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Warren L. Mengis

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> Our Civil Code is the legal monarch over all things it surveys. It is both subject and object, creator and created, preserver and preserved. In fact, it is legally Louisiana's Ark of the Covenant. However, for the better preservation of the law, we must put an end to the idolatry of precedent worship of decisions that are not in accord with the views and aspirations of the present and refuse to adopt the legal abstractions of other jurisdictions. We should more closely safeguard our own codal articles as to the devolution of property, in order to prevent our being drawn into the vortex of federal governmental regulations. There should be less focusing on the words of judges, and we should become imbued with the spirit of "what is right is right."[1]

The above words are taken from the opinion in *Succession of Gladney*,[2] written by Justice Moise in 1953, almost ten years prior to the United States Supreme Court decision in *Free v. Bland*.[3] The year prior to the decision in *Succession of Gladney*, the Louisiana Supreme Court decided *Winsburg v. Winsburg*,[4] wherein Justice McCaleb, bowing to the supremacy of federal regulations, concluded that the United States savings bond plan established an additional method of disposing of property *mortis causa* and that this plan had been superimposed on the forms prescribed for such dispositions by our Civil Code. The United States savings bonds in question in *Winsburg* were beneficiary bonds, payable on death to the alternate owner. Justice McCaleb went on to say, however, that it does not follow that the contract between the United States government and the bondholders may be employed to nullify the Louisiana laws applicable to the devolution of property or to confer on the donees greater rights than they would have had if the devise had been in the form of a last will and testament.[5]

> There was not, in our opinion, any intention to interfere with the enforcement of the laws of descent and distribution of the various States. Therefore, forasmuch as the payment on death clause contained in such bonds must be considered as a valid appendage to our laws respecting the forms for dispositions *mortis causa*, it appears logical to apply all provisions pertaining to testamentary dispositions, except those

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* Professor of Law, Louisiana State University.

1. Succession of Gladney, 223 La. 949, 954, 67 So. 2d 547, 548 (1953).
2. 223 La. 949, 67 So. 2d 547 (1953).
3. 369 U.S. 663, 82 S. Ct. 1089 (1962).
4. 220 La. 398, 56 So. 2d 730 (1952).
5. *Id.* at 404-05, 56 So. 2d at 731-32.

> dealing with forms, in determining rights and liabilities under such a devise.[6]

Indeed, Justice McCaleb continued, it seems manifest that the regulations of the Treasury Department for the payment of savings bonds were designed solely to facilitate the Government. By providing a simple method for the liquidation of these obligations, the Government would not be subjected to the inconvenience and delays attendant to the settlement of conflicting or disputed claims.

The lip service given to the federal regulations continued in the jurisprudence down to *Free v. Bland*, but only with respect to the necessity to deliver the bonds to the co-owner or the beneficiary.[7] All of the strings of the Civil Code, such as reduction, collation,[8] and community property, remained attached.

The Supreme Court of the United States made it quite plain in *Free v. Bland*,[9] however, that it was not concerned with the relative importance of state law. In fact, the purpose of the treasury regulations is to establish the right of survivorship regardless of local state law. The Court noted that a majority of the states which had considered the problem recognized that the Federal Supremacy Clause[10] controlled.

Free v. Bland involved the community property law of Texas. During the marriage, Mr. Free had used community property to purchase several series "E" and series "F" bonds which were made payable to Mr. *or* Mrs. Free. Upon Mrs. Free's death, a controversy arose between Mr. Free, who claimed the exclusive ownership of the bonds by virtue of treasury regulations, and Mrs. Free's son from a previous marriage. The son, as the principal beneficiary under his mother's will, claimed an interest in the bonds by virtue of the state community property laws.[11] The Court, in one of its plainest pronouncements, said: "One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings."[12] The requirement of making the bondholder account to the son for half the value of the bonds rendered the title to the bonds meaningless. This, according to the Court, interfered with the legitimate exercise of the power of the federal government to borrow money.

After the decision in *Free v. Bland*, the next United States Supreme Court decision of importance was *Yiatchos v. Yiatchos*,[13] which introduced the fraud

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6. *Id.* at 405, 56 So. 2d at 732.

7. Succession of Mulqueeny, 248 La. 659, 181 So. 2d 384 (1966); Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 (1953); Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947); Succession of Land, 212 La. 103, 31 So. 2d 609 (1947); Succession of Mulqueeny, 156 So. 2d 317 (La. App. 4th Cir. 1963).

8. But see Osterland v. Gates, 400 So. 2d 653 (La. 1981), which seems to eliminate the collation requirement.

9. 369 U.S. 663, 667-68, 82 S. Ct. 1089, 1093 (1962).

