of Williams,
184 So.2d 70 (La. App. 2d Cir. 1966)

[The deceased bequeathed her entire estate to her grandchildren, issue of the plaintiff in this suit, subject to a life usufruct in favor of the plaintiff and to a right of habitation in favor of a third person. Plaintiff contended that as the only child and forced heir of the deceased, he was entitled to his legitime in full ownership, and to the usufruct of the
This summary of the facts comes to us compliments of Professors Samuel, Spaht & Picou.

HALL, J.

Proponents of the will contend that according to a calculation made by them and accepted by the Trial Judge, the value of the usufruct bequeathed to plaintiff is far more than the value of his legitimate portion of 1/3, and therefore his legitime has been satisfied.

Art. 1493 of the Revised Civil Code provides in part as follows:

"Art. 1493. Donations inter vivos or mortis causa cannot exceed two-thirds of the property of the disposer, if he leaves at his decease, a legitimate child * * * "

(Emphasis supplied.)

which means that the child is entitled to one-third of the property of the disposer (not one-third of the value of such property) as a forced portion of which he cannot be deprived, and we know of no law which declares, or jurisprudence which holds, that the child's forced portion or legitime may be defeated, satisfied or reduced by the bequest to him of the usufruct of the estate, regardless of the value of the usufruct as compared to the value of the legitime.

Actually no true value can be placed upon a usufruct since its value depends upon the uncertainty of life. Moreover since a usufruct ceases to exist upon the death of the usufructuary while an heir's forced portion of an estate is transferable at death to his heirs, no comparison of their values is possible.

We know of no reported case which discusses the precise point raised by proponents, but in Succession of Blossom, 194 La. 635, 194 So. 572, where testatrix left the usufruct of her estate to her adopted daughter, Anne Baker, and left the naked ownership thereof to others, the Supreme Court held that the adopted daughter was entitled under the provisions of Art. 1493 of the Revised Civil Code to her legitime of one-third of the estate plus a usufruct on the remaining two thirds. In McCalop v. Steward et al, 11 La. Ann. 106, where a similar testamentary situation was presented, the Supreme Court reached the same result. * * *

In conclusion we are of the opinion that James Bolds is entitled by law to his legitime of one-third of the estate in full ownership plus a usufruct for life over the remaining two-thirds, and that his children are entitled to the said remaining two-thirds in naked ownership. The right of habitation bequeathed to Isaac Anderson must fall because Bolds' legitime cannot be subjected to a right of habitation (See C.C. Art. 1710; Clarkson v. Clarkson, 13 La. Ann. 422) and, a right of habitation cannot exist in two-thirds of a house.

For the foregoing reasons the judgment * * * is amended by providing that James Bolds be decreed to be entitled to one-third (1/3) of decedent's estate in full ownership together with a usufruct during his life over the remaining two-thirds (2/3) and that all of the descendants of James Bolds be decreed to be entitled to the ownership of the said

17 This summary of the facts comes to us compliments of Professors Samuel, Spaht & Picou.
remaining two-thirds (2/3) of the estate, subject however to the usufruct in favor of James Bolds. * * *

Cynthia Samuel, Katherine Spaht, & Cynthia Picou, Successions & Donations: Cases & Readings 253-54 (Fall 2000)

The Williams case, supra, is approved in 27 Louisiana Law Review 448-450 (1967), wherein the author notes that the case has been criticized on the grounds that "it contravenes the normal rule that a forced heir cannot claim both the legitime and a testamentary bequest," and that "no support for [the decision] other, than two Louisiana cases" was offered by the court. See Note, 41 Tul. L. Rev. 210, 213 (1966). The author of the note in 27 Louisiana Law Review points out, however, that:

"It is true that in Miller v. Miller, 105 La. 257 * * * and in Succession of Fertel, 20 La. 614 * * * on which the author of the note in the Tulane Law Review relies, the court concluded that the legacy to the forced heir had to be imputed to the reserved portion and that therefore, he could not claim the legacy in addition to his legitime. But it must be noted that the reason for this conclusion was that this was clearly found to be the unequivocal intention of the testator, and not because such was the normal rule of law. Thus in Miller, the court states: 'All we are called to do is to ascertain [the testator's] intentions and enforce them. We think his intention and wish are clear, that the whole estate, less $20,000 to be first paid to the minor, should vest in his other children share and share alike. . .' * * * And in Fertel the court states: The contention of Barney Fertel that he should be awarded, in addition to his legitime, the legacy of $100 per month to be paid out of the disposable portion, is discussed in the opinion of the trial court which we have hereinabove quoted. As is correctly shown in the opinion; it is obvious that it was not the intention of the testatrix to give Barney Fertel the legacy of $100 a month in addition to his legitime.'

"It must be conceded that in an intestate succession, where a donation has been made to one of the forced heirs and is not otherwise exempt from collation, the donee may elect to keep the donation only if he renounces the succession of the donor. Louisiana Civil Code Art. 1237 (1870). It must also be conceded that gratuitous dispositions in favor of third persons, whether inter vivos or testamentary, must be imputed to the disposable portion for the reserved portion of the forced heir must remain intact. Again, it is also clear that such gratuitous dispositions when made in favor of one of the forced heirs are generally imputed to the reserved portion unless declared to be made as an advantage or extra portion. Id. Art. 1228. In other words, as against his coheirs, a forced heir cannot keep his donation inter vivos in addition to his légitime, unless the donation was expressly declared to have been given as an extra portion. By the same token, he cannot 'claim his legacy' in addition to his légitime, unless the legacy was likewise intended as an extra portion. That the declaration that the donation is exempt from collation or that it is made as an extra portion need not be expressly made when the donation is mortis causa, and that therefore, the question whether the legacy will be imputed to the disposable portion
or to the légitime will be resolved in favor of the heir-legatee, unless the testator has expressed a contrary intention [presents a different question]. Cf. Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929)." (27 L.L.Rev. 449, note 32.)

DH 47.2. Suppose that T has written the bequest to S in this fashion: "In satisfaction of S's rights as forced heir, I leave to him the usufruct over my entire estate." Would that have made a difference? Why or why not?

DH 47.3. Pascal and Julie, husband and wife, respectively, have a separate property regime. In the course of time, Julie bears Pascal a son, Ti-Boy. Pascal then makes out a testament in which he leaves "all my property in usufruct to Julie and in naked ownership to Ti-Boy. Later, when Ti-Boy is 22 years old, Pascal dies. When Julie tries to probate the testament, Ti-Boy intervenes, contending that Pascal’s legacy of a “universal usufruct” to Julie impinges on his legitime. Is Ti-Boy right? Why or why not? See CC arts. 1496, 890, & 1499.

2) Prerequisites (for triggering the limitation)
   a) Opening of the succession
   b) Presence of at least one forced heir (CC art. 1493)
      1] Definition of "forced heir" (1493.A)
         a] Descendant
         b] First degree, i.e., child
         c] Young or disabled at the time of deceased's death
            1} Young: under 24
            2} Incapacitated:
               a] Actually incapacitated
                  1/ Cause
                     a/ Mental incapacity
                     b/ Physical infirmity
                  2/ Effect: inability to care for person or administer estate
DH 48. Maria executed a testament in which she left her entire estate to Baldamar, who was both her husband and the father of her children. After Maria's death, Floyd, one of several children of the marriage, sought to be recognized as Maria's forced heir. Though he was over twenty-three years of age when Maria died, Floyd contended that he nevertheless qualified as a forced heir in that he was "permanently incapable of taking care of [his] person[ ] or administering [his] estate[ ]" due to a "mental infirmity." CC art. 1493.A. In support of this contention, Floyd offered the following evidence: (i) that he was mildly mentally retarded; (ii) that he required the assistance of his brother, aunts and uncles in performing banking operations and in getting to and from appointments; (iii) that he lived with his brother, who took care of procuring groceries and other necessaries; and (iv) that he was unemployable. This evidence was rebutted by evidence that Floyd (i) was a "float lieutenant" for a Mardi Gras krewe, (ii) a member of the Knights of Columbus, (iii) a frequent volunteer for charitable causes, and (iv) able to cook for and clean up after himself. What result would you expect? Why?

See In re Succession of Martinez, 729 So. 2d 22 (La. App. 5th Cir. 1999) (finding, on similar facts, that the supposed forced heir was not, in fact, permanently incapable of caring for himself) & the doctrine that follows:


Despite the Louisiana State Law Institute's recommendation to the contrary, the legislature chose to include incapable descendants within the classification of forced heirs considering "the potential economic impact of eliminating incapable descendants from the category of forced heirs and anticipated taxpayer indignation about bearing the cost of care for such children so that the parent could dispose of his own property after he died to other people or organizations."

The protected descendants must be "permanently" incapable of caring for their persons or administering their estates, language, which absent "permanently" constitutes the statutory formulation for limited interdiction. As has been discussed elsewhere, the adverb "permanently" in Civil Code article 1493 modifies incapable and refers to the duration, not extent of the incapacity, even though some of the original language of comment (c) drafted after legislative passage suggested to the contrary. In 1998 the legislature by resolution directed the Law Institute to change the comment because the comment "incorrectly characterizes permanently incapable children by terms not included within the article as enacted by the legislature, such as 'severely disabled' and 'seriously handicapped', and thereby purports to limit the category of incapable children as defined by the legislature. . . ."

Nonetheless, in Succession of Martinez the Fifth Circuit Court of Appeal, without citing the 1998 Resolution, relied on Comment (c) before it was edited to deny a "permanently" incapable descendant his forced portion of his mother's estate. Just as
anticipated by the legislature in the Resolution, the comment was cited as authority to limit the category of incapable children who are forced heirs. . . . In affirming the decision of the trial judge, the court of appeal also relied upon the language in comment (c) describing incapable forced heirs as only those who are "severely handicapped." As the thirty-three year old child was only mildly handicapped mentally and not "severely" handicapped, he was not a forced heir, "even though he is incapable of taking care of certain aspects of his life without assistance."

By the court's own admission, the child "has difficulty with money transactions, banking and he cannot perform more than one task at a time." His relatives, including the brother with whom the child lived, helped him with all of his banking tasks, keeping appointments, and purchasing groceries and other necessities. Someone, the brother with whom the child lived or a friend in the brother's absence, was required to stay with the child at all times: "Although plaintiff [the child] held a job for a short time some years in the past, he is unemployable." The court after reciting such facts then added, as if relevant, that the "[p]laintiff does not consider himself severely handicapped and is socially active." Regardless of the opinion of the thirty-three year old mentally retarded child, he was clearly incapable of administering his estate and his incapacity was permanent, not temporary; he was a forced heir under Article 1493.

Both the workers' compensation scheme and forced heirship law involve social legislation designed principally to protect the worker (at least originally) and the descendant, respectively, and to provide for their support. Initially, because at the beginning the amount awarded the worker was modest, policy dictated that a judge should err on the side of the worker. Considering the unanimity with which the Legislature rejected the recommendation that incapable descendants should not be forced heirs and the fact that the law reserves only a portion, not the entirety of the decedent's estate, policy dictates that the judge should likewise err on the side of the descendant if doubt exists as to the extent of his incapacity or its permanency.

The thirty-three year old child seeking to be recognized as a forced heir, which he most surely was, sought reduction of the legacy made to his father, the divorced husband of the testator, of the entirety of his mother's estate. The legatee whose second marriage to the testator ended in a divorce remained her universal legatee. Thus, despite a demand for a mere one-quarter of the estate of his deceased mother with whom he had lived before her death, the child's own father refused to share with his son a portion of the estate of his ex-wife who had cared for the child before her death. Instead, the brother of the mentally retarded child who works offshore, and presumably the other relatives of the child's mother, must continue to care for the child on a daily basis without the economic contribution from the mother's estate in the form of the legitime.

Fortunately for the child and his family the defendant is the biological father of the mentally retarded child and at least is obliged to support the child. Had the defendant been a current or former stepparent, no legal obligation of support exists and the injustice suffered by this needy, vulnerable child could be compounded. The circumstances of the Martinez case illustrate in part the tension point at the intersection of family law and succession law: the human consequences of divorce and the impact on the law of succession. The prior law of forced heirship served to protect all children of divorce from
the consequences of the decisions made by their parent or parents. Now, only the most vulnerable of the already vulnerable children of divorce are supposed to be protected; but sometimes even they are not.

**b} Potentially incapacitated**

During the Regular Session of 2003, the Louisiana Legislature amended CC art. 1493 by adding a new paragraph, paragraph E, which reads as follows:

E. For purposes of this Article "permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent" shall include descendants who, at the time of death of the decedent, have, according to medical documentation, an inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future.

How, precisely, does this amendment change the law? Does it not expand the category of “permanently incapable” forced heirs? In what respects?

2] Possible modes of “presence”

a] Of right (forced heir for himself)

b] By representation (1493.B & -C)

1} Definition of "representation"

What is “representation”? See CC art. 881; then read pp. 373-77 infra.

2} Prerequisites:

a} Possibility # 1 (1493.B)

1/ As to representé: predeceased child of deceased

2/ As to representative: any descendant of predeceased child (as a matter of biology, almost always a child of the
3/ Other: had child of deceased survived, he would have been "young" at time of deceased's death

DH 49.1. X has two children, A and B. A, in turn, has one child, M, and B, in turn, has three children, R, S, and T. An accident occurs in which A, aged 25, and B, aged 22, die. X dies the next day from grief. His oldest grandchild, M, is 4. (i) Can M represent A for purposes of the law of forced heirship? Why or why not? (ii) Can R, S, and/or T represent B for purposes of the law of forced heirship? Why or why not?

b) Possibility # 2 (1493.C):

1/ As to representé: predeceased child of deceased

2/ As to representative: child of predeceased child

3/ Other: representative is incapacitated at the time of deceased's death

DH 49.2a. X has one child, C. C, in turn, has two children, P and Q. C, then aged 19, dies in a car accident. Twenty years later, X dies. At that time, P is 25 years old, is severely mentally retarded, and is a quadriplegic, whereas Q is 22 years old and in good physical and mental health. (i) Can P represent C for purposes of the law of forced heirship? Why or why not? (ii) Can Q represent C for purposes of the law of forced heirship? Why or why not?

3] Disinherison

a] Definition

What is “disinherison”? See CC art. 1617.

b] Subjects

1) The disinheritor
PART I: DONATIONS

Who may have the power of disinherison? See CC arts. 1621 & 1622.

2) The disinheritee

Who may be disinherited? See CC arts. 1617, 1621 & 1622.

c) Requirements

1) Substantive: just cause (CC art. 1619, 1620)

a) Parent against child (CC arts. 1621)

The most commonly invoked “just causes” for disinherison are four in number:

1/ Cruelty, crime, grievous injury (CC art. 1621(2))

DH 49.2β. After Olide and his wife, Clodice, were involved in a serious automobile accident, as a result of which Clodice was killed and Olide was paralyzed, Olide went to live with his theretofore estranged son, Skotos. From the get go Skotos treated Olide with contempt, specifically, he frequently cursed Olide (“Shut up, you sorry-assed, good-for-nothing, God-d----- bastard!” was one of Skotos’ favorite lines); often left Olide to lie in bed in his own urine and feces for hours; regularly sprayed him with Lysol, all the while saying, “Pyoo-ey! You sure do stink!”; and gave him only bread and water to eat and drink, saying, “Didn’t the Apostle Paul himself write, ‘Let him who does not work not eat’?” Eventually Olide’s buddy, Pascal, rescued him from this purgatory, whereupon Olide promptly “disinherited” Skotos for “cruel treatment” and “grievous injury.” Weeks later Olide died. Is the disinherison sound on the merits, i.e., did Skotos’ conduct fall into either or both of those categories? Why or why not? See the note and the doctrine that follow:

NOTE

The phrase “cruel treatment, crime, or grievous injury,” which appears in CC art. 1621(2), also appears in CC art. 1560(2) (re cases in which donations can be revoked for ingratitude). In both instances, the phrase represents an English translation of a French phrase – sévices, délits ou injures graves – that appeared in the respective “sources” of those articles – (i) for CC art. 1621(2): art. 1613(2) of the Code of 1825 and art. 130(2), bk. 3, tit. 2, of the Digest of 1808 and (ii) for CC art. 1560(2): art. 1547(2) of the Code of 1825 and art. 67, bk. 3, tit. 2, of the Digest of 1808. The latter of these sets of “sources”

18 This hypothetical, I’m sad to say, is not the product of my overly-active imagination: it is based on the facts of the last succession matter in which I was involved.
(i.e., those of current CC art. 1560(2)) seems to have been copied verbatim from of the Code Napoléon, specifically, art. 955(2). Given the relationship between CC arts. 1621(2) and 1560(2) and the historical derivation of the latter, it can be argued that the French interpretation of the ultimate source of the latter should inform our understanding of the former. Here’s the French interpretation.


Cruelties, delicts or grievous injuries. – The cruelties, delicts or grievous injuries of which the donee can be found guilty toward the donor must be grievous. This qualification is applied to each of the three elements of this expression in article 955. It's up to the judge to evaluate the gravity of the facts invoked in support of the demand for revocation.

Cruelties are bad physical treatments inflicted on the donor. Delicts are acts that are punishable by the criminal law. They harm the person or the goods of the donor and have an intentional character.

As for grave injuries, this terms aims not only at injurious words, but also at those attitudes and behaviors of the donee that are of such a nature as to wound the donor’s sentiments, honor, or reputation and do so with a malevolent intent. Thus, there are some acts that could not be qualified as grave delicts that could be placed under the rubric of grave injuries.

It has been judged, however, that the exercise of a right could not be regarded as injurious in the sense of article 955, nor could injurious imputations proffered in the course of a trial . . . .


Cruelties, delicts or grievous injuries. – On condition that they are grievous, certain facts constitute cases of ingratitude. By cruelties, one has in mind bad physical treatment, which gives rise to an overlapping of categories. By delicts, one intends, in fact, infractions that are criminally sanctioned (delicts and a fortiori crimes). It's a matter not only of an infraction against the person, but also an infraction against property: still it's necessary that the infraction have been committed voluntarily. By injuries – [which is used here] in the broad sense of the word and not in the narrow sense used in penal law –, one must understand the offenses and woundings that tend to affect the donor in his honor and his reputation.

2/ Marriage by minor child without parental consent (CC art. 1621(6))
This action is a suit by a testamentary executrix seeking to enforce the provisions of a last will and testament which disinherit two forced heirs . . . Shelly Morris Barto and Peter Joseph Barto (hereinafter collectively referred to as the Bartos), sons and forced heirs of Mr. Bertaut, seeking to have them disinherit for failure to communicate with him without just cause for a period in excess of six years. . . . After a contradictory hearing, the trial court found that the Bartos had failed to prove their failure to communicate with Mr. Bertaut was with just cause and rendered a judgment approving the disinheritson. . . .

FACTS

Mr. Bertaut was born on September 27, 1915. Prior to May of 1935, he married Antoinette Lalumia (Mrs. Barto). On May 17, 1935, Shelly M. Barto was born of this union. Two years later another son, Peter J. Barto, was born.

Shortly before the birth of Peter, Mr. Bertaut left his family for unknown reasons. He met and began seeing Etta Chemin in April of 1940. On June 7, 1940, at approximately 2:00 p.m., Mr. Bertaut and Mrs. Barto were divorced. At 5:00 p.m. on the same day, Mr. Bertaut and Etta Chemin (Mrs. Bertaut) were married. Mr. and Mrs. Bertaut resided in Baker, Louisiana, for most of their married years. They had two daughters during their marriage.

In the middle of 1942, Mr. Bertaut was arrested for failure to support his two sons. As a result of his arrest, Mr. Bertaut began paying $25 a month in child support. Prior to his arrest, Mr. Bertaut had not paid any support for his sons.

Shelly Barto saw his father twice during his father's lifetime. He saw Mr. Bertaut once for an hour when he was ten years old. This visit took place at Mrs. Barto's home in Slidell, Louisiana. He also saw Mr. Bertaut when he was eighteen years old and a freshman at Louisiana State University in Baton Rouge, Louisiana. This visit lasted about an hour.

Peter Barto saw his father approximately seven times during Mr. Bertaut's lifetime. He last saw his father in 1979 after his father had suffered a stroke.

Mr. Bertaut died on October 28, 1987, in Mandeville, St. Tammany Parish, Louisiana. He left a will dated April 3, 1986.

OBJECTION OF NO CAUSE OF ACTION

The Bartos contend the trial court erred in overruling their peremptory exception
raising the objection of no cause of action. They contend the disinherison provision is defective because . . . it fails to state that their failure to communicate with Mr. Bertaut was without just cause.

The disinherison provision of Mr. Bertaut's will reads as follows: “I specifically disinherit my two (2) sons, Shelly Morris Bertaut, and Peter Joseph Bertaut, under the provisions of Article 1623(12) [sic] inasmuch as they have failed to make any effort to communicate with me for a period in excess of six (6) years even though they have known of my whereabouts and they have not been in the military forces of any kind.”

The disinherison must be made by name and expressly, and for just cause, otherwise it is null. La.C.C. art. 1619 . . . .

The causes for disinherison of a child by a parent are found in La.C.C. art. 1621. The causes for disinherison of a parent by a child are found in La.C.C. art. 1623. La.C.C. art. 1621(12) provides the following: “If the child has known how to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after attaining the age of majority, except when the child is on active duty in any of the military forces of the United States.” (Emphasis added.)

The sufficiency of a disinherison provision to state a cause of action must be decided on a case by case basis. The disinherison provision is not defective because it fails to state that the Bartos' lack of communication for six years is without just cause. The facts recited in the disinherison provision adequately state the cause for which Mr. Bertaut is attempting to disinherison his sons. The requirement of expressly stating the cause of disinherison is fully accomplished when the statement is made that the child has failed to communicate with the parent for a period of two years when the child has known how to contact the parent. See Stephens v. Duckett, 111 La. 979, 36 So. 89 (1904).

The trial court found that the disinherison provision in Mr. Bertaut's will sufficiently stated a cause for disinherison against the Bartos . . . . For the reasons stated above, we find that the trial court was correct.

VALIDITY OF THE CAUSE FOR DISINHERISON

The Bartos contend the trial court erred in finding that they failed to meet their burden of proving that the cause stated for disinherison was not sufficient to disinherison them. They contend that they sufficiently proved that their failure to communicate with Mr. Bertaut was with just cause.

La.C.C. art. 1624 requires the testator to express in his will the reasons for disinherison of a forced heir. La.C.C. art. 1621 provides for a rebuttable presumption that the facts set out in the act of disinherison are correct. . . . [A]mended La.C.C. art. 1624 . . . shift[s] to the disinherited forced heir the burden of proving that the cause stipulated for disinherison did not exist or that the forced heir was reconciled with the testator after the acts alleged to constitute the cause for disinherison.

The Bartos at trial admitted that they had not communicated with their father in over six years. They contend their failure to communicate with their father was with just cause because their father abandoned them when they were infants and never attempted to establish any type of relationship with them.

In K[atherine] Spaht, . . . [Successions and Donations, Development in the Law, 1984-1985, 46 La.L.Rev. 707 (1986)], pp. 711-713, just cause is discussed as follows:
The heir may also prove as a defense to disinherison that his failure to communicate was with "just cause." "Just cause" explicitly provided by the statute includes lack of knowledge concerning how to contact the parent and active military service. Other examples of "just cause" can be borrowed perhaps from the statute dispensing with the natural parent's consent to an adoption. A condition of the parent's failure to communicate with the child which makes his consent to the adoption unnecessary is that the failure to communicate be without just cause. A survey of the jurisprudence interpreting the adoption provision reveals that parents have urged the following circumstances as just cause: incarceration, drug addiction, and emotional state. Incarceration urged as just cause for failure to communicate with a child was rejected by the court: "We would think that a father situated such as this who had a real concern for his children would recognize that, in order to maintain a relationship under these circumstances, an extra effort is necessary." The same should be true if the child is incarcerated and fails to communicate with the parent. It is also obvious that the Legislature intended to place the burden of making the effort to communicate on the child, since failure, not refusal, to communicate is the ground for disinherison. In the two cases where drug addiction and the emotional state of the parent were offered as "just cause" for failure to communicate or pay support, the issue was avoided by the court.

In deciding what constitutes just cause for failure to communicate by the child, the child's psychological state of mind presents the most difficulty. Drug addiction with its accompanying dependency and anxiety, other serious psychiatric problems that can be clinically identified, or psychological disturbances created by such events as an argument with the parent or a stepparent may be urged by the heir as "just cause." Consider, for example, the factual circumstances of Succession of Landry [463 So.2d 681 (La.App. 4th Cir.1985)]. If the case had been decided under Civil Code article 1621 as amended, the heir would have been compelled to argue "just cause" for his failure to communicate with his mother from 1947 until her death in 1980. The "just cause" for his failure to communicate was an acrimonious incident involving the removal of the heir's refrigerator from an apartment owned by his mother. In her will the mother wrote, "My son, Wilbert, never apologized for striking me or for the above referred to attack upon me and although he has always lived in the City of New Orleans or the Greater New Orleans Area, he has never come to see his mother even on many occasions (sic) when I was confined to the hospital because of a heart condition or other physical ills." The court suggested in its opinion that the mother was as much at fault as the child in failing to heal the breach: "Respect between parent and child is a mutual obligation."

However, in Succession of Landry, the executrix was seeking to prove that the disinherited heir had been guilty of cruelty to his mother. The court responded to the allegations of cruel treatment in the following manner: "An argument which results in prolonged indifference by both parties cannot be characterized as 'cruelty' by one of the parties." It then added gratuitously, "[d]isinherison cannot result from a child's failure to communicate with a parent."

The law has changed. Because the legislation now imposes a responsibility upon the child to communicate with a parent, an argument that creates strained relations with the parent should not constitute "just cause."
communication by the child need not apologize to the parent for an argument where both parties were at fault, but it should be respectful in tone, as was previously discussed. Furthermore, reliance upon the jurisprudence interpreting "just cause" under the adoption statute should proceed cautiously because the policies underlying adoption and disinherison differ substantially. Whereas the adoption statutes dispensing with the natural parent's consent must be strictly construed as in derogation of the natural parent's rights, the disinherison legislation should be interpreted liberally to permit a parent greater freedom in disinheriting an unworthy child. The motivation of the law regulating parent-child relations is to assure the natural parent the opportunity to establish strong emotional ties to the child. If the parent is dead, there is no reason to deny the disinherison to encourage such emotional relationship. Yet, balanced against the strict interpretation of the adoption statutes is a consideration also not present in the laws on disinherison--the critical need to provide a stable, warm, loving environment for the minor child. (Emphasis added; footnotes omitted)

The record reveals that Mr. Bertaut abandoned the Bartos when Shelly was two years old and Peter was still in utero. After he abandoned his two sons, Mr. Bertaut began a new life in Baker, Louisiana. He met Etta Chemin (Mrs. Bertaut) in Baker and after a six week courtship proposed to her. At this time, he informed her that he could not get married until he obtained a divorce from his first wife. Mrs. Bertaut found out at this time that Mr. Bertaut had two small children. About two weeks after his proposal, Mr. Bertaut obtained a divorce from his first wife. This occurred on June 7, 1940 at 2:00 p.m., and at 5:00 p.m. on the same day, he married Mrs. Bertaut. Mr. Bertaut at this time told Mrs. Bertaut that he did not have to pay support for the children. Mr. Bertaut did not pay child support for his sons until he was legally forced to pay.

The record shows that Mr. Bertaut had contact with Shelly twice in fifty years. These meetings occurred when Shelly was 10 and 18 years old. He last saw his father in 1953.

Mr. Bertaut saw Peter seven times in forty-eight years. He first met Peter when Peter was eight years old. He saw Peter again when Peter was about thirteen years old. On this occasion, Mrs. Bertaut wanted to meet Peter, so she picked him up from in front of his house. This meeting was the result of Mrs. Bertaut's efforts. Mr. Bertaut saw Peter again when Peter was in high school. Peter had gotten into trouble, and Mr. Bertaut went to Slidell to get the problem straightened out. Mr. Bertaut saw Peter twice in 1969 as a result of his daughter's efforts. Peter also visited Mr. Bertaut twice in 1979 after Mr. Bertaut had suffered a stroke. Peter did not see his father after 1979.

The record reveals that Mr. Bertaut did not seek to establish any type of meaningful relationship with his sons. The majority of his contacts with his sons were initiated by other people.

The trial court in its oral reasons for judgment stated the following:

The court finds that the heirs' feelings about their father's separation and divorce may be their reason for lack of communication. However, it does not equate to just cause. There is no evidence whatsoever in the record to the effect that the father discouraged or prohibited his sons in any way from communicating with him. In fact, the last contact with Shelley [sic], as previously stated, was initiated by the father, himself. The court finds that the proof is clear and that the heirs have failed to carry their burden of establishing that their failure to communicate, in accordance with civil code article 1621(12), was without just cause and the court therefore will sign a judgment approving the disinherison
and will order the will executed, and will sign judgment accordingly.  
(Emphasis added)

The purpose of La.C.C. art. 1621(12) is to require communications between children and parents so that strong family ties are maintained. This court is in accord with the trial court and legal scholars who feel that in ordinary situations La.C.C. art. 1621(12) places the burden of making the effort to communicate on the child. However, we do not think that a child must attempt to communicate with his parent when this attempt would be futile. If attempts by a child to communicate with his parent are futile, his failure thereafter to communicate with the parent is with just cause. A person should not be required by law to perform a vain and useless act.

In this case, the evidence shows that Mr. Bertaut did not want to establish a parental relationship with his sons. Most of his contacts with his sons were not a result of his efforts. The efforts by the Bartos to communicate with their father proved to be futile. The Bartos' failure to communicate with their father under the particular facts and circumstances in this case was with just cause. The trial court erred as a matter of fact and law in finding otherwise.

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b} Other ascendant against other descendant  
(CC art. 1622)

2} Formal

a} Express, implied or tacit? (CC art. 1619)

b} Oral, written, authentic form? (CC art. 1618)

c} Contents? Name? Cause?

Would it be sufficient for a de cujus to say, in the act of disinherison, “I hereby disinherit my son, Olide, because he did me wrong”? Why or why not? See CC art. 1619, 1624.

3} Timing

DH 49.2γ. One day Renard, Olide’s son (age 30), shoots Olide, evidently in an attempt to kill him. Olide then draws up an act, valid in form, in which he purports to “disinherit Olide” on the ground of “cruel treatment” and “grievous injury.” Weeks later Renard, while out gathering moss, falls from a tree, sustaining head injuries that leave him paralyzed from the neck down and mentally impaired. The next day Olide dies. Clodice, Olide’s surviving spouse and universal legatee, then seeks enforcement of the act of disinherison. In Renard’s defense, Renard’s representative argues that the act was invalid in that “neither at the time of the alleged wrongful act nor at the time of the confection of the act of disinherison was Renard a presumptive forced heir of Olide, i.e., he then was ‘over 23’ and was not ‘permanently disabled’.” What result would you predict? Why? See CC art.
1623.

d] Defenses: reconciliation, etc. (CC art. 1625, 1626)

1) Reconciliation

Succession of Lissa,
198 La. 129, 3 So.2d 534 (1941)

FOURNET, J.

Defendant, Mrs. Adele Spiro . . . has appealed from a judgment decreeing her to be disinherited under the terms of the testaments of her late mother and father.

Mrs. Sarah Lissa Spiro, defendant's mother, died testate on April 9, 1938, leaving surviving her, in addition to defendant, three children . . . . Defendant opened her mother's succession on June 8, 1938, praying that a search be made for her will. On June 14, by the petition of defendant's father, Mrs. Spiro's olographic will dated April 17, 1911, was probated, and by the provisions thereof defendant was disinherited for the reason that she married during her minority without the consent of her parents . . . . Defendant was likewise disinherited under the terms of the last will of her father who died on January 13, 1940. The will, nuncupative, in form by public act dated May 30, 1939, was duly probated. The two successions were subsequently consolidated, and on March 26, 1940, this suit was filed by defendant's sister and two brothers for the purpose of proving the facts on which her (defendant's) disinherison was based.

The defendant . . . , in the alternative, pleaded that she had been expressly forgiven by her parents, each of whom had become reconciled with her and had condoned the marriage.

The case went to trial on these issues, and the trial judge concluded. . . . [a]s to her alternative plea . . . , that since it is the mandatory requirement of the Revised Civil Code that disinherison be by one of the forms prescribed for testaments and no specific provision is made for the revocation of a disinherison, the same can only be revoked in the manner in which it is established. Consequently he was of the opinion that no other proof that the deceased condoned or became reconciled to the injury done him could be introduced and considered, although, in order to complete the record, he did admit parole (sic) testimony and referred it to the merits.

. . . This leaves for our consideration, therefore, whether or not the judge erred in his ruling on the issues raised by the defendant's alternative plea and the weight and effect of such testimony in the event we conclude he did.

. . .

Because of the establishment of important centers of legal and general development in the north, the customary laws of France, now referred to as the Customs of Paris, became, in time, the predominant law of the land. The result was a majority view, following the law, based on the theory that since the right to disinherit was a penalty for the infliction of a personal injury, the offended party could forgive the offense and revoke the penalty, i.e., the disinherison. Under this view disinherison could be rendered

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ineffective in three ways: (1) By an express revocation in a new will; (2) by a codicil to the old; or (3) by a reconciliation between the testator and the disinherited person. In reaching this conclusion the jurists reasoned that disinherison, being so contrary to all of the natural instincts of paternity, forgiveness was presumed to be a manifestation of the testator's condonation of the injury done him and the cancellation of the disinherison.

From Pothier, conceded to be one of the most eminent of all of the commentators on the Civil Law, we have the following comment on the right to disinherit and its revocation under the Roman law and the French law prior to the adoption of the Code Napoleon:

"Under the Roman law, disinherison could only be revoked by a testament which revoked the former one which contained the disinherison; that was, the result of the principles of Roman law whereby a testament can only be revoked by another testament and that a person cannot dispose of his estate, make a donation or cancel it except by testament; testamentum rumpitur per alium testamentum aequo perfectum; haereditas nec dari nec adimi potest nisi testamento: these principles are not admitted by our law; this is the reason why disinherison may be revoked by the bare and mere volition of its author.

"If the one who makes a disinherison declares afterwards by its testament, or by any other act, that he forgives his son, this act is equal to revocation of disinherison.

"It is not even necessary that a written act be drawn up; it is sufficient that the disinherited be able to prove that the testator has shown signs of reconciliation; viz, if he has let him stay at his house or if he has allowed him to make more frequent visits.

