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Glossae on the New Law of Marital Donations

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GLOSSAE ON THE NEW LAW OF MARITAL DONATIONS

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I. INTRODUCTION

Through Act 619 of 2004 (the Act),[1] effective September 1, 2005, the Louisiana Legislature revised what is undoubtedly one of the most obscure and little-used parts of the Civil Code, namely, Chapters 8 and 9 of Title II of Book III. These chapters concern, in general terms, "marital donations,"[2] one subset of which—donations made to

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1. 2004 La. Acts No. 619. The act originated as Senate Bill No. 177 by Sen. John Hainkel (R-NO).

2. The use here of the expression "marital donation" was inspired by French legal scholar Marcel Planiol. In the volume of his civil law treatise that concerns donations, he collected all donations related to marriage, be they donations made by marriage contract or otherwise on the occasion of marriage or donations made between spouses during marriage, under the rubric "*donations à caractère matrimonial*" ("donations of matrimonial character") for common treatment. 5 Marcel Planiol & Georges Ripert, Traité Pratique de Droit Civil Français: Donations et Testaments 913 (André Trasbot & Yvon Loussouarn revs., 2d ed. 1957) [hereinafter Planiol & Ripert, Traité Pratique].

French scholarship regarding "marital donations" is abundant. The topic is treated in scores of treatises, commentaries, and other works in addition to Planiol's treatise. *See id.* nos 735–793, at 913–992; 4(2) Henri & Léon Mazeaud et al., Leçons de Droit Civil: Successions-Libéralités nos. 693–706 at 34–44 & nos. 1539–1572 at 705–31 (5th ed. 1999); François Terré & Yves Lequette, Droit Civil: Les Successions–Les Libéralités nos. 533–560 at 426–55 (3d ed. 1997); Philippe Malaurie & Laurent Aynès, Droit Civil: Les Successions–Les Libéralités nos. 690–758 at 363–98 (3d ed. 1995); Gabriel Marty & Pierre Raynaud, Droit Civil: Les Succession et les Libéralités nos. 532–536, at 411–15 & nos. 626–649, at 475–88 (1983); Jacques Flour & Henri Soileau, Droit Civil: Les Libéralités nos. 387–469 at 257–306 (1982); 11 Charles Aubry & Charles Rau, *Droit Civil Français* §§ 735–744 (Paul Esmein rev., 6th ed. 1956), *in* 4 Civil Law Translations 574–619 (Carlos E. Lazarus tr. 1969); 3 Ambroise Colin & Henri Capitant, Cours Élémentaire de Droit Civil Français nos. 1705–1755, at 878–900 (Léon Julliot de La Morandière rev., 9th ed. 1945); 3(2) Marcel Planiol & Georges Ripert, *Traité Élémentaire de Droit Civil* nos. 3141–3263A (11th ed. 1938), *in* Treatise on the Civil Law 535–84 (La. St. Law Inst. tr. 1959) [hereinafter Planiol & Ripert, *Traité Élémentaire*] ; 3 Louis Josserand, Cours de Droit Civil Positif Français nos. 1751–1857, at 967–1020 (2d ed. 1933); 2 Gabriel Baudry-Lacantinerie & Maurice Colin, *Des Donations Entre Vifs et des Testaments* nos. 3838–4117, at 809–924, *in* 10 Traité Théorique et Pratique de Droit Civil (2d ed. 1905); 6 Théophile Huc, Commentaire Théorique & Pratique du Code Civil nos. 453–487, at 586–633 (1894); 4 Antoine-Marie Demante & Edouard Colmet de Santerre, Cours Analytique de Code Civil nos. 249–281bis, 479–558 (2d ed. 1884); 6 Charles

prospective spouses by other persons in "marriage contracts"—is addressed in Chapter 8 and another subset of which—donations made either between prospective spouses in "marriage contracts" or between spouses during their marriage—is addressed in Chapter 9.

Although the Act was not the work of the Louisiana State Law Institute (LSLI)—it was, instead, produced by a small group of law professors[3], each of whom teaches the law of donations on a regular basis[4]—, its purpose was, nevertheless, similar to that of the "code revisions" that that law reform body has sponsored through the years. That purpose, then, was two-fold. First, the Revisers sought to bring the prior law of marital donations "up to date." That law first took shape in 1808, just under two centuries ago.[5] Since that time a number of things have changed: (i) some of the concepts in terms of which that law was cast have been modified or replaced; (ii) some of the related substantive law, for example, the law of donations in general, has been revised; (iii) some of the procedures contemplated by that law have been revised or eliminated altogether; and (iv) some of the practices presupposed by that law have fallen into desuetude. The Act revises the law in the light of these developments. Second, the Revisers sought to correct various technical deficiencies in the