10. U.S. Const. art. VI, cl. 2.

11. *Free*, 369 U.S. at 664-65, 82 S. Ct. at 1091.

12. *Id.* at 669, 82 S. Ct. at 1093.

13. 376 U.S. 306, 84 S. Ct. 742 (1964).

element into the equation. In *Yiatchos*, the husband used community property to purchase beneficiary bonds, which were payable upon his death. He named his brother the beneficiary owner of the bonds. The Court recognized that the wife in a community property state has a vested interest in her half of the property and the fraudulent disposition of that property by the other partner of the community would serve to bar the title of the beneficiary owner. Whether or not there is fraud, however, must be determined as a matter of federal law; but, in applying the federal standard, state law would guide the court insofar as the widow's property interest, created by state law, is concerned.[14] The *Yiatchos* Court was not certain from an examination of the record that the wife had not consented or ratified the purchase of the bonds nor could the Court determine whether there was sufficient property left by the husband, other than the bonds, to make up the wife's one-half. The Court, therefore, remanded the case for a determination of these issues.

After *Free* and *Yiatchos*, it appeared settled under the Supremacy Clause that state law concerns about descent and distribution were subordinate to the policies and regulations of the Federal government. Surprisingly enough, however, despite the plain language of *Free v. Bland*,[15] Louisiana continued along the minority view where the interests of forced heirs were at stake.[16] The courts of appeal decided *Succession of Videau*,[17] *Succession of Guerre*,[18] and *Fontenot v. Fontenot*.[19] Each of these cases clearly held that although the bonds themselves, whether co-owner or beneficiary, must be delivered to the co-owner or the beneficiary, the value of the decedent's community interest in the bonds had to be included in the Article 1505 calculation of the forced portion.[20]

In *Succession of Guerre*, for example, the court went to great lengths to try to distinguish *Free v. Bland*. Although recognizing forced heirs have no vested right, which a wife would have in connection with community property in Louisiana, the court stated that the forced heir, nevertheless, has very important property rights protected by the Constitution of Louisiana. The court held the forced heir, therefore, has a right to proceed according to law in an action for reduction of an excessive donation against a surviving co-owner or beneficiary

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14. *Id.* at 309, 84 S. Ct. at 745.

15. The *Free* Court interpreted the Supremacy Clause such that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to Federal law, must yield." *Free*, 369 U.S. at 666, 82 S. Ct. at 1092. Elaborating, Chief Justice Warren continued: "[T]he purpose of [Treasury regulations governing United States savings bonds issued pursuant to Article I, section 8, clause 2 of the Constitution] is to establish the right of survivorship regardless of local state law . . . ." *Id.* at 668, 82 S. Ct. at 1093. Thus, the language of *Free* does not appear to limit that decision's sweep to state community property law.

16. Alfred M. Posner, Comment, *United States Savings Bonds—Ownership and State Inheritance Taxes*, 8 La. L. Rev. 571 (1948).

17. 197 So. 2d 655 (La. App. 4th Cir.), *writ refused*, 250 La. 920, 199 So. 2d 922 (1967).

18. 197 So. 2d 738 (La. App. 4th Cir.), *writ refused*, 250 La. 928, 199 So. 2d 926 (1967).

19. 399 So. 2d 897 (La. App. 3d Cir.), *writ denied*, 342 So. 2d 217 (1977).

20. La. Civ. Code art. 1505.

of the bonds. The forced heir would proceed in the same manner as if an equal amount of money had been given to them (the bondholders) through the medium of a donation *inter vivos*.[21] The Louisiana Supreme Court refused writs in both *Guerre* and *Videau*.

It thus seemed, at least in the perspective of a Louisiana lawyer, the spouse's *vested* community property interest took a back seat to the *non-vested* property right of the forced heir. In *Guerre*, the court had said there is no right more sacred in our laws than the right of a forced heir to inherit no less than a fixed minimum, which we call the legitime.[22] But, the Supreme Court of Louisiana in the 1956 case of *Messersmith v. Messersmith*[23] had said "[t]here is nothing more fundamental in our law than the rule of property which declares that this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired."[24] Why, then, would the less significant "property right" of the forced heir be more important than the "vested interest" of the partner in the community?

