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FEDERAL TAX EFFECTS OF THE PARENTAL OBLIGATION OF SUPPORT IN LOUISIANA

The incidence of federal taxation is not based solely on the form of transactions, but relies also on their underlying economic reality. This is illustrated by the tax treatment of the benefit accruing to the taxpayer when any of his legal obligations, including his obligation to support his children, is discharged by a trust he created or controls. This results in an economic benefit to the taxpayer that should be taxed to him. The Income Tax Regulations provide that the discharge of his parental support obligation will have this effect "if, and only if, the obligation is not affected by the adequacy of the dependent's own resources."¹ This Comment will explore the application of this formula to the Louisiana law of support and the resulting consequences in income, gift, and estate taxation.²

INCOME TAX

Trusts

Generally, income from trust property is taxed to the trust if it is accumulated, or to the beneficiary if it is distributed.³ However, in some instances the income of a trust is taxed to the person who has economic control over the trust or who derives economic benefit from it. Thus, trust income may be taxed to the grantor,⁴ or to a person who possesses certain powers over the trust,⁵ or to a person whose obligations are discharged by it.⁶ Section 677(a) states the general rule that the grantor shall be treated, and hence taxed, as owner of a trust to the extent that the income may be distributed to the grantor or applied for his benefit. Relying on this section,⁷ the Supreme Court in *Helvering v. Stuart*⁸ held that income of a trust available for the discharge of the grantor's parental obligation is taxable to him, notwithstanding that the income is not used for that purpose.

1. Treas. Reg. § 1.662(a)-4 (1956).

2. The tax treatment of alimony, and separate maintenance payments under INT. REV. CODE OF 1954, §§ 71, 215, 682, is beyond the scope of this Comment.

3. *Id.* § 662.

4. *Id.* § 677.

5. *Id.* § 678.

6. Treas. Reg. § 1.662(a)-4 (1956).

7. Int. Rev. Code of 1939, ch. 1, § 167, 53 Stat. 47, now INT. REV. CODE OF 1954, § 677(a).

8. 317 U.S. 154 (1942).

Congress, disapproving⁹ the interpretation of the Court in *Stuart*, amended the Code to restore the prior administrative practice¹⁰ and jurisprudence¹¹ with respect to support trusts. This amendment, now section 677 (b) of the 1954 Code, provides:

"Income of a trust shall not be considered taxable to the grantor . . . merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain except to the extent that such income is so applied or distributed. . . ."¹²

The amendment is considered by the courts as an exception to be interpreted strictly.¹³ Consequently, when the income of a trust may be used for the grantor's benefit in a manner not contemplated by the terms of section 677 (b), the income will be taxed as set forth in section 677 (a), and all income usable for support will be taxed to the parent-grantor.

The cases falling outside the exception provided by section 677 (b) may be divided into three groups. The first is where the income from the trust may be used to satisfy a personal obligation that is support related.¹⁴ A recent example of this is the trust considered in *Morrill v. United States*.¹⁵ The taxpayer set up trusts for the education of his children. The private schools in which they were enrolled looked to the father for the payment of tuition and other expenses but these were in fact paid by the trustee. The court found that the taxpayer was personally liable to the schools and, therefore, payment to them discharged the grantor's obligation. Since this was not a support obligation, the grantor was taxed on the entire income of the trust. If, however, the schools had contracted directly with the trustee and looked solely to him for payment, only that portion of the trust income actually applied to support would have been taxable to the grantor.¹⁶

9. H.R. REP. No. 871, 78th Cong., 1st Sess. 50.

10. G.C.M. 18972, 1937-2 CUM. BULL. 231.

11. *Douglas v. Willcuts*, 296 U.S. 1 (1935); *Commissioner v. Grosvenor*, 85 F.2d (2d Cir. 1936).

12. INT. REV. CODE OF 1954, § 677(b).

13. *Estate of Hamiel v. Commissioner*, 253 F.2d 787 (6th Cir. 1958); *Hopkins v. Commissioner*, 144 F.2d 683 (6th Cir. 1944).

14. The Regulations cite as examples the payment of the grantor's rent or other household expenses. *Treas. Reg. § 1.677(b)-1(d)* (1956).

15. 228 F. Supp. 734 (S.D. Me. 1964).

16. *Collins, How to Avoid Tax Traps Arising from Retention and Excessive Control by Grantor*, 27 J. TAXATION 356 (1967).

The grantor will also be treated as owner of a trust when he has discretion to distribute income and his discretion is not limited by a fiduciary duty.¹⁷ Even where the grantor is a named trustee, the court will find his powers retained in a capacity other than as trustee when he has been relieved of his fiduciary duty.¹⁸ Finally, when the terms of the trust require income to be applied to the support of the dependent, the so-called mandatory support trust, the *Stuart* doctrine will apply because the trustee has no discretion over the distribution of income.¹⁹ In all three of these cases, the grantor has retained control or enjoyment of the trust beyond the requirements of the exception and is, therefore, treated as owner.