"The injury is so much presumed to be forgiven that no credence would be given to a declaration, made afterwards by the father in his testament, that in receiving his son in his house he did not intend to revoke the disinherison.

"We have said, and it is the truth, that the effect of the disinherison is odious and hence it is easily removed by the reconciliation of the son with his father; it is a thunderbolt which is only preserved by the flash of anger; so much so that as soon as the tempest subsides and the father looks at his son once with a serene face all the clouds are scattered, he is presumed to have forgiven the past and to have wiped away his angry feelings. This is so very true that once the offense of the son has been wiped away by the forgiveness the father cannot rely upon it any longer to let subsist the disinherison which he made and still less to make a new one. And so we see although the causes of disinherison are quite ample, they rarely have their effect in execution; the traces of nature cannot be wiped away and disinherison, which amounts to the cutting off of a member of the family by way of fiction, through the abduction which a father makes of his son, suffers a perpetual opposition which emanates from the truth. And so, the law of nature is stronger than the civil law and if sometimes precedence is given authority of the latter to support the former, rigor then prevails over equity and fiction over truth."


...[I]t may be seen that while this court is not specifically instructed by the legislature to follow the jurisprudence found in Rome, Spain, and France on controversial questions before us for decision the first time, the settled principles of those countries are most persuasive assistants in the solution of problems presented under the provisions of our Civil Code which were either adopted from their laws or passed upon by their jurists.

... It is our opinion, therefore, after a most thorough study of the entire subject matter, that these articles were intended by the legislators to be treated in the light of the jurisprudence in the countries from which they were derived. It necessarily follows that whenever the injury which gives rise to the disinherison is forgiven by the injured person, the cause for the disinherison is defeated or stricken down, and such forgiveness may be established by parol testimony. To hold otherwise would be unreasonable and illogical, as just demonstrated in the case where the child, attempting to take his father's life, is nevertheless permitted to inherit from him if the father dies without disinheriting him, the cause of his unworthiness being presumed forgiven; yet the same child, although forgiven for the offense by the father during his lifetime, would be prevented from inheriting if he subsequently displeased his father and was disinherited by him for the attempt on his life because of his inability to prove that forgiveness. And for another example: If a child marries without the consent of the parents, which is another of the just causes for disinherison, and subsequently the parents do give their consent by way of condonation, can it be said that the parents, later becoming displeased with the child for some personal reason or because of mental ill health, can logically or for just cause punish the child by depriving him of his rightful legitime?

The trial judge in his written reasons for judgment said: "The preponderance and weight of the evidence show that Mrs. Spiro had forgiven her daughter Mrs. Adele Mathe." We think the record unmistakably bears him out in this respect.

The testimony shows that the defendant's mother visited defendant shortly after the marriage and continued to do so over a period of years, or until she became incapacitated. She spent as much as a week at a time with Mrs. Mathe, even taking a trip, financed by Mr. Spiro, with her to the Chicago World's Fair as late as 1932. The defendant and her family visited in the home of Mr. and Mrs. Spiro in New Orleans on a number of occasions at the invitation of Mrs. Spiro and also at the summer home of the family on the Gulf Coast. Defendant's mother visited her at the birth of her first child and also had one of her brothers visit her. When the second child, a son, was born, Mrs. Spiro (although Mr. Spiro did not attend the ceremony) made all arrangements for the child's circumcision (the family being strict orthodox Jews), and the ceremony was held at the home of the defendant's parents, Mrs. Spiro, together with defendant's father, acting as the child's sponsors and presenting to it the token or gift customary at such ceremonies. When this child subsequently died, she attended the funeral.

The record further shows that the defendant attended a celebration given at the home of her parents on the confirmation of her youngest brother, Joseph. On the same day both of her parents returned with her to her own home to attend the party celebrating the confirmation of her eldest daughter. In addition to these celebrations, the defendant attended a family party given at Club Forest by her brother Joseph, and also the fiftieth
wedding anniversary celebration of her mother and father held at Arnaud's Restaurant in 1933 and financed jointly by defendant and her sister, Mrs. Pick.

According to these facts, therefore, when Mrs. Spiro executed her will in April of 1911, the cause upon which the disinherison of defendant was based had long since been forgiven. In the face of her demeanor after defendant's marriage, her action in disinheriting Mrs. Mathe cannot be satisfactorily explained unless it was because she was dissatisfied with the defendant when she became reconciled to her husband against whom she had, in the January preceding the execution of the will, filed suit for separation on the ground of cruel treatment.

The learned trial judge, however, in analyzing the testimony that he had allowed to be introduced, declared that the fact that the father had taken an interest in the defendant at the time she was having marital trouble, as well as the interest taken in her financial affairs, and that he took her out to lunch, did not prove that he forgave his daughter or became reconciled to the marriage when taken into consideration with the further facts that in addition to the will of 1911, in which he disinherited the defendant, he made three other wills shortly before his death, in all of which he repeated his provisions relative to her disinherison, as well as the fact that he joined his other children in an effort to have defendant's disinherison from her mother's estate enforced.

The testimony on this aspect of the case is greatly in conflict. It is true the record shows the father did not as readily forgive his daughter's marriage as did his wife, but he, we believe, did become reconciled to his daughter's marriage during the period of approximately thirty years intervening between 1905, the year of her marriage, and 1934, when she again lost the good grace of her father because of some difficulty had with her sister, Mrs. Ruby Spiro Pick.

The record shows that when the defendant left her husband in January of 1911 her father took her to his own attorney, who filed the separation suit. Before the case went to trial the defendant became reconciled to her husband. It was soon thereafter that the defendant's father on April 17, 1911, executed a will identical with the one executed by her mother, in which he disinherited her. However, we find that her father thereafter financed both the defendant and her husband in their purchase of the first property belonging to the community by lending them 90% of the amount needed for the purchase at a smaller rate of interest than was customary. In 1933, when the defendant left her husband, her father again came to her assistance and he, together with her brother Edward, so manipulated her affairs that she acquired her husband's interest in the community, the father advancing the money for the final settlement.

It appears from the record that when defendant's husband embraced Judaism in order that his daughter might be confirmed in that faith, such evidence of opposition on the part of Mr. Spiro as had existed to Mrs. Mathe's marriage seemed to disappear. He became more intimate with her--so much so that he was seen lunching with her at Arnaud's and Morrison's on numerous occasions, sometimes alone with Mrs. Mathe and at other times with her children or her sister, Mrs. Pick. She visited him at his office on any number of occasions, one time in particular for the purpose of consulting him about the purchase of an automobile. She drove him around at times when he was attending to his business. He kept her money in his safety deposit boxes for her and kept an account thereof. The record also shows that at the family celebration given by her brother at Club Forest, her father danced with her. This close relationship appears to have continued until the time when the defendant had a disagreement with her sister, whose influence on her father was very apparent from the evidence in the record.
For the reasons assigned the judgment of the lower court is annulled and set aside and it is hereby ordered and adjudged that there be judgment against the plaintiffs and in favor of the defendant, Mrs. Adele Spiro Mathe, disallowing her disinherison and decreeing her to be entitled to her share of the estates of her father and mother.

Succession of Chaney,
413 So.2d 936 (La. App. 1st Cir. 1982)

COLE, Judge.

Plaintiff's third assignment of error is that even if the evidence proved he struck his father, his father forgave him so the disinherison provision has no effect. Successions of Lissa, 198 La. 129, 3 So.2d 534 (1941), established that when the evidence shows the testator has forgiven the disinherited heir, the disinherison provisions of the will are null. Plaintiff stated he visited his father in the hospital after his second surgery and later at the nursing home. On the occasions when the testator was alert he seemed glad to see plaintiff and inquired about a crop he had helped plant. Plaintiff admitted he had not seen or inquired about his father from the time the testator was admitted into the nursing home in July until the time of his second operation, which was sometime after October 18, 1979. He stated Willis had promised to notify him of his father's condition but he learned of the second surgery only because a distant relative so informed him. When asked why he didn't make the inquiries himself (rather than wait to be informed) he said he had wanted to avoid any controversy about the way his father was "raising sand the morning I took him down there." The court refused to deem this limited contact to mean the testator had forgiven the plaintiff, based partially on the evidence showing the testator had been semicomatose on many occasions after his surgery.

We find no manifest error in the conclusions of the trial court. The evidence offered by plaintiff does not establish his father forgave him for the striking. The jurisprudence does not set forth guidelines for determining when forgiveness has been established, therefore we have no "definition" as to what constitutes forgiveness. Yet we feel quite comfortable in saying there must be some affirmative action by the testator to show he has in fact forgiven the disinherited child. A merely passive action such as the testator allowing his son to visit him in a nursing home is not an act showing forgiveness. The record establishes the testator's mental and physical condition declined seriously after the second surgery and although we are not denying he had lucid intervals, we feel his general ill health would permit him to do little more than accept his son as a visitor.

Other defenses: incapacity, lack of intent, justification

DH 49.2è. One day a few weeks Jean Sot died, his three boys – Beau, Meau, and Seau – turned on him (or at least that’s how Jean saw it). Beau (25 years old) was first. The victim of a freak crawfishing accident that had left him both a paraplegic and a virtual mental vegetable (mental age of 4), Beau drove his wheelchair into Jean, knocking Jean to the ground. Next came Meau (22 years
old). When Meau, who suffers from Tourette's Syndrome, ran over to help Jean up, Meau’s arm “twitched” uncontrollably, sending his elbow rocketing into Jean’s eye. Last but not least was Seau (18 years old). As Jean reeled from the eye-poking, he began to stagger blindly toward an alligator-infested pond. To prevent Jean from falling into it, Seau lunged at Jean, knocking him to the ground again. This not only was a reasonable means of saving Jean from imminent reptilian perdition; it was also the only means. Afterwards, Jean, furious with all three, drew up an act of disinherison, in olographic form (see CC art. 1575), in which he purported to “disinherit my sons, Beau, Meau, and Seau for ‘cruel treatment’ and ‘grievous injury’ under CC art. 1621(2).” The act included a detailed and accurate account of the day’s events. After Jean Sot died, his sister and universal legatee, Leau, who stands to inherit everything if Beau, Meau, and Seau are disinherited, has sought enforcement of the act of disinherison. Do the boys have any defenses? If so, what might they be?

\[\text{e] Procedure: burden of proof}\]

1) **Existence of the cause**

Who bears the burden of proof with respect to the “merits” of the disinherison, i.e., whether the disinheritee was, in fact, guilty of the wrongful act on which the disinherison was based? What is that burden? See CC art. 1624.

2) **Defense of reconciliation (CC art. 1625)**

Who bears the burden of proof with respect to the defense of reconciliation? What is that burden? See CC art. 1625.

3) **Defenses of incapacity, lack of intent, justification (CC art. 1626)**

Who bears the burden of proof with respect to the defenses of incapacity, lack of intent, and justification? What is that burden? See CC art. 1625.

\[\text{f] Effect}\]

What is the effect of a valid act of disinherison (provided that the disinheritee has no defense)? See CC arts. 1617, 1494, 1500.

c) **Acceptance of the succession**

3) **Quotients of disposable portion & forced portion**

a) **Governing principles:**
1] Quotients depend on number of forced heirs

2] Determination of number of forced heirs: number of forced heirs still alive plus number of forced heir represented

DH 49.3 X has three children, A, B, and C. A, in turn, has two children, M and N; and B, in turn, has three children, R, S, and T. An accident occurs in which A and B, both aged 22, die, and C, aged 25, is rendered a quadriplegic. X dies the next day from grief. His oldest grandchild, M, is 4. How many forced heirs has X? Explain.

b) Quotient-fixing rules

1] General rule (CC art. 1495, ¶ 1)

a] Deceased leaves one forced heir:

1} Disposable portion: 3/4

2} Forced portion: 1/4

b] Deceased leaves two or more forced heirs:

1} Disposable portion: ½

2} Forced portion: ½

DH 49.4 X has three children, A, B, and C. A, in turn, has two children, M and N; and B, in turn, three children, R, S, and T. An accident occurs in which A and B, both aged 22, die, and C, aged 25, is rendered a quadriplegic. X dies the next day from grief. His oldest grandchild, M, is 4. Calculate the forced and disposable portions.

2] Exceptions

a] Where the (sum of the) legitime(s) exceeds the (sum of the) forced heir’s(s’) intestate share(s) (CC art. 1495, ¶ 2)

1} Disposable portion: total estate less sum of the interest shares
2) Forced portion: sum of the intestate shares

DH 50. X has five children, A, B, C, D, & E, all of whom are sound in body and mind. Only E is under 24. What are the forced portion and the disposable portion? Explain.

b) Where one or more forced heirs (or representatives) is disinherited, is declared unworthy, or renounces (CC art. 1500)

1) Disposable portion: disposable portion per general rule plus legitime of non-receiving forced heir

2) Forced portion: forced portion per general rule less legitime of non-receiving forced heir

DH 51.1. X has three sons, A, B & C, all of whom are under 24. X makes out a testament in which he makes numerous bequests to third persons and properly disinherits A on grounds of cruel treatment. Then X dies. Afterward, B is declared unworthy on grounds that he killed X. What are the disposable and forced portions of X’s estate? Explain.

4) Shares of the forced portion (legitimes)

How the forced portion is to be divided depend, in part, on whether any of the persons called to receive it are representatives of forced heirs.

a) Where there's no representation: by heads

b) Where there is representation: by roots and then, within each root, by heads

DH 51.2. X has three children, A, B, and C. A, in turn, has two children, M and N; and B, in turn, three children, R, S, and T. An accident occurs in which A and B, both aged 22, die, and C, aged 25, is rendered a quadriplegic. X dies the next day from grief. His oldest grandchild, M, is 4. Who gets what? Explain.

5) Sanction (reduction) (CC art. 1503)

b. Limitation on conditions: no impossible, illegal, or immoral conditions allowed (CC art. 1519)
PART I: DONATIONS

1) Causes

a) Of impossibility

b) Of illegality or immorality

1] Pertaining to personal matters (status, lifestyle)

a] Marital status

Succession of Ruxton,
226 La. 1088, 78 So.2d 183 (1955)

FOURNET, J.

... William Ruxton died testate at his domicile in New Orleans on the 9th of March, 1951, leaving neither ascendants nor descendants. His last will and testament, executed December 4, 1947, contained the provision: "* * * Second: I give and bequeath unto Miss Virginia Brookshire, of Hendersonville, North Carolina, the sum of Ten Thousand Dollars ($10,000.00) cash, provided however, that she be still unmarried at the time of my death. In the event she not be unmarried at the time of my death, then I direct that the aforementioned bequest of Ten Thousand Dollars ($10,000.00) be added to the rest, residue and remainder of my estate to be disposed of as provided in paragraph Third hereof, and be considered as a part of my estate passing thereunder." At the time of the testator's death, the opponent was married to Joseph W. Appleyard; the executor, therefore, following the directive of the testator, added the $10,000 to the residue of the estate.

The opponent, relying on Art. 1519 of the LSA-Civil Code, contends that a provision concerning her marital status at the time of the testator's death is a condition contra bonos mores and hence reputed not written.

Under the express provisions of the LSA-Civil Code, "The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals," Art. 1527, but "* * * those which are contrary to the laws or to morals, are reputed not written." Art. 1519. In the instant case, it cannot be said that the provision in the will had a deterrent effect on the opponent, as she was not apprised of it until the decedent's death; but conceding, without deciding, that a legacy conditioned upon the legatee remaining unmarried is against the public policy of this State, it is apt to observe here that the provision under consideration is not one forbidding the donee to marry during her lifetime or even for a fixed period of time, nor one that directs the legacy shall lapse in case the legatee should marry in the future, but rather one that is conditioned upon
her status at the time of the testator's death. Certainly, such a provision is not against good morals, and we know of no law prohibiting the same.

The argument that the testator had no motive impelling him to insert such a provision in his will, and that if there were such a motive it was one based upon his whim or caprice, has no basis in law, because under the clear provisions of Art. 1527, supra, a donor may dispose of his property as he pleases and his motive cannot be inquired into except when the condition is considered to be morally or legally impossible.

Labarre v. Hopkins,
10 La. Ann. 466 (1855)

BUCHANAN, J.

Mrs. Ezilda Volant Labarre, wife of James A. Hopkins, made her will, which has been duly probated, and in which are the following clauses:

"Je donne et légue a mon mari, Mr. James Hopkins, la jouissance pleine et entière de tous mes autres biens, sans exception ni réserve, tant qu'il ne sememaria pas; mais dans le cas ou il viendrait a se remarier, je veux et entend que ces mêmes biens soient partagés entre les membres de ma famille, conformément aux dispositions de lois de cet Etat."

Mrs. Hopkins died on the 26th of January, 1849, and her husband married again on the 15th of May, 1851. The plaintiffs, heirs at law of the deceased Mrs. Hopkins, claim of the defendant to be put in possession of the estate of his deceased wife, in conformity to the dispositions of her will. The defendant excepts that the limitation of this usufruct under the will to the time of his second marriage is unlawful and void, as being in restraint of marriage, and is reputed in law not written. It is admitted that all property left by Mrs. Hopkins was her separate estate.

Regarding it, then, as proved that James A. Hopkins has married again since the death of the testatrix, we find no text of the law of Louisiana which is violated by the term which she has thought fit to assign by her will to her husband's usufruct of her separate estate. The 603(d) Art. of the Code declares that a usufruct, if limited by its title determine in the event of a condition, terminates upon the happening of that condition.

By analogy, second marriages, by no means appear to be recognized by, or, to say the least, do not appear to be special favorites of the law of Louisiana. If a donation has been made, mortis cause or inter vivos, by one of the spouses to the other, in full ownership, and the legatee or donee contract a second marriage, children of the first remaining, his estate in the thing given or bequeathed, is reduced, by operation of law, from an ownership to an usufruct; and the same change takes place, if the thing has been bequeathed by a

19 Translation: “I give and bequeath to my husband, Mr. James Hopkins, the full and complete enjoyment of all my other goods, without exception or reservation, as long as he does not remarry; but in the event that he should come to remarry, I want and intend that these same goods be divided among the members of my family, conformably to the dispositions of the legislation of this State.”
brother or sister of any of the children of the first marriage which remain. C.C. 1746.

Again, by the statute of 25th March, 1844, (Session Acts. No. 152), in all cases when the predeceased wife of husband shall have left issue of the marriage with the survivor, and shall not have disposed by last will of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in the community property as may be inherited by such issue, provided, however, that such usufruct shall cease whenever the survivor shall enter into a second marriage.

These extracts from our statute book seem to demonstrate that devises in restraint of second marriages are not opposed to the policy of the law of Louisiana. And here we might conclude, for the plea of defendant has gone no farther than to assert the devise in question to be void, as being contrary to law. But the argument of his counsel has taken much a wider range. It is contended that the limitation of plaintiff's usufruct by his wife's will is void, and to be taken as not written, because it is contrary to good morals. The Art. 1506 of the Code, upon which this argument is based, is copied verbatim from Art. 900 of the Code Napoleon. The application of this article to the case of a devise restrictive of marriage to particular classes and circumstances, or prohibitory of marriage absolutely or qualifiedly, or maids or widows, has afforded a fine field for the casuistical propensities of French commentators. Those who are curious upon this head, may see the authorities collected in the Repertoire du Journal du Palais, verbo Conditions, Nos. 166 to 168, and in the treatise of Saintespès Lescot on Donations and Testaments, Nos. 126 to 136. The doctrine which may now be considered as established in France is, that the prohibition of marriage generally is contra bonos mores, but that the prohibition of a second marriage, whether there remain children of the first married or not, it not to be so considered. It is thus concisely summed up by Toullier, Vol. 5, Nos. 256 and 259:

"On a toujours regardé comme contraire aux bonnes moeurs, la condition absolue imposée au donataire, de quelque sexe qu'il soit, de ne point se marrier. Après quelques variations dans la legislation romaine, la condition absolue de ne point se remarier, fut regardée comme licte par la Novelle 22, Chap. 44, et cette Novelle formait le droit commun de la France. Sous l'empire du Code Civil, cette condition ne doit pas être regardée comme contraire aux bonnes moeurs ou comme contraire aux lois."20

Philippe Malaurie & Laurent Aynès, COURS DE DROIT CIVIL: LES SUCCESSIONS


Celibacy, widowhood, and jealousy. -- A liberality is sometimes subordinated to the celibacy of the beneficiary or to his not getting remarried. In practice, these clauses have become rare; that of widowhood [not remarrying] appears only in liberalities between spouses.

20 Translation: “One has always regarded as contrary to good morals an absolute condition imposed on the donee (of whatever sex the donee may be) not to marry. After some variations in the Roman legislation, the absolute condition of not remarrying was regarded as licit by Novella 22, Chapter 44, and this Novella formed the common law of France. Under the dominion of the Civil Code, this condition should not be regarded as contrary to good morals or as contrary to legislation.” The term "novella" refers to a Roman imperial edict; the particular one to which Toullier here refers was issued by Justinian.

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Following the Civil Code, which does not set forth any disposition on this point, the jurisprudence, by application of article 900, applies here the theory of cause. The clause is considered to be valid, save for when it has an immoral cause. Using these rationales, the courts, in fact, judge less the liberality than the marriage, [and] annul the clause only if they judge it unreasonable. In any event, the clause of celibacy is more easily annulled than is that of widowhood.

Contemporary authors criticize these rules. In their estimation, it would be appropriate to annul all clauses the effect of which is to threaten the liberty of marriage.

36 [That is true, at least, when the clause has for its raison d'être the interests of the beneficiary. Example: Req., 25 mars 1946, D. 46.222, G.P. 46.1.226: "Madame Dufour [the testatrix] had, in this way [i.e., by means of a clause against remarriage], intended to protect her husband against his weakness, to cause him to avoid the consequences that she feared [for him], and to stop him from contracting a second union that she considered to be immoral . . . for her family." . . .

37 E.g., a morbid thought of posthumous jealousy. Example: Req., 8 avril 1913, Cahen d'Anvers, D.P., 15.I.29. In that case, Cahen d'Anvers had given a life rent to his mistress with the stipulation that it would lapse in the event of her marriage . . . . It was judged “that he [the donor] obeyed, in this fashion, a blameworthy sentiment and that, by itself, the condition of which it is a question has assumed a clearly immoral character”; as a result, the condition was reputed to be not written . . . .

4-2 Henri & Léon Mazeaud et al., *Leçons de droit civil: Successions* – *Libéraltés* n° 1400, at 593 (5th ed. 1999)

Liberalities to which are attached conditions that address the marriage or remarriage of the beneficiary, whether they incite marriage or forbid it, are frequent. Even though the courts have pushed the necessity of assuring the “full liberty” of future spouses up to the point of denying that promises to marry are obligatory, they have shown themselves to be very liberal, by contrast, when that which threatens this liberty is a condition put on a liberality. In the courts’ estimation, conditions relative to the marriage of the beneficiary are licit whenever they are inspired by the beneficiary’s interest, by that of his family, or even simply by that of the familial patrimony. More specifically, the “clauses of widowhood,” by which one spouse gratifies the other on the condition that she not remarry, are considered to be licit, unless the beneficiary proves that it has been written for some shameful motive, for example, posthumous jealousy. In the same way, a condition not to divorce imposed by a father on his son was judged to be licit, because its object, in essence, was to assure the future of the son’s wife, who had cared for her father-

21 This provides further proof, as if any were needed, that "contemporary" authors have utterly lost their way, ethically speaking. Except in the most egoistical and hedonistic of ethical systems, any number of values may outrank the supposed "right to marry," e.g., protection of children or even devotion to God.
in-law [the donor] with devotion.

(Ct. App. de Rennes, 1st Chambre, 14 février 1972)

[Arsène Beaujouan, the father of the plaintiff-appellant (referred to as “Beaujouan” in the opinion) and the father-in-law of the defendant-appellee (referred to by her maiden name – “Rocher” – in the opinion), made out a testament in which he left a universal legacy to his son (Beaujouan), but with the following stipulation: “But I give an essential condition to the present legacy: in the event of the separation or divorce of my son [Beaujouan, from his wife, Rocher], the present legacy must automatically fall to my daughter-in-law [Rocher] . . . .” The testator made his stipulation, according to the testament, “by reason of the continual care given to me during my illness by Madame France Beaujouan [his daughter-in-law, Rocher] . . . .” Some years after the testator had died, Beaujouan and Rocher entered into what might best be described as a mutual divorce. When the divorce judgment was rendered, Rocher, predictably enough, claimed that the universal legacy that her father-in-law had left to Beaujouan was now resolved and, further, that the conditional universal legacy that her father-in-law had left her was now in effect. The trial court agreed with Rocher.]

[r]uling on the appeal prosecuted by Beaujouan against the judgment of the Tribunal de grand instance of Rennes . . ., [which] said that, as a result of the divorce between the spouses Rocher and Beaujouan, Madame Rocher had become the universal legatee of Arsène Beaujouan, who died in Gael on December 16, 1966 . . . .

Considering . . . that the formal and clearly-expressed intention of [Arsène] Beaujouan was that his daughter-in-law, by reason of the care that she had given him, should profit from the liberality he made to his son, be it in her quality as the spouse of the beneficiary or be it by becoming herself the legatee in the event of the dissolution of the marriage on account of . . . divorce;

Considering that the illicit or immoral character of the condition contained in a testament must be evaluated as a function of the intention of the testator and of the motives that have led him to impose this condition; that, in view of the facts, it is certain that the condition imposed on the legacy by Beaujouan the father was inspired, not by his desire to prevent his son from divorcing or in order to mark his opposition in principle to the institution of divorce, but by his concern to assure to his daughter-in-law, vis-a-vis whom he believed he had incurred a profound debt of gratitude, the enjoyment of the bequeathed goods, whatever might be the vicissitudes of her marriage; that, as a result, the motives that directed him and the end that he pursued threatened neither morality nor law and the condition is justified by a legitimate motive; . . .

For these reasons, [the court] . . . rejects the appeal and confirms this decision [that of the trial court] in all its dispositions. . . .
NOTES

1. Beaujouan v. Rocher has come in for criticism in France, at least among scholars of a “social liberal” bent. See Alain Bénabent, Observations on Beaujouan v. Rocher, J.C.P. [La Semaine Juridique] 1975.II.17934. Their critique is rooted in a curiously exalted view of the supposed “right to divorce” under French law:

   Divorce is an institution of public order, so much so that a proposal [to create] an option for a [form of] marriage that would exclude it (made by Léon Mazeaud, Solution au problème du divorce . . .) was rejected. Provided that one finds oneself in a situation within which legislation authorizes divorce, the right to demand divorce appears to be an attribute of individual liberty . . . .

   . . .

   Why shouldn’t the right to divorce be protected in this way? Like the right to marriage, it is more and more considered to be a prolongation of individual liberty . . . .

Bénabent, supra, at I(b) & II. See also Vouin, 187-88 (“It is permissible to believe, along with [the authors of] the preamble to the law of September 20, 1792 [which first established divorce in France], that ‘the power to divorce results from individual liberty, which would be lost in an indissoluble marriage’.”) According to the critics, any interference with this “fundamental” right, no matter how slight, no matter what the reason, and no matter by what means (including the subjection of donations to conditions), is against French “public morality”:

   [T]he power to demand a divorce . . . [has] great force, a force such that any and every pressure relative to its exercise must be rejected and any and every attempt at bridling it must be regarded as illegitimate. . . . Can one, then, consider that pressures exerted by a third person to promote the maintenance of the marriage are licit when they do so “for a good cause”?

   . . . [A]ny and every pressure relative to [the] exercise [of the right to divorce] must be annihilated. . . .

   . . .

   . . .[T]he operation of the condition [of non-divorce] ineluctably produces, in itself, a pressure on the will of the beneficiary and an impediment to the free exercise of his right [to divorce].

   Now, pressures of this kind are reprehensible. . . .

   . . .

   . . .[T]his right [to divorce] should not see its exercise limited by specific pressures that emanate from private persons, even when these pressures are unintended.

Bénabent, supra, at I(b). C’est incroyable!

2. Can one infer a contrario from the Beaujouan court’s rationale that if the motive that had inspired the testator to impose the condition had been either “to prevent his son from divorcing” or “to mark his opposition in principle to the institution of divorce,” then the condition would have been declared illicit? All of the French scholars who have commented on the case have answered this question in the affirmative! See Jean-Francois Vouin, Note on Beaujouan v. Rocher, D.1976.186,187, ; René Savatier, Successions et libéralités n° 4, in 74 Rev. Trim. Droit. Civ. 348, 351 (1975); Bénabent, supra, at 17934.
Encore une fois, c’est incroyable! Not only that, but these scholars approve of that result, both as a matter of interpretation (i.e., they think it reflects a proper interpretation of the applicable French law, including CN art. 900) and – here’s the amazing thing – as a matter of policy (i.e., they think it’s a good idea)! Their rationale? Their exalted view of the supposed “right to divorce” (as described in the previous note).

Whether this result is, in fact, appropriate in the context of the French legal system (a proposition that may itself be questioned), one can question whether it would be appropriate in the context of Louisiana’s legal system. The truth is that Louisiana’s view of divorce, if one can judge from the history of that institution in the Louisiana legal system, is considerably “lower” than is that of France.

In France, the “right to divorce” was established in the immediate aftermath of a profound social revolution and, further, was thought to be a necessary concomitant of one of the most basic principles of that revolution, namely, the radical expansion of individual liberty. For the French revolutionaries, the right to divorce was considered to be a fundamental natural right, on a par with the right to choose one’s religion (freedom of religion), the right to speak one’s mind (freedom of speech), and, most especially, the right to choose one’s spouse in the first place (freedom of marriage). Thus, from the revolutionary French point of view, a point of view that the French seem to retain even today, the right to divorce is a “good” thing, one that should be enthusiastically embraced and carefully guarded.

In Louisiana, by contrast, the “right to divorce,” if it’s even appropriate to call it that, was recognized only gradually and, it seems fair to say, rather reluctantly. When the state first codified its private law in 1808, Louisiana, in sharp contrast to France, made no provision whatsoever for divorce, that is to say, did not permit divorce on any grounds under any circumstances. Not until 1827 did Louisiana permit divorce, and then only for “cause” (divorce by “mutual consent,” an innovation of the French revolutionaries, was not allowed). Precisely why Louisiana changed its law in this fashion at that juncture is not entirely clear; it is clear, however, that whatever the reasons may have been, they had nothing to do with a radical social revolution or with some theory of “natural rights.” To be sure, Louisiana did eventually adopt an extremely liberal divorce regime (in 1991), one that in fact permits what’s called “no fault” divorce. But, once again, that change was the outgrowth neither of social revolution nor of reflection on “natural rights” theory. To the contrary, the supporters of no-fault divorce touted it as a pragmatic alternative (a “lesser evil,” if you will) to the then-existing divorce regime, one that, they believed, would do a better job of “making the best” of the “unfortunate situation” that develops when one or both spouses conclude that their marriage is irremediably broken. More recently, Louisiana once again manifested its ambivalent attitude toward divorce with the adoption of the institution of “covenant marriage.” Under this form of marriage, divorce is considerably more difficult to obtain than it is under a standard marriage; indeed, the very point of introducing this form of marriage was to deter divorce among those who choose it. In the light of this historical record, it is clear that Louisiana has viewed divorce as, at best, a “necessary evil.”

Under these circumstances, it would be a serious mistake to assume that Louisiana courts, when presented with the question “Are conditions against divorce based on nothing more than the donor’s moral objections thereto licit?”, would give to that question the same answer as have French jurists. The answer of those jurists, as I have shown, is

22 That’s true even if you don’t agree with me that divorce is both a mortal sin and a profound social evil.
rooted in the unique political and cultural history of the French people, a history that, at least on this point, differs dramatically from that of the people of Louisiana.

1) Marriage / celibacy

DH 52.1. H has a beautiful daughter, D. During her adolescence, D has several boyfriends, of all of whom H is intensely jealous. And so H gives D $100,000, on condition that she never marry. Is the condition valid? Why or why not?

DH 52.2. H has a daughter, D, who is getting on in years, has no suitors, and, as things now stands, looks like she will never earn a lot of money. And so H, out of a desire to provide for D, wants to give her a larger portion of his estate than he plans to give to his son, S, who's relatively well off. But, if it turns out she does marry, then H wants his estate to be distributed equally between D and S. And so, he makes out a testament in which he leaves an "extra portion" of $100,000 to D, on condition that she be still unmarried upon the fifth anniversary of his death. Is the condition valid? Why or why not?

DH 52.3. H has a daughter, D, who is “in love” with and wants to marry Ti-Boy. H, who (like D) is “English,” doesn’t want D to marry Ti-Boy, because Ti-Boy is “Cajun.” And so, H, donates a tract of land to D, subject to the condition that “she never marry Ti-Boy.” Is the condition valid? Why or why not?

DH 52.4. Ignatius has a daughter, D, who is “in love” with and wants to marry Calvin. Ignatius, who is Catholic, doesn’t want D to marry Calvin, because (I) Calvin is a Protestant and (ii) the projected marriage will take place in Calvin’s Protestant church before Calvin’s Protestant minister.” And so, Ignatius donates a tract of land to D, subject to the condition that “she never marry Calvin.” Is the condition valid? Why or why not?

DH 52.5. H has a daughter, D, who is “in love” with and wants to marry Olide, who has twice been convicted of felonies (once, forcible rape; another time, aggravated battery) and has a reputation (well-deserved) as a swindler, a liar, and a womanizer. H, fearful of what will happen to D if she marries Olide, donates a tract of land to her, subject to the condition that “she never marry Olide.” Is the condition valid? Why or why not?

DH 52.6. Re-consider DH 52.3 - 52.5, but now imagine that the donor gives the donation not to his daughter, but to her would-be spouse and that the condition attached thereto is “provided you never marry my daughter, D.” Would the result be different now? Why or why not?

2) Remarriage

DH 53. H and W are a young married couple without children. After learning that he has terminal cancer, H makes out a testament in which he leaves W "all of the community and separate property of which I die possessed, provided that she never remarry." He adds the condition because,
as he told his friends, he just "couldn't bear the thought of W being in another man's arms." Is the condition valid? Why or why not?