Calling into further doubt the strength of the Louisiana courts of appeal decisions is the 1981 United States Supreme Court decision, *Ridgway v. Ridgway*.[25] *Ridgway* addressed the beneficiary designation of a life insurance policy issued pursuant to the Servicemen's Group Life Insurance Act of 1965[26] and, specifically, whether the regulations adopted pursuant to that act would prevail over a constructive trust imposed by a state court decree. The Court held the federal act, along with the regulations adopted pursuant thereto, prevailed over and displaced the inconsistent state law. The Court further stated the right to name the beneficiary or change the beneficiary, even without the consent of the presently named beneficiary, was a personal right belonging to the insured member alone. It was not a shared asset subject to the interest of another as was the community property in *Yiatchos*, in which the wife had a distinct vested community interest.[27] That the Court stressed *Yiatchos* was distinguishable because of the vested interest present in *Yiatchos* makes the decisions in *Guerre*, *Videau*, and *Fontenot* even more dubious in so far as they protect the non-vested property right of forced heirs.

This brings us, finally, to *Succession of Harrell*,[28] which was decided by the Louisiana First Circuit Court of Appeal in 1993. In *Harrell*, the husband purchased United States savings bonds in the amount of $154,000, payable to himself or to his wife. Mrs. Harrell had been interdicted and a curator and

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21. *Guerre*, 197 So. 2d at 743-45.
22. *Id.* at 743.
23. 229 La. 495, 86 So. 2d 169 (1956).
24. *Id.* at 506, 86 So. 2d at 173 (citations omitted).
25. 454 U.S. 46, 102 S. Ct. 49 (1981). *See* Charles C. Coffee, Note, Ridgway v. Ridgway: *Forced Heirship's Maine Connection*, 28 Loy. L. Rev. 619 (1982).
26. 38 U.S.C. §§ 1965-1976 (1988 & Supp. V 1993).
27. *Ridgway*, 454 U.S. at 59-60, 102 S. Ct. at 57.
28. 622 So. 2d 253 (La. App. 1st Cir. 1993).

undercurator had been appointed to administer her estate. Upon the death of Mr. Harrell, the executor of his estate included a one-half interest in the bonds, $77,137, in the descriptive list of his estate. The bonds, physically, were given to Mrs. Harrell's curator. The homologation of the detailed descriptive list was opposed on two grounds, one of which was that Mrs. Harrell was entitled to full ownership of the savings bonds without any obligation to reimburse her husband's succession.[29] There was no doubt the bonds had been purchased with community funds and, accordingly, the executor of Mr. Harrell's succession contended that one-half of the value of those bonds should be included in the estate.

Surprisingly, the court concluded otherwise, holding *Free v. Bland* had overruled *Slater v. Culpepper*[30] and the other cases cited by the executor of Mr. Harrell's succession. *Succession of Videau* and *Succession of Guerre* did not control because no forced heirs were involved in *Succession of Harrell*.[31] The court also concluded that there was no fraud in what was done between Mr. and Mrs. Harrell and that they had clearly intended the bonds to go to the surviving spouse, free of legal entanglements. Toward the end of the opinion the court stated:

> In the instant case the savings bonds are of such a type that vest full and complete ownership in the surviving co-owner spouse. There is no indication of fraud or deprivation of property rights to Mr. Harrell's estate or any forced heirs. The Harrells clearly wanted the bonds to go to the surviving spouse with no legal entanglements.[32]

This is similar to the language in *Free v. Bland* that one of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings. But what are the ramifications of this holding? Is a Louisiana inheritance tax due by the donee? Suppose that there were creditors of Mr. Harrell's succession who might go unpaid if the account receivable for one-half the bonds is eliminated?

First, consider the tax consequences. In *United States v. Chandler*,[33] the United States Supreme Court held that co-owner bonds, which had actually been given by the decedent, Mary Baum, during her lifetime to her granddaughters but which had not been cashed, nor the payee changed, were still part of the federal estate of Mrs. Baum. The Court concluded the delivery of the bonds to the granddaughters, even with donative intent, was not sufficient to remove the value of the bonds from the decedent's gross estate.[34] Presumably then, if the Harrell

29. *Id.* at 254.
30. 222 La. 962, 64 So. 2d 234 (1953).
31. *Harrell*, 622 So. 2d at 255-56.
32. *Id.* at 256.
33. 410 U.S. 257, 93 S. Ct. 880 (1973).
34. *Id.* at 260-61, 93 S. Ct. at 882.

succession had been subject to federal estate taxes, the one-half that was Mr. Harrell's community interest would be included in the computation of federal estate taxes.