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Demolombe, *Traité des Donations Entre-Vifs* nos. 245–624, at 277–729, *in* 23 Cours de Code Napoléon (1876); 15 François Laurent, Principes de Droit Civil Français nos. 160–416, at 203–468 (2d ed. 1876); 4 Victor Marcadé, Explication Théorique et Pratique du Code Civil nos. 276–375, at 206–82 (7th ed. 1873); 4 Raymond Troplong, Droit Civil Expliqué: des Donations entre-Vifs et des Testaments nos. 2340–2756, at 483–933 (1855); Jean Baptiste Câesar Coin-Delisle, Commentaire du Titre des Donations et Testamens arts. 1081–1100, at 550–620 (rev. ed. 1855); 3 C.-B.-M. Toullier, Le Droit Civil Français nos. 819–925, at 223–48 (rev. ed. 1837); 9 Alexandre Duranton, Cours de Droit Français Suivant le Code Civil nos. 661–835, at 653–858 (3d ed. 1834); 3 Baron Jean Grenier, Traité des Donations, Testamens et de Toutes Autres Dispositions Gratuites nos. 404–64, at 1–166 (3d ed. 1826).

3. This is not to say that the LSLI had *no* role in the development of this legislation. Before the professors began their work (indeed, before the professors even considered taking up this task), the Successions and Donations Committee (the S&D Committee) of the LSLI prepared a projet for the revision of the very same law (the Projet), which was presented to the Council for adoption. The Council, however, rejected that projet. Shortly thereafter, the Reporter and Chairman of the Committee, Max Nathan, announced that the committee would no longer pursue such a revision. Convinced that such a revision was nevertheless desirable, the professors (the Revisers) then decided to prepare their own projet.

4. These professors, listed in alphabetical order, are: Michael McAuley, Clarence W. Edwards Associate Professor at the LSU Law Center; Cynthia Samuel, W.R. Irby Professor at the Tulane Law School; Katherine Spaht, Jules F. & Francis L. Landry Professor at the LSU Law Center; and me. Among these, I was the primary author and Professor Samuel was my principal collaborator.

5. *See* A Digest of the Civil Laws Now in Force in the Territory of Orleans bk. 3, tit. 2, arts. 210–229 (1808).

prior law of marital donations. In the nearly 200 years since that law was set up, legal scholars and judges had pointed out that it suffered from several technical problems. These included (i) *lacunae* (gaps), (ii) antinomies (contradictions), and (iii) uncertainties of meaning. The Act revises the law so as to eliminate most of these technical problems.[6]

My aim in this article is merely to present, rather than to discuss in depth, the revised legislation. To this end, I shall follow a format that was pioneered some years ago by a (then) young Louisiana civil law scholar, Symeon Symeonides, for the "presentation" of revisions to the Civil Code, namely, that of (i) visually juxtaposing the texts of the new and old legislation and (ii) dropping footnotes to the text of the old legislation or that of the new legislation, as might be appropriate, to signal the important changes.[7] I share Dean Symeonides' hope "that this format not only will prove convenient to the reader, but will also enable him to participate in the search for the latent changes in the new Act."[8]

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6. I must say "most," rather than "all," for the revision, despite its breadth, does leave at least a few technical problems uncorrected. One of the most significant is what might be called the "divorce lacuna," that is, the absence of any provision regarding how, if at all, marital donations made to or between the spouses will be affected if they should later be divorced. This lacuna was first created back in 1990 when the Legislature, as part of its "reform" of the law of divorce, repealed, but did not replace, article 156 of the Code of 1870:

> In case of separation from bed and board, the party against whom it shall have been pronounced, shall lose all the advantages or donations, the other party may have conferred by the marriage contract or since, and the party at whose instance the separation has been obtained, shall preserve all those to which such part would have been entitled; and these dispositions are to take place even in case the advantages and donations were reciprocally made.

Though the Revisers would have liked to have "filled in" this lacuna, they ultimately decided not to try. Why? As the Revisers conceived of it and as they planned to "pitch" it to the Legislature, their revision project was to be "purely technical." Now, the question of how the divorce lacuna should be filled is more than just a "technical" question; it is, as well, a "political" question and a highly controversial one at that. For these reasons, then, the Revisers concluded that addressing the divorce lacuna lay beyond the scope of their revision project.

7. *See, e.g.*, Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession*, 44 La. L. Rev. 69 (1983). Professor Symeonides, of course, cast the titles of his articles in the form "One Hundred Footnotes on . . . ." In keeping with my antiquarian character, I have decided to replace the more modern word "footnotes" with the more ancient word "*glossae*" (the plural of "*gloss*"), a term traditionally used to refer to the annotations that the so-called "Glossators" of the twelfth and thirteenth centuries wrote to Justinian's *Corpus juris civilis*. *See generally* Peter Stein, Roman Law in European History 45–49 (1999).