3) Divorce

DH 54. H, a devout Catholic, has a daughter D, who is preparing to marry B. Doubtful of B's commitment to the Catholic teaching that marriage is a sacramental relationship that should not be ruptured under any circumstances, H decides to provide B with a "temporal" incentive to conform to the teaching, namely, the donation of $500,000 of IBM stock, subject to the resolutory condition that the stock shall revert to him, H, in the event that B should ever divorce D. Is the condition valid? Why or why not?

b) Residence

1 Louis Poujol, Traite des Donations Entre Vifs et des Testament

art. 900, n° 11, at 114 (1836)

The condition of not changing one's domicile, without any indication of a plausible motive, is illicit, in that it is contrary to the absolute liberty that it is important to maintain for the individual, particularly in this respect. If, however, this condition is founded on a reasonable motive, such as that the donee continue performing the same functions or that the donee remain near to some person so as to care for him, then it would be valid, since the donee . . . would be free to accept the liberality by submitting himself to the condition.


. . . [T]he obligation imposed on the beneficiary to live in a certain place is, in principle, null, for it threatens a fundamental liberty. Nevertheless, the courts have recognized the validity of "clauses of residence" (or prohibitions of residence) as long as they are temporary and (or?) justified by a legitimate interest.

DH 55. H and W, an elderly couple, live in a house that they own in Gueydan. H gives his nephew, N, who also lives in Gueydan, $500,000 worth of land, on the condition that N [(i) after H's death, N visit W once a week and (ii) maintain his residence in Gueydan until W's death. Are these conditions valid? Why or why not?

DH 56. H has a daughter, D, who's in love with B. H hates B, saying "he ain't worth a lick. When it comes to brains he got the short end of the stick." And so he gives B $100,000, on condition
that he leave town and never again come within 100 miles of my daughter. Is this condition valid? Why or why not?

c] Sex

No one would deny that a “donation” made subject to the condition that the donee gratify the donor sexually would be null. But applying this rule is often difficult, for in many situations in which this kind of condition might possibly be present, it is rarely, if ever, stated expressly and, instead, is just left to be “understood,” that is to say, it is tacit. The challenge, then, is to identify situations to which the rule should be applied.

Consider, for example, the situation in which unmarried, long-term “lovers” give each other gifts. Might not such gifts be subject to this kind of tacit condition? Are they always? How do you tell which are and which aren’t?

Philippe Malaurie & Laurent Aynès, COURS DE DROIT CIVIL: LES SUCESSIONS
-- LES LIBÉRALITÉS n° 371, at 215-16 (4th éd. 1998)

Immoral cause & the price of favors. -- Unlike the law of the ancien régime, [current law] . . . does not strike concubines with an incapacity to receive. Liberalities between concubines are subjected to the control of immoral cause. Today, the courts usually decide that the liberality is valid when its cause is [i] a natural obligation, such as the [obligation] of repairing damage, or [ii] the accomplishment of a duty of conscience -- an explanation that consists of mere words; or, more simply, the courts note that the liberality does not have as its cause the establishment or the the maintenance of sexual relations.

More rarely, the courts decide that the liberality is null because it has an immoral cause, and sometimes they simply leave it to be understood [i.e., inferred] that it's a matter of an act by onerous title, one that is null for an immoral cause. [On this theory,] the woman's willingness [to participate in sexual relations] would constitute the equivalent for the good that is transmitted to her. This reasoning is all the less convincing in that the "immoral" liberality does not always constitute a true bargain and remains compatible with the existence of a liberal intention: sentiments are complex.

According to certain authors, the contemporary transformation of morals ought to render this jurisprudence obsolete, since concubinage would have ceased to be immoral.23 But even in a society that is very permissive, it remains degrading for a woman to exchange her body and her sentiments for gifts or for money; it is immoral to degrade a

23 Is it true that “concubinage has ceased to be immoral”? Or, is the truth rather that “the society (or part of it) has ceased to consider it to be immoral”? Unless one is prepared to admit that "what is moral" is equivalent to "what is considered to be moral" (which Malaurie and Aynès, like all secular moral relativists, are prepared to do, at least when it's convenient for them, i.e., when their moral judgments coincide with majoritarian moral judgments), one cannot suppose that these two propositions are identical.
Despite the righteous indignation with which the authors make this assertion, they must, if they are to be true to their principles, admit that their judgment is, at most, contingent and provisional and, therefore, necessarily open to revision. Recall that they believe that “what is moral” is the same as “what is considered to be moral.” And so, if the society should come to the point that the buying and selling of body and sentiments are no longer considered to be immoral, then, from our authors’ point of view, this practice, far from being the height of “degradation,” would be just another acceptable “life style choice,” one that the rest of us would then have to tolerate.

2] Pertaining to patrimonial matters

Succession of Feitel,
176 La. 543, 146 So. 145 (1933)

ODOM, J.

Jasmin Feitel, a resident of New Orleans, died on January 12, 1931, left a last will and testament in olographic form . . . . A number of special bequests were made, among them being the following:

"I will to Hannah *** all land & improvements owned by me in Sq. 408 this city ***. The real estate described above *** shall not be sold nor mortgaged further for a period of ten years after my death."

Some time after the will was probated, Mrs. Bodenheimer made demand on the executors, making the residuary legatees parties, to deliver to her the property described in the above bequest "free from the illegal restriction against the property's being sold for a period of ten years." She alleged and now contends that according to the terms of the will, she was given full ownership of the property described and . . . [is entitled to] the delivery to her of the property "in her own right free from any restrictions." She further averred that the stipulation in the will that the property bequeathed should not be "sold nor mortgaged further for a period of ten years after my death" was contrary to law and public policy and therefore void and should be considered as not written.

... The testator did not bequeath to Mrs. Bodenheimer the [mere]use of the property. He bequeathed to her the property itself. This is shown by the language used at the beginning of that section of the will containing the donation. The testator said, "I will to Hannah Levy Bodenheimer *** all the land & improvements owned by me in Sq. 408."

***

In connection with this special bequest, the testator said: "The real estate described above in Sq. 408 shall not be sold nor mortgaged further for a period of 10 years after my death."

The testator bequeathed the property to the donee in full ownership. Having done

24 Despite the righteous indignation with which the authors make this assertion, they must, if they are to be true to their principles, admit that their judgment is, at most, contingent and provisional and, therefore, necessarily open to revision. Recall that they believe that “what is moral” is the same as “what is considered to be moral.” And so, if the society should come to the point that the buying and selling of body and sentiments are no longer considered to be immoral, then, from our authors’ point of view, this practice, far from being the height of “degradation,” would be just another acceptable “life style choice,” one that the rest of us would then have to tolerate. ο θεός ελέησαι τας ψυχάς αυτών!
so, he could not prohibit her from selling or mortgaging it. Those who are living, as between themselves, may hold their property by any tenure or terms they see fit. But when property is transmitted by donation mortis causa in full ownership, the dominion of the testator over it is lost absolutely. He cannot impose his will or wish concerning its disposition after his death upon the donee.

The law will not carry into effect the "wishes and conceits of the dead" concerning the property they leave to another in full ownership, to the disturbance of the rules of public order and policy which regulate the living. Men instinctively desire to accumulate and own property. When acquired they hold to it tenaciously and abandon it with reluctance. So great is their propensity to hold dominion over that which they have acquired, what is theirs, that some of them, on the brink of the grave, attempt to continue their control over it after they are dead. But under our law and jurisprudence this cannot be done. The reason underlying the law is that it is against public policy that estates be tied up in perpetuity or even for a limited time, except in cases where a limited trust for ten years is provided for under Act No. 107 of 1920. Except in cases of limited trusts, the donor cannot render the property donated inalienable and thereby withdrawn from commerce.

The stipulation in this will that the property bequeathed shall not be sold nor mortgaged for a period of ten years is illegal and void. It is an impossible condition. Art. 1519 of the Civil Code reads: "In all dispositions inter vivos and mortis causa impossible conditions, those which are contrary to the laws or to morals, are reputed not written."

Philippe Malaurie & Laurent Aynès, COURS DE DROIT CIVIL: LES SUCCESSIONS
-- LES LIBÉRALITÉS n° 366-368, at 212-13 (4th éd. 1998)

A. Clauses of inalienability

... In 1971, the legislation established a particular disposition in regard to these clauses when they are stipulated in liberalities (art. 900-1, redacted July 3, 1971). It is summed up in two rules...

369. Requirements for validity. -- The first rule endorses the supple standards of the prior jurisprudence: a clause of inalienability is valid only on two conditions, conditions that [purport to] reconcile two contradictory principles: [i] the free circulation of goods and [ii] contractual liberty. [Here are those conditions:] it [the clause] must be [i] temporary and [ii] justified by a serious and legitimate interest. [Considered to be] perpetual, and therefore null, is a clause of inalienability fixed for the life of the beneficiary, but not that which has for its duration the life of the disposing party, for the latter is generally more advanced in age than the former. As for serious and legitimate interest, it ... can result from the moral utility that there is in keeping a good within the family of the disposing party.

4-2 Henri & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: SUCCESSIONS
-- LIBÉRALITÉS n° 1400, at 593 (5th éd. 1999)
The disposing party sometimes attaches to his liberality a “clause of inalienability” that strikes the donated immovables. Although these clauses appear to be contrary to the free circulation of goods, the jurisprudence upheld them when they were temporary and were justified by the legitimate interest of the disposing party, the beneficiary, or some third party. This jurisprudence was indorsed by the legislature: Law no. 526 of July 3, 1971 inserted into the Civil Code a new article – article 900-1 – that takes up the principles that “clauses of inalienability that affect a donated or bequeathed good are valid only if they are temporary and are justified by a serious and legitimate interest.”

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a| Limits on alienability

DH 57. In his testament H leaves his daughter, D, his farm, on condition that she not sell it until 5 years after his death. Is the condition valid? Why or why not?

DH 58. In his testament H leaves his daughter, D, the ownership of his house, subject to a habitation in favor of his ailing mother, M. Not wanting his mother to have to deal with anyone other than D, however, he imposes this condition on the bequest to D: on condition that she not sell it until the earlier of M’s death or 5 years after his death. What result now? Isn't this case different (from DH 57)? How so?

b| Limits on partition

DH 59.1. By his testament H leaves his farm in equal shares to his children A, B, and C, subject to the proviso that they keep the farm together, i.e., not partition it, “forever.” Is this condition valid? Why or why not? See CC art. 807 & 1299.

DH 59.2. The same as before (DH 59.1), except that, this time, the testament provides that A, B, and C must keep the farm together for 20 years. What result now? Why? See CC art. 807 & 1300.

DH 59.3. The same as DH 59.1, except that, this time, (i) at the time of H’s death, A, B, and C are, respectively, 12, 14, and 16 years old and (ii) the testament provides that they may not partition the property “until they reach majority.” What result now? Why? See CC arts. 807 & 1301.

c| Limits on the assertion of rights (penal clauses)


In other arenas, the courts have been called upon to annul various illicit or immoral clauses, but they have not done without making certain distinctions in this matter.
It is so with clauses relative to the devolution or the management of a succession. For example, clauses whose effect, be it direct or indirect, is to threaten the forced portion are illicit, whereas clauses that impose on the heirs a partition of the estate in conformity with certain modalities are valid.

An analogous distinction has been adopted on the subject of “penal clauses,” by means of which the disposing party intends to deprive the beneficiary of the liberality — and, indeed, of his successorial rights — in the event that he should contest the validity of the disposition. The penal clause is valid when it threatens only private interests and has nothing in it contrary to public order or to good morals . . . . Thus, penal clauses tending to promote an assault on the forced portion are null: as a result, the heir can demand the annulment of the clauses that impinge upon his legitime without experiencing the effects of the penal clause. To the contrary, a clause that would deprive an heir of his part of the disposable portion if he should contest . . . the legacy of a good that belongs to one of the [other?] heirs is valid.

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4-2 Henri & Léon Mazeaud et al., *Leçons de Droit Civil: Successions* — *Libéralités* n° 1400, at 594 (5th ed. 1999)

A penal clause, which the testator imposes on his legatees so that the dispositions he has made will be respected, is a resolutory condition. . . . [T]he jurisprudence upholds his kind of clause when its end is to maintain good relations between the heirs or respect for the testator’s will to pursue a licit end; it is reputed to be not written if the testator wanted to assure the execution of immoral dispositions or to affect the forced portion. . . .

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*Succession of Gardiner*,
366 So.2d 1065 (La. App. 3rd Cir. 1979)

CULPEPPER, J.

The defendants contend plaintiff's petition [challenging the testament] states no cause of action because of two portions of Article Fortieth of the testament. The first portion in question contains a penal clause and reads as follows:

"FORTIETH: If any devisee, legatee or beneficiary under this Will or any person claiming under or through any devisee, legatee or beneficiary or any person who would be entitled to share in my Estate through inheritance or intestate succession shall, in any manner whatsoever, directly or indirectly contest this will or attack, oppose or in any manner seek to impair or invalidate any provision hereof, or shall in any manner whatsoever conspire or cooperate with any person or persons attempting to do any of the acts or things aforesaid or shall acquiesce in or fail to oppose such proceedings, then in each of the above mentioned cases, I hereby bequeath to such person or persons the sum of One ($1.00) Dollar only, and all other bequests devises and interest in this Will
given to such person and the spouse and/or issue of such person shall be deemed to have lapsed and shall become part of my Residuary Estate hereunder to be administered in accordance with the terms thereof."

The validity of such a clause in Louisiana has not been judicially determined with finality. Commentators have stated the governing statutory provision is LSA-Civil Code Art. 1519: "In all dispositions inter vivos and mortis causa impossible conditions, those which are contrary to the laws or to morals, are reputed not written." Oppenheim, 10 La.C.L.Tr. Sec. 129; Aubrey and Rau, Droit Civil Francais, Civil Law Translations 3, Section 692, p. 295; and Wood Brown, Provisions Forbidding Attack On A Will, 4 Tu.L. Rev. 421 (1929). Art. 1519 is taken directly from the Code Napoleon and is found almost verbatim in nearly every civil law jurisdiction. Oppenheim, supra; and Brown, supra. The French solution is to look to the effect of the penal clause. Aubrey and Rau state the French rule:

"The penal clause . . . will be valid and obligatory if the purpose thereof is to insure the execution of dispositions that, containing nothing contrary to public order or good morals, would be susceptible of attack only for causes of private interests. . . . (Sec. 692, p. 296, supra)

Wood Brown, in 4 Tu.L.Rev. 421, at 423, explains:

"...where the principal dispositions of the will (those which it is forbidden the legatee or heir to attack) have nothing of public import in them, and where the right against which the penal clause operates is only of a private or pecuniary nature, the penalty is good and if an attack is made it will operate to divest the unfortunate litigant of his share. However, if the principal disposition is against good morals, then the penal clause automatically becomes against good morals also, since it is surely, so the commentators argue, to the public interest that such dispositions in wills be attacked."

One Louisiana case appears to favor the French rule. In Succession of Kern, 252 So.2d 507 (4th Cir. 1971), the testament contained a penalty clause that if it be challenged in "any way by any heir it becomes null and void and my entire estate is to be given to "The Crippled Children Hospital . . ." A nephew, not named in the will, attacked the disposition in favor of the hospital, contending they were prohibited substitutions. The court refused to uphold this type of penal clause but implied that a penal clause which is restricted to protest by a special legatee may be considered valid. The court stated:

"If the clause in question were restricted to protests or challenges by the legatees receiving a benefit from the will, there would be little problem in the absence of forced heirs. However, the clause in question prohibits protest by "any heir," whether or not he is a party to the will or benefits thereby. Under the circumstances, the legatees are virtually helpless and at the mercy of any heir not mentioned in the will.

. . .

"Such a provision is repugnant to law and good morals and cannot be sanctioned by the courts. LSA-R.C.C. Art. 1519."

We conclude[ , however, that] it is unnecessary to decide the validity of the penal clause at issue here. [There follows the court’s (lame) explanation of why, in its view, it can dodge this issue.] . . .
DAWKINS, Senior District Judge.

Ernest B. Parker has instituted this action in an effort to enforce a provision in the will of his deceased brother, Robert Lee Parker III. . . .

... Prior to his death December 30, 1965, Robert Parker owned Leona Plantation in Tensas Parish, Louisiana, in indivision with plaintiff. In his will, decedent bequeathed his entire interest in this property to his wife, Winnie Kelly Parker, and his daughter, Patsy Parker Reaver, who were recognized in the judgment of possession '... as sole and only heirs and/or legatees of the decedent ...' This bequest, however, was made subject to the following condition:

ITEM IV: The devise of all of my right, title and interest in and to real property is made subject to the condition that no part of said lands in Warren County, Mississippi, in which I own an undivided interest at the time of my death, and no part of the lands in the State of Louisiana in which I own an undivided interest with my brother, Ernest B. Parker, shall be sold, mortgaged, or in any other way alienated unless the said land or part thereof proposed to be sold, conveyed or alienated has been first offered to the other co-owners thereof, by written offer, such offer to set forth in detail the terms of the proposed sale, conveyance or alienation. . . . Any sale, conveyance or alienation of the said lands or any part thereof in violation of the terms and conditions hereinabove set forth, shall automatically terminate all of the right, title and interest in the land of the person making such violation, and in such event the right, title and interest of such person shall become the property of the other devisee of the land under this paragraph of my will.

... Defendants sold their undivided one-half interest in Leona Plantation to defendant Second Davis Island Land Co., without making the required prior offering to plaintiff.

Plaintiff contends that, under the forfeiture provision of the will clause, he is entitled to be declared the owner of the entire property “by forfeiture and by virtue of being the sole remaining heir at law of Robert Lee Parker, III.” . . .

... Mere reading of the will clause quoted impels us to grant summary judgment in favor of defendants without even considering the obvious objections with respect to its nullity under Louisiana law. 2 [There then follows an exposition of the basis for the court’s judgment, the content of which is of no interest to us at present. What interests us is footnote 2.]

2 La.Civ.Code art. 1519: “In all dispositions inter vivos and mortis causa impossible conditions, those which are contrary to the laws or to morals, are reputed not written.” The penalty clause in this will stating that a sale in violation of its terms shall terminate title in the violator and vest it in “the other devisee” is such an “impossible condition” since a sale by definition transfers title to vendee; hence, a devisee violating the will would no longer have title in
the property sold that could be terminated and vested “in the other devisee.” Also, Louisiana law is settled that a will provision prohibiting alienation is contrary to the codal provisions and public policy of Louisiana and, therefore, null and considered as not written under Article 1519.

Succession of Wagner,
431 So.2d 10 (La. App. 4th Cir. 1983)

BARRY, Judge.

Herbert U. Wagner died testate on August 26, 1975 at his domicile in Plaquemines Parish. He was married on October 4, 1917 to Byrtie A. Fisher and they had five children. Mr. Wagner's wife pre-deceased him and one of their children, Herbert G. Wagner, died on October 3, 1972 and was survived by a son. The dispositive portion of his will provides:

All of the property which I own is located in Louisiana and is community property, belonging to the community formerly existing between myself and my deceased wife.

I give and bequeath to Marie Amick a lot of ground, situated in Plaquemines Parish in Star Plantation, measuring 167' feet front on the right descending side of Louisiana State Highway No. 23 by a depth of 200' feet between equal and parallel lines. Said lot is to be taken from the upper portion of my property.

In the event that any of my children should object to the above and foregoing disposition of that particular lot to Marie Amick, then I will and bequeath to the said Marie Amick the disposable portion of my entire estate.

. . . On November 12, 1979 Mr. Wagner's forced heirs filed a petition for possession urging that the decedent owned only an undivided one-half interest in the property and could not bequeath a particular portion to Amick. . . . They further contend the alternate bequest of the disposable portion to Amick should be considered a penalty clause and is contra bonos mores under Succession of Kern, 252 So.2d 507 (La.App. 4th Cir.) writ denied 259 La. 1050, 254 So.2d 462 (1971).

Stanford filed an opposition to the petition for possession asserting he should receive the land bequest or, alternatively, the disposable portion of the decedent's estate. He concedes the testator could not bequeath full ownership of property in which he had an undivided one-half interest[;] however, Stanford contends the will afforded Wagner's children the option of conveying their one-half interest in the lot or receiving their legitimate with the disposable portion going to Mrs. Amick's heir.

. . .

The entire will is dedicated to Marie Amick's receiving a portion of Wagner's estate. If the specific bequest was the only provision in the will Amick would be entitled to only an undivided one-half interest in the designated property because that was all Mr. Wagner owned. (It is understood, but not an issue, that the bequest would be subject to attack if it infringed on the legitime.) A testator cannot bequeath that which is not owned and any such legacy is void to that extent. LSA-C.C. Arts. 1519, 1639. Succession of Marion, 163 La. 734, 112 So. 667 (1927). However, the will convinces us that Mr. Wagner's
intent was to give Amick full ownership of the lot, even though he knew he couldn't.

That leaves no doubt Mr. Wagner was fully aware he could not bequeath the particular lot in full ownership to Amick. He understood the concurrence of his children was necessary in order to effect his wishes.

We are satisfied Mr. Wagner knew his bequest could not be accomplished without his children's cooperation. Foreseeing the possibility they would not comply, he saw fit to include the alternative provision.

Legitime imperanti parere necesse est—one lawfully commanding must be obeyed. We cannot require Mr. Wagner's children to transfer their interest in the lot to Amick's heir. They alone have the capability to comply with their father's request. Otherwise, the alternative disposition is effective which we view as a conditional donation and within the parameters of the law. LSA-C.C. Art. 1527.

The forced heirs argue that the alternate provision is a penalty clause and should not be given effect, citing LSA-C.C. Art. 1519 and Succession of Kern. . . . We disagree. Kern did not involve forced heirs. The provision in Kern was that a protest by any heir, not just a legatee under the will, would result in the entire estate going to a third party. This Court felt that provision "particularly vicious ... repugnant to law and morals" as it rendered the legatees "helpless and at the mercy of any heir not mentioned in the will. Such an heir need only to file suit in order to force a legatee to surrender a portion of his legacy to prevent the have-not heir from instituting legal proceedings."

That is not the case here. The option flows to the forced heirs, not to "any" heir. It puts no one in a position to defeat a legacy by merely objecting or contesting the will. It simply implements the alternative provision if the heirs do not comply with the testator's wishes. The alternative bequest will not deprive the forced heirs of anything they are legally entitled to, i.e., their legitime. The forced heirs have no "right" to the disposable portion; the testator has a right to bequeath the disposable portion in any manner. Succession of Hyde, 292 So.2d 693 (La.1974). We find the optional bequest is not repugnant to law or good morals and is valid as a conditional legacy.

Frederick Wm. Swaim, Jr. & Kathryn Venturatos Lorio,

Successions & Donations § 12.5, at 303-04,

in 10 Louisiana Civil Law Treatise (1995)

. . . One type [of condition] that testators have utilized with some liberality is the penalty or forfeiture clause forbidding attack on a will under penalty of forfeiting whatever one has gained under it. The question arises whether such provisions are Article 1519 [prohibited] or Article 1527 [permitted] conditions.

In Louisiana, as in France, such provisions tend to be linked to the legality of the disposition sought to be made immune from attack by the forfeiture clause or condition. If this disposition is unlawful, then the condition is unlawful; if not, it is legal. Such an approach tends to prevent frivolous attacked on wills because a legatee would, in such a case, hesitate to institute such an attack. He would not want to risk attacking the will if he is doubtful of his claim because he would risk losing all of the advantages he has been granted under it.
1) Definition of “penal clause”

2) Statement of rule

3) Illustrations

a) Rights of public interest

1/ Forced-heirship rights

DH 60. T has one child, A, who's profoundly autistic. In his testament, he purports to leave A the usufruct of all his property and to X, his mistress, the naked ownership. But he provides that, if A or his representative should seek to reduce the legacy to Y, then A shall have nothing. Is the penal clause valid or invalid? Why? If it’s invalid, what would be the appropriate remedy?

2/ Right to complain of defects of form

b) Rights of private interest

* Possibilities:

1/ Right to complain of "will" problems (e.g., capacity, consent)

2/ Right to complain of donation omnium bonorum (?)

2) Sanctions

a) Legislative sanction

1] Statement: the condition alone is void; otherwise, the donation is valid (CC art. 1519)

2] Critique:
a] Historical justification

1} Roman law

2} Revolutionary France

b] Change of circumstances

b) Jurisprudential & doctrinal sanction

1] General rule: rule of the legislation

2] Exception:

a] Statement: nullity of the donation as a whole


One cannot, without doing violence to the intent of the clear language of the article [CN art. 900, the source of our CC art. 1519], the historical precedents of which more clearly define its meaning, openly say that the intention of the disposer should be inquired into in order to uphold the donation free of the illicit condition only when such was actually the intention of the disposer. And applying verbatim Article 900 [La. C.C. Art. 1519], the decisions sometimes uphold the liberality even where the disposer has expressly declared his intention that it should depend upon the execution of the condition.

However, for some time now, the decisions have been making reference to the will of the disposer and have given effect thereto by declaring the nullity, not only of the condition, but of the liberality itself when it appears that the disposer considered the execution of the condition an essential element of the liberality. They hold that in such cases, the condition is the impulsive and determinant cause of the liberality.

As soon as it admitted that Article 900 [La. C.C. Art. 1519] should not be literally applied, and that there are instances where it is necessary to refer to the intention of the disposer, recourse to the notion of cause in order to annul the disposition is justified. The cause of an onerous obligation being the counter-promise obtained or to be obtained in return for what is furnished, there is no cause, properly speaking, in a gratuitous obligation. But when the disposer designates the purpose to which the thing given shall be put, or when he imposes certain conditions on its use, there is no longer a pure and simple liberality. The fulfillment of his wishes, even though postponed until after his
death, is the payment he intends to receive.

Succession of Thompson,
123 La. 948, 49 So. 651 (1909)

MONROE, J.

[The testator imposed upon one of the legacies a condition that, under the circumstances, was impossible of fulfillment. The question presented concerned the “sanction” for that condition – was it (i) that the condition alone should be struck and the donation, as so modified, should stand or (ii) the donation as a whole should be invalidated. The court chose the latter alternative. Here’s why:]

In disposing of the remaining ground relied on by the city, our learned Brother of the district court says:

"But the testator added a condition to this legacy of such a nature that, if it be impossible or illegal, the bequest itself is null, notwithstanding Art. 1519 of the Civil Code. The French commentators agree, and the French Court of Cassation, interpreting a similar article, in the Code Napoleon, has repeatedly decided, that when the condition of a legacy is such that it is the prime, or moving, cause for making the legacy, without which it would not have been made, in that case, the impossibility or illegality of the condition carries with it the nullity of the legacy itself. See Fuzier-Hermann on C. N. 900, Nos. 158, 159, 170, 171."

We have nothing to add to this, save that the rule stated is, and must needs be, the same in Louisiana as in France, since it is founded in the principle, recognized everywhere, that the first duty of a court, upon which is imposed the obligation of interpreting a will, is to ascertain the real intention of the testator. . . .

b] Theoretical justification

c] Illustration

DH 61. T, the father of three girls, A, B, & C, all over 25 and unmarried, makes out a testament in which he leaves $200,000 to the Home, an institution for the care of widows and orphans. The bequest is subject to the condition that the Home furnish "a comfortable room and support" to any one or more of his daughters “should misfortune render them homeless at any time.” Then T died. Though the Home was happy to accept the donation, it was not happy to accept the condition. And so, the Home challenged the condition on grounds of impossibility. Assume that the condition was, in fact, impossible to fulfill. What, then, is the sanction? To strike the condition, allowing the donation, as so reformed, to be executed? Or to nullify the donation itself? Why? See Succession of Thompson, 123 La. 948, 49 So. 651 (1909) (nullifying a similar legacy because the condition, which the court found to be impossible, was, in the court’s judgment, the “prime, or moving, cause” for the legacy).
c. Limitation on power to control donee’s disposition of property: prohibition of certain substitutions

1) Definitions: “substitution” and “fideicommissum”

What is a “substitution”? What is a “fideicommissum”? How are they related? Consider the materials that follow:

1 Charles Demolombe, TRAITÉ DES DONATIONS ENTRE-VIFS ET DES TESTAMENTS, n° 52-55, at 45-49, in 18 COURS DE CODE NAPOLÉON (1876)

52. The meaning . . . of the word “substitution”. – The word “substitution,” in its etymological sense – which is, as well, its proper technical sense –, expresses the idea of an “institution” (instituto + sub), [more precisely,] a “sub-institution.”

53. Of the Roman law of vulgar, pupillary, and quasi-pupillary or exemplary substitutions. – It is in this manner that the word was understood by the Romans, who were, as Thévenet d’Essaule has said, the “inventors” of this mode of disposition. [During the classical period,] the Romans distinguished, in this sense, [only] three sorts of substitutions: (i) the vulgar substitution, (ii) the pupillary substitution, (iii) the quasi-pupillary, or exemplary, substitution.

The “vulgar” substitution was a disposition by which the testator, after having instituted one heir, instituted another heir for the case in which the first should fail to receive [the institution]. It was so named, no doubt, by reason of its frequent use in Rome as a safeguard against the numerous causes of caducity [lapse of legacies] that the caduciary legislation had introduced . . . .

The substitution called “pupillary” was that whereby the paterfamilias [male head of the (extended) family], after having instituted an heir for himself, also instituted (in his own testament) an heir for a minor child of his that was still under his immediate power, in anticipation of the case in which this child should die as a pupillus, that is, before the age at which the child would be permitted to make a testament.

And the “exemplary” substitution was so named because it had been introduced, at the beginning, after the “example” of the pupillary substitution. It was that by which an ascendant, after having also instituted an heir for himself, likewise instituted one for a child or [other] descendant of his who was demented, in anticipation of the case in which . . . .

25 In current Louisiana law, there is no real equivalent to what the Romans called an “instituted heir.” If one were to use contemporary terminology to describe the function and powers of that “heir,” one might say this: he was the deceased’s “universal successor of the residuum” and “estate administrator” rolled into one. This description, it must be understood, is no more than a crude approximation, but it will do for now.
this descendant should die without having recovered his [power of] reason.

It is easy to recognize, in these three hypotheses, that a substitution was always, in effect, an institution of one heir subordinated to another institution.

54. Of fideicommissa. – The *fideicommissum*, the origin of which likewise goes back to Roman law, . . . was a disposition whereby the disposing party, after having made a liberality to one person, asked him to turn over the goods that were the object of the disposition to another person.

The *fideicommissum* did not [originally] have the character of a “substitution.” That is so for a very simple reason, namely, that it was not an institution in the technical sense of the word . . . .

This mode of disposition was, at first, employed to elude legislation that had established various incapacities to receive on the part of certain persons. That explains why these dispositions were not, in principle, obligatory. Thus, they were made in simply “precatory” terms, whereby the disposing party placed his confidence “in the faith” of him whom he had charged [to turn over the goods]. The name of these dispositions comes from this very fact: *et ideo fideicommissa appellata sunt*.

[Later,] under Augustus *fideicommissa* [not only] were authorized, but [also] became obligatory. From that point on, these dispositions quickly acquired great favor.

This business, so simple in its origin, was soon to become one of the most complicated. . . . On the one hand, [whereas], at first [before the Augustinian innovations], the interposed party – the fiduciary – had to render the thing to the fideicommissary immediately after the testament had taken effect, now [with the Augustinian innovations] he was authorized to keep it for a certain period of time, even up until his death [if that’s what the donor had stipulated] . . . . On the other hand, it happened that donors did not limit themselves to calling [only] a second beneficiary after the first, but [also] a third after the second and so on, in such a fashion that a fideicommissum could be perpetuated, from one degree to another, throughout a lengthy series of generations. [The problem became so serious] that Justinian, offended by the abuse, concluded that he must stop the transmission of perpetual *fideicommissa* after the fourth degree . . . .

55. . . . The law of France’s ancien régime. – . . . [As I have explained,] the *fideicommissum* in [classical] Roman law was not a substitution in the exact and proper sense of the term: how could it be a substitution, that is to say, a sub-institution, given that it was not a substitution at all? And nevertheless, it was precisely the *fideicommissum* that, by a revolution in language of sorts, became the most important of our French “substitutions.”

[This transformation can be traced to] some Roman texts [that] had designated *fideicommissa* under the denomination of “substitutions.” [Though] this designation was clearly improper . . . , nothing further was required in order for the denomination to be vulgarized. That is all the more true in that, considered apart from the special rules of the Roman institution, the fideicommissum, such as it was in the last centuries of Rome and especially such as it came to be among us with the passage of time, presented all of the characteristics of a substitution properly so called. [And so it was that the fideicommissum came to be regarded as yet another kind (the fourth) of substitution.]

. . .
TITLE V.
Of the manner of instituting other heirs in testaments in the place of those originally designated therein and which in Lain are called substitutos

Men institute their heirs in testaments in which they impose conditions, as has been indicated in the preceding Title: and because it is possible that the heirs who have been originally designated in the testament may die without issue, or fail to comply with the conditions imposed or to do the things which the testator ordered should be done, the ancient sages who wrote the laws wisely conferred upon man the right of instituting his heirs by several methods in one and the same testament. Because if the first should die or fail to comply with the conditions and the will of the testator, others who would so comply should come and take their place. And because we have already spoken of the heirs originally designated, we refer to the others who arise now and are called in Latin substitutos. And we shall indicate what the meaning of this word is. And how many kinds of substitutions there are. And who can make them. And the manner in which they must be made. And what is the legal effect thereof. And how and when they fall, and for what reason.

LAW I
The meaning of the word substitutos, and how many kinds of substitutions there are.

In the Spanish vernacular, the Latin term substitutos means the heir who is instituted by the testator in the second place, after the first. As for example, where the testator says: I institute so and so as my heir, and if he does not wish to, or cannot become such, then so and so shall be heir in his place. And in Latin this substitution is called vulgaris and may be made by any citizen in favor of anyone. There is another substitution which in Latin is called pupillaris in which a substitute is named to a male child under 14 years of age or to a female child under the age of 12. And there is another kind of substitution known by the Latin term exemplaris in which a substitute is designated as in the case of an orphan. And it may be made by parents and grandparents when those who descend from them are insane. There is another kind of substitution known by the Latin term compendiosa which is a short form of designation. And there is another substitution which in Latin is called breviloqua or reciprocal, which is a sort form of designation containing four substitutions two of which are vulgar and two pupillary. Another kind of substitution is that known in Latin as fideicommissaria. And each of the above kinds of substitutions will be explained below.

LAW XIV
Of the substitution which in Latin is known as fideicommissaria.