The parent may be taxed as owner of a trust under section 678, although he is not the grantor. This section provides that a person other than the grantor is taxed on income of a trust to the extent that he can vest the corpus or income in himself. However, there is an exception, strictly interpreted,²⁰ taxing income usable for support to such a person only to the extent it is actually so applied.²¹ The application of section 678 will usually arise in the so-called "grandfather trusts," in which a grandfather creates a trust for the support of his grandchildren and appoints their father trustee. The grandfather will not be taxed under section 677 because his obligation to support depends on the adequacy of the minor's resources²² and is, therefore, without tax effect.²³ However the father as trustee will be taxed on that part of the income used for support.²⁴

The most general basis upon which the parent may be taxed is as a beneficiary. Regulation 1.662(a)-4 provides: "Any amount which, pursuant to the terms of a will or trust instrument, is used in full or partial discharge of a legal obligation of support

17. Treas. Reg. § 1.677(b)-1(e) (1956).

18. In *Hopkins v. Commissioner*, 144 F.2d 683 (6th Cir. 1944), where the grantor, who was also a co-trustee, retained the power to, in his sole discretion, require either the income or corpus of the trust to be expended for the best interest of his son, and was relieved of liability except for fraud or bad faith, the grantor was held not to be acting as trustee as that word is used in the Int. Rev. Code of 1939, ch. 1, § 167(c), 53 Stat. 47, now INT. REV. CODE OF 1954, § 677(b).

19. Treas. Reg. § 1.677(b)-1(f) (1956).

20. *Id.* § 1.678(c)-1(b).

21. INT. REV. CODE OF 1954, § 678(c).

22. See note 109 *infra*, and accompanying text.

23. Treas. Reg. § 1.662(a)-4 (1956).

24. INT. REV. CODE OF 1954, § 678(c); *Mallinckrodt v. Nunan*, 146 F.2d 1 (8th Cir. 1945). See also Sarles, *Tax Consequences of "Grandfather" Trusts*, 1959 SO. CAL. TAX. INST. 675.

is included in the gross income of such person. . . ."²⁵ This regulation treats the parent as beneficiary and taxes him on the trust income even though he is neither the grantor of the trust nor a fiduciary with respect to it. It has been criticized²⁶ because it taxes the parent on income applied to meet his support obligation even though he has no power²⁷ over such application. Its rationale is based on the economic benefit theory, but its validity has not yet been tested in the courts.²⁸

Writers²⁹ have suggested that taxation of the trust income to the trust may be accomplished, and hence taxation to the father avoided, by the accumulation of income in a trust with a provision for distribution of it to the minor beneficiary without restriction when he reaches a certain age or at the termination of the trust.³⁰ Then the minor could use the previously accumulated income as his own funds to provide a large support item such as college education. This result can be aided further by avoiding any mention of support, maintenance, or education in the trust instrument.

Uniform Gifts to Minors Act

The Uniform Gifts to Minors Act, enacted in Louisiana³¹ in 1958, provides that the custodian of the minor's property shall have the discretionary power to apply all or a part of its income for "the support maintenance, education and general use and benefit of the minor."³² In view of this power, the Commissioner held in Revenue Ruling 56-484³³ that, regardless

25. Treas. Reg. § 1.662(a)-4 (1956).

26. Mannheimer, *Sprinkling Trusts*, 95 TRUSTS AND ESTATES 919 (1956); Winton, *Taxation of Nongrants under Trusts for Support of Their Dependents*, 33 TAXES 804 (1955).

27. *Mallinckrodt v. Nunan*, 146 F.2d 1, 5 (8th Cir. 1945): "It seems to us, as it did to a majority of the Tax Court, that it is the possession of power over the disposition of trust income which is of significance in determining whether, under section 22(a) [definition of gross income], the income is taxable to the possessor of such power."

28. Ehrlich, *The Effective Use of Support Trusts: Trusts for Minors, Custodian Statutes, Gifts of Future Interests*, 19TH N.Y.U. INST. ON FED. TAX. 729 (1961).

29. Kirby, *Current Developments in Use of Trusts in Income and Estate Planning*, 1959 So. CALIF. TAX INST. 627, 653; Miller, *Appropriate Forms of Gifts to Minors*, 16TH N.Y.U. INST. ON FED. TAX. 765, 770 (1958).

30. Such distributions would avoid the effect of the five-year throwback rule. See INT. REV. CODE OF 1954, § 665(b). Greater savings could be achieved by distributing part of the income currently to the minor and retaining the rest. In this way full use is made of both tax entities, the trust, and the minor.

31. LA. R.S. 9:735-742 (1958).

32. *Id.* 9:738.