On the other hand, one should not forget the two Louisiana cases dealing with inheritance taxes, *Succession of Tanner*[35] and *Succession of Raborn*.[36] *Tanner* involved co-owner United States savings bonds and *Raborn* involved beneficiary United States savings bonds. The Louisiana Inheritance Tax statute provides that "the tax shall be imposed with respect to all property of every nature and kind included or embraced in any inheritance legacy or donation or gift made in contemplation of death."[37] The court in *Raborn* concluded the payments on death bonds were made in contemplation of death and, therefore, a Louisiana inheritance tax was appropriate. The court indicated the decision in *Succession of Tanner* held to the contrary, but because the *Tanner* court was divided, that decision was not persuasive.[38] Actually, the cases are different in that one was a co-owner bond and the other was a beneficiary bond.[39]

Second, what are the consequences for a creditor? Suppose the deceased has put virtually his entire estate in "either/or" bonds, who is to pay the funeral expenses? Would the creditor be like Farm Credit Bank in *Succession of Sweeney*,[40] wherein the court concluded that life insurance payable to the estate of the deceased was not available to pay the debts of the deceased? On the other hand, if the debt was incurred prior to the death of the deceased, the holding in *Yiatchos* would probably protect the creditor *if* it could find out who had the bonds. But suppose there was absolutely no fraud, that things simply went sour financially and the only assets left were the bonds. No succession would be opened and it would be most unlikely for anyone to come forward and surrender the bonds.

Where does all this bring us? What is the succession attorney supposed to do when United States savings bonds, either co-owner or beneficiary, are found in the safety deposit box of the decedent? There is no doubt at all that the bonds themselves must be delivered to the co-owner or the beneficiary; but, suppose there are forced heirs? Or, suppose there is a surviving spouse and the bonds, which were purchased with community property, have to be delivered to a stranger to the community? Should the attorney include the value of the bonds in the descriptive list or one-half of their value in community property if he concludes, under the holding in *Succession of Harrell*, that where only a community property interest is involved he does not have to? Would this compel him to the conclusion that he does not have to include the value of bonds in the Article 1505 calculation for forced heirship purposes? When the Supreme Court

35. 24 So. 2d 642 (La. App. 1st Cir. 1946).
36. 210 La. 1033, 29 So. 2d 53 (1946).
37. La. R.S. 47:2404 (1990).
38. *Raborn*, 210 La. at 1037-38, 29 So. 2d at 53.
39. This distinction is brought out in Posner, *supra* note 16.
40. 607 So. 2d 996 (La. App. 3d Cir. 1992), *writs denied*, 610 So. 2d 818, 818 (1993).

said that one of the inducements selected by the Treasury is the survivorship provision, which is a convenient method of avoiding complicated probate proceedings, did it intend to permit a forced heir to follow the bonds into the hands of the co-owner or beneficiary owner with an action for reduction?

CONCLUSION

It is the conclusion of the writer, based upon all of the cases reviewed above, that Louisiana should join the majority of other states and allow both co-owner and beneficiary United States savings bonds to move freely into the hands of the co-owner or beneficiary without any strings attached, except the possible revocation for fraud. There is no basis for the distinction between Louisiana's system of forced heirship and Louisiana's system of community property. Either both or neither should have "strings attached" to the transfer of the bonds. Furthermore, it is senseless to try to put square pegs into round holes. A co-owner bond is not a donation *inter vivos* as we define it in the Civil Code, nor is a beneficiary bond a *mortis causa* donation. By adopting the rule of the majority of other states, we would simply recognize the Supremacy Clause of the United States Constitution. Certainly, this would not please Justice Moise; but, is there anyone in the present day who still regards the Civil Code as the "Ark of the Covenant"?

Surely, it will be argued, as it was in *Succession of Geagan*,[41] that we should not permit one spouse to dispose of the other spouse's share of the community by a contract with the federal government when he could not do so by donation *inter vivos* or *mortis causa*. Just as surely, those in favor of forced heirship will contend that such a contract with the federal government should not be permitted to cut off the "sacred right" of the forced heir to inherit. Judge Dore, in *Succession of Tanner*, suggested we treat United States savings bonds the same way we treat life insurance. To that, we could now add pension benefit plans. Why not amend Article 1505 again and provide that co-owner and beneficiary United States savings bonds are not to be included in the computation to fix the legitime? Section 2404 of Title 47, Louisiana Revised Statutes, could similarly be amended to exclude such bonds from Louisiana's inheritance tax. It is suggested that a much smaller amount of wealth is involved here than in life insurance and pension benefit plans. Whether we amend or not, it would appear the United States Supreme Court is likely to apply the Supremacy Clause and achieve the same result.[42]

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41. 212 La. 574, 33 So. 2d 118 (1947).

42. The author acknowledges the tremendous assistance of Joseph S. Parlermo, Jr., Comment, *Donations À Cause de Mort*, 37 La. L. Rev. 1071 (1977), and the equally helpful Kenneth D. McCoy, Jr., Comment, *Problems in Classification of Particular Property Under Community Property Regimes*, 25 La. L. Rev. 108 (1964).