In the Spanish vernacular the Latin fideicommissaria substitutio means the institution of an heir who is placed upon trust that the inheritance left to him he shall give to another; as for example where the testator says: I institute so and so as my heir, and I request of him, or wish to command, that this inheritance which I leave to him to have for a stated time, he shall afterwards give it to and return it to so and so. And an institution such as this can be made by any one in favor of anyone unless it is prohibited by other laws of this book. But the person who is charged and instituted in this manner must give and deliver the inheritance to the other as we ordained by the testator, taking the fourth part thereof,
however, which he may keep for himself. And this fourth party is known by the Latin name of Trebellianica. And if he who has thus been instituted as heir does not want to accept the inheritance or, if after he has accepted it, refused to give it to the other, the judge of the place can compel him to do so.

6 José Maria Navarro y Manresa, Comentarios al Cóódigo Civil Español

The testator may designate not only the heirs whom he desires should enjoy the inheritance at his death, but is also permitted by law to make a second or ulterior call for the case in which the instituted heir or legatee first named by him be unwilling or unable to accept the inheritance or legacy, or dies without being able to dispose of his estate; and not only is he authorized to do this, but he can also leave the inheritance to one person charged with delivering it to another either in whole or in part.

This new call which the testator has the faculty of making is what has always been known as substitution.

In its broadest and most precise sense, the substitution is, as stated by Roguin, “the disposition whereby a third party is called to take a hereditary asset (total or partial inheritance or legacy) in default of a person first designated, or after such person.” From the last phrase in this definition it is clear that here are two principal species of substitutions (1) when the substitute receives the thing in default of the person first instituted and who does not want to, or cannot accept it (direct substitution); (2) when the substitute receives the thing after the person first instituted has enjoyed the gift during a stated time (indirect, oblique, or gradual substitution). There are vast differences between the two. (a) In the direct substitution there are several donations, one of which is immediate and the other or others eventual, but only one of which is executed (for in the end it is only the substitute or the substituted who inherits), while in the indirect substitution there are two or more donations which are effectively executed one after the other. (b) In the direct substitution the testator organizes the transmission of his estate in favor of one or several heirs who may dispose of it and who are not obligated to make restitution, while in the indirect substitution the first beneficiary has the obligation of preserving the property for the benefit of one or several subsequent beneficiaries, and thus, his freedom of disposition is impeded or at least, restrained. (c) The importance of the direct substitution is the elimination of the successors ab intestato; the indirect substitution, on the other hand, has a considerable social impact because it interferes with the free alienation of property, for which reason it has been prohibited or limited by certain law.

The preceding observations comprise, within their terms, the most complete definition of the substitution that can be given. Ordinarily, it is defined by some authors with reference only to the case where the instituted heir refuses to, or cannot accept the inheritance, in which case there is truly a personal transmission from the testator to the substitute; but besides this direct substitution, the law has recognized another indirect substitution in cases where the instituted heir dies while yet a minor or in a state of insanity, permitting the testator to make any disposition he might deem convenient with respect to the succession of the property, and it even authorizes the substitution to take effect after the instituted heir has received the inheritance on condition of returning it to another either in whole or in part.

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In truth and in fact, the substitution is nothing more than the subsidiary institution of a second or ulterior heir or legatee, subordinated to another principal institution which depends upon and even more or less certain to happen, that is to say, a conditional institution.

In Roman law, the substitution was necessarily important because of the implied accretion of inheritances under that law. The Partidas devoted to it the 14 laws of Article 5, Partida 6, and the jurisprudence has constantly respected and confirmed the doctrine established by those laws. Prior to the Code, the law recognized six kinds of substitutions, namely: the vulgar, pupillary, exemplary, fideicommissary, breviloqua and reciprocal. The first (vulgar) was the substitution which any testator could make of the heir instituted in case the latter did not become such; the second (pupillary) was that which a parent made by naming a substitute for his minor son in case the latter, having become heir, should die before reaching the age of puberty, and to acquire, therefore, the right to testate in his place; the third (exemplary) was that made by ascendants by naming substitutions for those heirs who would have the right to inherit from them, but who might, because of insanity, be unable to make a testament, in case they should die before having recovered their sanity and without having made a testament previous to the insanity or during a lucid interval; the fourth (fideicommissary), also referred to by the writers as indirect, took place when the testator instituted a person as his heir charging this person to return the inheritance to another either in whole or in part; the fifth, also called compendiosa, was the consolidation into one document of several of the substitutions above mentioned; and the last took place when several instituted heirs were substituted inter esse. As can be seen from above, the six kinds of substitutions recognized by the former legislation can be reduced to the four first cited, since the last two are only modifications of the others.

2) **Prohibition (CC art. 1520 (2001))**

a) **Statement**

CC art. 1520, clearly enough, establishes some sort of prohibition with respect to substitutions and / or fideicommissa. But what is the scope of that prohibition? Are all substitutions and / or fideicommissa prohibited? Or is it just some of them? Doesn’t the following Venn diagram accurately describe the scope of the prohibition?
Here's a note on terminology. "Gradual" (hereinafter, "G") means containing several grades of substitutes or, to put it more plainly, successive substitutes; "effective at death" (hereinafter, "D"), that the duty to "render" owed by each predecessor donee to his successor donee is to be executed at the predecessor donee's death; and "for the benefit of future generations" (hereinafter, "F"), that none of the substitutes need yet be in existence at the time of the donation. Thus, a "GDF" fideicommissary substitution is one in which the donor gives a thing to the institute, with the charge to conserve it during his (the institute's) lifetime and, upon his (the institute’s) death, to render it to the first substitute (who may have been born after the donation was made), with the charge to conserve it during his (the first substitute’s) lifetime and, upon his (the first substitute’s) death, to render it to a second substitute (who may have been born after the donation was made), and so on.

Has Louisiana always prohibited certain substitutions and / or fideicommissa? Consider the historical note that follows:

HISTORICAL NOTE

Up until the enactment of the Digest of 1808, Louisiana seems to have allowed the very substitutions that, since that time, it has prohibited, including even those fideicommissary (i.e., non-vulgar) substitutions that were "gradual," "effective at death," and "for the benefit of future generations" (hereinafter, "GDF fideicommissary substitutions"). I base this conclusion on my study of the private law that was in force in Louisiana during the first French colonial period (1712-1763) (reflected, for example, in the private law that was in force in Louisiana during the first French colonial period (1712-1763) (reflected, for example,
in *La Coutume de Paris* and the Ordinances of the French Kings) and that which was in force in Louisiana during the Spanish colonial period (1763-1800), the second French colonial period (1800-1803), and the first part of the still-ongoing American occupation (1803-1808), namely, Spanish private law as it stood before the first modern Spanish codification (reflected, for example, in *Las Siete Partidas*). GDF substitutions, it turns out, were a well-established fixture of both these bodies of law.

(i) Private law of the first French colonial period. – Though *La Coutume de Paris* (the codified version of the customary law of the Île de France) says nothing about fideicommissary substitutions (that is, neither authorizes nor forbids/restricts them), there is no doubt that the customary law of the Île de France permitted them and, beyond that, that they were in widespread use there for centuries. The earliest evidence of the permissibility and use of these substitutions, which has been uncovered by Professor Olivier Martin, the leading historian of the customary law of the Île de France, includes (i) a Parisian court judgment dated 1294 that gives effect to a “D” substitution and (ii) a set of “letters patent,” dated 1333, issued by then King Philippe VI of France to Jean de Levis II, which authorized the practice of substitutions (apparently “GDF”’s) as a means whereby the nobles might keep their property “within the family.” Further evidence of the permissibility and use of these substitutions is found in a series of royal ordinances – two from the mid-16th century and another from the mid-18th century – in which the French Crown sought to restrain them. The first – *la Ordonnance (de Charles IX) d’Orléans de janvier 1560* – provided as follows:

Art. LIX. And in order to cut the root of numerous litigations that arise in the matter of substitutions, we forbid all the judges to give effect to [d’avoir aucun égard aux] substitutions that will be made in the future by testament and ordinance of last will or inter vivos, by contracts of marriage, or by any other means whatsoever, outside of and beyond two degrees of substitution, after the institution and first disposition, not included.

This ordinance, which, obviously enough, presupposes that up until this point in time GDF substitutions had been permitted without restriction, continued to permit the creation of new substitutions of that kind after that point in time, provided they didn’t go beyond the second degree. The second ordinance – *la Ordonnance (de Charles IX) de Moulins de février 1566* – “restrained” GDF substitutions that had been established before the date of the first ordinance (which substitutions the first ordinance had not affected) “to the fourth degree beyond the institution” (art. LVII). The third ordinance – *la Ordonnance du mois d’août 1747* –, which effectively repealed the second, made the rule of the first ordinance universal, that is, applied the “no more than two degrees” rule to all substitutions, even those that had been created before the first ordinance. If any further evidence were needed that GDF substitutions (as restrained by the ordinances) were part and parcel of the customary law of the Île de France, it is provided by Pothier, who, in his commentary on the law of substitutions, not only assumed that perpetual gradual substitutions were permissible, but even described their “tell-tale” signs:

One ought not to suppose that a substitution is gradual except when there are terms [of the testament] that express that it is so or when one can conclude, from that which is contained in the testament, that the testator wanted to make

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another degree of substitution beyond that which is expressed in those that are made [merely] for the benefit “of the family” or “of the posterity.” The terms “forever” and “in perpetuity” express that the substitution is gradual and that the testator wanted there to be as many degrees as there could possibly be, as when he says: “I make a certain person my universal legatee, and I substitute to him my family forever or well in perpetuity.”

In similar fashion, with respect to substitutions that result from the prohibition of alienating things outside the family, if, to this prohibition on alienation, the testator adds these terms – “So that the estate will not leave the family” or “So that it will always be kept in the family” – , [he] expresses a gradual and perpetual substitution . . . . 29

These GDF substitutions were not entirely suppressed in the Île de France until after the Revolution30, when the French government outlawed all but “vulgar” substitutions, a prohibition that eventually made its way into the Code Civil.31

(ii) Private law of the Spanish colonial period & the American period prior to codification. – Unlike LA COUTUME DE PARIS, LAS SIETE PARTIDAS expressly authorized at least some substitutions:

Fideicomissaria substituti, in Latin, means, in Castilian, the appointment of an heir which is made with the belief of anyone that he will deliver to another party the inheritance which he leaves in his hands, as if the maker of the will should say, “I appoint So-and-So my heir, and I request, ask, or direct that he hold this my estate which I leave to him, for such-and-such a time, and that afterwards he give and deliver it to So-and-So.” An appointment like this can be made by anyone of the people . . . . If the party appointed in this way as heir should not be willing to accept the property or, after he has accepted it, should refuse to deliver it to the other, the judge of the district can compel him to do so.32

The text of this provision admittedly does not make it clear whether the substitutions so authorized included “G”s, “F”s, or even “D”s. But any doubt on that score evaporates as soon as one considers the Spanish legislation, adopted in the late 19th century, that first purported to limit such substitutions. The clearest evidence is found in la Ley de 11 de Mayo de 1888, which provided that substitutions could not “go beyond the second generation unless they are made in favor of persons living at the time of the testator’s death.”33 This restriction, which eventually made its way into the Spanish Civil Code,34 clearly presupposes that, up until that point in time, GDF substitutions were permitted without restriction.35

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29 Robert Jean Pothier, TRAITÉ DES SUBSTITUTIONS sec. 2, art. 3, in 7 ŒUVRES DE POTHIER 564 (Dupin éd., nouv. éd. 1825).
30 See la Loi du 14 novembre 1792.
31 See CODE CIVIL FRANÇAIS art. 896 (1804).
32 LAS SIETE PARTIDAS pt. 6, tit. 5, law 14, at 1216 (Samuel Parsons Scott tr., 1931).
33 See Jose Maria Manresa y Navarro, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL bk. 3, tit. 3, ch. 2, art. 781, at 171 (7th ed. 1951).
34 See CIVIL CODE OF SPAIN art. 781 (Julio Romanach tr. 1994).
35 That’s not just my conclusion; it’s also Manresa’s. See Manresa, supra note 8, at 170-71. And since Manresa is to Spanish civil law what Planiol is to French civil law, his opinion should not be lightly dismissed.
b) Subjects

1] Donor

2] Donees

   a] Institute (or *grevé*): the donee who's supposed to take first

   b] Substitute (or *appelé*): the donee who takes after the first

c) Prerequisites

1] Double liberality

   a] Explication

   b] Implications

      1} What's included (and, so, possibly prohibited)

      2} What's excluded

         a} Joint legacy (and, so, permitted)

            1/ Description (CC arts. 1588)

            2/ Illustration

   DH 62. By testament, T bequeaths her library to "my son, S, and my daughter, D, share and share alike, with right of accretion." Is this donation null on grounds that it constitutes a prohibited substitution? Why or why not?

   3/ Rationale
PART I: DONATIONS

b) Donation dividing usufruct from naked ownership

1/ Description

2/ Illustration

DH 63. In his testament, T makes the following bequest: "To my brother, X, I leave 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 my dead brother, Y." T dies. After X files the testament for probate, Y's children, through their tutor, challenge the testament, arguing that the bequest constitutes a prohibited substitution. Is this donation null on grounds that it constitutes a prohibited substitution? Why or why not? See Fisk v. Fisk, 3 La. Ann. 494 (1848) (finding, on similar facts, that the disposition was not a prohibited substitution; the court reasoned that T had given X and Y, respectively, the usufruct and the naked ownership of the money; though the court admitted that the plain meaning of the bequest indicated that T had intended to give X "full ownership," the court reasoned that such an intent is not inconsistent with the intent to give T a mere usufruct, inasmuch as a usufructuary of consumables (a quasi-usufructuary) is, by definition, the owner of those consumables (see CC art. 538)).

3/ Rationale

c) Donation of successive usufructs

1/ Description

2/ Illustration

DH 64. In his testament, T makes the following bequest: "I do hereby leave the right to the revenues generated by my mineral interest in Tract M to my daughter, D, for her life, and after that, to my son, S." Is this donation null on the ground that it constitutes a prohibited substitution? Why or why not? See Succession of Goode, 425 So.2d 673 (La. 1982) (finding, on similar facts, that the disposition was not a prohibited substitution; the court reasoned that T had given D and S, respectively, successive usufructs over the mineral interest).

3/ Rationale

d) Vulgar substitution

1/ Description

a/ In general
b/ Typical forms

2/ Illustration

DH 65. T, an expecting mother, makes out an olographic testament that reads as follows: "I leave all that I own, including all immovable and movable property, to my soon-to-be-born child. But in case of my child's death as well as my own, I leave all my property to my husband, H, save for a diamond ring, which I leave to my niece, N." Sometime later, T delivers a baby boy. It dies a few hours later. A few days after that, T, too, dies. H then files the testament for probate. T's brothers challenge the legacy to H on the ground that it was the second half of a prohibited substitution. What result? Why? See Swart v. Lane, 106 So. 833 (La. 1926) (finding, on similar facts, that the disposition was not a prohibited substitution; the court reasoned that T had intended to make her legacies to H and N contingent on her son’s pre-deceasing her and, therefore, had not intended for the legacies to H and N to be operative if her son were to post-decease her).

3/ Rationale

e} (Some?) double conditional legacies

1/ Description

2/ Illustration

DH 71. In his testament, T makes the following bequest: "I leave all of my property to my wife, W. In the event that she shall have predeceased me or that she shall die within 30 days after my death, then this bequest shall be null and my property shall be distributed in equal shares to my four nephews, A, B, C, & D." After T dies, W files his testament for probate. T's brother, B, challenges the testament, arguing that the bequest to W and then to A, B, C, & D, is a prohibited substitution. What result? Why? Read CC art. 1521; then see the jurisprudence that follows:

Baten v. Taylor,
386 So.2d 333 (La. 1979)

DENNIS, J.

The double conditional legacy is not a prohibited substitution because it does not: (1) constitute a double disposition, in full ownership, of the same thing to persons called to receive it one after another; (2) impose upon the first beneficiary a charge to preserve and transmit the succession property; and (3) establish a successive order that causes the property to leave the inheritance of the burdened beneficiary and enter into the patrimony of the substituted beneficiary. A prohibited substitution, as defined by Civil Code Art. 1520, must have all of these characteristics.
Louisiana Civil Code Art. 1520, as amended in 1962, provides:

Substitutions are and remain prohibited, except as permitted by the laws relating to trusts.

Every disposition not in trust by which the donee, the heir, or legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee.

The Louisiana State Law Institute, in its report to the Legislature accompanying the Trust Code, explained the essential elements of a prohibited substitution, defined by Civil Code Art. 1520, as follows:

The second paragraph of Art. 1520 specifies and defines the disposition prohibited in the first paragraph, which is identical with its French counterpart, Art. 896, C.N., except for the provisions relating to trusts. It is, for example, a disposition conceived in these terms: "I bequeath my farm Blackacre to Paul, and I charge him to preserve and transmit it at his death to LeDoux."

The constituent characteristics of this prohibited substitution that are implicit in this definition are:

(1) A double liberality, or a double disposition in full ownership, of the same thing to persons called to receive it, one after the other;

(2) Charge to preserve and transmit, imposed on the first beneficiary for the benefit of the second beneficiary;

(3) Establishment of a successive order that causes the substituted property to leave the inheritance of the burdened beneficiary and enter into the patrimony of the substituted beneficiary.

This is in accord with settled French doctrine and jurisprudence, and it is in this sense that the term "substitution" is used in the Civil Code, and by derivation from the Code in the Constitution. Report Trust Code 3A LSA.-R.S. p. XXXIII, XXXVIII (1965).

We are convinced that the Law Institute's interpretation of Art. 1520 is correct. As its report indicates, the article implies the foregoing definition of a prohibited substitution, and the term is used in this sense in French doctrine and jurisprudence. 3 Civil Law Translations, Aubry & Rau § 694, pp. 307-23; 3 Planiol, Civil Law Treatise §§ 3278-83, pp. 593-95. Moreover, the report of the Law Institute is entitled to great weight as reflecting legislative intent in this instance. The Institute, to open the way for a new trust code which it had been instructed to draft by the Legislature, prepared amendments to Art. 1520 to clarify the meaning of a prohibited substitution and to remove any obstacle to an effective trust device in Louisiana. See Oppenheim, Trust Code Introductory Comment 3A LSA.-R.S. XXVII p. XXIX (1965). The Legislature evidently endorsed the Law Institute's definition of a prohibited substitution by adopting the amendments and enacting the new trust code on the basis of its report.

The definition of a prohibited substitution which we infer from Art. 1520, furthermore, is consonant with the original legislative motive for prohibiting substitutions. The reasons assigned for the prohibition are to prevent the making of gratuities to future generations; to prevent property left to an existing generation from being made inalienable, 3 Planiol, supra, § 3197; and to ward off all of the objectionable consequences from such dispositions. See Tucker, Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantical Reappraisal, 24 La. L. Rev. 439, 454 (1964).

The disposition at issue in the present case has none of the characteristics of a
prohibited substitution, as defined by Art. 1520. First, it does not make double disposition of the same thing, in full ownership, to persons called to receive it one after another. Since the widow's legacy was subject to a suspensive condition, she would not have received the succession in full ownership if she had failed to survive the testator for thirty days. The second legacy to the nephews was under condition of the failure of the condition of the widow's legacy. As a result of the retroactivity of the condition, the nephews could have received the property only in default of the widow's legacy, not after her.

Second, there was no charge to preserve resting on the first legatee. It is not necessary for the creation of a substitution that the disposer make use of the identical terms found in Art. 1520. It suffices that the charge to preserve and to deliver necessarily result from the tenor of the disposition, or, what amounts to the same thing, that it is impossible to execute the disposition without preserving and making restitution of the property given or bequeathed. See 3 Aubry & Rau, supra, § 694, p. 315. The disposition at issue in the present case, however, by its wording, purpose and tenor, does not imply a charge to preserve. If the suspensive period had been longer, it could be argued that the legacy would be impossible to execute without a charge to preserve. The brief thirty-day suspensive period, however, allows execution of the disposition without this effect.

Finally, for the same reasons that there was no double disposition, the will does not establish a successive order whereby the property could leave the inheritance of the first beneficiary and enter into the patrimony of the substituted beneficiary.

The type of double conditional legacy presented in this case has been approved repeatedly by the French Courts and commentators. French jurisprudence has held that there is no prohibited substitution "when a legacy, though made in full ownership, is made to depend on a suspensive condition, with the clause that in case the condition fails, the thing shall be given to a third person." 3 Aubry & Rau, supra, § 694, p. 309. An illustration of this double conditional legacy is the legacy made to Primus on the condition that he marries, or that he marries before a certain age, or that he lives to a certain age, with the stipulation that, if this condition is not accomplished, the property will be bequeathed to Secundus. Tucker, supra, at 481; 3 Aubry & Rau, supra, at 309; 3 Planiol, supra, § 3295, p. 601.

The underlying considerations upon which French jurisprudence has based its approval of such dispositions, according to John H. Tucker, Jr., are as follows:

(1) It constitutes two legacies under a suspensive condition, the first legacy under the condition described in the illustration, the second legacy under the condition of the failure of the condition of the first legacy.

(2) As a result of the retroactivity of the condition, the second legatee (Secundus) is considered as receiving the property not after the first legatee (Primus), but in default of him, and there is no successive order.

(3) There is no real charge to preserve and render resting on the first legatee.

(4) In such a case, the testator will be considered to have bequeathed the usufruct to Primus for the period intervening between his receipt of the legacy and the failure of the condition, even if he has not so specified.

(5) In some instances, the courts have annulled a conditional legacy (e. g., "I bequeath my property to X if he attain 21 years; if he die before that this legacy will fail and be as not written."), as containing a resolutory condition. However, the jurisprudence generally has validated double conditional legacies of the type given in the illustration, where the testator intends to maintain the first legacy,
only if the legatee attains a certain age, or accomplishes a fact before a certain age without being concerned with whether the condition is resolutory or suspensive.

*   *   *

Tucker, supra, at 481-82.

The court of appeal reasoned that, because the disposition in the present case is indistinguishable from a classic substitution, its enforcement would render Art. 1520 and the jurisprudence developed around it meaningless. The rationale is based on a faulty postulate, however, because a classic substitution is one which contains all of the characteristics stated or implied by the second paragraph of Art. 1520 and listed in the Law Institute's Report. Thus, it is a disposition bequeathing property to A in full ownership, but requiring that he preserve the property and that, upon his death, it be delivered to B in full ownership. Since the disposition at issue in this case contains none of the three characteristics of a substitution, its enforcement does not conflict with Art. 1520. Also, as the appellate court recognized, a review of the Louisiana cases reveals none in which a double suspensive conditional legacy was evaluated. The enforcement of the disposition here, therefore, does not conflict with the holdings in our previous opinions.

There is language in some of the cases which, if followed, would nullify conditional donations outside the ambit of Art. 1520's strict definition of a prohibited substitution. Many of those decisions may be disregarded as obsolete because they were focused on prohibiting the common law trust in Louisiana, now adopted to some extent in our trust code. See Succession of Walters, 261 La. 59, 259 So.2d 12, 16 (1972) (Barham, J., concurring); Crichton v. Succession of Gredler, 256 La. 156, 235 So.2d 411, 421 (La. 1970) (Sanders, J. dissenting). Fundamentally, however, all of the jurisprudence defining and applying the law of former Art. 1520 must be reassessed in light of the amendments by which the Legislature has harmonized our definition of substitutions with French doctrine and the rule that penal and prohibitory laws should be strictly construed. Report Proposed Trust Code 3A LSA-R.S., p. XLI. See State v. Executors of McDonogh, 8 La. Ann. 171, 230 (1853); Heirs of Cole v. Cole's Executors, 7 Mart.N.S. 414 (1829).

We conclude, for these reasons, that the disposition in the present case is not a substitution prohibited by Art. 1520.

Can we conclude, after Baten v. Taylor, that Louisiana now permits all double conditional legacies without restriction? How does CC art. 1521 affect your answer? How does the jurisprudence that follows affect your answer?

Launey v. Barrouse, 509 So.2d 734 (La. App. 3d Cir. 1987)

DOMENGEAUX, Judge.

. . . [T]he plaintiff, Angela R. Launey, seeks to have certain provisions in a will declared null. Mrs. Launey is the testator's sister and the universal legatee under the will. . . .
The decedent, Levy Richard, died on August 8, 1978, having left a nuncupative will by public act, dated April 29, 1974. The testament contained the following pertinent dispositive provisions:

"2. I leave and bequeath unto Angela R. Launey and Lorraine S. Barrouse, share and share alike, the use of my home, together with all furniture and fixtures located therein, which home is located on Sixth Street in Mamou, Louisiana, for the remainder of their natural life; and to the survivor of these two, Angela R. Launey or Lorraine S. Barrouse, I leave the house and lots, together with the furniture and fixtures located therein, and other improvements located thereon, with full title to the aforesaid property.

3. I leave my store building and lots located on Sixth Street in Mamou, Louisiana, unto Angela R. Launey and Lorraine S. Barrouse for their use for the remainder of their natural life, provided that so long as Lorraine S. Barrouse lives, she shall be entitled to use the store building as a store and/or other businesses, upon payment of a rent of $12.50 per month to Angela R. Launey, and to the survivor of these two, Angela R. Launey or Lorraine S. Barrouse, I leave the said store building and lots.

5. The remainder of my cash, savings account and savings bonds and any other property not hereinabove donated, I leave to Angela R. Launey, in full ownership."

On May 6, 1985, Mrs. Launey brought this suit seeking to have the provisions in sections 2 and 3 of the will declared to be prohibited substitutions and therefore absolutely null, the result being that the legacies therein would lapse and fall to her as the residuary legatee.

In order to determine the merits of Mrs. Launey's assignment of error, we must first interpret the language of the testament to determine the way in which the testator intended his property be disposed of.

The two provisions of the will which we must examine are the dispositions that are numbered 2 and 3. Disposition 2 begins "I leave and bequeath unto Angela R. Launey and Lorraine S. Barrouse, share and share alike, the use of my home, together with all the furniture and fixtures located therein, which home is located on Sixth Street in Mamou, Louisiana, for the remainder of their natural life." There is no difficulty in interpreting this provision. In bequeathing the use of his home and its contents to Mrs. Launey and Mrs. Barrouse for the remainder of their lives, it is clear that the testator intended to leave them the usufruct of this property.

Disposition 2 then provides "and to the survivor of these two, Angela R. Launey or Lorraine S. Barrouse, I leave the house and lots, together with the furniture and fixtures located therein, and other improvements located thereon, with full title to the aforesaid property." The terms of this disposition indicate that the testator intended to make a conditional bequest of the full ownership of the described property to either Mrs. Launey or Mrs. Barrouse, but not to both. Under this provision the bequest is conditional because the disposition of the property depends on the happening of an uncertain event, namely that one of the parties survive the other. It is also apparent that, since by the terms of the disposition the testator bequeathed the property to only one of the parties, i.e., the survivor, there is no immediate vesting of ownership in either of the parties upon the death
of the testator. The testator, thus, intended that ownership vest only upon the happening of the condition. Therefore, this bequest is one subject to a suspensive condition.

We also conclude that the testator intended a similar result with respect to his disposition of the property described in disposition 3. That provision begins "I leave my store building and lots located on Sixth Street in Mamou, Louisiana, unto Angela R. Launey and Lorraine S. Barrouse for their use for the remainder of their natural life, provided that so long as Lorraine S. Barrouse lives, she shall be entitled to use the store building as a store and/or other businesses, upon payment of a rent of $12.50 per month to Angela R. Launey ...". Again, we have no difficulty in interpreting this provision. In bequeathing the use of the described property to Mrs. Launey and Mrs. Barrouse, subject to Mrs. Barrouse's right to use the store building as a store or other business upon payment of $12.50 per month to Mrs. Launey, it is clear that the testator intended to leave the usufruct of this property to them.

The remaining part of disposition 3 then states "and to the survivor of these two, Angela R. Launey or Lorraine S. Barrouse, I leave the said store building and lots." The terms of this disposition also indicate that the testator intended to make a conditional bequest of the full ownership of the described property to either Mrs. Barrouse or Mrs. Launey, but not to both. Again, the bequest is conditional because disposition of the property depends upon the happening of an uncertain event, namely that one of the parties survive the other. Since it is apparent that the testator intended that the disposition not take place until the condition is fulfilled, the bequest is one subject to a suspensive condition.

Given this interpretation of the testator's dispositions, we must now determine whether the bequests are valid under our law.

Mrs. Launey argues that these dispositions constitute prohibited substitutions and are, therefore, invalid under La.C.C. Article 1520. Alternatively, she argues that the dispositions are subject to illegal or impossible conditions which should be reputed not written under La.C.C. Article 1519. In either case, she argues, the dispositions lapse and the property should fall to her as residuary legatee, subject to Mrs. Barrouse's testamentary usufruct.

We must first address, then, whether the dispositions at issue here constitute substitutions prohibited under La.C.C. Article 1520.

In Baten v. Taylor, 386 So.2d 333 (La.1979), the Supreme Court held that a double conditional legacy is not a prohibited substitution and that a universal legacy subject to a suspensive condition is not in conflict with our rules of seizin. The testator in Baten had left his estate to his wife subject to the condition that she survive him for thirty days. In the event that she did not survive the testator by thirty days, the estate then went to the testator's nephews. The court characterized this as a double conditional legacy because the wife's legacy was subject to a condition and the bequest to the nephews was conditioned upon the lapse of a legacy to the wife. The court also concluded that the condition attached to the wife's bequest was suspensive, not resolutory.

The Supreme Court concluded that the double conditional legacy in Baten contained none of the characteristics of a prohibited substitution as defined by Article 1520. In reaching that conclusion, the court first noted that since the wife's legacy was subject to a suspensive condition, she could not receive the succession in full ownership until she survived the testator for thirty days. The nephews, on the other hand, could only receive the property in default of the widow's legacy, not after her. Therefore, there was no
double disposition of full ownership of the property and no successive order was established whereby the property could leave the inheritance of one beneficiary and enter into the patrimony of the substitute beneficiary.

The court also concluded that there was no charge to preserve and transmit the property imposed on one beneficiary for the benefit of the second beneficiary. In addressing this question the court made the following observations:

"It is not necessary for the creation of a substitution that the disposer make use of the identical terms found in Article 1520. It suffices that the charge to preserve and to deliver necessarily result from the tenor of the disposition, or, what amounts to the same thing, that it is impossible to execute the disposition without preserving and making restitution of the property given or bequeathed.... The disposition at issue in the present case, however, by its wording, purpose and tenor, does not imply a charge to preserve. If the suspensive period had been longer, it could be argued that the legacy would be impossible to execute without a charge to preserve. The brief thirty-day suspensive period, however, allows execution of the disposition without this effect." (Citations omitted).

It is apparent that the length of the suspensive period is an important element to consider in determining whether a charge to preserve has been imposed.

The conditional legacies in the case before this Court are similar to the conditional legacy made in the Baten case. After comparison of the dispositions made here with the essential elements of a prohibited substitution as listed in Baten, we conclude that these dispositions are not substitutions prohibited by Article 1520.

First, there is no double disposition of the same property in full ownership to persons called to receive it one after another. By the terms of the dispositions only the survivor of Mrs. Launey and Mrs. Barrouse is called to receive the property in full ownership. Pending the happening of the condition neither party has a vested interest in the property, other than the usufruct bequeathed to both of them. Since only one of the parties receives full ownership of the property, which only occurs when the condition is fulfilled, there is no double disposition of the property.

For the same reason, the dispositions here do not establish a successive order whereby the property can leave the inheritance of one beneficiary and enter into the patrimony of a substituted beneficiary. Under the terms of the dispositions, the survivor of the two parties receives the property directly from the testator when the condition of her survivorship is fulfilled. Since as the survivor, the legatee is the first and only beneficiary of the bequest under the will, no successive order is established whereby the property can leave the legatee's inheritance and enter into the patrimony of a substituted beneficiary.

A more difficult issue concerns whether the dispositions contain charges to preserve. In Baten the court stated that "the suspensive period had been longer, it could be argued that the legacy would be impossible to execute without a charge to preserve." Here the suspensive period is indefinite and has already exceeded the thirty-day [now 90 day] period allowed in Baten and now provided for by the legislature in La.C.C. Article 1521. In fact, from the date of the testator's death on August 8, 1978, until this suit was filed on May 6, 1985, almost seven years passed without the testamentary condition occurring. Certainly this suspensive period is of such length that the legacy would be impossible to execute without a charge to preserve. However, to be a charge to preserve as contemplated by Article 1520, the charge must be imposed upon the first legatee receiving full ownership for the benefit of the second legatee, who is a substituted beneficiary. In this case, any charge to preserve resulting from the length of the suspensive period will
be born by the person seized of the property, not by the legatee. Since the legatee receives the bequeathed property only upon the happening of the suspensive condition, there is no charge to preserve the property imposed upon the legatee for the benefit of a substituted beneficiary.

For these reasons, then, we conclude that the dispositions in the present case do not constitute substitutions prohibited by Article 1520.

While a testamentary disposition subject to a suspensive condition may not constitute a substitution prohibited by Article 1520, as in this case, the disposition may be subject to a condition which is considered impossible under La.C.C. Article 1519. In that event, the disposition stands, however the condition is reputed as not written.

To determine whether the conditions present here are impossible we must determine the nature of the parties' interest during the suspensive period. This was considered in Baten v. Taylor, supra, in the court's analysis of the effect of the Civil Code's concept of seizin on a universal legatee subject to a suspensive condition.

In Baten, after concluding that the double conditional legacy in that case was not a prohibited substitution, the court went on to examine the effect of the Civil Code's concept of seizin on the disposition before it. The court noted that immediately after the death of the testator, one of three classes of heirs is seized of the succession under the Civil Code scheme, stating:

"Seizin is giving first to the forced heirs of the deceased. In default of a forced heir, it is given to the universal legatee. Finally, in the absence of a member of the first two classes, the legitimate heirs are seized of the deceased's property. La.Civil Code arts. 887, 915, 940, 1607, 1609, and 1613."

The court, having distinguished seizin from ownership, then made the following conclusions, at page 340:

"Accordingly, we conclude that there is no conflict between a suspensively conditional universal legacy and the civil code's seizin provisions. In the present case, the universal legatee having been installed under a suspensive condition, the legitimate heirs acquired seizin at the moment of death under the civil code scheme and remained provisionally seized until the legacy's suspensive condition was fulfilled. Furthermore, the succession representative is given full seizin of the deceased's property, as a practical matter, by Article 3211 of the Code of Civil Procedure. The survivorship clause in the present will, therefore, does not suspend seizin of the succession, but is a valid disposition of ownership subject to suspensive conditions."