8. Symeonides, *supra* note 7, at 70.

A. Prolegomenon

Within the French civil law tradition, from which much of Louisiana's private law, including its law of martial donations, was derived, donations of this kind have long been singled out for special regulation.[9] To understand this special regulation, one must, first, have some appreciation for its "why" and its "how," that is, the purpose it is designed to attain and the ways in which it is supposed to attain that purpose.

The ultimate end of the law of "marital donations" is, in short, *to promote marriage.*[10] This law accomplishes that result by

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9. In some civil law jurisdictions, notably Germany, there is no "special regime" that governs marital donations. In those jurisdictions, then, marital donations are treated just like any other donation *inter vivos*, that is, they are subjected to the general rules on donations *inter vivos*.

10. *See* 4(2) Mazeaud, *supra* note 2, no. 1552, at 725 ("The legislature desired to establish a favored status for donations in view of marriage, because these donations aid the setting up of the family and its patrimony."); Terré & Lequette, *supra* note 2, no. 533, at 426 ("[T]he end pursued by the donor [in such a donation is] to favor the foundation of a new family by furnishing to the donees resources that will aid them in assuming the burdens of that family . . . . The legislator evidences a certain favor for these liberalities."); Malaurie & Aynès, *supra* note 2, no. 690, at 363 ("French law manifests . . . a policy of favor [toward such donations]. . . . In fact, matrimonial donations made at the moment of the marriage sometimes facilitate its conclusion and always lighten its burdens. As to liberalities between the spouses during the marriage, they manifest the affection that the spouses bear toward one another."); 11 Aubry & Rau, *supra* note 2, § 735, at 574, *in* 3 Translations 574 ("Following the example of the old law, the Civil Code admits, in favor of marriage and in consideration of the special nature of the contract the object of which is to regulate the matrimonial conventions of future spouses, of certain derogations from the general principles of law in matters relative to donations inter vivos."); 3 Colin & Capitant, *supra* note 2, no. 1705, at 878 ("Let us add that . . . these sorts of liberalities deserve to be encouraged because, in all cases, they facilitate the making of marriages."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3142, at 537 ("Donations made by parents or friends to the prospective spouses often facilitate the conclusion of the marriage. Hence law ought to, and actually does, encourage and facilitate such donations, because they support the founding of new legitimate families."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3838, at 809 ("Our legislators favor marriage, which is one of the bases of the social order. By virtue of this same fact, these legislators have had to favor those donations that facilitate and encourage it. This explains why the legislators have freed these donations, in part at least, from the confines of the common law [the law of donations in general]."); 6 Huc, *supra* note 2, no. 453, at 586 ("In order to facilitate marriages, we have believed it useful to free donations made in view of marriage from some of these rules [i.e., the restrictive rules of the law of donations *inter vivos* in general]"); 4 Demante & Colmet de Santerre, *supra* note 2, no. 249, at 479 ("The favor that marriage enjoys has led to the recognition of some special rules for donations that tend to or to facilitate it . . . ."); 6 Demolombe, *supra* note 2, no. 243, at 278 ("One knows how donations made by contract of marriage encourage and facilitate marriage . . . . Thus, our laws, at all

encouraging donations *inter vivos* that, in one sense or another, "facilitate" marriage.[11] By donations that "facilitate" marriage, I mean *inter alia* donations that (i) encourage the prospective spouses to enter into the marriage in the first place, (ii) encourage the married spouses to stay in the marriage, (iii) help the spouses to underwrite the cost of the marriage, or (iv) confirm the prospective spouses in their decision to marry or, to put it another way, provide tangible evidence to the spouses that the donor "blesses" the marriage.

The means whereby the legislation encourages such donations is, quite simply, to make them "easier to do" than other donations. This the legislation accomplishes by excepting these donations from at least some of the restrictive rules of the law of donations *inter vivos* in general, rules that, by conscious design, serve to make the act of donating relatively "painful." The restrictive rules in question, which are found in articles 1528–1531, are those that spell out the implications of the ancient French legal maxim *donner et retenir ne vaut*.[12] In contrast to typical donations, marital donations are not

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times, have extended to these donations the same favor that they accord to marriage . . . ."); 15 Laurent, *supra* note 2, no. 160, at 203–04 ("Every legislator . . . must encourage marriages, and it is to encourage them that he gives the most free rein to donations without which these bonds would not be formed. . . . These donations are favorable because they favor marriage."); 4 Troplong, *supra* note 2, no. 2340, at 483 ("The favor that marriage enjoys has always led to the recognition of special dispositions in regard to donations whose object is to encourage these alliances, which provide the foundation for the State."); *see also* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 735, at 913 ("Following the law of the *ancien régime*, the redactors of the Code thought that donations, which ordinarily ought to be discouraged, were nevertheless very well justified when their purpose was to facilitate the making of a marriage or to manifest one spouses's affection for the other during the marriage. Thus, the redactors adopted a number of favorable dispositions in regard to such donations.").