33. 1956 CUM. BULL. 23.

of the relationship of the donor or of the custodian to the donee, income derived from property transferred under the Act³⁴ is includable in the income of the person obligated to support the minor to the extent that the income is used in discharge of the obligation. The ruling was issued under section 61 of the Code, which defines gross income, and, it is, therefore, based on the economic benefit theory. As noted above,³⁵ this basis is questionable when an independent custodian is appointed, and the father neither provides the property nor retains any power over the application of the funds for support.³⁶

Outright Gifts

This device offers the additional burden to the parent of proving the transfer was an economic reality.³⁷ This may be difficult as the courts scrutinize family transactions closely.³⁸ In addition, the Service's position in this area, as set forth in Regulation 1.662(a)-4 and Revenue Ruling 56-484, will probably result in an attempt to impute income from the donated property to the parent when it is used for support. The economic benefit theory, implicit in the regulation and ruling, would require taxing any income used for the support of his child to the father.³⁹

GIFT TAX

To the extent a parent is satisfying his support obligation in making a transfer for the benefit of his minor child, he is not making a gift.⁴⁰ Where the transfer discharges his support obligation in full, the Commissioner has held that there is an adequate consideration in money or money's worth⁴¹ and, therefore, such a transfer is beyond the reach of the gift tax. Also,

34. Even though Rev. Rul. 56-484, 1956-2 CUM. BULL. 23, applied only to the Model Gifts of Securities to Minors Act, the Commissioner in Rev. Rul. 59-357, 1959-2 CUM. BULL. 212 held that the variations between the Model Act and the Uniform Act would produce no different tax effects, and that prior rulings on the Model Act applied to the Uniform Gifts to Minors Act.

35. See note 27 *supra*, and accompanying text.

36. See CCH 1968 STAND. FED. TAX REP. ¶ 303.467, at 9543.

37. *Knetsch v. United States*, 364 U.S. 361 (1960); *Gregory v. Helvering*, 293 U.S. 465 (1935); *Henry D. Duarte*, 44 T.C. 193 (1965); *cf. Prudence Miller Trust*, 7 T.C. 1245 (1946); Rev. Rul. 55-469, 1955-2 CUM. BULL. 519.

38. *Schoenberg v. Commissioner*, 302 F.2d 416 (8th Cir. 1962); *Wodehouse v. Commissioner*, 178 F.2d 987 (4th Cir. 1949).

39. See CCH 1968 STAND. FED. TAX REP. ¶ 303.467, at 9543.

40. For an excellent discussion of the policies in this area, see Note, 74 HARV. L. REV. 1191 (1961).

41. E.T. 19, 1946-2 CUM. BULL. 166.

as to continuing expenditures for support, such as education, a gift tax should not be due unless they are clearly in excess of the obligation.⁴²

The problem is complicated where the support obligation is not completely discharged by the transfer. In cases of mandatory support trusts, it is arguable that the transfer is for the benefit of the donor, and thus, a gift has not been made. Here the taxpayer could urge the economic benefit theory⁴³ used by the Commissioner in the income tax area.⁴⁴ When a discretionary support trust is involved, the entire transfer will probably be taxed, because the portion of the income that will be used for support cannot be determined in advance. The Commissioner has ruled that transfers under the gifts-to-minors statute are taxable gifts whether or not they are used for support.⁴⁵

ESTATE TAX

The support obligation may also affect the determination of what property is included in the gross estate of a decedent⁴⁶ under section 2036(a)(1).⁴⁷ This section reaches property of which the decedent retained the possession, enjoyment, or right to income. When the income from transferred property is to be applied to the support obligation of the donor, he has retained a right to income over such property.⁴⁸ There are three requirements before the section becomes operative: (1) there must be a transfer by the decedent during life for less than adequate

42. The majority of these cases of course would fall within the \$3,000 annual exclusion anyway. INT. REV. CODE OF 1954, § 2503(b).

43. See note 28 *supra*, and accompanying text.

44. However, it is well settled that the income and gift tax do not necessarily form an integrated pattern of taxation. See, *e.g.*, Commissioner v. Prouty, 115 F.2d 331, 337 (1st Cir. 1940); Whayne v. Glenn, 59 F. Supp. 517 (W.D. Ky. 1945).

45. Rev. Rul. 56-86, 1956-1 CUM. BULL. 449. Here also the amount that will be used for support cannot be determined in advance.

46. As this Comment deals only with the tax effect of the support obligation, only § 2036(a)(1) dealing with retained life estates is pertinent. Other sections, such as §§ 2036(a)(2), 2038, 2041 may require inclusion of the transferred property due to a power retained by the parent, but they are beyond the scope of this discussion.

47. INT. REV. CODE OF 1954, § 2036(a): "GENERAL RULE—The value of the gross estate shall include the value of all the property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—(1) the possession of enjoyment of, or the right to the income from, the property, or"

48. Treas. Reg. § 20.2036-1(b)(2) (1960).

consideration; (2) the decedent must have retained the possession, enjoyment, or right to income of such property; and (3) the retention must have been for his life or for any period not ascertainable without reference to his death or for any period that does not in fact end before his death.⁴⁹