These principles are applicable to this case. Therefore, immediately upon the death of the testator, the universal legatee acquires seizin, since the testator did not leave any forced heirs. The universal legatee remains provisionally seized of the property, subject to the succession representative's rights and duties under the Code of Civil Procedure, until the legacy's suspensive condition is fulfilled, while the legatee's ownership rights under the will are suspended during this period.

In Baten the suspensive period was a relatively short thirty days. As stated, the suspensive period in this case has already exceeded six years. Such a long suspensive period necessarily imposes upon the seized heir an obligation to preserve and deliver the property to the legatee upon the happening of the condition. This is because the heir seized of the property does not own it, but merely acquires possession of the property upon the death of the testator, enabling him to bring all the actions which the deceased
could have brought. Baten, supra, at page 340. Not having title to the property, the seized heir is significantly restricted in his ability to alienate or encumber the property. The seized heir is also discouraged from improving the property during his tenure. The result is that the property is effectively removed from commerce during the suspensive period, and the seized heir is bound to preserve the property for an indefinite period of time and then to deliver it to the legatee. The resulting disincentives to improving the property and the effective removal of the property from commerce are against public policy since the maximum utilization of property is deemed to be in the public's best interest. Since the suspensive conditions result in a scheme which is against public policy, the conditions are deemed impossible under Article 1519, and are, therefore, reputed not written.

Support for this conclusion is found in the Baten case as well as in the legislature's codification of the Baten survivorship clause in Article 1521. In Baten, the court emphasized the short duration of the suspensive period, noting that due to its brevity the suspensive period did not impose a charge to preserve. We note that such a short and definite suspensive period will have little, if any, effect on the ability to alienate the immovable property.

We also note that in upholding the thirty-day survivorship clause in Baten, the court did not resolve the question of what maximum suspensive period a testator may stipulate for the survival of his legatee. The legislature, however, has provided an answer to this question in La.C.C. Article 1521 wherein it provides that the suspensive period a beneficiary may be required to survive the testator "shall not exceed thirty days after the testator's death." [now 90 days] Therefore, there is express legislative disapproval of suspensive periods exceeding thirty days [now 90 days], at least in the case of survivorship clauses.

We conclude, therefore, that since the testamentary dispositions of ownership of the property in this case are subject to suspensive conditions which have resulted in excessively long suspensive periods, the conditions are impossible under Article 1519. This being the case, the conditions are reputed as not written.

In an ordinary case, a disposition subject to an impossible condition is given effect without the condition and the legatee takes the property free from it. In this case, however, since the legatee cannot be identified until the suspensive conditions are fulfilled, the dispositions of ownership lapse as a result of the conditions being reputed not written. The dispositions having lapsed, the property falls to the residuary legatee, who in this case is Mrs. Launey.

3/ Rationale

f} Inefficacious substitution

1/ Description

2/ Illustration

DH 66. T executes a testament that contains the following legacy: "I give my house to my son, S, in full ownership and, upon his death, to my daughter, D, in full ownership. While he is owner,
S may not dispose of the house." Before T dies, D dies. Is the legacy to S valid or not? See CC art. 1697.

3/ Rationale

2] Duty to conserve & render

a] Explication

1} Definitions

a} Conserve

b} Render

2} Requirement

b] Implications

1} What's included

2} What's excluded

a} Prohibition on alienation

1/ Description

2/ Illustration

3/ Rationale

b} Residuary legacies

1/ Description

2/ Illustrations
DH 67. T, unmarried and with no children, makes out a testament in which he (i) directs his executor to liquidate his estate and then place the proceeds into a bank account, (ii) gives his sister, S, a usufruct over the money in the account, (iii) authorizes to take from the account not only the interest, but also up to $40/month to meet her living expenses, and (iv) provides that whatever is left over in the account, if anything, at S's death, shall be paid to his niece, N. T dies. S and N then file the testament for probate. T's brother, B, challenges the testament on the ground that the bequest of the account or the account funds to S and then to B was a prohibited substitution. What result? Why? See the following jurisprudence:

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_In re Courtin_,
81 So. 457 (1919)

[Testator bequeathed to his sister "the usufruct of all I die possessed of" and directed that everything he had should be converted into cash and placed at interest. The will then provided: "As the interest in the total amount will not be sufficient for her support, I authorize the withdrawal of $40 per month for her maintenance," and should there be anything left after the sister's death, then, "the balance to go to my niece May Willoz."]

DAWKINS, J.

... Plaintiffs contend that the provision in the will in which the testator directs that, inasmuch as the interest on the funds of his estate will not be sufficient to support the usufructuary, $40 per month be withdrawn for that purpose, creates a fidei commissum or fiduciary bequest, which is prohibited by the provisions of Art. 1520 of the Revised Civil Code, and is a prohibited substitution, likewise denounced by the same article. If the following clauses were eliminated from the testament, there can be but little question that it would leave a perfectly valid will as to the other special legacies and the granting of the usufruct in favor of Miss Marie Emma Courtin, but would leave the naked ownership of the estate to be inherited by the lawful heirs of the deceased, instead of giving it to Mrs. Willoz, as was the apparent intention of the testator. The provisions referred to are:

"As the interest in the total amount will not be sufficient for her support, I authorize the withdrawal of forty dollars per month for maintenance."

"Should she die before the funds are exhausted, the balance to go to my niece and godchild, May Willoz."

It becomes necessary therefore, for us to interpret these two clauses, and to determine their validity when tested by the provisions of Art. 1520 of the Code. ** **

So that, to be amenable to the prohibitions of the law, the bequest must be to the donee, and, at his death or at the end of a fixed or determinable time, to a third person, which, if permissible beyond the first donee, would give the testator the power to tie up the title ad infinitum, and thereby take it out of commerce; or the bequest must be made

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36 Another statement of the facts compliments of Professor Samuel, Spaht, and Picou.
to one in trust for another, with request or direction to preserve and return it to such third person, which would permit a donor to do indirectly that which he could not do directly, and that is, transmit by will or donation inter vivos to a person prohibited from receiving of him by law, through the medium of a trustee or third person.

Is there anything in either of the clauses of the will attacked and quoted above which does or has the effect of doing the things prohibited? We think not. The will, after making certain bequests, gives to the sister of deceased "the usufruct of all that I die possessed of," and directs the converting of all of the testator's property into cash, and the placing of the funds at interest. Realizing that the interest might not be sufficient for the support of his sister, he then authorizes her to withdraw the sum of $40 per month, and to include enough of the capital to make up that amount monthly. Lastly, he gives to his niece and godchild the residue of the principal or capital, if any remains after the death of his sister. He did not give to the sister any part of the principal, except so much thereof as was necessary, with the interest, to make the sum of $40 per month; nor was the sister charged with preserving and returning to Mrs. Willoz the part that was vested in her through the monthly withdrawals. By the same act he vested in the latter at the moment of his death the naked ownership of whatever might remain at the death of his sister. In the one case the entire principal might be consumed by the sister, on condition that she live long enough to consume it; and, for the same reason, this imposed a condition on the bequest to the niece which might defeat it altogether. On the other hand, if the other condition or contingency of the sister's death happened before the principal was exhausted, her (the sister's) right or title to the remainder would never become vested; and that condition would immediately render perfect the title of the niece.

It must be borne in mind that what is known as the "vulgar substitution" is not prohibited by our law, as appears from Art. 1521 of the Revised Civil Code: * * * It is well settled that a testator may give the usufruct to one person and the naked ownership to another, without violating the provisions of Art. 1520 of the Civil Code, Revised Civil Code 1522. That was exactly what was done here, except that the usufructuary was given the further right to draw upon the capital to supplement the revenues in an amount sufficient each month to make the sum of $40. She was not given the property or funds in complete ownership, and at her death the same property or funds to the decedent's niece; nor was the former charged with the duty of preserving and returning anything to the latter.

Plaintiffs further contend that the will requires the executor to remain in office, to collect and invest the funds, and to pay over to the usufructuary the amounts provided under the will, during her lifetime, and at her death to pay over the remainder to Mrs. Willoz; a function and a tenure not only not contemplated, but prohibited, by our law. However, this cannot be so; for the usufructure is given the further right to draw upon the capital to supplement the revenues in an amount sufficient each month to make the sum of $40. She was not given the security, and at her death the same property or funds to the decedent's niece; nor was the former charged with the duty of preserving and returning anything to the latter.

In view of these provisions, what occasion would there have been for the executor to remain in office any longer than was necessary to convert the assets of the estate into cash, discharge the special legacies, and to cite the usufructuary and universal legatee into court for the delivery thereof, and his discharge according to law? He was not concerned as to whether or not Mrs. Willoz should exact security, as that was not required under the will; and, in fact, she and the usufructuary promptly entered into an agreement adjusting matters as between themselves, as is permitted by the Code, and had a judgment of court
rendered, by consent, sending them into possession pursuant to that settlement.

DH 68. In his testament, T makes the following bequest: "I leave everything to my wife, W, for as long as she shall live and on condition that she leave to her stepson, S, no more but no less than 1/4 of what's left at the end of her life." After T's death, W files the testament for probate. T's brother, B, challenges it, arguing that it contains a prohibited substitution. What result? Why?

3/ Rationale

c} Precatory legacy (*fideicommissum* without duty to render)

1/ Description

2/ Illustration

3/ Rationale

d} Fideicommissum with power of selection

1/ Description

2/ Illustration

DH 69. T makes out a testament in which he leaves his farm to his brother B, subject to the condition that B, at his death, transmit it intact to whomsoever he (B) may choose. Does this donation contain a prohibited substitution? Why or why not?

3/ Rationale

3] Successorial order

a] Explication

b] Implications

1} What's included
2) What's excluded: *fideicommissum* executable before death

a/ Description

b/ Illustration

DH 70. On the verge of death, T executes an action of donation in which he leaves his farm to his brother B, until such time as T's then minor son, S, should reach majority, at which point B must deliver the farm to S. Does this donation entail a prohibited substitution? Why or why not?

c/ Rationale

d) Rules of construction

1] Reconstruction of intent: realize the donor's desires to the extent legally permissible

2] Preference for "saving" construction

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Exercises:

*Recognizing Prohibited Substitutions*  

I. Problems

1 Pascal’s son, Ti-Boy, a UN peacekeeper in Sierra Leone, disappears while on patrol. Pascal, uncertain whether Ti-Boy is still alive, makes out a testament that reads, in part, as follows: “I leave all my goods to my brother, Basile. But if Ti-Boy should thereafter return from his peacekeeping mission, they shall belong to him.”

2 Marie bequeaths 1/2 of her goods to Jean-Joseph, her son-in-law, in full ownership, but with this proviso: “If Jean-Joseph’s daughter, Henriette, attains the age of majority, the legacy to Jean-Joseph will be converted from one in full ownership to one in usufruct only and the naked ownership will belong to Henriette.”

3 Jean Sot leaves all of his property to his youngest son, Meau, but with this proviso: “If Meau shall die before attaining the age of 25 or without children, I charge him (actually, his heirs) to turn my things over to my eldest son, Beau.”

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4 “I leave to Titius all of the goods of which I am permitted to dispose, reckoning from the day of my death, in usufruct only, during his life. After Titius’ death, the universal legacy that I’ve just made to him will belong, in full ownership, to his children.”

5 Henrys has four children: two girls, Simon & Amable, and two boys, Paul & Pierre. Henrys leaves 1/4 of all his goods to “whichever of Simon and Amable shall live at least up to the age of 25, should the other one have died.” Henrys further provides that “if both girls reach the age of 25, Simon will have 3/4 of the 1/4 of my goods and Amable, the other 1/4 of the 1/4 of my goods.”

6 The same as # 5, except that Henrys, as an initial matter, leaves the 1/4 of his estate to both girls, but provides that, if one of them should die before having reached age 25, the other shall take the entire 1/4.

7 Jacques-Joseph Drion names his brother, François, as his universal legatee and charges him to give to each of the children of his other brother, Adrien, a sum of 6000 francs as soon as each should get married. But Jacques-Joseph goes on to provide that, in the event that one of the children of Adrien should happen to die without leaving any offspring of his marriage, his part will return to his brothers and sisters.

II. Solutions

1 Answer: Not a prohibited substitution. Rationale: It’s a double conditional legacy. If the son returns, then, by virtue of the fiction that the fulfillment of conditions has retroactive effects, we would say that Basile had never owned the goods and that Ti-Boy had owned them from the very beginning, that is, as of the moment of Pascal’s death.

2 Answer: Not a prohibited substitution. Rationale: This is another, though slightly deviant (in that the real right given “shifts” from ownership to usufruct), double conditional legacy.

3 Answer: ? Explanation:

a Toullier, following a longstanding French tradition (one that continues until the present day), classified this kind of donation as a prohibited substitution. His rationale was somewhat conclusory, i.e., that this kind of donation satisfies all three of the requirements for qualifying a donation as a prohibited substitution.

b Modern French commentators and judges might well disagree with this conclusion. For them, this kind of donation constitutes a double conditional legacy and, therefore, fails, as a technical matter, to satisfy the requirements for classifying a donation as a prohibited substitution. According to modern French doctrine and jurisprudence, however, there are some double conditional legacies that, though they don’t “technically” satisfy those requirements, still should be classified as prohibited substitutions and, therefore, struck down. Which ones? Those in which the conditional event consists “solely of the predecease of the legatee and includes no other elements, such as the existence
of posterity.”

The rationale for this “unscientific” exception is part historical—this kind of donation has always been regarded as null—and in part functional—in terms of its practical effect, there’s not a hair’s breadth of difference between a classic substitution, on the one hand, and a double conditional legacy contingent solely on the death of a donee, on the other. Here, the condition does have some “other element” aside from death of a donee by a certain time, i.e., the existence of posterity.

c How our courts will deal with this kind of mess is something only a fool would try to predict.

4 Answer: Not a prohibited substitution. Rationale: There’s no “double liberality” of full ownership, for the first bequest consists only of usufruct (to one person, i.e., Titius), with the naked ownership (which is also not full ownership) falling to the donor’s intestate heirs.

5 Answer: Not a prohibited substitution. Rationale: This is another, albeit an atypically complicated, double conditional legacy.

6 Answer: Prohibited substitution. Rationale: See #3. Here, both Toullier, on the one hand, and modern French doctrine and jurisprudence, on the other, would condemn the donation.

7 Answer: ? Explanation: See #3. Je simplement ne peux pas dire!

e) Sanctions

1] Possible solutions

Suppose that a certain donation is found to entail a prohibited substitution. What is the proper sanction? Is it the nullity of the entire act of donation or testament, as the case might be? Or is it just the nullity of the donation? Or is it the nullity of the charge to the first donee to deliver the thing to the second donee (substitute), so that the disposition stands as to the first donee (institute)?

2] Retained solution: nullity of the donation

What does CC art. 1520 suggest? See also Successions of Walters, 259 So.2d 12, 13 (La. 1972) (“the presence in a will of a bequest containing a prohibited substitution results only in the total nullity of that bequest, but does not affect the remaining valid dispositions of the will”), & Succession of Gwathmey, 364 So.2d 226 (La. App. 3d Cir. 1978) (“the effect of a prohibited substitution is to invalidate the entire disposition, and not merely the charge or direction as to the

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ultimate disposition of the donation”).

C Regimes applicable to particular types of donations

1 Donations inter vivos

a Special requirements: form

As an introduction to the topic of “donative formalities,” read, first, CC arts. 1536, 1539, 1554, and, then, the following doctrinal and jurisprudential materials. These materials review the history of those formalities and explain (and in some instances critique) the justifications that have been offered in support of them. 40

1 Calixte Accarias, Précis de Droit Romain n° 304, at 794-97 (4th ed.1886)

Before Justinian, the classic theory of donations inter vivos underwent three modifications that served as the point of departure for the legislation of that monarch. First, Emperor Antony the Pius, in a decree the text of which has not survived . . ., decided that a simple contract of donation, provided it had been made in writing and that the writing had been turned over to the donee, would be obligatory [when made] between ascendants and descendants. Second, in the first years of the 4th Century, we find in force a new theory that would rapidly lead to the desuetude of the lex Cincia [the earlier legislation on donations inter vivos]: I allude to the theory of “insinuation.” This word designates the copy or maybe the simple analysis of the act of donation [made] on the register of the superior magistrate or local judge. 41 This formality, which was already in use, though not yet required, at the time of the jurisconsults, was imposed, for all donations and under pain of nullity, by Emperor Constance Chlore, who did it, I think, less to the end of provoking the donor to reflection than to the ends of assuring publicity for the donation and of preserving proof for it. Later, this requirement was limited to donations in excess of 200 solidi. Third, as a consequence of the innovation of Constance Chlore, his son, Constantine, ordered that every donation be consecrated by a writing. But that decision was abrogated by Theodosius the Young and Valentinian III.

. . .

What did this monarch [Justinian] do? Two things.

First, he decided that a simple contract of donation, whether written or not and regardless of the persons between whom it was made, became by itself a sufficient cause

40 In many of these materials, you will find numerous references to the Ordinance of 1731. That legislation of the French ancien régime was the immediate source of CN art. 931, which, in turn, was the ultimate source of our CC art. 1536.

41 Savigny described “insinuation” this way: “a judicial procedure initiated upon the declaration of the parties” wherein the judge gave the donation his “attestation of authenticity.” 4 Frederick Carl von Savigny, Traité de Droit Romain § 165, at 223 (Charles Guenoux tr. [German to French] 1845).
for an obligation. . . .

Second, Justinian required insinuation only for donations in excess of 500 *solidi*. The omission of this formality carried with it absolute nullity, but only for the surplus. From this followed several consequences: (i) a donor who had not yet made delivery had no need of an exception [special procedural device of defense] in order to reject a demand by the donee as long as the donation did not surpass 500 *solidi*; (ii) upon delivering the thing, the donor put himself into a state of co-ownership by indivision with the donee, the latter of whom necessarily became a co-owner for the part that was equivalent to this sum; (iii) the donation did not constitute a just cause [just title] for usucaption [acquisitive prescription]; (iv) the death of the donor did not confirm the donation in any case. . . . [T]he nullity resulting from the absence of insinuation could be asserted not only by the donor, but by all interested persons.

By exception, Justinian exempted from insinuation (i) donations *dotis causa* [dowries] or *propter nuptias* [on account of marriage]; (ii) donations made or received by the Emperor; (iii) those intended to ransom captives; (iv) those whose cause was the reconstruction of a collapsed or burned house.

5 Jose Maria Manresa y Navarro, *Comentarios al Código Civil Español* arts. 632 & 633, at 135 (Pascual Marin Perez rev., 6th ed. 1951)

According to Law 9, Title 4, Partida 5 [of *las Siete Partidas*], one was entirely free to make any and every donation, regardless of value, with or without a writing, [of the following kinds:] . . . donations by or in favor of the State, dowries and donations *propter nuncias* [on account of marriage], those made to a church or [other] pious establishment, those whose object was the ransom of captives or the repair of some collapsed temple or house. Outside of these, any donation that exceeded 500 *maravedis* of gold . . . had to be made “[i] with a writing and [ii] with the knowledge of the major judge of the place at which the donation is made.” This [latter requirement] was the “insinuation,” which consisted . . . of “the presentation to the judge of the instrument . . . that evidenced the donation so that it could be approved by the intervention of his authority or a judicial decree.” That the *Partidas* required a “writing” for these donations [the former requirement] cannot be doubted. But it is not so clear whether this word alluded only to written form [in which case, any writing, even an act under private signature, would do] or specifically to a public document [authentic act].

4-2 Henri & Léon Mazeaud *et al.*, *Leçons de Droit Civil: Successions - Libéralités* n° 1451, at 642

(Laurent Leveneur & Sabine Mazeaud-Leveneur revs., 5th ed. 1999)

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*It would seem, then, that the authors of *las Siete Partidas* did little more than to restate the legislation of Justinian.*
...[I]n our ancient law up until the 17th century, donations were not submitted to any particular form. Beginning in the 17th century, the Parlements, out of disfavor for donations inter vivos and for the purpose of assuring their irrevocability (which, it was believed, was of such a nature as to discourage disposing parties [from making such donations]), required the writing of an authentic act en minute.43 [Chancellor] D’Aguesseau codified this jurisprudence in his Ordinance on Donations of 1731, which, for the most part, was copied verbatim by the redactors of the Code Civil.44

Robert Pothier, Traité des Donations Entre-Vifs sec. 2, art. 4, in 7 Œuvres de Pothier 474-75 (Dupin éd., nouv. éd. 1825)

43 According to our own Professor McAuley, himself a former notaire, the phrase “authentic act en minute” is a short-hand reference to a specific kind of notarial procedure, the salient features of which are as follows: (i) the notary prepares but a single original of the act (multiple originals are not allowed); (ii) once the act has been signed, the notary himself retains and archives this original in a vault for safekeeping; and (iii) the notary makes a “minute entry” of the act (in the case of donation inter vivos, a bare-bones summary stating only the names of the parties and the nature of the act) on the répertoire (register or directory) that he keeps of all acts passed before him.

44 The perceptive reader will note that this account of the history of “form requirements” in French law includes no reference to the Roman law institution of “insinuation.” That is not because the French never had it; to the contrary, they certainly had it at one time, albeit in modified form, and arguably still do, albeit in a barely recognizable form (in both ancient and modern French law, “insinuation” meant and still means simply “recording of an instrument in the public records,” so that no judge even takes a look at the donation, much less passes on its authenticity). The reason for the omission, rather, is that the authors of the text, like most other French legal scholars during the last 250 years, do not think of “insinuation” as a “form requirement.” And why not? By “form requirements,” they mean those requirements pertaining to documentation of donations that must be satisfied if the donation is to be valid as between the parties themselves (and their successors). Now, the “authentic act” requirement is a “form requirement” in this sense, for, without such an act, the donation is invalid (provided the donatum is immovable or incorporeal) as between the parties themselves (and their successors). But the “insinuation” requirement is not a “form requirement” in this sense, for a donation that is otherwise valid as between the parties (and their successors) is still so even if there’s no insinuation. For what, then, is insinuation necessary? To make the donation effective as against third persons (if, that is, the donatum is immovable: since 1804, donations of movables, be they corporeal or incorporeal, haven’t had to be insinuated at all). That kind of requirement the French (rightly) think of as a “publicity requirement” or, to use Louisiana’s terminology, a “public records doctrine” requirement. And, to the French way of thinking, this requirement, unlike the form requirements properly so called (e.g., the authentic act requirement), has nothing to do with protecting the donor or his family from ill-considered gratuities, but rather is designed solely to protect third persons who, but for this publicity requirement, might find themselves “surprised” by secret donations.

For a detailed account of the evolution of the institution of insinuation from its Roman origins into its modern French form, see 3 Charles Demolombe, Traité des Donations Entre-Vifs et des Testaments n° 230-243, at 198-213, in 20 Cours de Code Napoléon (1876). See also Robert Pothier, Traité des Donations Entre-Vifs sec. 2, art. 3, in 7 Œuvres de Pothier 459-74 (Dupin éd., nouv. éd. 1825) (explaining in detail the law of insinuation under the French ancien régime).
In Pothier’s view, clearly enough, the rationale behind the form requirements for donations *inter vivos* is linked to the principle that such donations must be truly “irrevocable,” to be precise, these requirements, in his judgment, serve as a guaranty that that principle will be respected. But this justification for the requirements, far from providing a completely satisfactory explanation for their existence, merely invites another question, namely, “Why is irrevocability so important?” Though Pothier doesn’t answer that question here, he does answer it elsewhere:

> The reason why our law requires . . . the necessity of . . . irrevocability for the validity of donations is readily understandable. The spirit of our French law is inclined toward this: that goods remain within families and pass to the heirs. The dispositions of this law regarding separate property, as well as those regarding the customary reserve [forced portion], make this inclination well known.

> In this view, . . . our laws have judged it appropriate, while preserving for individuals the right [to dispose of their property as they wish], nevertheless to impose a restraint that makes the exercise of this right more difficult for them. It is for that reason that these laws have ordered that one cannot validly donate [a thing] unless he relinquish control of the thing given as of the very moment of the donation and unless he forever deprive himself of the power of disposing of it. The objective [of this restraint] is that the natural attachment that one has for that which one possesses and the aversion that one has for depriving oneself of things will deter individuals from giving.

Thus, the rationale for the form requirements, as Pothier understands it, seems to be this. The form requirements are needed to insure that donations *inter vivos* are in fact irrevocable. Irrevocability, in turn, is needed to protect the legitimate expectation of the donor’s family to share in his wealth upon his death. Irrevocability does that by deterring the donor from giving away his wealth in the first place. How so? By making the donor himself, right now and up front, “feel the same pain” that his giving away his wealth will inflict on his family at the time of his death, namely, the pain of losing that wealth and not being able to get it back.
would resort to a writing only so as to prove the existence of the contract more easily. Justinian retained this reasonable simplicity of principles, as much in the form of donations _inter vivos_ as in that of other contracts. Donations could be made . . . verbally and _a fortiori_ by private writings.

170. Neither the ancient ordinances nor the _coutumes_ of France governed the form of donations by means of any particular dispositions. Nevertheless, inasmuch as private acts could serve to elude the dispositions of those _coutumes_ under which the power of giving by testament was less extended than was the power to donate _inter vivos_, the validity of donations made under private signature came to be questioned. The opinions of the [French] jurisconsults were divided on this question.

The Ordinance of 1731 caused these doubts to cease by providing . . . that all acts purporting to be donations _inter vivos_ will be passed before a notary and that the act will be kept [by him] _en minute_, under pain of nullity.”

171. The Code [Civil] suppressed the difference established by the _coutumes_ between the power to give by testament and the power to give _inter vivos_. As a result, the rationale that had led to the introduction, for donations, of the requirement of a notarial act _en minute_ existed. Even so, the Ordinance of 1731 was copied verbatim into article 931, which provides: “Every act purporting to be a donation _inter vivos_ will be passed before a notary in the ordinary form for contracts; and the act will be kept [by him] _en minute_, under pain of nullity.”

The form of donations _inter vivos_ is, then, the same as that of all notarial contracts . . . . But the other contracts can be made under private signature, whereas donations must be passed before the notary.

187. Two different things must be considered here: the acceptance in itself and the solemnity [form] for the acceptance. One pertains to the substance of the contract; the other is only a formality of the civil law.

The acceptance is nothing other than the consent given by the donee to the offer of the donor. It is of the essence of a contract, which requires the consent of the two parties – the concourse of two wills. It is only at the moment of acceptance that the two wills are united; thus, it is the acceptance that renders the agreement complete.

The solemnity for the acceptance is the express mention that must be made of it [the acceptance] in positive terms and under penalty of nullity either in the act of donation itself or in a separate act that is both authentic and passed before a notary [and two witnesses]. Contracts other than donations are valid even though the acceptance is not referred to in express terms – even though it is manifested [i] only by the presence of the parties and is [therefore] only tacit or [ii] only by their signature.

The Roman law, which on this point was conformed to the simplicity of the natural law, made no distinction in this regard between donations and other contracts. But in customary French law, in which donations were viewed with an unfavorable eye, it was questioned whether a tacit acceptance was sufficient, and there were, in earlier times, a variety of doctrinal and jurisprudential opinions on this point. The Ordinance of 1731 adopted the opinion of those who contended that the acceptance had to be express and that it was impermissible to take into account the circumstances from which one might pretend to infer a tacit or presumed acceptance, even when the donee was present at the making of the act of donation, even when he signed it, or even when he was put into possession of the things given! The reasons for this exception to the general rules [i.e., that no particular form is required for the acceptance of a contract] can only be found in the
marked aversion of the coutumes to donations. The Code Civil . . . has not re-established the . . . simplicity of principles with respect to the acceptance of donations. It has adhered, at least in part, to the dispositions of the Ordinance of 1731 . . . .


8. Every act purporting to be a donation *inter vivos* must be passed before a notary. – *Rationale.* – Article 931 [CN] is thusly conceived: “Every act purporting to be a donation *inter vivos* will be passed before a notary in the ordinary form for contracts; and the act will be kept [by him] *en minute*, under pain of nullity.”

That the necessity of passing an act before a notary has been seen as an essential guaranty of the certitude and independence of the will of the donor is incontestable. It is necessary to recognize, however, that this was not the principal rationale that directed the legislators of 1804. What they wanted, above all, was to attain the end ([inspired] by the example of the old law) that formed the predominant object of their preoccupation [in the domain of donations *inter vivos*], namely, to promote effectively the principle of the irrevocability of donations *inter vivos*. “The principal motive for this legislation,” Damours says of the Ordinance of 1731, was the irrevocability of donations.” And Pothier wrote, in the same vein, that “the Ordinance has this precaution in it in order to prevent the donor from being able to conserve the power to annihilate his donation, be it by retaining the act of donation with him or by putting it into the hands of a third person who would return it to the donor were he to ask for it back; that would be contrary to the irrevocability required in donations *inter vivos*.”

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46 At this point, Demolombe inserts a cross-reference to another part of his treatise on donations, namely, volume 1, n° 3-5. To understand what Demolombe means here, one must first read at least part of the cross-referenced material. Here it is:

3. First of all, it was necessary, we say, that the legislators intervene [i.e., adopt laws regulating donations] in the interest of the disposing party himself . . . .

5. . . .

Dispositions by gratuitous title, by virtue of the very fact that they deprive us of property without compensation and without equivalent, offer dangers of a special nature, against which it is important to protect, first of all, the disposing party himself.

These dangers, which exist in donations *inter vivos*, are still more to be feared in testaments, where the disposing party is neither warned nor protected by his own interest, since the act imposes on him no immediate sacrifice and which, in any event, can be made as he approaches death, when his faltering will can no longer resist the obsessions of all sorts with which it so often then besieged.

Here is the source of the entire order of rules that have been introduced in the interest of the disposing party, to the end of guaranteeing that the disposition is indeed the word of a healthy and free will . . . . Such are the rules on solemn formalities for donations *inter vivos* and testaments as well as the rules on capacity to dispose and to receive.
I find this criticism itself to be “illogical,” at least if its point is supposed to be that the solemnity requirement should be eliminated. All that the criticism establishes is that there is an inconsistency in the law. Now, this normative inconsistency, like every other normative inconsistency, might, as a logical matter, be resolved in either of two ways, namely, by eliminating one of the norms or the other and then subjecting the cases that were formerly covered by the eliminated norm to the norm that has been retained. Here, the two possibilities are (i) eliminate the form requirement for donations or (ii) subject other “dangerous” contracts to the form requirement (or, perhaps, to some functionally equivalent alternative). As between these alternatives, however, the criticism itself does not and, as a logical matter, cannot help us choose.

By the way, it seems to me that, since Planiol’s treatise was last revised (1957), Louisiana (as well as France) has, to a great extent, opted for the latter alternative. To be sure, Louisiana has not gone whole hog and required that onerous contracts be made in authentic form. But it has subjected a host of onerous contracts, in particular, those that are considered to be the most dangerous, to a variety of rules the point of which is the same as that of the form requirement for donations, namely, to give the contracting parties time to reflect and, if they so choose, to back out of the contract. I have in mind (i) the legislation that permits

Value of the principle of solemnity. – . . .

The solemnity of the donation has been justified by three ideas, which can be traced to the law of the ancien régime:

(i) The solemnity assures the liberty of the donor. The donor is often won over more or less effectively by the beneficiary; he who deprives himself for the benefit of another acts under a foreign influence that dominates his will. The presence of the notary is of such a nature as to repel or to diminish these influence and, at the very least, gives time for reflection.

(ii) The solemnity is attached to the idea of the conservation of goods within the family, which was so important in the old law. By imposing a solemn form, the law wished to draw the attention of the donor to the interest of his family and, in addition, to provide indisputable proof of the existence and the amount of the donations for the calculation of the reserve [forced portion] and the disposable portion.

(iii) The principle of the irrevocability of donations was recognized as early as the 16th century; to prevent any recovery of the effectuated donation, the law required the en minute notarial form. As a matter of history, this is perhaps indeed the principal reason for the solemnity. With an act under private signature, the donor would have had the de facto means of annihilating the liberality – by suppressing the title. . .

All these justifications are insufficient. Leaving aside the idea of irrevocability, which will be evaluated later, the solemnity is illogical and ineffective. [i] It is illogical in the sense that there are well other means of ruining oneself and of ruining one’s family, all of which are just as dangerous as the donation. Numerous people who would never consent to an unreflected donation allow themselves to be tricked into onerous contracts by adept swindlers. [ii] But the solemnity is above all ineffective. In order to work

5 Marcel Planiol & Georges Ripert, Traité Pratique de Droit Civil: Donations et Testaments nº 342, at 461-62 (André Trasbot & Yvon Loussouarn revs., 2d éd. 1957)
PART I: DONATIONS

usefully, it would have to cover all donations without exception. Now, that is radically impossible in an epoch where fortunes are created without difficulty and where one knows money, bearer paper, and checks.\(^{48}\) A manifestation of an outdated defiance toward liberalities, the solemnity is, in the end, a costly luxury that is used [only?] by vigilant and scrupulous persons for whom, by definition, such protection is particularly superfluous.

4-2 Henri & Léon Mazeaud et al.,

*LEÇONS DE DROIT CIVIL: SUCCESSIONS - LIBÉRALITÉS* n° 1451-1452, at 642-43

(Laurent Leveneur & Sabine Mazeaud-Leveneur revs., 5th ed. 1999)

1451. History. — . . .

Currently the principle of solemnity [in donations *inter vivos*] is criticized, for it is thought that the formalities do not fulfill the end for which they were instituted. In addition, insofar as it is impossible to stop donations without form, which are accomplished in large numbers by hand-to-hand transfers, it is thought that the rule has no effect but to incite the parties, for fear of the sanctions, to leave no trace of their

consumers who purchase goods in response to in-home or over-the-phone solicitations to cancel their contracts within three days of making them, see La. Rev. Stat. 9:2711, 2711.1, & 3538 & La. Rev. Stat. 45:831(E); and (ii) the legislation that permits borrowers who apply for “consumer” or “federally related mortgage” loans to cancel their applications within five days of submitting them, see La. Rev. Stat. 9:3572.10. Thanks to this legislation, the “inconsistency” that had Planiol so ginned up has been significantly reduced, if not eliminated entirely.