11. *See supra* note 10 and collected authorities.

12. The phrase means "to give and to retain is not valid." For a general exposition of this maxim, see 4(2) Mazeaud, *supra* note 2, no. 1498–1499, at 677–79; Terré & Lequette, *supra* note 2, no. 430, at 351–52; Malaurie & Aynès, *supra* note 2, nos. 430–431, at 243–44; Marty & Raynaud, *supra* note 2, no. 503, at 392–93; Flour & Soileau, *supra* note 2, no. 60, at 39; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, nos. 427–430, at 560–64; 3 Colin & Capitant, *supra* note 2, nos. 1643–1651, at 849–52; 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, nos. 2592–2597, at 266–69; 3 Josserand, *supra* note 2, nos. 1349–1351, at 768–69; 1 Gabriel Baudry-Lacantinerie & Maurice Colin, *Des Donations Entre Vifs et des Testaments* nos. 1428–34, at 634–37, *in* 9 Traité Théorique et Pratique de Droit Civil (2d ed. 1905); 6 Huc, *supra* note 2, no. 5, at 11; 4 Demante & Colmet de Santerre, *supra* note 2, no. 84, at 202–03; 3 Charles Demolombe, *Traité des Donations Entre-Vifs* no. 369, at 327, *in* 20 Cours de Code Napoléon (1878); 12 François Laurent, Principes de Droit Civil Français nos. 407–412, at 491–500 (2d ed. 1876); 3 Victor Marcadé, Explication Théorique et Pratique du Code Civil no. 477, at 372 (7th ed. 1873); 3 Toullier, *supra* note 2, nos. 220–22, at 71–72; 1 Baron Jean Grenier, Traité des Donations, Testamens et de Toutes Autres Dispositions

subject to these rules.[13] Thus, unlike the donor of a typical donation, who is limited to giving up some piece of property he presently owns,[14] the donor of a marital donation can, instead, give up all or part or some of the property that he may still happen to have at his death. Unlike the donor of a typical donation, who must give his thing away free of any even *partly* potestative conditions,[15] the donor of a

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Gratuites 12–16 (4th ed. 1826).

13. *See* La. Civ. Code art. 1532 ("The four preceding articles are not applicable to donations of which mention is made in the eighth and ninth chapters of the present title.").

14. *See* La. Civ. Code art. 1528 ("A donation *inter vivos* can comprehend only the present property of the donor. If it contemplates property to come, it shall be null with regard to that."). For a general exposition of the restriction set forth in this article, see 4(2) Mazeaud, *supra* note 2, no. 1502, at 680–81; Terré & Lequette, *supra* note 2, nos. 436–42, at 356–60; Malaurie & Aynès, *supra* note 2, no. 433–434, at 246–47; Marty & Raynaud, *supra* note 2, no. 504, at 393–94; Flour & Soileau, *supra* note 2, nos. 68–70, at 44–46; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, nos. 438–442, at 568–73; 3 Colin & Capitant, *supra* note 2, nos. 1652–1653, at 852–54; 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, nos. 2599–2603, at 270–72; 3 Josserand, *supra* note 2, nos. 1352–1355, at 770–71; 9 Baudry-Lacantinerie & Colin, *supra* note 12, nos. 1435–1454, at 637–45; 6 Huc, *supra* note 2, nos. 217–220, at 281–85; 4 Demante & Colmet de Santerre, *supra* note 2, nos. 85–85bis(V), at 203–06; 3 Demolombe, *supra* note 12, nos. 373–415, at 333–74; 12 Laurent, *supra* note 12, nos. 413–429, 500–24; 3 Marcadé, *supra* note 12, nos. 671–674, at 575–79; 3 Raymond Troplong, Droit Civil Expliqué: des Donations entre-Vifs et des Testaments nos. 1193–1205, at 146–61 (1855); Coin-Delisle, *supra* note 2, art. 943, nos. 1–13, at 241–44; 3 Toullier, *supra* note 2, no. 224, at 72; 7 Alexandre Duranton, Cours de Droit Français nos. 452–473, at 440–49 (3d ed. 1834); 1 Grenier, *supra* note 12, nos. 4–7, at 197–209.