The first and third of these quickly eliminate many cases involving support. Under the first requirement, the support obligor who had retained enjoyment must have made the transfer for less than an adequate consideration. Hence, a grandfather's transfer would not be included in his estate because of the subsidiary nature of his obligation,⁵⁰ nor would it be included in the estate of the father because he is not the transferor.⁵¹ This requirement also excludes property transferred by the parent in consideration of the relinquishment of his support obligation. A complete discharge of the duty to support minor children⁵² is considered an adequate consideration in money or money's worth;⁵³ therefore, the transferred property is excluded from the operation of the statute. Under the third requirement, the "period test," the obligor must die while the obligation is still in force; otherwise, the transfer would be for a period that does in fact end before his death.⁵⁴

The second requirement, retention of possession, enjoyment, or the right to income of the property, may create more problems. The Regulations provide that such enjoyment has been retained to the extent income "is to be applied" toward the discharge of a legal obligation including the obligation of support.⁵⁵ The words "to be applied" imply that taxability is based on the intention of the decedent in making the transfer.⁵⁶ Under this test a mandatory support trust is includable in the gross

49. 3 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION § 24.06 (1959).

50. See note 109 *infra*, and accompanying text.

51. Estate of Chrysler v. Commissioner, 361 F.2d 508 (2d Cir. 1966).

52. As to the possibility of completely discharging the obligation to support a minor in Louisiana, see note 96 *infra*, and accompanying text.

53. Chase Nat'l Bank v. Commissioner, 225 F.2d 621 (8th Cir. 1955); Helvering v. United States Trust Co., 111 F.2d 576 (2d Cir. 1940); Estate of Robert M. McKeon, 25 T.C. 697 (1956).

54. In Estate of Robert M. McKeon, 25 T.C. 697, 704 (1956), the court makes it clear that the fact the decedent intended the reservation of income should end before his death is irrelevant. See also Helvering v. Mercantile-Commerce Bank & Trust Co., 111 F.2d 224, 226 (8th Cir. 1940); Estate v. Ambrose Fry, 9 T.C. 503, 507 (1947).

55. Treas. Reg. § 20.2036-1(b)(2) (1960).

56. 3 J. MERTENS, LAW OF FEDERAL GIFT AND ESTATE TAXATION § 24.11 (1959).

estate⁵⁷ since, where income is required to be used for support, the grantor intended such use. However, where the trustee is granted uncontrolled discretion in applying income, the grantor intends not to require its use for support and the courts have generally refused to include the property in the estate, even though part of the income has in the past been used for support.⁵⁸

The effect of section 2036(a)(1) on transfers under the Model or Uniform Gifts to Minors Act⁵⁹ was considered by the Tax Court in *Estate of Jack F. Chrysler*.⁶⁰ The court held that where the father-donor appointed himself custodian under the act, the property transferred to his children would be included in his gross estate at his death because he could apply the income to their support and thus satisfy his own support obligation. Hence, he had in effect retained the enjoyment of the property. On appeal, the Second Circuit reversed on other grounds and failed to decide this issue.⁶¹

THE OBLIGATION OF SUPPORT

Federal Requirements

Throughout the Regulations and Revenue Rulings the support obligation is referred to as the "legal obligation of support."⁶² This phrase implies an obligation that is not voluntary but required by law. Since there is no federal law of support,⁶³ the obligation must be founded on state law. The term "legal obligation of support" is defined in the regulations relating to income tax, which provide:

57. *Commissioner v. Dwight's Estate*, 205 F.2d 298 (2d Cir. 1953); *Helvering v. Mercantile-Commerce Bank & Trust Co.*, 111 F.2d 224 (8th Cir. 1940); *Estate v. William H. Lee*, 33 T.C. 1064 (1960).

58. *Commissioner v. Douglas's Estate*, 143 F.2d 961 (3d Cir. 1944): "There is certainly an important difference of fact between the trust set up for the very purpose of providing for the settlor's legal obligation to his wife and the one in which disinterested trustees have an option to apply a portion of the income for the support of the settlor's minor child." See also *Estate of Jack F. Chrysler*, 44 T.C. 55 (1965), *rev'd on other grounds*, 361 F.2d 508 (2d Cir. 1966).

59. The tax consequences under both acts are the same. See Rev. Rul. 59-357, 1959-2 CUM. BULL. 212.

60. *Estate v. Jack F. Chrysler*, 44 T.C. 55 (1965), *rev'd on other grounds*, 361 F.2d 508 (2d Cir. 1966).

61. *Estate of Chrysler v. Commissioner*, 361 F.2d 508 (2d Cir. 1966).

62. See, e.g., Treas. Reg. §§ 1.667(b)(1), (1956), 1.678(c)-1 (1956), 20.2036-1(b)(2) (1960).

63. The great number of cases and rulings handed down under § 151 of the Code could be used as a basis for a support standard, but as of yet neither the Commissioner nor the courts have seen fit to refer to them when handling problems in this area.

"The term legal obligation includes a legal obligation to support another person if, and only if, the obligation is not affected by the adequacy of the dependents' own resources. . . . In any event, the amount of the trust income which is included in the gross income of a person obligated to support a dependent is limited by the extent of his legal obligation under local law."⁶⁴

Revenue Ruling 56-484,⁶⁵ dealing with gifts-to-minors acts, makes it clear that the income imputed to the parent is limited by the extent of his legal obligations under local law.