\(^{48}\) Really? Why? As you will see below, Louisiana (unlike France) presently subjects gifts of some of the things Planiol mentions – the gratuitous *issuance* of negotiable instruments (e.g., promissory notes and checks) and the gratuitous *issuance* as well as the gratuitous *transfer* of non-negotiable instruments – to the form requirements for donations *inter vivos*. Not only that, but numerous Latin American jurisdictions (again, unlike France) do the same even for *gifts of cash* (above certain amounts)! See, e.g., *Côd. Civ. Braz.* art. 1168 (“A donation is made by public writing or particular instrument. A verbal donation will be valid if it concerns goods that are movable and of small value and if it is followed immediately by delivery.”); *Côd. Civ. Costa Rica* arts. 1397-1398 (“A verbal donation is permitted only when there has been a delivery and when it concerns movables goods whose value does not surpass two hundred colons.”); *Côd. Civ. Mex.* art. 2343 (“A verbal donation will produce effects only when the value of the movables does not surpass two hundred pesos.”); *Côd. Civ. Peru* arts. 1474 (“[¶1.] A donation of a movable thing can be made verbally when it concerns objects of small value, but requires the simultaneous delivery of the thing given. [¶2.] A donation of movable things that is not covered by the previous paragraph will always be made in writing, under pain of nullity, identifying and stating the value of things of which it consists.”); *Côd. Civ. Venez.* art. 1439 (“To be valid a donation must be made in authentic form and its acceptance must be made in the same manner . . . . When the donation is of a movable thing whose value does not exceed 2000 bolivars, no writing of any kind is necessary.”); see also *Côd. Civ. Chil.* art. 1401 (“A donation *inter vivos* that is not insinuated will have effect only up to the value of two centavos and will be null in the excess. By ‘insinuation’ is understood the authorization of the competent judge solicited by the donor or the donee.”); *Côd. Civ. Colombr.* art. 1458 (the same). I submit that that which is, in fact, being done is, by definition, not “radically impossible.”
These criticisms, however, have not convinced the Commission for the Reform of the Code Civil, which has proposed to maintain (while nonetheless relaxing) the principle of solemnity. The majority of foreign legal systems likewise make the donation a solemn contract, notably, Italian law (C.Civ. art. 782 (1942)), Spanish law (C.Civ. Español. 633), and Greek law (C.Civ. Hellinique). Swiss law makes the publicity of donations of immovable rights a condition for the validity of the contract (C. Suisse des Obligations art. 242, ¶ 2). German law submits the promise of donation, but not the donation itself, to the writing of a notarial act (B.G.B. art. 518).

1452. The purpose of the formalities. – The formalities have been instituted for the protection of the family and of the disposing party. The counsel that the notary must give will lead the disposing party to reflect and will discourage or foil maneuvers of captation [undue influence]. Moreover, the sole fact that one must avow one’s intention before a notary is of such a nature as to cause a person who would consent to a liberality if it would remain secret to reverse himself.

In addition, a donation that would be valid without any form could remain unknown or form the object of great difficulties of proof, be it when revocation for ingratitude . . . is demanded or when the heirs require collation or reduction. The writing of an en minute act by a notary assures the excellent conservation of proof.

Finally, the writing of an authentic act guaranties the irrevocability of donations. In this the legislature has believed it sees a rule that is protective of the family.

NOTE

When Louisiana first codified its law of form requirements for donations inter vivos (back in 1808), it seems to have all but ignored the Romano-Spanish tradition and to have followed, instead, the French tradition, though with some interesting deviations.

Louisiana required insinuation, but only in its aberrant and watered-down French form. Thus, the only requirement was that the act of donation be recorded in the public records (the parties did not have to appear before a judge), the requirement applied only to donations of immovables (movables, whether corporeal or incorporeal, were exempt), and the only “sanction” for failure to meet the requirement was that the donation was to have no effect against third persons (as between the parties and their successors, insinuation was not a prerequisite to validity).

As for the form of the donative instrument itself, Louisiana, like France, required that the instrument be passed before and signed by a notary (as well as signed by the parties themselves). Beyond that point, however, the Louisiana redactors broke with their French counterparts. Oversimplifying somewhat, one could say that the former required at once both more and less than the latter. The Louisianans required less in this sense: the special “en minute” procedure used by French notaires was not required, that is, the notary who passed the act was not required to keep and archive the original or, for that matter,

\[49 \text{ See supra note 44, p. 186, for a description of “insinuation” French style.} \]
to keep any record of the act at all. The Louisianaans required more in this sense: the instrument had to be passed before and signed by not only a notary (which was all that French law required), but also two witnesses.

With only a few exceptions (all of which will be noted below), Louisiana’s law regarding the form of donations inter vivos remains today as it was in 1808.

Deborah F. Zehner, Comment, Louisiana’s Approach to Gratuitous Inter Vivos Dispositions, 22 LOY. L. REV. 743, 747-48 (1976)

The courts have demanded stringent compliance with the form prescribed in the Civil Code for donations inter vivos. Policy considerations form the basis for such a strict construction. Since by its very nature a donation effects a transfer of property to another without any consideration flowing to the donor, strict requirements of form serve to protect the donor from any coercive influence to which he might be subjected in disposing of his property. By requiring donations inter vivos to be by authentic act, transfers become a matter of public record, openly entered into, with the risk of undue influence minimized. Or perhaps of utmost importance, the solemnity of an authentic act helps to impress upon the donor the gravity of depleting his patrimony during his lifetime, just as requiring a witness to take a solemn oath at trial calls his attention to the seriousness of his testimony. All of these policies are present and operations under the articles dealing with the form of donations inter vivos in the Louisiana Civil Code.

Succession of Miller, 405 So.2d 812, 819, 821-22
(on rehearing) (La. 1981)

50 Why the redactors of the Digest of 1808 chose not to impose this requirement probably had something to do with the (dismal) state of notarial practice here in the early 19th Century. Prior to 1882, Louisiana notaries, even those in the big cities, were not required to maintain archives of the acts that had been passed before them. In that year, the Louisiana legislature imposed such a requirement for the first time ever, but limited its scope to Orleans Parish. See 1882 La. Acts No. 50. Thus, even after that time, notaries outside that parish were under no “archiving” obligation. See Atty. Gen. A.V. Coco, Notaries Public in Country Parishes not Required to Keep Public Records of Acts Executed Before Them, 1916-1918 La. Atty. Gen. Ops. 709 (Oct. 6, 1917). And – here’s the kicker – that’s how things have remained to this day!

51 Why the redactors of the Digest of 1808 chose to impose this requirement is not entirely clear. It is not unreasonable to assume, however, that they viewed the requirement as a substitute of sorts for the notarial “en minute” procedure, that is, as a measure that would (i) encourage the donor to reflect up on his decision, (ii) assure that the donation would, in fact, be “irrevocable,” and (iii) provide proof of the existence of the donation.
DIXON, C.J., dissenting.

... In this state provisions for manual gifts were first codified in Article 1526 of the Civil Code of 1825. The Code Napoleon did not provide for manual gifts, and made no distinctions between corporeals and incorporeals or movables and immovables in regard to donations inter vivos. Instead, the Code provided that any instrument containing or importing ("portant") an inter vivos donation should be executed before a notary, in the form usual for contracts; the original instrument was to be kept on file by the notary. C.N. 931. . . .

The primary purpose of requiring the notarial act was to insure the irrevocability of the donation; since the notary was required to retain the original copy of the act in his files, the donor was powerless to revoke the donation by destroying the instrument, as could be done in the case of an act under private signature. A secondary purpose of the requirement was thought to be to diminish any external influences that may have affected the donor. 3 M. Planiol, supra, s 2526, p. 233. Much the same purpose was achieved in the case of donations of movable things: a descriptive list of the effects was required to be annexed to the act of donation. C.N. 948. Compare C.C. 1538. This article contemplates the situation in which a donor makes a gift of a movable, yet nevertheless retains possession of it. Since the donor retains possession, it would be possible to transfer or destroy the objects of the gift. To prevent this, and to assure the irrevocability of the donation, the descriptive list served as a title to the movable effects. 3 M. Planiol, supra, ss 2556-61, pp. 253-55.

Article 1526 of the Code of 1825, the predecessor of Article 1539, had no counterpart in the Digest of 1808 or in the Code Napoleon. The Louisiana articles, appearing to allow manual donation only of corporeal movables, worked a refinement upon traditional French law, in which no notarial act was required for any donation that was actually effected by the real delivery of the object donated. Corporeal movables, of course, were typically the object of such gifts, since the transfer of possession conferred ownership. Aubry & Rau, Droit Civil Francais s 659, pp. 109-111 (L.S.L.I. trans. 1969).

... The Louisiana Civil Code made significant departures from the Code Napoleon, and it is not altogether clear why those changes were made. C.C. 1536, requiring a notarial act for donations inter vivos, applies to immovables and to incorporeal things such as rents, credits and rights or actions, none of which can be physically transferred from one person to another. The purpose of requiring a notarial act to effect donations of incorporeals and immovables would thus seem to be entirely evidentiary: the document manifests the delivery of things which cannot be seen or touched and things which, by definition, cannot easily be moved. The notarial act accomplishes a delivery of ownership. If, as has been suggested, the effort of preparing a notarial act is imposed to impress upon the donor the seriousness of the act of donation, it is impossible to explain why this same cautionary device is not imposed when donations of money are made, which could easily exceed the value of an incorporeal thing. Just as a tract of land cannot be physically transferred from one person to another, an incorporeal thing eludes delivery. Corporeal movables, however, are susceptible to physical transfer. Cf. C.C. 2247. It is for this reason alone that corporeal movable effects are exempted from the rule of C.C. 1536.
NOTE

In some modern codes there is no requirement that the donee’s acceptance of the donation, as opposed to the donor’s offer (or promise) of the donation, be in any particular form. Examples include the BURGERLICHES GESETZBUCH (German Civil Code) (see §518, which requires that the promise of donation be in notarial form but says nothing about the acceptance of that promise or of the eventual donation) and the CODE CIVIL SUISSE (Swiss Civil Code) (see arts. 242 & 243, which require that the promise to donate an immovable be made by authentic act and be filed for public registry but say nothing about the acceptance of that promise or the eventual donation).

1) The requirements

a) Act of (offer of) donation

1) General rule: by authentic act (CC art. 1536)

a) Explication

b) Scope: all donations IV of all things no matter what category

1} All donations IV

a} Donations that appear to be donations

b} Donations disguised as sales

* Illustration

DH 72. F wants to give his nephew, N, a tract of land, but doesn't want anyone else, especially not his son, S, to realize that it's a donation. And so F draws up a document, entitled "Act of Sale," in which he purports to "sell" N the tract of land for $50,000. N, too, signs the document. Of course, no such money ever changes hands. Sometime later, S discovers that the "sale" to N was really a sham. And then F dies. S now sues N to recover the tract of land on the theory that (i) the deal was really a donation and (ii) the donation was null for it was not in proper form. What result? Why? See CC art. 2027, sent. 2, & comments (b) & (d), and the jurisprudence that follows:

Lambert v. Penn Mutual Life Ins. Co.,
24 So. 16 (La. 1898)

Syllabus by the Court

3. A donation made in the form of an onerous contract (without consideration, and really intended as a donation in disguise), to have effect as such must be passed before a notary public and two witnesses.

BLANCHARD, J.

... Nor can we assent to the proposition that the assignment of the [rights] ... by Mrs. Lambert to her husband is valid as a donation, as contended for it on the authority of Rev. Civ. Code, art. 1746. It is quite true that under that article one of the spouses may during marriage give to the other whatever he or she might give to a stranger. But this must be done pursuant to the directions of the law relative to donations. Id. art. 1536. The donation of incorporeal things, such as credits, rights, or actions, must be by public authentic act. This assignment was not such act. It is sought to overcome this difficulty, however, by the contention that the assignment is made in the form of a sale by private act, and, though not a sale, because without consideration, it is yet good, in this form of an onerous contract, as a donation, although not clothed with the formalities requisite for the validity of a donation. Several old decisions (Holmes v. Patterson, 5 Mart. [La.] 693; Trahan v. McMannus, 2 La. 215) are cited as sustaining this view. These cases were decided under Code 1808, page 220, whose article 53 provided that 'all acts containing donations must be passed before a notary and two witnesses,' etc. An essential difference, both in language and effect, will be noted between that article of the Code of 1808 and article 1523 of the Code of 1825, now article 1536 of the Revised Code, in respect to the form of donations. The donation in Trahan v. McMannus, 2 La. 215, was upheld because it did not profess on its face to be a donation, though it was in reality one in the guise of an onerous contract under private signature. As it was not an act by its terms containing a donation, it was held not to contravene the provisions of article 53 of the then Code. But this article was changed in the Code of 1825 so as to make the law declare that 'an act shall be passed before a notary and two witnesses of every donation,' etc. The 2 La. case, therefore, is not an authority under the altered conditions. This was pointed out in Brittain v. Richardson, 3 Reb. (La.) 81, where it was declared that all donations inter vivos must be passed before a notary and two witnesses. See, also, Rhodes v. Rhodes, 10 La. 90; Cole's Heirs v. Cole's Ex'rs, 7 Mrat. (N. S. 424; Miller v. Andrus, 1 La. Ann. 237; Soileau v. Rougeau, 2 La. Ann. 766; Atkinson v. Atkinson, 15 La. Ann. 491; Farrar v. Michoud, 22 La. Ann. 358. The conclusion we announce on this subject is that a donation made in the form of an onerous contract,--that is to say, an onerous contract which is not such because without consideration, and really intended as a donation in disguise,--to have effect as a donation, must be passed before a notary public and two witnesses. . . .
PART I: DONATIONS

a) Immovables (CC art. 1536)

b) Incorporeals (CC art. 1536)

c) Corporeal movables (?) (CC art. 1538)

c] Explication

What, exactly, is required? See CC art. 1536. Can defects in form later be “cured”? If so, how? See CC art. 1845.

2] Exceptions

a] Manual gift

1} Explication


a} By donor himself to donee himself

b} By donor through representative to donee himself

DH 73. P hands $100 to his mandatary, M, with instructions that M hand it over to X. M does so. Has there been a manual delivery? Why or why not?

DH 74. The same as before (DH 73), except that, this time, P, instead of handing M $100, tells M to withdraw $100 from P's checking account and then hand it to X. Different result now? Why or why not?

DH 75. The same as before (DH 74), except that, this time, P, appoints X, the donee, as his mandatary for purposes of delivery and directs X to withdraw $100 from his checking account and then keep it (in other words, give it to himself). Different result now? Why or why not? See the jurisprudence that follows:

Succession of Gorman,
26 So.2d 150 (La. 1946)
ROGERS, Justice.

Mrs. Georgina Jepson Gorman died at her domicile in the City of New Orleans on September 1, 1942. . . . The items inventoried [by the executor of her testament] was . . . a claim against Mrs. Margaret Muller for $2,643.92. The claim against Mrs. Muller was for money which, acting under a power of attorney, she drew out of a savings account in the name of Mrs. Gorman prior to her death.

The record shows that the defendant, Mrs. Margaret Muller, and the decedent, Mrs. Georgina Gorman, were half sisters, the children of the same mother. On July 22, 1942, Mrs. Gorman was ill and confined to the Mercy Hospital in the City of New Orleans. At that time she had on deposit in a savings account in the Whitney National Bank the sum of $2,643.92 . . . . She executed a power of attorney on the form provided by the bank authorizing Mrs. Margaret Muller to withdraw her money from the bank.

On July 22, 1942, the day the power of attorney was executed, Mrs. Muller withdrew $200; on August 6, 1942, she withdrew $2,000, and on August 28, 1942, she exhausted the account by withdrawing the balance. The death of Mrs. Gorman occurred four days later.

The tradition or delivery of movable effects takes place if the party to whom it is intended they should be transferred or delivered has them already in his possession. Civ. Code, art. 2478. If the funds involved in this case had been in the actual possession of Mrs. Muller at the time her sister, Mrs. Gorman, expressed the desire to make the donation there would have been no necessity in order to perfect the manual gift to go through the ceremony of having Mrs. Muller turn the money over to Mrs. Gorman in order that Mrs. Gorman might immediately return the money to Mrs. Muller. The parties adopted the most expedient way of making and accepting the donation. It was not ineffective on that account. It would have been an idle ceremony for Mrs. Muller after withdrawing the money from the bank to hand it to Mrs. Gorman, the donor, so that Mrs. Gorman in turn might give it to Mrs. Muller, the donee. The law takes no account of useless formalities. In order to complete the manual gift it suffices that the will of the donor to give and the actual possession of the movable property by the donee operate simultaneously. In this case, the desire of Mrs. Gorman to make the gift was in full operation at the moment Mrs. Muller actually received the money from the bank. Succession of Zacharie, 119 La. 150, 43 So. 988. Gibson v. Hearn, 164 La. 65, 113 So. 766.

The mere circumstance that a person authorizes another to withdraw his funds from a bank under a power of attorney does not of itself constitute a donation of the funds, but if the evidence satisfactorily shows that the power of attorney was executed as one of the means of establishing a donation of the funds and the volition of the donor to make the gift is still in operation at the moment the donee actually receives the money from the bank, there would seem to be no good reason for holding the donation to be invalid.

Considering the testimony offered to establish the manual gift by Mrs. Gorman to her sister, Mrs. Muller, and the close personal relations existing between them, the transaction whereby Mrs. Muller came into possession of the jewelry and the money from Mrs. Gorman can be considered in no other light than as a donation.
DH 76. D hands $100 to M, X's general purpose mandatary, with instructions that M turn it over to X. Has there been a manual delivery? Why or why not?

DH 77. D deposits $100 into a savings account that belongs to X and has been set up in the name of X. Has there been a manual delivery? Why or why not?

DH 78. D gives T, the tutor of X, $100, with instructions that the money is to be deposited in the account that T maintains for X's benefit. This account, though in T's name, indicates that T holds the accounts "as tutor for X." Has there been a manual delivery to X? Why or why not? See the jurisprudence that follows:

Allen v. Allen,
301 So. 2d 417 (La. App. 2d Cir. 1974)

HALL, J.

The issue presented by this appeal is whether two savings accounts in a savings and loan association in California are assets of the community of acquits and gains formerly existing between Jack H. Allen and Joyce Reynolds Allen, now divorced, or whether the accounts are owned by their children through donations to the children made over a period of years. . . .

In 1963, Mr. and Mrs. Allen had a savings account in First Federal Savings & Loan Association in Monroe with a balance of over $700. They were advised of the tax advantages of putting savings in the children's names and reporting the income therefrom separately. The account at First Federal was closed out and a check issued to Mr. and Mrs. Allen for the balance, which was deposited in their checking account in a Monroe bank. A few days thereafter, two accounts were opened in the State Mutual Savings & Loan Association in California in the names "Mr. or Mrs. Jack H. Allen as guardian of the estate of Jacqueline Melinda Allen" and "Mr. or Mrs. Jack H. Allen as guardian of the estate of Robin Leslie Allen" and funds were deposited therein by Mr. and Mrs. Allen. Either Mr. or Mrs. Allen had the authority to make withdrawals.

Through the years thereafter, additional funds were deposited in the accounts by Mr. and Mrs. Allen . . . .

In about 1968, the names of the accounts were changed to Mrs. Joyce R. Allen, custodian for Jacqueline Melinda Allen and Robin Leslie Allen under the Louisiana Uniform Gifts to Minors Act. Only Mrs. Allen had authority to make withdrawals from the accounts. Separate income tax returns were filed in the children's names for 1969, showing interest income from each account of over $700 . . . .

Although the accounts were carried in the names of both parents as guardians and then in the name of Mrs. Allen as custodian, the provisions of the Louisiana Gifts to
Minors Act, LSA-R.S. 9:735-742, were never complied with in that no deed of gift was ever signed.

The district court held the accounts are owned by the children and are not assets of the former community, the funds having been donated to the children by manual gift pursuant to Civil Code Art. 1539. Appellant contends there was no effective donation because the funds were not irrevocably vested in the donees as required by Civil Code Art. 1468 since the parents retained control and the right to withdraw the funds. Appellant further contends the accounts are incorporeal rights which cannot be the subject of a manual gift but require authentic acts under Civil Code Arts. 1536 and 1538 . . . .

Pertinent to the issue presented are the following articles of the Civil Code:

"Art. 1546. A donation made to a minor, not emancipated, must be accepted by his tutor.

"Nevertheless, either parent of the minor, or any ascendant of the minor, whether the minor is emancipated or not, or the tutor of the minor, may accept the donation for the minor whether such parent or ascendant is the donor, or the tutor of the minor or both. And a donation to be held in trust for the minor may be accepted by the trustee alone."

In Gibson, the court held that a deposit by the donor into a bank account in the name of an agent for a minor donee was a donation of money, accompanied by a real delivery, and constituted a donation by manual gift. Money is a corporeal movable, and may be donated by manual gift . . . .

In the instant case, as in Gibson, the gifts were of money, accompanied by real delivery through deposit of the money in savings accounts in the name of a fiduciary for the minors.

The donors' intent to make irrevocable donations of the funds deposited into the accounts is manifest from the evidence. Appellant's own testimony was that this was done for tax purposes, which necessarily presupposes an irrevocable gift to lawfully receive the tax advantage of separate income. The accounts were continuously carried in the names of fiduciaries for the named minors. The permanent and irrevocable nature of the donations is further demonstrated by the fact that no funds were ever withdrawn in the more than ten years since the initial donations were made.

The only factor weighing against the irrevocability of the donations is that both parents at first and then one parent had the right to make withdrawals and to that extent retained control of the funds. However, the donees are minors and someone had to act for them -- logically, the parents. The cases cited by appellant deserve careful consideration. In Succession of Grubbs, a husband deposited $10,000 in a savings account in the name of his wife. Withdrawals could be made by either the husband or wife. This court held there was not an effective donation because the husband attempted to transfer a savings account, an incorporeal immovable, without complying with C.C.Art. 1468 and because he retained the power of withdrawal. Grubbs is distinguishable from the instant case for two reasons. First, under the authority of Gibson v. Hearne we hold the gifts here were of money, a corporeal movable, not gifts of the accounts into which the money was deposited. Secondly, here the donees were minors and necessarily the authority to withdraw needed to be vested in someone, which was not the situation in Grubbs.

In Basco, Louis Basco opened a savings account in the name of "Joseph Basco, by Louis Basco." Louis had the sole right to make withdrawals. The court held the account was an incorporeal movable and since there was no compliance with C.C. Art. 1536 there
was no valid donation to Joseph Basco. This case is distinguished from the instant case for the same reasons as stated above in connection with the *Grubbs* case.

In *Succession of Dykes, supra*, the accounts were opened by W. H. Dykes in the name of "W. H. Dykes or W. E. Dykes." The court held that conceding a donative intent, there was never a real delivery of the funds on deposit since W. H. Dykes remained the owner thereof and retained power of control and withdrawal until his death. In the instant case, the accounts were in the names of the donors only in a fiduciary capacity and their control was in the same capacity.

The accounts in question represent money donated to the children through manual gifts and are not assets of the community formerly existing between the divorced parents.

4) By donor through representative to representative of donee

DH 79. D appoints B as his mandatary, directing him (i) to sell a certain asset of D's and (ii) to hold the proceeds as mandatary for X. At the time, X knows nothing about it. But after B sells the asset and collects the proceeds, X "ratifies" B's acts. Has there been a manual delivery to X? Why or why not? See the jurisprudence that follows:

*Chachere v. Dumartrait*,

2 La. 38 (1830)

This is an injunction suit, instituted by the wife, against the syndic of the creditors of her insolvent husband, B. Martel to restrain him [the syndic] from selling the immovable property . . . of the insolvent [her husband], until her claim for property and money brought into[the] marriage is first satisfied by a sale for cash. . . .

It appears from the evidence that some time after the marriage of the petitioner to B. Martel, on or about the year 1816, her father Louis Chachere, allowed her husband to sell two tracts of land, situated on the Carancro and in the Parish of St. Landry, to one William Johnson, for $1,600 and to receive the price. The title to Johnson was ratified and confirmed by L. Chachere the father of Madame Martel. The wife alleges this land was a donation from her father to her, though sold by her husband. Madame Boutte her sister testifies that Louis Chachere (père) purchased the land since sold by Martel to Johnson, for his daughter, Madame Martel to live on. And that Martel and his wife did live on it a year or more. Mr. Boutte, a brother-in-law of the plaintiff, states it was always understood in the family that the land on the Carancro, "sold to Johnson," belonged to "Madame Martel." . . .

The wife now claimed in her petition of injunction, the price of the land . . ., and to have so much of the property in the hands of Dumartrait the syndic, sold for cash as will satisfy this claim . . .

MATHEWS J. delivered the opinion of the Court.

. . .
The $1600 . . . seem[s] to have been considered [by the trial court] as a donation made to her [Madame Martel] by her father [Louis], which fell into the hands of her husband, the insolvent, and was by him appropriated to his own use.

The donation appears to have been made in the following manner: Chachere the father, was the owner of certain tracts of land of which he permitted the husband of his daughter to take possession and occupy for some time, who afterwards sold this property to one Johnson for $1600, which was paid (on Chachere's ratification and confirmation of sale) to his son-in-law. From the whole tenor of the evidence we do not doubt the intention of the father to give these tracts of land to his daughter as a marriage portion: but before any legal transfer was made to that effect, her husband was permitted to make the sale as above stated.

The price, although paid to him by the vendee must be considered as really due to the owner of the property, Chachere the father; and was left in the possession of the receiver as a donation to his wife, he received it as her agent, delivered from her father through the agency of the vendee of the land, who was really a purchaser from Chachere, altho' nominally from Martel. The donation was thus fully and completely effected. It was as fully executed as if the money had been delivered from the father to his daughter and by the latter transferred to her husband. If it was of moveable or personal property and was executed, it is good according to law. See La. Code, Art. 1528.

e} By donor himself to both himself & donee

DH 80α. D opens an account in the name of D or X and then deposits $100 into the account. Not long thereafter, X withdraws the $100. Has there been a manual gift of money to X? Why or why not?

DH 80β. The same as before (DH 80α), except that X has not yet withdrawn the $100. Has there been a manual gift of money to X? Why or why not?

NOTE

The Louisiana Supreme Court once purported to sum up the requirements for the "manual gift" exception of CC art. 1539 this way:

[I]t is clear from this prior jurisprudence that there is no need for the donor to actually hand over the [donatum] to the donee. It is sufficient 'that the will of the donor to give and actual possession of the movable property by the donee [or his representative] operate simultaneously.

Succession of Miller, 405 So. 2d 812, 819 (La. 1981) (on rehearing). Based on the hypotheticals set forth above, do you agree or disagree with this generalization?

2} Scope: corporeal movables only
a} Definitions

1/ Corporeal movables

What’s a corporeal movable? See CC art. 471.

2/ Incorporeal movables

What’s an incorporeal movable? See CC art. 472.

3} Illustrations

DH 81. A gives B, her cousin, a $100 bill. There’s no “act of donation”; the bill is delivered by hand. Any form problem here? Why or why not? See Succession of Hale, 26 La.Ann. 195 (1874) (“We think the evidence establishes that the donation was made in money, in the form of the manual gift, and that a notarial act of transfer was not requisite to its validity.”)

b] Transfer of stock

NOTE

Under Louisiana’s investment securities law La. Rev. Stat. 10:8-101 et seq.), certain types of securities, including shares of stock, can be transferred merely by “indorsement and delivery.” What that means is spelled out in §§ 8-309 & 8-308 of the statute:

§ 8-309. Effect of indorsement without delivery

An indorsement of a certificated security, whether special or in blank, does not constitute a transfer until delivery of the certificated security on which it appears or, if the indorsement is on a separate document, until delivery of both the document and the certificated security.

§ 8-308. Indorsements; instructions

(1) An indorsement of a certificated security\textsuperscript{52} in registered form\textsuperscript{53} is made

\textsuperscript{52} “A ‘certificated security’ is a share, participation, or other interest in property of or an enterprise of the issuer or an obligation of the issuer which is (i) represented by an instrument issue in bearer or registered form; (ii) of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and (iii) either one of a class or series or by its terms divisible into a class or series of shares, participations, interest, or obligations.” La. Rev. 10:8-
when an appropriate person signs on it or on a separate document an assignment or transfer to the security or a power to assign or transfer it or his signature is written upon the back of the security.

DH 82. A gives B, her cousin, some shares of common stock issued by Microsoft, Inc. There’s no “act of donation”; the stock certificate is delivered by hand. Any form problem here? Why or why not?

c] Negotiation of negotiable instruments


“(e) Donations inter vivos of instruments shall be governed by the provisions of this Chapter notwithstanding any other provision of the Louisiana Civil Code or of any other law of this state, relative to the form of donations inter vivos, to the contrary.”

NOTE

Many students, upon reading the statutory provision quoted above, jump to the conclusion that any and every gift of any and every kind of commercial paper is exempt from the form requirements of CC arts. 1536 et seq. Would that these students looked before they leapt! The truth is that the scope of the rule announced in that provision is radically limited in at least two significant respects.

First, that rule applies only to transfers of an instrument that, at the moment of the transfer, is already “negotiable.” Says who? The statute itself. Note that the provision, by its own terms, purports to apply only to donations inter vivos “of instruments.” Now, the term “instrument,” as used in this provision, “means a negotiable instrument.” La. Rev. Stat. 10:3-104(b); see also id. 1990 UCC cmt. (1). Accord Cynthia Samuel, Katherine Spaht, & Cynthia Picou, SUCCESIONS & DONATIONS: CASES & READINGS 414 (Fall 2000) (“If an instrument is marked non-negotiable, then the provisions of this statute do not apply and the instrument is subject to the general rules for donation of an incorporeal movable.”)

Second, that rule applies only to post-issuance gifts of instruments or, to put it another way, only to gifts of already-issued instruments. Says who? Again, the statute

102(1)(a).

53 “A certificated security is in ‘registered form’ if (i) it specifies a person entitled to the security or to the rights it represents and (ii) its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security so states.” La. Rev. Stat. 10:8-102(d).
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Itself. The provision in question appears at the tail end of (and therefore is part of) § 3-203. Now, that section, as its title clearly indicates ("Transfer of instrument; rights acquired by transfer"), is concerned with "transfers" of instruments, properly so called. According to ¶ (a) of the section, "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving deliver the right to enforce the instrument." La. Rev. Stat. 10:3-203(a) (emphasis added). As 1990 UCC cmt. (1), ¶ 3 points out, that language "excludes issue of an instrument" from the scope of "transfer." 1

DH 83α. A gives B, her cousin, a number of negotiable "bearer bonds" that had been issued to her (A) by Cajun, Inc. There’s no "act of donation"; the bonds are delivered by hand. Any form problem here?

DH 83β. A gives B, her cousin, a check, drawn on A’s account at Bayou Bank, payable to the order of B. There’s no "act of donation": the check is delivered by hand. Any form problem here? Why or why not? See the jurisprudence that follows:

Succession of Schneider,
199 So.2d 564 (La. App. 3d Cir. 1967)

CULPEPPER, Judge.

The plaintiff, Laurence J. Habetz, filed this action against Reverend Leonard C. Habetz, testamentary executor of the Succession of Mrs. Gertrude Victoria Habetz Schneider, for judgment ordering the executor to pay plaintiff the sum of $35,000 out of the succession funds. Plaintiff alleges that, shortly before her death, Mrs. Schneider made a donation inter vivos to him of that amount by the manual gift of her check, which the bank refused to pay after her death. . . .

We, like the court below, have concluded that even assuming the facts to be substantially as asserted by plaintiff, the gift of the check did not, as a matter of law, constitute a valid manual gift of corporeal movable effects, within the meaning of LSA-C.C. Article 1539.

For purposes of our opinion, we will assume the following facts as proved: About 4 months before her death, Mrs. Schneider handed to her nephew, the plaintiff, a check for $35,000, stating that she wanted him to have this sum as a gift because he was not named as a legatee in her will. The check is dated March 13, 1965; the drawee is the First

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54 ""Issue" means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person." La. Rev. Stat. 10:3-105(a). Thus, if I draw up a promissory note that says "I owe you $100" and hand it to you or if I make out a check to your order and hand it to you, what I’ve done is to "issue" the note or check, not to "transfer" it. Of course, if you, then, in turn, gave that note or check to someone else, then that would be a "transfer," not an "issuance."
National Bank of Crowley; it is payable to the order of Laurence J. Habetz for the sum of $35,000; the word 'donation' is written in the lower left hand corner; and it is signed by Victoria Habetz Schneider, the decedent, as drawer.

No attempt was made by plaintiff to negotiate or present the check for payment or certification until after the death of Mrs. Schneider on July 16, 1965. About 10 days after her death, plaintiff endorsed the check 'For Deposit' and deposited it to his account in the Louisiana Bank & Trust Company, of Crowley. On August 11, 1965 the Louisiana Bank & Trust Company returned the check to plaintiff unpaid, with a notation that the drawer of the check was deceased. . . .

Plaintiff contends that the gift of the check was a valid donation inter vivos of the sum of $35,000 under the provisions of LSA-C.C. Article 1539 . . . .

Defendant contends that the mere issuance and delivery of donor's own check, prior to its acceptance by the drawee bank, is the gift of an incorporeal right and therefore not subject to donation inter vivos except under the form provided by LSA-C.C. Article 1536 . . . .

. . . .

Construing these statutory provisions, our jurisprudence is established that the simple issuance and delivery of the depositor's own check to the payee does not operate as an assignment of any part of the funds of the drawer in the bank, even though the drawer has sufficient funds on deposit to cover the check. Hence, there is no privity between the holder of the check and the bank; and the holder has no cause of action against the bank for the funds. . . .

Under these authorities, it is apparent that the gift of the donor's own check is not equivalent to the gift of the money on deposit in the bank. It is merely the gift of an incorporeal right to the donee to present the check to the bank for payment. . . .

. . . .

Underlying all of these decisions, including our own, is also the idea that where the donor's check is not presented for payment until long after the donor's death, there is just cause for suspicion. If the gift is proper, one would naturally expect the recipient of a large check to present it for payment immediately and not take the chance of the donor changing his mind or the funds on deposit being depleted. However, where the check is not made known until after the donor's death, there is just cause to suspect the donation. For, during his lifetime, the donor received no notice from the bank that the check had been paid. And, after the donor's death, he is not available to contradict or corroborate the gift. Hence, the courts are loath to recognize the mere manual delivery of the deceased donor's check, as being equivalent to delivery of the funds on deposit.