15. *See* La. Civ. Code art. 1529 ("Every donation *inter vivos* made on conditions, the execution of which depends on the sole will of the donor, is null."). For a general exposition of the restriction set forth in this article, see 4(2) Mazeaud, *supra* note 2, no. 1500, at 679–80; Terré & Lequette, *supra* note 2, no. 433, at 353–54; Malaurie & Aynès, *supra* note 2, no. 432, at 245; Marty & Raynaud, *supra* note 2, no. 504, at 394–95; Flour & Soileau, *supra* note 2, nos. 63–65, at 41–42; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, nos. 431–432, at 564–65; 11 Aubry & Rau, *supra* note 2, § 699, at 228–31, *in* 3 Translations 360–63; 3 Colin & Capitant, *supra* note 2, no. 1654, at 854–55; 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, nos. 2604–2606, at 272–74; 3 Josserand, *supra* note 2, nos. 1356–1360, at 772–73; 9 Baudry-Lacantinerie & Colin, *supra* note 12, nos. 1455–1464, at 645–49; 6 Huc, *supra* note 2, no. 221, at 285–87; 4 Demante & Colmet de Santerre, *supra* note 2, nos. 86–86bis(IV), at 206–08; 3 Demolombe, *supra* note 12, no. 416–431, at 374–89; 12 Laurent, *supra* note 12, nos. 430–433, 524–27; 3 Marcadé, *supra* note 12, nos. 675–676, at 579–81; 3 Troplong, *supra* note 14, nos. 1206–1211, at 161–67; Coin-Delisle, *supra* note 2, art. 944, nos. 1–2, at 245; 3 Toullier, *supra* note 2, no. 223, at 72, & nos. 270–273, at 83–84; 7 Duranton, *supra* note 14, nos. 474–480, at 449–54; 1 Grenier, *supra* note 12, nos. 8–15, at 209–15, & nos. 18–25, at 216–21.

What is meant by the phrase "condition[ ] the execution of which depends on the *sole will* of the donor"? According to the overwhelming majority of these authorities, that category includes *all* so-called "potestative" conditions—not just

marital donation can give it subject to such a condition, thereby leaving open to him the possibility that he might be able, by causing the condition to fail or to be fulfilled, as the case might be, to get the thing back. Unlike the donor of a typical donation, who cannot require that the donee, in consideration for the gift, undertake to pay off more than the debts the donor then owes,[16] the donor of a marital

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those that are "purely" potestative, but also those that are "simply" potestative. *See, e.g.*, 4(2) Mazeaud, *supra* note 2, no. 1500, at 680; Terré & Lequette, *supra* note 2, no. 433, at 353; Marty & Raynaud, *supra* note 2, no. 504, at 394; Flour & Soileau, *supra* note 2, no. 64, at 41–42; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 431, at 564; 3 Colin & Capitant, *supra* note 2, no. 1654, at 854–55; 3 Josserand, *supra* note 2, no. 1358, at 772; 9 Baudry-Lacantinerie & Colin, *supra* note 12, nos. 1458–1459, at 647–48; 6 Huc, *supra* note 2, no. 221, at 286–87; 4 Demante & Colmet de Santerre, *supra* note 2, no. 86bis(I), at 206–07; 3 Demolombe, *supra* note 12, nos. 417–419, at 376–80; 3 Marcadé, *supra* note 12, no. 675, at 580–81. A good number of the authorities go still further, holding that the category extends even to so-called "mixed" conditions. *See, e.g.*, 3 Colin & Capitant, *supra* note 2, no. 1654, at 854–55; 3 Josserand, *supra* note 2, no. 1358, at 772; 9 Baudry-Lacantinerie & Colin, *supra* note 12, nos. 1458–1459, at 647–48; 6 Huc, *supra* note 2, nos. 221, at 286–87; 4 Demante & Colmet de Santerre, *supra* note 2, no. 86bis(I), at 206–07. But others contend that all or at least some mixed conditions fall outside the category. *See, e.g.*, Marty & Raynaud, *supra* note 2, no. 504, at 394–95 (noting that whether a French court will strike down a donation made subject to a mixed condition depends or, at least, should depend on the relative weights of the potestative and non-potestative elements within it); Flour & Soileau, *supra* note 2, no. 65, at 42 (same); Terré & Lequette, *supra* note 2, no. 433, at 353 ("Donations under a *casual* condition remain valid . . . . It is the same for donations concluded under a *mixed* condition, for such a condition depends at once on the author of the act and on the will of a third person."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 2605, at 273 ("By limiting the statutory ban to conditions the execution of which depends solely on the will of the donor, it is quite certain that the Code has intended to authorize donations made on condition the realization of which depends on the will of a third person as well as on the donor's will (mixed condition).").

For a general exposition of the distinctions among "purely" potestative, "simply" potestative, "mixed", and "casual" conditions, see Saúl Litvinoff, The Law of Obligations §§ 5.6-5.7, at 86–93, *in* 5 Louisiana Civil Law Treatise (1992); Alain Levasseur, Louisiana Law of Obligations in General: *A Précis* 54–59 (3d ed. 1996).