These statements by the Service imply a consistent position. However, a different interpretation may be advanced.⁶⁶ It could be argued that Regulation 1.662(a)-4 applies to the situation envisioned in Code section 662, in which the parent is neither grantor nor fiduciary of the trust. If he is either settlor or trustee, that Regulation would not apply and taxation to the parent would rest solely on an interpretation of sections 677(b) and 678(c) and the Regulations. A reasonable interpretation of the wording of the statute, "applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain,"⁶⁷ seems to require the imputation of all amounts expended for a beneficiary whom the grantor or holder of a power is obligated to support. Under this approach, state law would be used to determine the existence of the obligation and its nature as primary or secondary. Therefore, the Commissioner would not be bound by state law as to the extent of the obligation and could tax to the parent all of the money spent on the minor even when it exceeded that obligation.

A reading of the cases does not support this theory. The courts definitely look to state law to determine not only the existence of the obligation,⁶⁸ but also its extent.⁶⁹ However, local law has not restricted the Commissioner from taxing to the parent all income distributed for the benefit of his child as

64. Treas. Reg. § 1.662(a)-4 (1956).

65. 1956-2 CUM. BULL. 23.

66. Samuels, *Beware of Trusts for Dependents*, 37 TAXES 109 (1959).

67. INT. REV. CODE OF 1954, § 677(b). Similar wording is found in the section dealing with a power in the person owing the obligation. See *id.* § 678(c).

68. *Darling v. United States*, 375 F.2d 843 (Ct. Cl. 1967); *Hopkins v. Commissioner*, 144 F.2d 683 (6th Cir. 1944); *Hogle v. Commissioner*, 132 F.2d 66 (10th Cir. 1942).

69. *Darling v. United States*, 375 F.2d 843 (Ct. Cl. 1967); *Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941).

constituting support, except in extreme cases.⁷⁰ Authority can readily be found in local legislation or jurisprudence stating that the extent of the obligation depends on the parents' station in life.⁷¹

The statement in Regulation 1.662(a)-4, that the support obligation does not include obligations affected by the adequacy of the dependent's own resources, is probably equally applicable to sections 677 and 678.⁷² This is illustrated by the fact that the Commissioner has been unsuccessful in cases where the trust income was paid to persons whom the grantor was only secondarily liable to support,⁷³ such as adult children or parents.

Louisiana Law

Article 227 of the Civil Code is the basis of the parental support obligation in Louisiana. It provides: "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children."⁷⁴ This text is a literal translation from article 203 of the Code Napoleon. Planiol, in commenting on the French article, describes the obligation as a subsidiary one because, when the child has resources of his own, his support should first be drawn from those resources.⁷⁵ The priority in which funds may be used is described by Savatier as follows: the income of the minor,

70. *Hill v. Commissioner*, 88 F.2d 941 (8th Cir. 1937), where the court found that it would be incredible to think that the entire trust income of \$8,200 per year was used to support and educate a ten-year old boy.

71. *Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941); *Hill v. Commissioner*, 88 F.2d 941 (8th Cir. 1937).

72. Most writers assume the regulation applies as well under §§ 677, 678. See Savage, *Comparative Advantages and Disadvantages of Support Trusts and Uniform Gifts to Minors Statute Gifts: What Constitutes Support for Tax Purposes*, 17TH N.Y.U. INST. ON FED. TAX. 729, 1112 (1959); Goodson, *When Is Payment in Discharge of Parent's Legal Obligation*, 99 TRUSTS & ESTATES 1009 (1959).

73. *Commissioner v. Armour*, 125 F.2d 467 (7th Cir. 1942).

74. LA. CIVIL CODE art. 227 (1870).

75. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1684 (1959): "This burden is only imposed upon the parents because the child has no personal property, as is ordinarily the case. When it has resources of its own, it is from its income that the sums necessary for its upkeep should first be drawn. Its parents are not then held except in case of the insufficiency of the child's personal income." See also 1 P. MERLIN, REPERTOIRE DE JURISPRUDENCE 312 (5th ed. 1825). The Spanish law, relied on by the redactors of the Louisiana Civil Code of 1825, is in accord. LAS SIETE PARTIDAS IV, tit. 19, L. 6 (transl. L. Moreau Lislet & H. Carleton 1820): "Likewise, when the son possesses wherewith to live, or has a trade by which he can support himself, by exercising it, in an honest way, the father is not bound to maintain him."

the income of the parent, the capital of the minor, and finally, the capital of the parent.⁷⁶

The subsidiary nature of parental support is illustrated by two other articles of the Louisiana Civil Code. Article 223 grants to the parents the enjoyment or usufruct of their children's property,⁷⁷ while article 224 imposes upon them, in return for this usufruct, the obligation to support, maintain, and educate their children. The subsidiary nature of the obligation, thus, is clear because the parent is granted the right to income from the minor's property in order to aid him in supporting the minor.