DH 83. Iota gives A, her sister, a check, drawn on Iota's account at Creole Bank, payable to the order of A. The gift is memorialized by an authentic act of donation, which both Iota and A sign. Then A, after endorsing the check “in blank” (that is, she simply signs her name on the back of the check), gives it to B, her cousin. For this transfer between A and B, there’s no “act of donation”; A simply hands the endorsed check over to B. Any form problem here? Why or why not? See La. Rev. Stat. 10:3-205(b), sent. 2 (“When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone . . . .")
DH 836. A gives B, her cousin, a check, drawn on A’s account at Bayou Bank, payable to the order of B, that Bayou Bank had certified at A’s request. There’s no “act of donation”: the certified check is delivered by hand. Any form problem here? Why or why not? See the jurisprudence that follows:

Succession of Leroy,
103 So. 328 (La. 1925)

LAND, J.

... These oppositions... are based mainly upon the omission of the executor to include in said accounts, as a part of the assets of said estate, a certain check for $10,800, certified by the Whitney-Central National Bank, and delivered to the testator shortly before his death, as the balance due on the purchase price of certain real estate sold by him to P. H. Dubus. The executor contends, in answer to these oppositions, that said check was indorsed in blank, and was delivered to him by the testator, as a donation inter vivos by manual gift.

The question presented to us for decision in this case is whether such a check is susceptible of manual gift by delivery under article 1539 of the Civil Code, or whether an act passed before a notary and two witnesses is essential to the validity of such donation under article 1536 of said Code.

... The evidence in the case shows that this check had been delivered to the deceased after the sale, and that, about five hours before his death, deceased indorsed the check in blank and handed it to Mahoney, with the statement, 'This is for you.'... The donee is the nephew of the deceased, is named as his executor in his last will and testament, and had attended to the legal business of decedent for a number of years without compensation.

The check in question is drawn by P. H. Dubus upon the Whitney-Central National Bank, is made payable to the order of D. B. H. Chaffe, attorney, and is indorsed by him payable to the order of J. Leroy. Under this notation is the indorsement in blank signed 'M. J. Leroy.'

... Under the latter article [CC art. 1539] this court has repeatedly held that the indorsement and delivery by the donor of a check payable to order constitutes a valid donation of the fund represented by such check, whether collected before or after the death of the donor.

... This brings us to the consideration of the effect of the check in question being certified by the Whitney-Central National Bank.

'Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

'Where the holder of a check procures it to be accepted or certified the
drawer and all indorsers are discharged from liability thereon.

'A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.'


Therefore the certification of the check in this case by the Whitney-Central National Bank rendered said bank primarily liable to the holder, Leroy, for the payment of the check. Such certification or acceptance, however, did not operate to make Leroy, the holder, the drawer of said check, nor did it have the effect of assigning to the credit of Leroy, as holder, the funds of the drawer in said bank, to the amount of the check certified.

As a matter of custom, when a check is certified, a bank charges the amount of the check at once to the account of the drawer, as the bank becomes primarily liable for the payment of the check.

The death of Leroy therefore did not affect the manual gift of this check to Edwin I. Mahoney, as said check was not drawn by Leroy upon his own funds in said bank. The bank was not the agent of Leroy. There was no mandate to be revoked by the demise of the donor, as the bank was primarily bound to pay such check, when presented by Leroy, as holder, or by his transferee, Mahoney.

We are therefore of the opinion, that there was a valid manual gift of the check in controversy to Mahoney by Leroy, although said check was not collected by Mahoney until after the death of the donor.

DH 83€. A, the aunt of N, goes to the Bank and buys a certificate of deposit (‘CD’). This CD, which (like most CDs) is non-negotiable, is issued in the name of A alone. Sometime later, A gives the CD to N with the intent to donate it. But no act is executed; rather, A simply indorses the CD on the back and hands it to N. Any form problem here? Why or why not? See the jurisprudence that follows:

Montet v. Lyles,
638 So.2d 727 (La. App. 1st Cir. 1994)

CRAIN, J.

Sometime prior to February, 1991, Barbara Montet Lyles and her husband Larnel Lyles prepared to construct a home in Tangipahoa Parish. Before construction commenced Lena Montet (Barbara Montet Lyles' aunt) and the Lyleses agreed that a bedroom and bath would be added to the plans of the house which was to be constructed by the Lyleses so that Mrs. Montet could move in with the Lyleses. Mrs. Montet was approximately 81 years old at the time and suffered from diabetes and a heart condition.

...
Sometime in February, 1991, Mrs. Montet handed Mrs. Lyles a certificate of deposit (CD) in the sum of $30,000 issued in the names of Lena Montet or Barbara Lyles. . . . In early June, 1991, Mrs. Lyles and Mrs. Montet had a disagreement regarding the cost of food needed for Mrs. Montet's special diet which was necessitated by her diabetic condition. On June 17, 1991, Mrs. Montet informed Mrs. Lyles that she was moving back to Metairie to live in an apartment complex where she had previously resided. Mrs. Lyles cashed in the CD on June 18, 1991. This was done without Mrs. Montet's consent. Mrs. Montet moved out of the Lyleses' residence on June 22, 1991. She thereafter instituted this suit against Barbara Montet Lyles and her husband Larnel Lyles for reimbursement of the sum represented by the certificate, as well as for other sums allegedly loaned to Mrs. Lyles. . . .

**DONATION OF THE CERTIFICATE OF DEPOSIT**

Defendants admit in brief that the CD at issue was an incorporeal movable subject to the requirements of La.C.C. art. 1536, requiring donation by authentic act, which defendants admit was not accomplished in this case. In order for La.C.C. art. 1536 to be applicable as to form defendants are apparently conceding that the certificate of deposit was not negotiable pursuant to former La.R.S. 10:3-104. They contend, however, that the CD was negotiated by Mrs. Lyles, the donee, thus converting the CD to a corporeal movable in the form of cash which was placed into the donee's possession. Thus, the donation was perfected pursuant to La.C.C. art. 1539.

The CD was issued by Secor Bank in the names of Lena M. Montet or Barbara M. Lyles in the sum of $30,000 at the request of Mrs. Montet. It is undisputed that the money used to obtain the CD was solely that of Mrs. Montet; Mrs. Montet's tax identification number appeared on the CD; and she alone paid taxes on the interest generated by the CD.

If we assume, as defendants concede, that the CD was not negotiable and that La.C.C. art. 1536 controls as to form, it is uncontested that there was no transfer of the CD by authentic act. Thus, there is no valid donation of the CD as to form.

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**d] Transfers to minors**

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**NOTE**

Under certain circumstances, Louisiana law permits an adult to transfer property to a minor without having to comply with the form requirements of CC arts. 1536 et seq. See Uniform Transfers to Minors Act, La. Rev. Stat. 9:751-773. The kinds of property that may be so transferred include investment securities, money, life insurance, annuities, irrevocable present rights to future payments, corporeal movables for which a certificate of title has been issued by a government entity, and even immovables. Id. § 758. To be sure, the transfer of such property still must be memorialized in some form. But the form requirements are significantly less stringent than are those found in CC arts. 1536 et seq. For example, to transfer a certificated corporeal movable (e.g., an automobile), all that the donor must do is to have the certificate re-issued in his name “as custodian for [minor’s name here] under the Louisiana Uniform Transfers to Minors Act.” La. Rev. Stat. 9:758(A)(6)(a). To take another example, to create a bank account for a minor, all the donor must do is to send money to the bank with instructions that it be deposited into an
account in his name “as custodian for [minor’s name here] under the Louisiana Uniform Transfers to Minors Act,” together with the bare bones “transfer form” (a simple act under private signature) described in § 758(B).

DH 83. In honor of Lil-Fille’s 16th birthday, Pascal, Lil-Fille’s father, wants to buy her a tract of land. After he and the present owner, Olide, come to terms, they draw up an act of sale for the land in which the “buyer” is described as follows: “Pascal, as custodian for Lil-Fille, under the Louisiana Uniform Transfer to Minors Act.” Pascal then promptly files this act of sale into the public records. Any form problem here? Why or why not? See La. Rev. Stat. 9:759(A)(5).

b) Act of acceptance

1] Definition

2] Modes

a] General rule

1} Manner of manifestation: express (CC art. 1540)

NOTE

Though CC art. 1540, ¶ 1 says that the acceptance must be expressed “in precise terms,” the Louisiana courts, following French doctrine, have concluded (i) that the term "precise" would better have been translated as "express" and (ii) that all that's required for an "express acceptance" is some verbal acknowledgment from the donee that makes it clear that he is willing to take the thing offered. See, e.g., Rutherford v. Rutherford, 346 So.2d 667 (La. 1977)

2} Form of manifestation: authentic act

a} Statement

b} Possibilities:

1/ Acceptance expressed in the act of donation

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2/ Acceptance expressed in a separate authentic act

b] Exception: tacit (CC art. 1541)

1} Statement

2} Scope:

a} Corporeal movables donated by manual gift

b} Things donated by authentic act

DH 84α. A gives B a tract of land. The donation is accomplished by authentic act. B, however, neither signs that act nor executes a separate act of acceptance. He does, however, move onto the property, which he begins using. Has there been a valid acceptance? Why or why not? See the jurisprudence and doctrine that follow:

Sisters of Charity of Incarnate Word v. Emery,
81 So. 99 (1919)

O’NEILL, J.

*** The next defense in order is the contention that there was not a valid acceptance of the donation from Dr. John I. Shumpert. The instrument was signed and accepted for the donee by Sister Beatrice, who was then the Sister Superior of the order in Shreveport and has full charge of the infirmary there. It does not appear that she was authorized by a resolution of the board of directors of the corporation to accept the donation; but her acceptance for the corporation was approved and ratified in every conceivable way by both the donee and the donor. Being already in possession of the property, the donee continued to occupy it for nearly four years under the act of donation, to the constant knowledge and express approval of the donor. Art. 1541 of the Civil Code provides that, if a donation has been executed, that is, if the donor has put the donee into corporeal possession of the property donated, the donation shall have full effect, even though it was not accepted in express terms. Although the word "effects" is used instead of "property" in the article referred to, it has been decided that the provision refers to real estate. See In re Lahaye, 115 La. 1093, 40 South. 468 [1906],55 and Baker v. Baker, 125 La. 975, 52

55 "Their contention is that by article 1541 they have acquired a right because the donation has been executed and the donor [sic] placed in corporeal possession of the land given, and that, although the donation may not have been accepted in express terms, it has full effect. We agree with the learned counsel for plaintiffs to this extent. It would have had full effect as an acceptance if the donee had taken possession and
In fact, Art. 1541 would have no meaning or purpose whatever if it did not refer to real estate; because Art. 1539 provides that a manual gift, that is, the giving of corporal movable effects, accompanied by actual delivery, is not subject to any formality. The defendants rely upon the decision in *Cawthon v. Kimbell*, 46 La. Ann. 750, 15 South. 101, to the effect that a donation that is null for want of form is not made valid by a delivery of possession of the property. In that case the informality in the donation of a slave, was that there was no authentic deed. The ruling, therefore, has no application to a case where the only informality is that the donee did not accept in writing the act of donation.

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*A donation was made by authentic act to the two minor children of the donor. The donation consisted of immovable property wherein the named donees are then residing with their grandfather. The property donated consisted of community property, that is, property belonging to the community existing between the donor and his wife. The wife then brought an action to set aside the donation on the grounds that the donees had never accepted the property, and judgment setting aside the donation was rendered, declaring the same to have been il]l and void. On the next day, the husband-donor sold the property to third parties. One of the minor donees now contends that there had been an acceptance of the donation under Art. 1541 of the Code, since both donees were living on the property donated at the time the donation was made.]

O'NEILL, J.

* * * The plaintiff contends that the donation made by his father to him and his brother on the 9th of Jan., 1908 was valid without acceptance because he and his brother were then residing on the property with their paternal grandparents. He relies upon Art. 1541 of the Civil Code, which declares that, if the donation has been executed, that is, if the donee has been put into corporeal possession "of the effect given," the donation shall have effect without an express acceptance. Art. 1541 was not taken from the French Code, but was an original Art. 1528, in the Code of 1825. In the French text, the words which have been translated into "of the effect given" were "des choses donnees." One of the legal definitions of the French word chose, according to Spier's & Surenne's French Pronouncing Dictionary, is, choses, and another of the legal definitions of which is chattels, and the most commonplace definition of which is things. It is not improbable, remained in possession.” *Lahaye*, 40 So. at 469.

56 “Not only was the property [i.e., “certain tracts or parcels of land”] situated in the state of Louisiana, but the donation was without effect until formally accepted by the donee . . . or until the donee was put into corporeal possession of the property. Civ. Code arts. 1500, 1541 . . . .” *Baker*, 52 So. at 117.

57 Another case summary compliments of Professors Samuel, Spaht, and Picou.

58 Note that the author of this opinion was also the author of the opinion in *Sisters of Charity*. One must wonder what happened to the man in the intervening 14 years. Did he change his mind? Did he suffer a lapse of memory?
therefore, that Art. 1528 of the Code of 1825, which is Art. 1541 of the Revised Civil Code, was intended originally to apply only to donations of movable property. As to that, we express no opinion, however, because we do not consider that the fact that the children to whom the donation was made were residing with their grandparents on the property donated dispensed with the necessity of an acceptance of the donation. According to Art. 1540 of the Code, an acceptance by authentic act is essential to the validity of a donation of real estate. It is true that Art. 1546 of the Code permits the grandparents to accept a donation for a minor grandchild, even though the parents are living, and even though neither of the grandparents is the tutor of the child. But that has reference to a formal acceptance, as prescribed by Art. 1540.

As to the donation of community property, the appellant contends that the donation in this instance was valid because it was made "for the establishment of the children of the marriage," and was therefore expressly excepted from the prohibition in Art. 2404, of the Civil Code. The fact that the donation was revoked before it was accepted by or for the donees, makes it unnecessary to decide whether it would have been valid if it has been accepted before it was revoked. * * *

Cotton v. Washburn,
84 So. 2d 208 (La. 1955)

MOISE, J.

... 

The parties herein were engaged to be married, and on June 6, 1952 defendant bought the property herein involved, which is situated in Oak Grove Subdivision, Shreveport, Louisiana. By authentic act the property was placed in the names of plaintiff and defendant as co-owners, both parties contemplating such to be their home. They were married on July 15, 1952, within five or six weeks after this act of sale was passed. Neither of them signed the authentic act (the vendors did), and they moved in the premises and occupied it as their home. This constituted an acceptance of the property.

Plaintiff and defendant remained in the premises until the defendant left the premises on April 11, 1953. Plaintiff obtained a divorce from the defendant on statutory grounds on March 10, 1954, and, thereafter, filed this suit for a partition.

In answer, the defendant contends that since the property was purchased before his marriage to plaintiff and was admittedly paid for with his separate funds . . ., [then the transfer between the sellers, on the one hand, and him and his then bride-to-be, on the other, must have entailed, in effect, a donation from him to her of an undivided interest in the premises.]

... 

It is urged by the defendant that there was not an acceptance of the donation. It is true that Art. 1540 of the Civil Code requires that there must be an acceptance of the donation of an immovable. However, we are not limited and restricted to this one article of the Code. We must give full effect to all articles of the Code directly bearing on this subject.

Art. 1541 of the Civil Code provides:
"** * * if the donation has been executed, that is, if the donees has been put by
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the donor into corporeal possession of the effects given, the donation, though not accepted in express terms, has full effect."

Since the wife moved into the house, it constituted an act of corporeal possession. This is manifest from the record that the wife was in the home when the husband left the premises on April 11, 1953.

Excerpts from
J.-R. Trahan,
Trashing Works v. Noble

I. Problem

1. In the course of his opinion in Works v. Noble, Justice O’Neill, commenting on CC art. 1541, made a statement that has clouded the minds of at least two generations of Louisiana lawyers, judges, and law professors. Here it is: “It is not improbable . . . that article 1528 of the Code of 1825, which is article 1541 of the Revised Civil Code, was intended originally to apply only to donations of movable property.” The considerations that led him to that conclusion he explained as follows:

Article 1541 was not taken from the French Code, but was an original article, 1528, in the Code of 1825. In the French text, the words which have been translated into “of the effects given” were “des choses données.” One of the legal definitions of the French word chose, according to Spier’s & Surenne’s French Pronouncing Dictionary, is choses, and another of the legal definitions of which is chattels, and the most commonplace definition of which is things.

Notwithstanding that the statement was pure obiter dictum, as O’Neill himself candidly admitted, in the years since Works was decided many have taken it for granted that the scope of the article is limited to movables.

II. Thesis

2. It’s high time that the doubts about the scope of article 1541 raised by Justice O’Neill’s statement were put to rest. Not only is it not “not improbable” that the rule of article 1541 was originally intended to apply to movables only; it is highly improbable! In other words, it is almost certain that article 1541 was “intended originally” to apply to donations of all things—immovables as well as movables. Here’s why.

59 177 La. 681, 149 So. 423 (1933).
60 “Yet, if the donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects given, the donation, though not accepted in express terms, has full effect.” CC art. 1541.
61 I believe Justice O’Neill meant to say “from” rather than “was.”
62 Immediately after the statement, O’Neill added this disclaimer: “As to that, we express no opinion, however, . . . .” 149 So. 2d at 424.
III. Proof

A. Demolition of O'Neill’s “argument”

3. As it is stated, Justice O'Neill's argument is a patent non sequitur, that is, the conclusion does not follow from the premises. Those premises can be stated as follows: (i) the English term "effects" is a rendering of the French word chose and (ii) the French word chose sometimes means "movable" (though its usual meaning is "things in general"). Note, in particular, the second premise: Justice O'Neill does not say, as some have assumed, that the usual meaning of the word chose is "movable." Now, from the premises that Justice O'Neill actually stated, the most that one could conclude is that it is "not impossible" that the term chose, as used in article 1528 of the Code of 1825, was intended to mean "movable only." That proposition, of course, is a far cry from the conclusion that Justice O'Neill reaches. So much for Justice O'Neill's argument.

4. This demonstration of the invalidity of Justice O'Neill's argument, far from ending our inquiry, merely moves it past the first of several hurdles. As any student of logic knows, the mere fact that an argument that's put forward in support of a conclusion fails does not mean, without more, that the conclusion itself is false. Proof of the falsity of the conclusion requires a counter-argument, one that is logically valid and whose premises are sound. That's what I want to provide now.

B. Presentation of my counter-argument

5. My counter-argument has two foundations, the first, the usage of the term chose in the Code of 1825 in general and, the second, the usage of the term chose in the sources from which the drafters of that code drew article 1528.

6. The first argument can be summarized as follows. An analysis of the Code of 1825 makes it clear that (i) the drafters ordinarily (indeed, almost always) used the word choses to mean "things in general," including immovables, and (ii) the drafters never used the word chose to mean "movables only" unless, in the article immediately prior to that in which the term was so used, they had made it clear that the scope of the prior article was limited to movables only. The article immediately prior to article 1528, that is, article 1527, contains no indication that its scope is limited to movables only. Far from it, that article clearly applies to all things, movable and immovable.

7. The second argument can be summarized as follows. It begins with a premise that is so self-evident that few would bother to state it: When the drafters of a piece of legislation consciously draw its content from some pre-existing source, they will almost invariably understand the terms of that legislation in a manner that is consistent with the usage of those terms in that source. As the term chose was used in the sources of article 1528, it meant all things in general, including immovables, not just movables.

1. Usage of "Chose" in the Code of 1825

a. In the Code of 1825, “Choses” Ordinarily Means “Things in
8. Not surprisingly, article 1528 is not the only article in the Code of 1825 in which the term *chose* appears. In the other articles in which it shows up, the term is *ordinarily*, indeed, nearly exclusively, used to refer to "thing of any kind" (including immovable thing), not just "movable thing." . . .

[9-23. Omitted.]

b. *In no Article of the Code of 1825 is “Choses” Ever Used to Refer to “Movables Only” unless it is Clear that the Immediately Preceding Article Applies Only to Movables*

[24. Omitted.]

2. *Usage of "Choise" in the Sources of Article 1528 of Code of 1825*

25. Because the notes to the Projet of 1823 do not identify the source (or sources) from which the commissioners drew article 1528, it is impossible to say, with absolute certainty, just what that source was. But that does not mean that one cannot make an educated guess. One need only apply (with certain modifications I’ll explain below) the method that Professor Batiza has developed for such investigations and used with such success: (i) identify the materials that the drafters announced they had used as sources; (ii) locate the parts of those materials that correspond (in terms of subject matter) with the article under examination; (iii) compare the discussion in those parts of the materials with the content and wording of that article.

26. The materials upon which the commissioners drew in preparing their projet were numerous. Those materials included, among others, scores of "classic" Roman law, Spanish law, and French law.

Locating the parts of each of these materials that correspond to article 1528 would be quite an undertaking, one for which I, at present, have neither the time nor the inclination. But there is a possible shortcut. It is known that most of the innovations introduced into the Code of 1825 were based upon four "French law" works (or sets of works): Domat's treatise, Pothier's treatises, Toullier's treatise, and the *Projet du Gouvernement* of the French *Code Civil*. It seems reasonable, then, to start the search for the source of article 1528 with these works.

27. Of these works, two can be ruled out immediately, namely, Domat's treatise and the *Projet du Gouvernement*. . . .

28. That leaves Pothier and Toullier. . . .

29. Finally, there's Toullier. Here, at long last, we come to what is almost certainly the principal source of article 1528. Unlike Domat and the *Projet du Gouvernement* but like Pothier, Toullier does consider whether the "execution of the donation" or the "putting of the donee into possession of the donated thing" will or should suffice as a substitute for

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64 I have scores of examples. Confident, however, that I’ve already taxed my readers’ patience beyond the breaking point, I think I’ll stop here.

65 Indeed, Professor Batiza of Tulane has spent a good part of his career making just such educated guesses.
compliance with the form requirements for the acceptance of a donation *inter vivos*. Unlike Pothier, however, Toullier answers that question in the affirmative, just as does article 1528. Toullier’s rationale rests, in part, on certain textual differences between article 6 of the Ordinance of 1731, on the one hand, and its counterpart in the French *Code Civil* (article 932), and on an expansive (all other French commentators later said “too expansive”) notion of tacit confirmation. Here is that rationale, transliterated into English:

187. . . . The solemnity of the acceptance is the express mention that must be made of the acceptance in positive terms and under pain of nullity, be it in the very act of donation or in a separate act in authentic form . . . .

   Contracts, other than donations, are valid even though the acceptance is not referred to in the contract document in express terms and even though it is only tacit, manifested solely by the presence of the parties . . . .

   The Roman law, which on this point was conformed to the simplicity of natural law, made no distinction in this regard between other contracts and donations. But, in French customary law, wherein donations were viewed with a somewhat unfavorable eye, it was disputed whether a tacit acceptance was sufficient, and there was, in previous times, a variety of scholarly opinions and jurisprudential rulings on this point. The Ordinance of 1731 adopted the opinion of those who sustained that the acceptance should be express, so that one could not have regard to the circumstances from which one might propose to infer a tacit or presumed acceptance, not even [i] when the donee had been present at [the signing of the] act of donation and had signed it or [ii] when he had entered into possession of the given things [les choses donées].

188. The reason for this exception to the common rules [for contracts] can be found only in the marked aversion of the customs toward donations.

   The Code Civil . . . had not reestablished the same simplicity of principles on the acceptance of donations. It has stuck, in part, to the disposition of the Ordinance of 1731, which are expressed in a more concise manner in article 932: “A donation will not engage the donor and will produce no effect except from the day on which it will have been accepted in express terms.

   . . .

189. It is necessary to remark, however, that the Code has not reproduced the nullity pronounced by the Ordinance of 1731 for the case in which the donee has entered into possession of the given things [les choses donées]. By not repeating it, the Code has rejected it, and with good reason. It is a basic principle that the voluntary execution [i.e., performance] of a null act cures the nullity of it and renders an attack on it impermissible, when the nullity is not founded on the public interest or on respect for good morals. If the nullity is established for the interest of the particular parties, they can renounce it once they acquire the right to assert the nullity . . . . Thus, every man in favor of whom is opened the right of attacking some act of donation, the nullity of which the law pronounces for his private interest, validates this act and renders it, in his regard, fully obligatory by virtue of the voluntary execution [i.e., performance] that he makes of it.

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66 The emphasis here is in the original.
67 Once again, the emphasis is in the original.
There are on this point, in the Roman law, a crowd of particular decisions, out of which the Civil Code has made a general rule in article 1338. That article provides that [i] in the absence of an act of confirmation or ratification, it is sufficient that the obligation has been executed voluntarily after the time at which the obligation could have been validly confirmed or ratified and [ii] this voluntary execution constitutes the renunciation of the means and exceptions that could have been opposed to the act. Thus, a tacit ratification, which entails voluntary execution, has more force, in certain regards, than an act of express ratification, which is valid, according to the same article, only so long as one finds therein the substance of the ratified obligation, the mention of the [possible] ground for an action of rescission, and the intention to repair the vice on which that action would be founded. If it’s a matter of ratifying an act of donation that is null by virtue of a vice of form, it is necessary, moreover, that the act of confirmation be made in the legal form required for a donation. But the voluntary execution of a donation, like that of other contracts, takes the place of a confirmative act in legal form and implies the renunciation [of the right] to oppose, be it for vices of form or for any other exception.68

30. If, as is almost certainly true, Toullier and, to a lesser extent, Pothier were the sources of article 1528, then one can say, with complete confidence, that the term chose, as used in the sources of that article, meant all things, that is, not just movables but movables and immovables. That this is so is clear from the context in which the term was used in those sources. In the part of Pothier’s treatise that influenced the drafters of article 1528, Pothier discusses the form requirements for the acceptance of each and every kind of donation, regardless of the nature of the donated object. Absent from his discussion is any language that even indirectly suggests he has in mind only donations of movables. The same can be said of the part of Toullier’s treatise from which the drafters of article 1528 got the very idea for that article. The form requirements for acceptances themselves Toullier obviously considers to be applicable to all donations, including those of immovables. Not only that, but when Toullier proposes, in that part of his treatise, that those requirements can be dispensed with if the donation is "executed," that is, when the donee "enters into the possession of the thing given," he clearly has in mind not an exception to those requirements that's limited to donations of movable things, but one that extends to donations of all things, immovables included.

NOTE

It is sometimes pointed out, in defense of O’Neill’s dictum in Works, that “French law” is to the same effect, that is, that in France there is one and only one way to accept a donation of an immovable, namely, an acceptance by authentic act, so that the mere “execution” of the donation (i.e., the “putting into possession” of the donee) will not suffice. Though the observation on which this “French defense” of the dictum rests is accurate enough (French law is as the defenders of the dictum say it is), the defense itself is to no avail. Here’s why.

As it turns out, Toullier’s opinion (quoted above) that the execution of a donation be treated as a substitute for a formal acceptance had a very different fate in France than it had in Louisiana. In Louisiana, as I have shown, Toullier’s opinion was so highly regarded that it was codified, specifically, was written up as article 1528 of the Code of 1825. In France, by contrast, Toullier’s opinion was roundly panned. Here’s what Grenier, perhaps the earliest French critic of that opinion, said:

Monsieur Toullier . . is of the opinion that the fact that the donee would have entered into possession of the object given would supply the absence of an acceptance or, at least, that it would stop the donor from availing himself of this absence. But, despite the deference that the opinions of Monsieur Toullier deserve, we could not possibly regard his decision as well-founded.

1 Baron Jean Grenier, Traité des Donations, des Testaments et Toutes Autres Dispositions Gratuites n° 57ter, at 269 (4th éd. 1826). In the years that followed, all the other French scholars who addressed the issue (save one69) followed Grenier in rejecting Toullier’s opinion. See, e.g., 3 Charles Demolombe, Traité des Donations Entre-Vifs et des Testaments n° 122, at 121-23, in 20 Cours de Code Napoléon (1878); 3 Victor Marcadé, Explication Théorique et Pratique du Code Civil n° 633, at 518 (2d éd. 1859); 7 Alexandre Duranton, Cours de Droit Français n° 389, at 410 (3d éd. 1834); 2 Claude Étienne Delvincourt, Cours de Code Civil note (3) to page 70, at 252-53 & note (1) to page 71, at 255 (1824). In the words of Marcadé, Toullier’s “idea has been rejected by all the authors, even by Toullier’s annotator, Monsieur Duvergier.” 3 Marcadé, supra, at 410.

In the light of this fundamental divergence between Louisiana law and French law, it becomes clear that the supposed “French defense” of O’Neill’s dictum is really no defense at all. To the contrary, that “defense” provides still further proof, as if any were needed, that the dictum is just flat out wrong. Why? Because it shows that the dictum is the equivalent of a rule that is the precise opposite of that which we know Louisiana adopted.

3) Explication

3) Effectivity

When is the acceptance “effective”? In other words, precisely when, once the acceptance has been made, is the contract of donation considered to be “perfect” (complete)?

69 The sole exception is Louis Poujol. In terminology that is, at once, reminiscent of that of Toullier and that of La. CC art. 1528 (1825), Poujol made this contention:

If, before the acceptance or the notification of the acceptance, the donor had remitted the thing given to the donee or had put him into possession, it would be appropriate to apply [CN] article 1338, which provides that “in the absence of an act of confirmation or ratification, it suffices that the obligation be executed [performed] voluntarily.”

1 Louis Poujol, Traité des Donations Entre Vifs et des Testaments art. 932, n° 8, at 349 (1836). Poujol’s opinion was ignored by all later French writers.

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a] Where the donation and the acceptance are made in the same act (CC art. 1540, ¶ 1): immediately

b] Where the acceptance is made in a “posterior” act (CC art. 1540, ¶ 2): upon notification of the donor

DH 84β. On June 1, 2002, Pascal, having decided he’d like to donate a certain tract of land to his son, Ti-Boy, who is away at college in Lafayette, makes out an act of donation to that effect, in authentic form, and then mails the act to Ti-Boy. When Ti-Boy receives the act, which occurs on June 3, 2002, he runs down to the office of his favorite notary, where he makes out an authentic act of acceptance. But neither Ti-Boy nor the notary bothers to send Pascal a copy of that act; nor does Ti-Boy acknowledge the donation in any other way (e.g., by letter, telephone call, e-mail). Two weeks later (on June 17, 2002), Pascal, having heard nothing from Ti-Boy, “revokes” his (offer of) donation to Ti-Boy; has his daughter, Lil-Fille, meet him at his notary’s office; and, once there, makes out another act of donation, also in authentic form, in which he donates the same land to Lil-Fille. Then and there, Lil-Fille accepts the donation in the same authentic act. Days later, Pascal dies. Which of Pascal’s children is entitled to the land – Ti-Boy or Lil-Fille? Why? See CC art. 1540, ¶ 2, & the doctrine that follows:

3-1 C.-B.-M. Toullier, Droit Civil Français n° 209-210, at 134
(J.-B. Duvergier rev., 6th éd. 1848)

209. It is not sufficient that the acceptance be made during the lifetime of the donor; it is likewise necessary, in order for the donor to be bound, that the acceptance be made known to him. The donation has effect with respect to him only from the day on which the act that evidences the acceptance is juridically notified to him. If he die, if he revoke his offers before this notification, the donation vanishes.

210. It is necessary to note, too, that, unlike the acceptance, which must be made known to the donee if it is to produce its effect, the revocation of the offer of the donor or his change of will [to donate] need not be made known to the donee, who, as yet, still has no vested right. A tardy acceptance – one notified to the donor after his revocation – would have no effect.

What form must the “notification” take? Is a “verbal” notification enough, or must it be in writing? And, if it must be in writing, is authentic form required?

When is the “notification” effective? Upon dispatch? Upon receipt (i.e., when the notification reaches the donor’s mailbox or some equivalent thereof)? Upon the donor’s learning of it (i.e., acquiring subjective knowledge of it)?

Aren’t these interesting questions? Too bad we have no clear answers.
c) **Recordation (insinuation) (CC art. 1554 & 1557)**

2) **The sanction**

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**NOTE**

Suppose that the parties to a purported donation *inter vivos* fail to put it (the offer of donation, the acceptance, or both) into proper form. What’s the result? What “sanction” does the law attach to such a purported donation?

Part of the answer is found in CC art. 1536. According to that article, the requirement that donations be in a specified form is imposed “under penalty of nullity.” The sanction, then, is that the purported donation is “null.”

But that answer, of course, is incomplete. Recall that there are at least two kinds of nullity – absolute and relative –, each with a distinctive set of effects. *Compare CC art. 2030 (absolute nullity) with CC art. 2031 (relative nullity) & see CC arts. 2032 (prescription of annulment claims) & 2033 (remedies upon annulment).* It is essential, then, if we wish to come to a full understanding of the sanction for failing to put a donation *inter vivos* into proper form, that we determine what kind of nullity CC art. 1536 has in mind: is it “absolute,” “relative,” or maybe something else?

The Louisiana jurisprudence has addressed this issue on several occasions, at least in passing (that is, in *obiter dictum*). And in each instance it has given the same answer: the nullity is “absolute.” *See Castleman v. Smith, 86 So. 778, (La. 1920) (“The petition charges that the act is an attempted donation *inter vivos* of immovable property and incorporeal rights under private signature. Hence, . . . it was an absolute nullity . . . .”*) (emphasis added); *Stelly v. Vermillion Parish Police Jury, 482 So.2d 1052, 1055 (La. App. 3d Cir. 1986) (“This purported act of donation of immovable property can be considered as nothing more than an act under private signature duly acknowledged and, as such, is absolutely null as a donation of immovable property.”) (emphasis added) (Knoll, J.); *Ducote v. Ducote, 442 So.2d 1299, 1301-02 (La. App. 3d Cir. 1983) (“The purported donation of immovable and incorporeal property can be considered as nothing more than an act under private signature duly acknowledged and, as such, is absolutely null.”) (emphasis added).

That answer, however, cannot be approved, at least not without certain significant qualifications. Why not? Because it is contradicted, at least in part, by CC art. 1845. That article provides as follows:

A donation *inter vivos* that is null for lack of proper form may be confirmed by the donor but the confirmation must be made in the form required for a donation.

The universal successor of the donor may, after his death, expressly or tacitly confirm such a donation.

Where’s the contradiction? Consider this syllogism:

MP: If an act is absolutely null, then it cannot be confirmed. CC art. 2030, ¶ 1, sent. 2.

mp: A donation *inter vivos* that’s null for want of form can be confirmed.
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CC art. 1845.

QED: A donation inter vivos that’s null for want of form is not absolutely null.

Does that mean, then, that a donation inter vivos that’s null for want of proper form is relatively null? If, as our CC articles on nullity imply and as the conventional wisdom suggests, there’s only one alternative to absolute nullity, namely, relative nullity, then the answer would be and, as a matter of logic, could only be “yes.” But one can question whether there is, in fact, only one such alternative.