16. *See* La. Civ. Code art. 1530 ("It is also null, if it was made on condition of paying other debts and charges than those that existed at the time of the donation, or were expressed either in the act of donation or in the act that was to be annexed to it.") For a general exposition of the restriction set forth in this article, see 4(2) Mazeaud, *supra* note 2, no. 1503, at 681; Terré & Lequette, *supra* note 2, no. 435, at 355–56; Malaurie & Aynès, *supra* note 2, no. 432, at 246; Marty & Raynaud, *supra* note 2, no. 504, at 395; Flour & Soileau, *supra* note 2, no. 67, at 43; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, nos. 435–437, at 566; 11 Aubry & Rau, *supra* note 2, § 699, at 230–31, *in* 3 Translations 362–63; 3 Colin & Capitant, *supra* note 2, no. 1655, at 855; 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, nos. 2607–2609, at 274–75; 3 Josserand, *supra* note 2, nos. 1361–1362, at 773–74; 9 Baudry-Lacantinerie & Colin, *supra* note 12, nos. 1465–1471, at 649–1471; 6 Huc, *supra* note 2, no. 222, at 287–89; 4 Demante & Colmet de

donation can require that the donee, in consideration for the gift, undertake to pay off even debts the donor will incur later on. Last and far and away most important, unlike the donor of a typical donation, who must give his thing away finally and irrevocably,[17] the donor of a marital donation can "give" it while at the same time reserving to himself (subject to certain restrictions) the right to dispose of it otherwise. In short, excepting marital donations from these rules enables the donor, at one and the same time, to give (*donner*) and, at least in some sense and to some degree, to retain (*retenir*), something that is, of course, less "painful" than to give (*donner*) but not to retain (*retenir*).

B. Corpus

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CHAPTER 8. OF DONATIONS MADE BY MARRIAGE CONTRACT TO THE HUSBAND OR WIFE, AND TO THE CHILDREN TO BE BORN OF THE MARRIAGE

Santerre, *supra* note 2, nos. 87-87*bis*(III), at 208–11; 3 Demolombe, *supra* note 12, nos. 432–464 , at 389–417; 12 Laurent, *supra* note 12, nos. 434–439, 527–31; 3 Marcadé, *supra* note 12, nos. 677–678, at 581–82; 3 Troplong, *supra* note 14, nos. 1212–1221, at 168–75; Coin-Delisle, *supra* note 2, art. 945, nos. 1–14, at 245–49; 3 Toullier, *supra* note 2, no. 225, at 72; 7 Duranton, *supra* note 14, nos. 481–483, at 454; 1 Grenier, *supra* note 12, nos. 42–49, at 242–49.

17. *See* La. Civ. Code art. 1531 ("In case the donor has reserved to himself the liberty of disposing of any object comprised in the donation or of a state sum on the property given, if he dies without having disposed of it, that object or sum shall belong to the heirs of the donor, any clause or stipulation to the contrary notwithstanding.") For a general exposition of the restriction set forth in this article, see 4(2) Mazeaud, *supra* note 2, no. 1501, at 680; Terré & Lequette, *supra* note 2, no. 434, at 354–55; Marty & Raynaud, *supra* note 2, no. 504, at 395; Flour & Soileau, *supra* note 2, no. 66, at 43; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, nos. 433–434, at 565–66; 11 Aubry & Rau, *supra* note 2, § 699, at 230, *in* 3 Translations 362; 3 Colin & Capitant, *supra* note 2, no. 1656, at 855–56; 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, nos. 2610–2611, at 275; 3 Josserand, *supra* note 2, nos. 1363–1364, at 774–75; 9 Baudry-Lacantinerie & Colin, *supra* note 12, nos. 1472–1479, at 652–55; 6 Huc, *supra* note 2, no. 223, at 289; 4 Demante & Colmet de Santerre, *supra* note 2, nos. 88–88*bis*(III), at 211–13; 3 Demolombe, *supra* note 12, no. 465–477, at 417–26; 12 Laurent, *supra* note 11, nos. 440–45, 532–36; 3 Marcadé, *supra* note 12, nos. 679–80, at 582–84; 3 Troplong, *supra* note 14, nos. 1222–1226, at 175–79; Coin-Delisle, *supra* note 2, art. 946, nos. 1–6, at 249–50; 3 Toullier, *supra* note 2, nos. 226–229, at 72–73; 7 Duranton, *supra* note 14, nos. 484–485, at 654–55; 1 Grenier, *supra* note 12, nos. 16–17, at 215–16.

New

CHAPTER 8.[18] OF DONATIONS *INTER VIVOS*[19] MADE IN

18. In terms of its overarching organizational scheme, the revision changes nothing. Like the prior legislation, the new is divided into two chapters, numbered 8 and 9, which concern, respectively, (i) marital donations by third persons and (ii) marital donations between spouses. In the early stages of the drafting process, the redactors toyed with the idea of adopting an alternative organizational scheme, one drawn from French doctrine, under which the subject matter of the two chapters would have been divided, first, between marital donations made in anticipation of a marriage and marital donations made during a marriage and, then, within the first of the two parts so established, between donations of present property and donations of property to be left at death. *See, e.g.*, 11 Aubry & Rau, *supra* note 2, §§ 735–744, at 493–550, *in* 3 Translations 574–619; 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, nos. 3141–3263A, at 535–84; 3 Josserand, *supra* note 2, nos. 1751–1857, at 967–1020. In the end, however, the redactors chose to stick to tradition on this point.