The Louisiana Supreme Court has applied this principle in each of two cases⁷⁸ involving an opposition by the children to the father's accounting as natural tutor. In each case the children had inherited substantial property from their mother and they objected to their father's charging their support expenses against the revenues from their property in his accounting. The court found for the father saying:

"[W]hen children have property from which a sufficient income may be derived to provide for their subsistence and education, the natural obligation of their father ceases, after the dissolution of the marriage; and that then their expenses ought to be provided for out of the revenues of their property, pro tanto at least, if insufficient."⁷⁹

These holdings should be applicable generally to the support obligation of the father even though the court limited its opinion to expenses arising after the dissolution of the marriage. It has been consistently held that the duty to support continues

76. PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* n° 339 (2d ed. 1952): "Parents may nevertheless charge the maintenance of their children to the revenues of the latter, if they have any. . . . But they may not use the capital of the children for their support unless the parents would otherwise be required to risk loss of their own capital."

77. Gifts by parent to child were excluded from the usufruct by amendment to article 226 in 1952 so that the parent could escape taxation on the income from such gifts. See LA. CIVIL CODE art. 226 (1870), *as amended*, La. Acts 1952, No. 265.

78. Succession of Fontano, 196 La. 775, 200 So. 142 (1941); Mercier v. Canonge, 12 Rob. 385 (La. 1846).

79. Mercier v. Canonge, 12 Rob. 385, 396 (La. 1846). Same language quoted with approval in Succession of Fontano, 196 La. 775, 792-93, 200 So. 142, 148 (1941). See also Sims v. Billington, 50 La. Ann. 968, 24 So. 637 (1898); Newman v. Cooper, 48 La. Ann. 1206, 20 So. 722 (1896).

throughout minority and is not extinguished by the termination of the marriage.⁸⁰

The same result has been reached in cases involving the support of children after separation or divorce. The amount of the support payment is determined by the needs of the person requiring it and the circumstances of him who owes it.⁸¹ Based on this formula, the courts have held that a child who obtains employment reduces his need, and that support payments should be lowered accordingly.⁸²

The Court of Appeal, Orleans Circuit, failed to recognize the subsidiary nature of the parents' obligation in a workmen's compensation case in which the mother was attempting to establish dependency on her deceased minor son. The court held that she was dependent on his earnings because, when the son used them for his support, he was relieving his mother of her support obligation. However, the court rested its opinion more on the liberal interpretation of the statute required in workmen's compensation cases rather than on the primary support obligation of the mother.⁸³

There is language in some of the cases that can be cited to negate the subsidiary nature of this obligation. The courts have generally said that the father is primarily obligated to support his children.⁸⁴ However, these cases may be distinguished on their facts. They involve the usual situation where the child has no resources of his own, and in that case, the father of course is obligated.

As shown by the language of article 227, the obligation to support, be it primary or secondary, extends to mothers as well as fathers. Planiol speaks of the solidary nature of the obligation because each of the spouses is required to contribute

80. *Wilson v. Wilson*, 205 La. 196, 17 So.2d 249 (1944); *Lorson v. Madere*, 149 La. 95, 88 So. 701 (1921); *Duncan v. Duncan*, 146 So.2d 255 (La. App. 2d Cir. 1962); *Lytell v. Lytell*, 144 So.2d 925 (La. App. 4th Cir. 1962).

81. LA. CIVIL CODE art. 231 (1870).

82. However, the court did not reduce the award in either case due to other factors. *Lawrence v. Lawrence*, 167 So.2d 414 (La. App. 4th Cir. 1964); *Lawrence v. Lawrence*, 145 So.2d 642 (La. App. 4th Cir. 1962).

83. *Stubblefield v. McKesson & Robbins, Inc.*, 20 So.2d 430 (La. App. Orl. Cir. 1945). See also *Lewis v. Southern Advance Bag & Paper Co.*, 147 So. 532 (La. App. 2d Cir. 1933); *Lemmler v. Fabacher*, 19 La. App. 144, 139 So. 683 (Orl. Cir. 1932).

84. *Laiche v. Laiche*, 237 La. 298, 111 So.2d 120 (1959); *Meyers v. Bohrer*, 176 So.2d 3 (La. App. 3d Cir. 1965); *Duncan v. Duncan*, 146 So.2d 255 (La. App. 2d Cir. 1962); *Lytell v. Lytell*, 144 So.2d 925 (La. App. 4th Cir. 1962).

to it in proportion to his or her resources.⁸⁵ The courts have recognized this and have required one spouse to bear the entire burden when the other is insolvent,⁸⁶ or adjusted the obligation between them in proportion to their resources.⁸⁷

The duty to support under article 227 lasts throughout the minority of the child.⁸⁸ Upon attaining majority, the child has an action for alimony under article 229 only when in necessitous circumstances.⁸⁹ The separation or divorce of the spouses and awarding of custody to the mother does not end the father's liability for the maintenance of his children.⁹⁰ The additional obligations of the father, due to his remarriage, cannot prejudice the children's rights.⁹¹ In fact, the support obligation becomes a debt of the community of the second marriage and the wages of the new wife may be garnished for its satisfaction.⁹²

It is not clear how and to what extent emancipation of the minor relieves his parent of the obligation of support. In cases dealing with alimony for the wife, the courts have held that the obligation of the husband under article 160 of the Civil Code is superior to that of the parent under article 229.⁹³ Even though these decisions dealt with majors, the same reasoning should excuse the parent from his duty of support after emancipation of their daughter by marriage unless her husband cannot meet his obligation. As to emancipation of minors over eighteen by judicial decree, the opposite result should be reached. Even though this type of emancipation is described as relieving the minor "from the time prescribed by law for attaining the age

85. 1 *PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA LAW INSTITUTE)* no. 1683 (1959).