This “binary” system of nullities, according to which every nullity is either absolute or relative, has come in for severe criticism in France. One of the problems with it, say the critics, is that it is overly-simplistic, in particular, that it fails to account for those nullities that have, at once, some of the characteristics of one and some of the characteristics of the other of the two supposedly exclusive category-types of nullity, nullities that, for that reason, “fall between the cracks” of those category-types. 70 According to the critics, the categories of “absolute” and “relative” nullity, far from constituting the only possibilities, are but the extreme “poles” of a “continuum” of nullities or, to use a different metaphor, are just “pure” strains of nullity that can be “mixed” to produce any number of “hybrid” strains.

Employing this theory of the “continuum” (or the “hybridization”) of nullities, France’s foremost family of civil law scholars, the Mazeauds, has offered up this analysis of our problem (that is, the problem of the nature of the sanction for donations inter vivos that are null for want of proper form):

Sanction of the form rules. – The required solemnities constitute elements of formation for the contract of donation, which therefore is included among the “solemn acts.” The nullity that sanctions the failure to observe them is absolute, at least in the sense that it can be demanded by any interested person, in particular, by the donor or his creditors. Moreover, contemporary jurisprudence submits the action in nullity to a [liberative] prescription of 30 years. 71 But the absolute nullity in question here is a very peculiar one, for it approximates a relative nullity with respect to confirmation: . . . in the terms of article 1340 of the Code Civil, “after the death of the donor, his heirs can validly confirm a donation that is null in form.” Some have tried to explain this situation by pointing out that the heir has a natural obligation to accomplish the will of the deceased as it may have been expressed outside of legal forms. 72 . . . . [This] explanation is not satisfying. Article 1340 of the Code Civil demonstrates the accuracy of the critique that has been made against the French system of nullities, a system that is oversimplified in that it distinguishes only [two kinds of nullity:] the nullity open to challenge by every interested person [absolute] and that which benefits only a single person [relative]. Between the

70 See, e.g., 2-1 Henri & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: OBLIGATIONS no 315, at 292 (François Chabas rev., 5th ed. 1999).
71 In French law, the right to seek judicial recognition of an absolutely nullity prescribes in 30 years. In Louisiana law, by contrast, that right is imprescriptible. See La. CC art. 2032, ¶ 1 (“Action for annulment of an absolutely null contract does not prescribe.”)
72 See La. CC art. 1762 (“Examples of circumstances giving rise to a natural obligation are . . . (3) When the universal successors are not bound by a civil obligation to execute the donations and other dispositions made by a deceased person that are null for want of form.”)
general interest and the particular interest, [there is another:] the interest of the group – here, that of the family – [,which] demands protection that ought not to surpass the members of this group. . . .

4-2 Henri & Léon Mazeaud et al., *Leçons de Droit Civil: Successions – Liberalités* n° 1456, at 645 (Laurent Leveneur & Sabine Mazeaud-Leveneur revs., 5th éd. 1999).

This analysis is compelling. If it is sound, then the “nullity” of donations *inter vivos* that are made in improper form should be characterized as follows. Such a donation is a “mixed” nullity, but one that is much closer to the absolute nullity “pole” than to the relative nullity “pole” on the nullity “continuum.” In fact, it has one and only one attribute that’s associated with relative nullities, namely, it can be confirmed by either the donor himself or by his successors. All of its other attributes, however, are ones that are associated with absolute nullities, for example, (i) the act is considered to be null *ab initio*, that is, it is null even in the absence of a judicial declaration to that effect; (ii) the nullity may be invoked by any person – not just the donor or his successors – or may even be declared by the court on its own initiative; and (iii) the action to have it declared null never prescribes.

b Revocation

1) Introduction (CC arts. 1468 & 1559)

Behold, I tell you a mystery: though CC art. 1468 states that a donation *inter vivos* is, by definition, “irrevocable,” CC art. 1559 purports to recognize several grounds upon which such a donation can supposedly be “revoked”? How might (should) the apparent antinomy between these two articles be resolved?

2) Definition

What does “revocation” mean? (i) What is its *common* meaning? In this instance, the answer can be found in the word’s etymology. The word is derived from the Latin prefix *re-*-, which means “again,” and the Latin verb *vocare*, which means “to call.” A revocation, then, is a “calling back” of something. (ii) What is its *general legal* meaning? See *Vocabularie Juridique* 712 (Gérard Cornu ed., 1987) (“Revocation . . . 2.a. A unilateral act of retraction by which a person intends to put at nought a prior act of which he was the sold author or even a contract to which he is a party that that produces this effect in cases determined by legislation.”); *Private Law Dictionary and Bilingual Lexicons* 381 (Paul-André Crépeau gen. ed., 2d ed. 1991) (“Revocation . . . 1. Termination of a juridical act resulting from a unilateral decision, with regard to an offer, a liberality, a mandate or a judicial admission.”) (iii) What is its meaning in this specific legal content, i.e., donations *inter vivos*? Figure this one out for yourself.

3) Causes (CC art. 1559)

a) Pseudo-cause: non-fulfillment of suspensive condition
b) True causes

1) Legal or conventional return

a] Legal return

1} Definition

2} Varieties:

a} The retour successoral (CC arts. 897-98)

b} Right of collation (?)

b] Conventional return (CC art. 1535)

1} Definition

2} Illustration

DH 85. X gives Y a tract of land subject to the proviso that if Y should predecease X, then ownership shall revert to X. Y predeceases X. Can X now "revoke" the donation? Why or why not?

2) Ingratitude (CC art. 1560)

* Instances

Is the list of instances of ingratitude set out in CC art. 1560 exhaustive or merely illustrative? Why?

a] Attempted murder of donor

b] Cruel treatment of, crimes against, or grievous injuries to donor

Re-read the note, supra, at pp. 120-121 regarding the meaning of the phrase “cruel treatment, crimes, and grievous injuries.”
1) Cruel treatment:
   a) *Mens rea*: intent
   b) *Actus reus*: physical mistreatment

2) Crimes: intentional offenses against the person or property defined by the criminal law

3) Grievous injuries:
   a) *Mens rea*: intent
   b) *Actus reus*: works, behavior, or even attitudes that damage his sentiments, honor or reputation

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*Whitman v. Whitman*,
730 So.2d 1048 (La.App. 2 Cir. 1999)

DREW, J.

William Newell Whitman appeals the judgment revoking two donations made to him by his former wife during their marriage. Arguing that the transactions were onerous donations and that he fulfilled the obligations imposed by the donations, Mr. Whitman contends that the trial court erred in finding that the property transfers were gratuitous donations and subject to revocation for ingratitude.

FACTS

On June 10, 1997, Marilyn Mann Whitman sued Mr. Whitman for divorce based upon his alleged adultery on June 7, 1997. The couple married in 1981 and had no children. In addition to the divorce, Mrs. Whitman requested that the court revoke for ingratitude a donation she made to Mr. Whitman on December 31, 1985 of her one-half interest in immovable property. On August 21, 1997, the trial court signed a divorce judgment in favor of Mrs. Whitman.

Shortly after their 1981 wedding, Mrs. Whitman donated to her husband a one-half interest in an acre tract on which their home was later built. Mrs. Whitman testified she and Mr. Whitman had mortgaged the one-acre tract on two occasions and later paid off the loans.

Mrs. Whitman owned an undivided one-half interest of a 1/32 interest in a much larger tract, which fractional interest she had acquired from her mother. She owned an undivided 300-acre interest in the property in which a number of persons had ownership
interests. In 1985, she donated to Mr. Whitman one-half of her undivided interest in that farm and timber land. . . .

. . .

In written reasons signed April 28, 1998, the trial court noted that the divorce was granted on grounds of adultery. The trial judge found that Mrs. Whitman had met her burden of proof in establishing that she was entitled to revoke the inter vivos donations based upon ingratitude. La. C.C. art. 1560(2). . . .

DISCUSSION

La. C.C. art. 1559(1) provides that a donation inter vivos may be revoked on account of ingratitude of the donee. Ingratitude can take place only in three cases: (1) if the donee has attempted to take the life of the donor, (2) the donee has been guilty of cruel treatment, crimes or grievous injuries against the donee, or (3) the donee has refused the donor food when the donor was in distress. La. C.C. art. 1560. Only art. 1560(2) has any application to this dispute. A revocation for ingratitude must be brought within one year from the act of ingratitude or from the day the act was made known to the donor. La. C.C. art. 1561. Revocations based on ingratitude do not affect any alienation or mortgages made by the donee or any real encumbrances the donee placed upon the thing provided those transactions occurred before the filing of the suit for revocation. La. C.C. art. 1562. When a donation is revoked for ingratitude, the donee is obligated to restore to the donor the value of the thing given, estimating the value according to its worth at the time the action for revocation is brought and the fruits from the day it is brought. La. C.C. art. 1563.

. . .

First, Mr. Whitman asserts that the trial court erred in concluding that the donations were gratuitous and, therefore, subject to revocation for ingratitude.

. . .

Mrs. Whitman correctly argued that the donations were not ambiguous and imposed no charges on Mr. Whitman. Even if evidence outside the donations were considered, the evidence presented does not support that these donations were onerous ones.

. . .

As purely gratuitous donations, Mrs. Whitman's gifts of land to Mr. Whitman during their marriage were subject to revocation for ingratitude. We find no palpable error in the trial court's conclusion that Mr. Whitman's adultery constituted cruel treatment and grievous injury to Mrs. Whitman. Therefore, the gratuitous donations made by her to him were revocable. Pursuant to her timely action based on his ingratitude, the donations were validly revoked. La. C.C. arts. 1559, 1560(2) and 1561.

DH 86a. Olide gives his son, Renard, a tract of land, Terre Puante, as a gift. Sometime later, Olide promises to "put up" $50,000 to help Renard, a burgeoning entrepreneur, get his new nutria-products business off the ground. The promise is memorialized in authentic form. But when it comes time for Olide to pay up, he finds that, thanks to a series of recent financial reversals, he's no longer in a position to do so. Renard then sues Olide to enforce the promise and, after getting a default judgment against Olide, proceeds to foreclose on Olide's personal effects, which the sheriff seizes. Olide then sues Renard, seeking to revoke the donation of Terre Puante. What result would you predict? Why? See the following jurisprudence:
The opposing parties in this case are father and son. The father, a part owner of Ogden--Perry Theaters, Inc., gave to his son over a period of years a substantial amount of stock in the corporation. When the son became an attorney, the father signed a written guarantee prepared by the son of a contract by which the corporation agreed to buy back the son's stock to enable him to finance his law practice. . . . In the summer of 1985, the corporation ceased making payments due to its financial difficulties and subsequently filed for bankruptcy. The son then sued his father as guarantor on the contract, and on April 22, 1986, the district court rendered judgment against the father in the amount of $163,249.28.

Apparently unable to collect on the judgment, Mr. Perry, Jr. obtained a writ of fieri facias and directed the sheriff to seize various items of personal property located at his parents' home, including jewelry, appliances and furniture. During the seizure, at which the son was not present, his mother fainted and his father was summoned to obtain medical attention for her.

Following this experience, Mr. Perry, Sr. and his wife filed a petition seeking a preliminary injunction against the seizure alleging, among other claims, that they were revoking for ingratitude various donations they had made to their son and that the revocation of these donations would be compensation for their judgment debt. . . .

The trial judge's decision to grant the injunction was based on two underlying conclusions: (1) That the seizure of Mr. & Mrs. Perry's property instigated by their son is sufficient cause under the Civil Code for revocation of donations made to the son . . . . The appellant challenges both of these conclusions.

Article 1560 of the Civil Code provides that revocation on account of ingratitude can take place if the donee "has been guilty towards [the donor] of cruel treatment, crimes or grievous injuries." The trial judge found that the son's having directed the sheriff to seize personal property of his parents constitutes cruel treatment or grievous injury within the meaning of the article. We agree. Although we have found no cases on point, the discussion of revocation for ingratitude in the Civil Law Translations of Aubry and Rau defines "grievous injuries" as follows:

"Injuries" include any act naturally offensive to the donor. It may be the adultery of one of the spouses.... The act may consist of slanderous charges; of a seizure levied by the donee against the donor of whom he is creditor; or, in a proper case, even of the refusal to consent to the revocation.

4 C. Aubry & C. Rau, COURS DE DROIT CIVIL FRANCAIS, § 708 (La. State Law Institute Trans. Vol. 3, 1965) (Footnotes omitted; emphasis added.). A common understanding of the term "grievous injuries," bolstered by the above authority, leads us to conclude, as did the trial judge, that the actions of Mr. Perry, Jr. as creditor of his father are sufficient evidence of ingratitude to support revocation of any donations made to him.
DH 86β. The same as before (DH 83α), except that Renard’s suit against Olide is *ex delicto* rather than *ex contractu*, specifically, seeks indemnification for personal injuries Renard sustained as a result of Olide’s negligence. Should Renard’s “foreclosure” action still be regarded as an act of ingratitude? Why or why not?

DH 86γ. Olide, the incorporator, chairman of the board, and CEO of Cajun Nutria Products, Inc., gives some of his shares of stock in the company (a minority share) to his son, Renard. Over time, Renard becomes convinced that Olide is exploiting the corporation for his own benefit. And so Renard files a “shareholder derivative suit” against Olide, alleging not only breach of fiduciary duty, but also violations of RICO. Is the donee guilty of ingratitude? Why or why not? If so, what kind? See the jurisprudence that follows:

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*Spruiell v. Ludwig*,

568 So.2d 133 (La. App. 5th Cir. 1990)

GOTHARD, Judge.

This appeal concerns four shareholder derivative actions and a reconventional demand for revocation of inter vivos donations which were consolidated for trial.

The roots of these cases began in the 1950's and 1960's when Edward B. Ludwig, Sr. began several family corporations to conduct the family business centered around steel, construction and real estate. In 1967... his son Edward B. Ludwig, Jr. (Buddy)... put together a project whereby Mr. Ludwig, Sr. invested $43,000 to buy land on which three industrial buildings were constructed for lease to a third party. A new corporation, Drawde-Allen, was formed to own and manage these buildings and any future industrial real estate the family might acquire. The sole shareholders were Edward B. Ludwig, Sr. and his wife Nella. Edward B. Ludwig, Sr. died in 1968.

During the period from 1968 to 1983... the various corporations were managed on a day to day basis by Buddy. His sister, Joyce Ludwig Spruiell, served as a director in several of the corporations. No formal corporate meetings were held... At any rate, the corporate proceedings are chronicled in written minutes and resolutions signed by Joyce and the various family members, who were directors in the corporations.

In 1976 Nella Ludwig began making inter vivos donations of stock to her children, Buddy and Joyce, and her grandchildren.

In 1983 Joyce and her children, now adults, received notice that two of the family corporations, Container Realty & Construction, Inc. and Drawde-Allen, Inc. were merging. Because they did not fully understand the ramifications or meaning of the merger, Joyce and her children (Catherine, Sidney and John), contacted Joyce's attorney and requested that he investigate the merger and their interests in the family businesses. Pursuant to the attorney's request for more information a meeting was held for the purpose of an examination of corporate books and records concerning the merger. The meeting deteriorated into a family feud pitting Joyce and her children against Nella, Buddy and...
Buddy's family.

Subsequently, Joyce and her children filed four separate shareholder derivative actions against Nella, Buddy and his family and against five family corporations. The petitions in all four suits are similar and assert that plaintiffs were damaged as a result of eleven transfers of immovable property to the detriment of the family corporations. The suits seek return of the immovable property to the corporations and an accounting of rentals or, in the alternative, damages.

As a result, Nella filed suit against Joyce and her children for revocation of donations for ingratitude based on the allegations in Joyce's petition.

In a reconventional demand Joyce asserts that defendants' actions constitute a pattern and practice of minority oppression in violation of 18 U.S.C. § 1961 et seq. (RICO). The four derivative actions and the revocation action were consolidated for trial. After a trial on the merits, the trial court rendered judgment in favor of defendants in the derivative actions, finding actions prescribed on three of the transfers and that the remaining sales were proper and not in violation of plaintiffs' derivative rights. Additionally, the court ruled in favor of plaintiff in the revocation action finding that Joyce and her children acted in a manner that was "so cold and vituperative as to justify the revocation action."

REVOCATION OF INTER VIVOS DONATION.

Article 1559 of the Civil Code provides that an inter vivos donation may be revoked for ingratitude of the donee. Article 1560 explains that revocation can take place on account of ingratitude if the donee "has been guilty towards him (donor) of cruel treatment, crimes or grievous injuries." The trial court revoked the donations finding that, the "depth of ingratitude and perniciousness was demonstrated in the pleadings filed on behalf of the plaintiffs accusing defendant mother, Nella, and E.B. Ludwig, Jr., the defendant's son, of racketeering activities in violation of the Federal statutes."

At trial Nella testified that she was hurt and embarrassed by the selfishness and ingratitude of her daughter and grandchildren. Nella also testified that Joyce referred to her as a "crooked thief." Joyce and her children maintain that their action in bringing the shareholder derivative actions and making the reconventional demand to the revocation suit were solely to protect their rights and not intended as a personal attack on Nella.

Nella was sued in her capacity as director or shareholder in various corporations formed pursuant to R.S. 12:1 et seq. Despite Nella's testimony that the corporations involved were family matters and should not be aired in public, the law does not make that distinction between family and business corporations. Pursuant to R.S. 12:1 et seq. a minority shareholder has a right to bring a derivative action on behalf of the corporation. The minority shareholders in a derivative action are only nominal plaintiffs whose right to recover can only be asserted secondarily.

We do not find that allegations of breach of fiduciary duty contained in the shareholder derivative pleadings asserting the corporations' right to recovery are sufficient to constitute grievous injury under the Civil Code. But the allegations go beyond the norm in shareholder's derivative actions. Joyce and her children made the direct allegation that Nella was guilty of wrongdoing to the extent that she incurred liability under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) embodied in 18 U.S.C.1961 et seq. The trial court relied heavily on these allegations of wrongdoing.
in the reconventional demand to the revocation suit in revoking the donations. The thrust of the allegation in the reconventional demand is that Nella, by filing the revocation action, formed a "deliberate attempt or scheme to appropriate unto the said defendant in reconvention your reconvenor's interest as minority stockholders in each .... corporation."

Grievous injuries are defined as follows:

"Injuries include any act naturally offensive to the donor. It may be the adultery of one of the spouses.... The act may consist of slanderous charges; of a seizure levied by the donee against the donor of whom he is creditor; or, in a proper case, even of the refusal to consent to the revocation."


The evidence adduced in the instant case reveals that Joyce and her children sought to obtain more of the family property for themselves. In order to do this they initiated a shareholder's derivative action through attorneys hired to represent their interests. As part of their representation of their clients, and with the clients' understanding and acquiescence these attorneys filed a reconventional demand in response to Nella's suit for revocation. That demand implied unfounded claims of criminal activity. The demand, dismissed for failure to state a cause of action under 18 U.S.C.1961, was unnecessary to protect shareholder's rights as asserted by Joyce, et al in testimony given at trial.

. . .

The trial court found grievous injury sufficient to revoke the donations existed in the lack of concern and in the overt attempts to discredit Nella committed by Joyce and her family, acts so naturally offensive to the donor that they constitute grievous injury. We find no manifest error in that conclusion and uphold the trial court's action in that matter.

___

c] Refusing food to donor when in need

3] Failure to fulfill charges (CC arts. 1565-1568)

a] Exposition

b] Prerequisites

1] General rule: revocation occurs as of right (automatic) (CC art. 1565)

2] Exception: judicial declaration of revocation required (CC art. 1566)

c] Limitations

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1) Donations to charities: conditions / charges that become impracticable or impossible of fulfillment: cy-pres doctrine (9:2331)

Cynthia Samuel, Katherine Spaht, & Cynthia Picou,
SUCCESSIONS & DONATIONS: CASES & READINGS 440-41 (Fall 2000)

In De Pontalba v. New Orleans, supra, the act of donation was made in 1785 by the plaintiff’s father to the Ayuntamiento of the city of New Orleans. The court applied the laws of Spain, but in so doing, the court appears to recognize the exception made by the Spanish law for it concludes: "Unless the right of return, in case of inexecution of the mode, charge, or condition, be expressly stipulated in the act, these donations are irrevocable. The act in this case contains no such stipulations. **" It must be noted that the case was decided in 1884.

In Orleans Parish School Board v. Manson, 241 La. 1029, 132 So. 2d 885 (1961), noted in 22 Louisiana Law Review 681 (1962), the court states: "Since the School Board has long ago discontinued the use of the property for school purposes, the school building having been condemned and demolished in 1953, it would appear that the district judges was correct in holding that the defendants were entitled to have the donation revoked for noncompliance with the condition imposed by the donor. However, the School Board contests defendants’ claim for a declaration of the right of revendication. It contends that the donation is to be regarded as a dedication *** for public use ***. Jaenke v. Taylor and Wilkie v. Walmsley were suits involving dedications of property for street purposes and the question was whether the land would revert to the original owners upon discontinuance of the public use. It was held, in line with other authorities pertaining to dedications, that the property does not revert to the original owner in the absence of an express reservation contained in the act of dedication to that effect."

In Board of Trustees v. Richardson, 216 La. 633, 44 So. 2d 321 (1950), the court states:

In the case of Board of Trustees of Ruston Circuit, M.E. Church, South v. Rudy, 192 La. 200, 187 So. 549, 550, the court *** observed: "It has been held that where the donor does not place such a reservation in the act of donation, the donee is granted a complete title," and concluded that inasmuch as the act whereby Rudy donated certain property to the church did not contain such a revisionary clause, the title was completely vested in the church by the first deed and that the stipulation that it was “to be used for religious purposes” was merely indicative of the motive for making the donation. This holding is not only at variance with our civil law, as hereinabove demonstrated, but it is also not supported by the authorities relied upon by the author of the opinion and we will not, therefore, follow it.

The legislative recognition of the Cy-pres doctrine (R.S. 9:2331, et seq., as last amended by Act 43 of 1970) now makes it possible for a charitable legatee or donee to obtain judicial approval for the administration of the subject matter of the donation or bequest in a manner different from that which the parties had in mind, whenever the circumstances have so changed since the execution of the donation as to render it impractical or impossible to comply literally with the terms and conditions thereof. The statute contains adequate provisions for a judicial declaration and determination that the
DH 87a. Just before his death in 1963, Papére donated a portable office building to Sowela Technical Institute, Inc. (SOTI). In the act of donation, Papére stipulated that the building was given “on the condition that the building be forever used as a laboratory in which students will be instructed in the fine art of mimeography.” \(^3\) Over the past several years, the “market” for persons trained in mimeography has all but disappeared, insasmuch as that technology has now been superseded (first, by photocopying, and later, by laser printing). As a result, the number of students interested in studying mimeography long ago fell to zero. And so it is that SOTI’s board of directors now wants to use the building for other instructional purposes. Can they do so? Why or why not?

2) Donations to religious institutions: conditions/charges after lapse of 10 years (9:2321)

Read La. Rev. Stat. 9:2321 & 2322. What is the real import of these provisions, particularly the latter? \(^4\) See Cynthia Samuel, Katherine Spaht, & Cynthia Picou, SUCCESSIONS & DONATIONS: CASES & READINGS 440-41 (Fall 2000) (“The evident purpose of these statutes is to limit the effect of reverter clauses to ten years from the date of the donation, so that after ten years the donee may well ignore the conditions and dispose of the thing given in any manner he may please.”)

87b. Back in 1990, Olide, concerned about the destiny of his immortal soul, donated a portable office building to Our Lady of the Bayou Catholic Church. In the act of donation, Olide stipulated that the building was given “on the condition that the building be forever used as a chapel in which the faithful may offer devotions to Our Lady, the Blessed Θεοτόκος.” The church’s new pastor, Monsignor Nouveau, wants to use the building for another purpose, namely, to house the parish library. Can he divert it to that purpose? Why or why not?

4) Effects (CC art. 1569)

a) In general:

1] Action to recover thing given

2] Remedies (restoration of thing given or damages)

b) For particular causes

\(^3\) If you’re old enough, you’ll remember “mimeographs” – the aromatic, purplish copies – from elementary school.
1] Ingratitude (CC art. 1561)

a] Action

1} Subjects

a} Plaintiffs

1/ Donor

2/ His heirs (sometimes)

Under what circumstances may the donor’s heirs, rather than the donor himself, sue to revoke a donation *inter vivos* because of the donee’s ingratitude? See CC art. 1561, ¶ 2.

And now, two more questions: (i) can the successors of one who has made a donation *inter vivos* to an ingrate sue to revoke the donation if the donor himself never discovered the ingratitude and (ii) if so, from what point in time does the liberative prescription of one year to which the action is subject begin to run in such a case. As you ponder these questions, consider the following authorities:

Jean Baptiste Caesar Coin-Delisle, *Commentaire du Titre des Donations et Testaments* art. 957, n° 15, at 288 (new ed. 1855)

15. So long as the year [starting] from the wrong has not expired, the legislation presumes that the donor has not pardoned [the ingrate]; as a result, the second part of Article 957 [LCC 1561] causes the deceased donor’s action to pass to his successors [if he] dies before the end of this year, even if the donor has not shown any diligence [i.e., has not brought suit]. But this part of the article does not state the delay within which the successors must bring the action.

The natural consequence is that the successors enjoy in the this regard the delays that the first part of the article accorded to the donor. One will, then, draw a distinction depending on whether the wrong was known during the lifetime of the donor or whether it remained unknown. If the wrong, or who did it, has remained unknown, then the [one-year] delay will run from the day on which the successors could have acquired knowledge of the wrong, just as it would have run from the same day for the donor. . . . If the wrong was known, then the successors will have only what remains of the . . . year [starting from the time at which the donor could have learned of the wrong], regardless how much of the year passed during the donor’s lifetime.

But when the action belongs to the successors of the donor, within what delay must they bring it? This question is one that the legislation does not specifically resolve and for which one must evidently resort to the rules specified in the first paragraph of article 957.

The application of the principle presents no difficulty if the donor died without having [been able to] know [ ] of the acts of ingratitude. In this case, the action is opened in favor of the successors just as it would have been opened in favor of the donor. The delay within which they must bring it will begin to run against them just as it would have run against the donor. The point of departure, then, will be the day of death of the donor, if, at this moment, his successors [were able to] know of the acts of ingratitude; otherwise, the starting point will be only the day on which they will have [been able to] know [ ] of these facts. Nevertheless, if they act more than a year after the death of the donor, it is clear that they will be required to prove not only that the donor died ignorant of the ingratitude, but also that they themselves did not know about it until after his death.

5 Marcel Planiol & Georges Ripert, _Traité Pratique de Droit Civil Français: Donations et Testaments_ no. 510, at 646-47 (André Trasbot & Yvon Lousouarn revs., 2nd ed. 1957)

According to Article 957, paragraph 2 [LCC 1561, par. 2], the successors can bring the action if the donor died without having done so, on the condition that they are still within a year of the wrong. The successors are the continuers of the person of the deceased. What the deceased could have done, they can do likewise . . . . Thus, they will have the same rights as he. From this idea, one draws the consequence that they, the continuers of the person of the deceased, will have this right [i.e., to sue to revoke the donation for ingratitude]; [and] the successors [will] have the same delay as their author within which to bring the action for revocation. Article 957, paragraph 2 provides that the successors can act if the deceased has died “within a year from the wrong,” whereas paragraph 1 accords to the donor a delay of a year “from the day of the wrong” or “from the day on which the donor could have known of the wrong.” It is necessary to combine the two formulae: if before his death the donor knew or was able to know of the wrong, the successors have as their entire delay only the time sufficient to complete the year that began during the lifetime of their author; if, on the contrary, the donor died in ignorance of the wrong, the successors have a delay of one year, starting from the day on which they themselves have [been able to] know [ ] of the wrong.

DH 87γ. Shortly before his death, which occurred on June 1, 2004, Pascal made two donations _inter vivos_: a gift of a tract of land to _A_; a gift of some cattle to _B_. Between the time at which he made these acts and that of his death, both of Pascal’s donees were, well, “naughty.” First, on April 1, 2004, _A_ together tried to kill Pascal in his sleep. His effort was foiled by Pascal’s children, Ti-Boy and Lil-Fille, who rescued Pascal at the last minute. Though Pascal knew what _A_ had done, he took
no action against her. Then, on May 1, 2004, B falsely accused Pascal of a serious “sex crime.” Though Pascal did not learn of these accusations before his death, Ti-Boy and Lil-Fille learned of them one month after his death, i.e., on July 1, 2004. Ti-Boy and Lil-Fille now want to sue A and B to revoke the donations that Pascal made to them. With respect to each donation, answer the following questions: (i) Can Ti-Boy and Lil-Fille bring such an action? (ii) If so, how long do they have within which to bring it?

2} Defendants: the donee only

2} Prescription

a} Delay: one year

b} Trigger: act of ingratitude or discovery of that act by donor

b] Remedies

1} Where donee has not alienated the thing: return

2} Where donee has alienated the thing: payment of value

3} Where donee has allowed real rights to be acquired on the thing: real rights subsist

DH 87.1a. Not long after Olide donated a farm to Clodice (his concubine), she mortgaged it to Bayou Bank to secure a $100,000 loan. Then one night Olide and Clodice got into a heated argument, during which Clodice attacked Olide with a meat cleaver. When Olide recovered from the attack, he demanded that Clodice return the farm to him on account of her “ingratitude.” Recognizing that his demand was legitimate, she complied with it. A few weeks later, Clodice defaulted on her loan from Bayou Bank. And so, the bank proceeded to foreclose on what it called its “mortgage on the farm.” Does the bank have such a mortgage? If so, is it effective against Olide? Why or why not? If it is effective against him, does he have any sort of recourse against Clodice?

2] Failure to fulfill charges (CC arts. 1565 et seq.)

Under this heading, one must distinguish donations of immovables from donations of movables, for the rules seem to vary from one class of donation to the other.

a] Donations of immovable property
1) Action

a) Subjects

1/ Plaintiffs: donor or his successors or assigns

2/ Defendants (CC art. 1568)

a/ Donee

b/ The donee's successors

c/ Gratuitous transferees of donee or donee's successors

b) Prescription (CC art. 1567)

1/ Delay

How long may the donor wait before bringing suit to revoke a donation inter vivos on the ground that the donee has failed to fulfill the charges attached thereto? Read CC art. 1567. What is meant by “the usual prescription”? Read the following jurisprudence and note:

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_DiMattia v. DiMattia_, 282 So.2d 554 (La. App. 1st Cir. 1973)

...  

Plaintiff contends that the five year prescriptive period provided in C.C. Article 3542 is the applicable prescription for suits to revoke donations based on the non-performance by the donee of conditions imposed and therefore plaintiff's suit based on this ground was timely filed. With this contention we agree.

Civil Code Article 1567 provides:

Art. 1567. An action of revocation or rescission of a donation on account of the non-execution of the conditions imposed on the donee, is subject only to the usual prescription, which runs only from the day that the donee ceased to fulfill his obligations.'

It has been held that donations which impose charges or conditions upon the donee are onerous in nature and a right of revocation exists with respect to such donations just as in any ordinary commutative contract. Under the provisions of C.C. Article 3542 suits “... for nullity or rescission of contracts, testaments or other acts ...” are prescribed by
At the time at which DiMattia was decided, CC art. 3542 (1870) read as follows:

**Art. 3542.** The following actions are prescribed by five years:

- That for the nullity or rescission of contracts, testaments or other acts.
- That for the reduction of excessive donations.
- That for the rescission of partitions and guarantee of the portions.

This prescription only commences against minors after their minority.

In 1983, this article was repealed and replaced by new article 3497.

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**NOTE**

**i.** Did the *DiMattia* court interpret CC art. 3542 (1870) correctly? Did “rescission” as used in that article meant the same thing as “rescission” as used in article 1567? In the French version of the article of the Code of 1825 that CC art. 3542 reproduced (article 3507), the word rendered in the English translation as “rescission” was “réscission,” which means “nullification.” By contrast, in the French version of the Article of the Code of 1825 that CC art. 1567 reproduced (article 1554), the word rendered in the English translation as “rescission” was “résiliation,” which means “dissolution.” Were (are) *nullification* and *dissolution* the same thing?

**ii.** Is *DiMattia* correct today?

**a.** In 1983, the legislature repealed CC art. 3542 (1870) and replaced it with new article 3497, which you should now read. Note that, even though the official revision comment to the new article states that it “does not change the law,” it does not include any provision for the “rescission of contracts.”

**b.** Under present law, an action for *dissolution* of a contract, properly so called, is subject to a liberative prescription of ten (10) years, CC art. 3499 (rev. 1983), whereas an action for *nullification* of a contract, properly so called, is subject to a liberative prescription of five years, in the case of a *relative* nullity, CC art. 2032, par. 2, and not liberative prescription at all, in the case of an *absolute* nullity, CC art. 2032, par. 1 (rev. 1984).

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2/ **Trigger:** day on which noncompliance begins
2) Remedies (CC art. 1568)

a) Where donee has not alienated the thing: return

b) Where donee has alienated the thing

1/ Onerously: payment of value

2/ Gratuitously: return

c) Where donee has allowed real rights to be acquired on the thing: real rights subsist, but donee is liable for diminution in value

DH 87.1β. Olide donated a farm to Clodice (his concubine) “on the condition that she not use it to grow tobacco.” Clodice, in turn, mortgaged the farm to Bayou Bank to secure a $100,000 loan. Before long, Clodice planted the farm in tobacco. When Olide learned of it, he demanded that she return the farm to him. Recognizing that his demand was legitimate, she complied with it. A few weeks later, Clodice defaulted on her loan from Bayou Bank. And so, the bank proceeded to foreclose on what it called its “mortgage on the farm.” Does the bank have such a mortgage? If so, is it effective against Olide? Why or why not? If it is effective against him, does he have any sort of recourse against Clodice?

b) Donations of movable property

Who may bring an action to revoke a donation of movable property on the ground of “failure” of a charge or condition? Against whom may it be brought? By what date must it be brought? What remedies are available? Do CC arts. 1565 et seq. answer these questions?

3) Legal or conventional return

Who may bring an action to revoke a donation on the ground of a legal or conventional return? Against whom may it be brought? By what date must it be brought? What remedies are available? Do any of the articles in Section 3, Chapter 5, Title II, Book ÍII of the Civil Code answer these questions?