19. Under all of Louisiana's civil codes as well as under the French *Code civil*, the different kinds of marital donations have consistently been treated as if they were species of the genus "donations *inter vivos*." *See, e.g.*, Terré & Lequette, *supra* note 2, no. 545, at 440–41 ("[T]he traditional doctrine teaches that the contractual institution is first of all a donation; it is then from the juridical regime of donations that the borrowings [of rules] ought to be effectuated."); Marty & Raynaud, *supra* note 2, no. 534, at 412 ("It [the contractual institution] is a 'donation' and it is submitted to the rules on donations as to its form . . . , but also as to capacity, which is not that of testating, but that of donating."); Flour & Soileau, *supra* note 2, no. 418, at 274 (the *Code Civil* "at least in its classifications, attributes this character [i.e., that of donations *inter vivos*]" to contractual institutions); 3 Josserand, *supra* note 2, no. 1766, at 973 ("Under these two aspects [its framework and effects], the contractual institution belongs to liberalities *inter vivos*. That such was indeed the point of view of the legislature follows from the heading of Chapter VIII [Title II, Book III, *Code Civil*], in which this operation [the contractual institution] is treated: 'Of *donations* made by contract of marriage . . .'."); 6 Demolombe, *supra* note 2, no. 263, at 293–94 ("[D]onations by marriage contract belong . . . by their genre to donations inter vivos. Article 893, in fact, recognizes that, in our new law, there are only two modes of disposition by gratuitous title [by testament and by donations inter vivos] . . . . Now, donations by marriage contract are not testaments; therefore, they can only be donations inter vivos."); 15 Laurent, *supra* note 2, no. 178, at 221 ("It is necessary, then, to classify the contractual institution [donation of property to be left at death] either among testaments or among donations [*inter vivos*]. The code has settled the difficulty by qualifying the contractual institution as a donation [*inter vivos*]."); 4 Marcadé, *supra* note 2, no. 276, at 206 ("[T]he exceptional liberalities with which our chapter [Chapter 8] and the following chapter [Chapter 9] are occupied are never anything but donations *inter vivos* . . . ."); Coin-Delisle, *supra* note 2, art. 1082, no. 6, at 556 ("As for the *Code civil*, it is clear that it adopts the opinion that the contractual institution is a donation *inter vivos*, despite the differences that separate it from ordinary donations *inter vivos*."); *see also* Succession of McCloskey, 29 La. Ann. 237, 238–39, 240 (1877) (stating, after quoting Marcadé, that "[w]e accept these views as being the true exposition of the law, and as in consonance with the provisions of our Code"; finding that a donation made in a marriage contract by a husband to his wife of property that he would leave at his death "is a donation *inter vivos*"). With respect to donations of

CONTEMPLATION OF MARRIAGE[20] BY THIRD PERSON[21]

present property (defined *infra* note 39), this treatment cannot be questioned. The same cannot be said, however, with respect to donations of property *to be left at death* (defined *infra* note 42). As French scholars from the days of the *ancien régime* until the present have noted, these donations have a "mixed" or "hybrid" character—in Furgole's incomparable language, they are "amphibians" and "hermaphrodites"—for they exhibit, at once, characteristics of both donations *inter vivos* and donations *mortis causa*. *See* Terré & Lequette, *supra* note 2, no. 545, at 440–41; Malaurie & Aynès, *supra* note 2, no. 750, at 393; Marty & Raynaud, *supra* note 2, no. 534, at 412–13; Flour & Soileau, *supra* note 2, no. 418, at 274–75; 3 Josserand, *supra* note 2, no. 1765, at 962. Be that as it may, the drafters of new Chapters 8 and 9 elected not to break with tradition at this point: under these chapters, all marital donations—donations of property to be left at death included—continue to be treated as donations *inter vivos*.

20. *a.* In reformulating both the headings to and the articles within former Chapters 8 and 9, the Revisers, concurring in the proposal of the S&D Committee, jettisoned the expression "marriage contract." The reason for the Revisers' decision was the same as that behind the S&D Committee's proposal: the expression "marriage contract" is equivocal. In some instances, the expression is used to refer to the "contract of marriage" itself, that is, the contract whereby the future spouses become husband and wife, *see* CC art. 86; in other instances, to refer to a "matrimonial agreement" (commonly called an "antenuptial" or "premarital" agreement), that is, a contract whereby the future or present spouses modify or exclude the legal regime of acquets and gains, *see* Civ. Code art. 2328; and, in still other instances, to refer to a contract between two future spouses (i) in which, at a minimum, (a) some third person "intervenes" to make a donation in favor of both or one of them and/or their common children or (b) at least one of them makes a donation to the other, and (ii) which may, but need not, modify or exclude the legal regime of acquets and gains. As it was used in Chapters 8 and 9, the expression "marriage contract" had only the *last* of these senses.