86. *First Natchez Bank v. Moss*, 52 La. Ann. 1524, 28 So. 133 (1900); *St. Louis University v. Prudhomme*, 21 La. Ann. 525 (1869).

87. *Black v. Black*, 205 La. 861, 18 So.2d 321 (1944); *Poydras v. Poydras*, 155 So.2d 221, 1 A.L.R. 317 (La. App. 1st Cir. 1963); *cf. Qvistgaard-Peterson v. Qvistgaard-Peterson*, 135 So.2d 669 (La. App. 2d Cir. 1961).

88. *Tooley v. Karcher*, 196 La. 685, 200 So. 4 (1941); *Wilmot v. Wilmot*, 136 So.2d 806 (La. App. 4th Cir. 1962).

89. LA. CIVIL CODE art. 229 (1870); *Toller v. Karcher*, 196 La. 685, 200 So. 4 (1941). LA. CIVIL CODE art. 230 (1870) limits the term of educational payments under article 299 to the minority of the child.

90. *Wilson v. Wilson*, 205 La. 196, 17 So.2d 249 (1944); *Hardy v. Collins*, 136 La. 467, 67 So. 333 (1915); *State v. Seghers*, 124 La. 115, 49 So. 998 (1909).

91. *Meyers v. Bohrer*, 176 So.2d 3 (La. App. 3d Cir. 1965); *Duncan v. Duncan*, 146 So.2d 255 (La. App. 2d Cir. 1962); *Lytell v. Lytell*, 144 So.2d 925 (La. App. 4th Cir. 1962).

92. *Fazzio v. Krieger*, 226 La. 511, 76 So.2d 713 (1954); *Lytell v. Lytell*, 144 So.2d 925 (La. App. 4th Cir. 1962).

93. *Matheny v. Matheny*, 205 La. 869, 18 So.2d 324 (1944); *Simon v. Simon*, 127 So.2d 769 (La. App. 3d Cir. 1961).

of majority,"⁹⁴ it is generally regarded as for the benefit of the minor rather than his parents.⁹⁵ The Louisiana Supreme Court held that a judicial decree relieving the father of his duty to support his minor child was void as contrary to the public policy of this state.⁹⁶

Article 227 of the Louisiana Civil Code is silent as to the extent of support, maintenance, and education it requires. Article 224 provides that in return for their usufruct, the parents are obligated "to support, to maintain and to educate their children according to their situation in life."⁹⁷ However, as an inventory of the child's assets must be recorded to obtain this usufruct,⁹⁸ it is seldom in force.

While the courts have usually said that the extent of the support obligation depends upon the means⁹⁹ of the parent and the needs of the child,¹⁰⁰ the amount of alimony required of the parent has varied to some degree, depending upon the type of litigation involved. In determining the amount of alimony for children after separation or divorce, courts have always allowed basic food, shelter, clothing, medical care, and educational expenses, at least through high school.¹⁰¹ When wealthier parents are before the court, such "luxuries" as music and dancing lessons¹⁰² and private schools¹⁰³ have been awarded. In general, the courts endeavor to maintain for the children the same standard of care as they would have had in the father's custody.¹⁰⁴

College education was recognized early by the Supreme

94. LA. CIVIL CODE art. 385 (1870).

95. *Id.* art. 386; Comment, 20 TUL. L. REV. 574 (1946).

96. The court was dealing with a divorce decree, but its reasoning should be equally applicable to an emancipation decree. *Walder v. Walder*, 159 La. 231, 105 So. 300 (1925). See LA. CIVIL CODE art. 11 (1870).

97. LA. CIVIL CODE art. 224 (1870).

98. *In re Monroe*, 187 La. 739, 175 So. 475 (1937).

99. Means had been interpreted to include both the assets and income of the parent. *Sanders v. Sanders*, 250 La. 588, 197 So.2d 635 (1967); *Moser v. Moser*, 220 La. 295, 56 So.2d 553 (1951).

100. LA. CIVIL CODE art. 231 (1870).

101. *Stabler v. Stabler*, 226 La. 70, 75 So.2d 12 (1954); *Newton v. Newton*, 196 So.2d 575 (La. App. 1st Cir. 1967); *Poydras v. Poydras*, 155 So.2d 221 (La. App. 1st Cir. 1963); *Harris v. Harris*, 127 So.2d 747 (La. App. 3d Cir. 1961).

102. *Williams v. Barnette*, 226 La. 635, 76 So.2d 912 (1954); *Wilmot v. Wilmot*, 223 La. 221, 65 So.2d 321 (1953); *Newton v. Newton*, 196 So.2d 575 (La. App. 1st Cir. 1967); *Poydras v. Poydras*, 155 So.2d 221 (La. App. 1st Cir. 1963).

103. *Williams v. Barnette*, 226 La. 635, 76 So.2d 912 (1954); *Wilmot v. Wilmot*, 223 La. 221, 65 So.2d 321 (1953); *Wilson v. Wilson*, 129 So.2d 61 (La. App. 3d Cir. 1961).

104. *Wilmot v. Wilmot*, 223 La. 221, 65 So.2d 321 (1953); *Wilson v. Wilson*, 129 So.2d 61 (La. App. 3d Cir. 1961).

Court as an item of support in *St. Louis University v. Prudhomme*.¹⁰⁵ There the University was suing parents of substantial means for payment of the educational expenses of their son. The court found such education a part of the support obligation. In prosecutions for criminal neglect of family the awards are more restrictive due to the "necessitous circumstances" requirement of the statute.¹⁰⁶ In one case, however, expenses of a high school education were allowed.¹⁰⁷

The lack of a clear definition of the extent of the support obligation in the jurisprudence is due to the prohibition in Louisiana law against the minor suing his parents.¹⁰⁸ However, it seems safe to conclude that the obligation of support varies proportionately with the means of the parent in Louisiana.

Mention must also be made of the duty to support provided by article 229. This provision requires ascendants and descendants in the direct line to maintain each other when they are in need. Since this obligation depends on the adequacy of the resources of both parent¹⁰⁹ and child, it is without tax affect under Regulation 1.662(a)-4. This applies also where both the parent and child are destitute and the obligation is in fact due.¹¹⁰

CONCLUSION

The basic Louisiana law on support is by no means settled. However, it would seem that the sounder interpretation of the sources would be that the parent's obligation to support his child, under article 227, is subsidiary in nature because it comes into being only after the child's income has been exhausted. Thus, for two reasons, the Louisiana parental support obligation would have none of the tax effects discussed above. First, it fails to meet the requirements of Regulation 1.662(a)-4¹¹¹ and Revenue Ruling 56-484,¹¹² since it depends on the adequacy of the child's resources. Second, it is satisfying the child's primary obligation to support himself and, therefore, should be taxed to him.

105. 21 La. Ann. 525 (1869).

106. LA. R.S. 14:74 (1950).

107. *State v. Woods*, 223 La. 496, 66 So.2d 315 (1953).

108. LA. R.S. 9:571 (1950).

109. Louisiana courts have refused to hold that the obligation of the grandparent is subsidiary to that of the parent. However, the courts have only held the grandparent liable upon a showing that the father was destitute or could not be found. See *Jefferson v. Jefferson*, 246 La. 1, 163 So.2d 74 (1964); *Nations v. Nations*, 128 So.2d 228 (La. App. 2d Cir. 1961).

110. Treas. Reg. § 1.662(a)-4 (1956).

111. *Id.*

112. 1956-2 CUM. BULL. 23.

Nevertheless, on the basis of federal tax policy, this conclusion is unsatisfactory. The fiscal laws should apply to residents of different states equally so far as practical, and differences in state law should not produce substantially contrary results in this important area. Such policy considerations could convince Congress or the Commissioner to make changes in the present statute and regulations. Such a change could be accomplished by the enactment of a federal support standard for tax purposes.

The risks from indecision in this area can be substantially reduced by the tax planner. If the transfer is made into a discretionary support trust with an independent trustee, an adverse decision on the effect of the Louisiana support obligation would still result in substantially lower income and estate taxes than if the transfer had not been made.¹¹³ However, a favorable decision to the taxpayer would avoid taxation to the parent and result in another tax advantage to Louisiana residents because of their civil law heritage.

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ARTIFICIAL ACCESSION TO IMMOVABLES

Accession is the mode of acquiring ownership by the owner of a principal thing of whatever is produced by, or incorporated into, that principal thing.¹ According to the Louisiana Civil Code, accession may be natural, brought about by forces of nature,² or artificial, brought about by human works.³ Special rules in the Civil Code deal with accession as applied to movables⁴ and immovables.⁵

This Comment is limited to a consideration of the rules governing artificial accession to immovables, contained in articles 507 and 508 of the Louisiana Civil Code. Insofar as article 508 is concerned, discussion is largely limited to a consideration of who may be characterized as "possessor in good faith," "landowner," and "third person," and to an examination of the rights

113. This assumes the usual case in which the parent is being taxed in a higher bracket than the child.

1. LA. CIVIL CODE arts. 498, 499, 504 (1870).

2. *Id.* arts. 509-519.

3. *Id.* arts. 505-508.

4. *Id.* arts. 520-532.

5. *Id.* arts. 505-519.