Like the S&D Committee, the Revisers recognized that they could not remove all references to "marriage contract" from Chapters 8 and 9 without, at the same time, replacing them with "something" that would perform the same function as had those references. What was that function? It was to impose on "donations made by marriage contract" a *de facto* "form" requirement: it has long been supposed that a "marriage contract" of the kind contemplated by Chapters 8 and 9 was to be made in the same form as a "matrimonial agreement." *See* Cynthia Samuel, Katherine S. Spaht, & Cynthia Picou, Successions and Donations: Cases and Readings, 579 (2000). And so, the Revisers, again following the example of the S&D Committee, fashioned a new form requirement for those donations to replace the former "marriage contract" form requirement. *See* NAs 1735 & 1747.

b. The expression "donation in contemplation of marriage," as used in the heading to new Chapter 8, is merely a "shorthand" substitute for the longer expression "donation in contemplation of a prospective marriage" as used in the texts of the succeeding new articles.

21. Unlike the heading of old Chapter 8, that of new Chapter 8 omits any reference to the person or persons to whom donations that are governed by the chapter may be made. This omission, which was made for purely stylistic reasons, does not signal any substantive change. As a reading of new articles 1737 and 1738 reveals, donations governed by new Chapter 8 may, depending on the circumstances, be made to one or both of the spouses or to one or both of them and

Old

None

New

Section 1.[22] *In General*

Old

Art. 1734. Donations *inter vivos* by marriage contract; effect as to unborn children

Every donation *inter vivos,*[23] though made by marriage contract to the husband and wife or to either of them, is subject to the general rules prescribed for the donations made under that title.

. . .

Art. 1742. Reduction of donations to disposable portion

All donations made to a married couple by their marriage contract, are, at the time of the opening of the succession of the donor, reducible to the portion that the law permitted him to dispose of.

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their children, just as was true under old Chapter 8. *See* La. Civ. Code arts. 1737–1738.

22. Unlike old Chapter 8, new Chapter 8 is formally subdivided into three "sections." The first comprises general principles; the second, rules governing marital donations of "present property" made by third persons; the third, rules governing marital donations of "property to be left at death" made by third persons.

23. It is highly likely that old article 1734 contained within it a rather serious redaction error, one that can be traced all the way back to the Digest of 1808. The article of the Digest from which old article 1734 sprang—article 210, Title II, Book III—was clearly modeled on either (or both) article 1081 of the French *Code civil* or (and) article 146, Title II, Book III of the *Projet du gouvernement. See* Rudolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4, 93 (1971) (in Appendix C). Indeed, save for one slight variation, the Digest article was a verbatim reproduction of the French articles. That one variation was this: whereas the first line of each of the French articles read "every donation *inter vivos* of present goods," the first line of the Digest article read simply "every donation *inter vivos*." The omission of the qualifying phrase "of present goods" from the Digest article was almost certainly inadvertent rather than deliberate. One can suppose that the omission was deliberate only on the assumption that the redactors intended for the article to apply, at once, not only to donations of present property, but also to donations of property to be left at death. But if the article had been intended to apply to this latter kind of donation, then it would have contradicted the very next article: whereas article 210 provided that the donations to which it applied "could not take effect for the benefit of children not yet born," article 211, which without any doubt applied to donations of property to be left at death, provided that the donations to which it applied could be "give[n] . . . for the benefit of . . . the children to be born of their [the spouses'] marriage." The redactors could not possibly have intended to write such a stark antimony into the legislation.

New

Art. 1734. Donations in contemplation of marriage[24] by third persons; in general

24. On the meaning of the shorthand expression "donation in contemplation of marriage," see *supra* note 19, part *b*.

Any third person[25] may make a donation *inter vivos* in contemplation of a prospective marriage in accordance with the provisions of this Chapter.[26] Such a donation shall be

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25. *a.* By providing that "any third person" may make a donation in contemplation of a prospective marriage of the kind governed by this chapter, new article 1734 reiterates a principle that, insofar as it applies to donations of property to be left at death, was expressly stated in the old legislation (see old article 1735) and that, insofar as it applies to donations of present property, was presupposed by the old legislation. In this regard, then, new article 1734 does not change the law. *b.* In the phrase "any third person," the word "any" really means "any;" thus, the principle applies not only to the parents and other relatives of the prospective bride or groom, but even to "strangers." *See* 4(2) Mazeaud, *supra* note 2, no. 698, at 38–39 ("Outside of a contract of marriage, a donation of goods to come can be realized only by one spouse for the benefit of the other. On the contrary, an institution made in a contract of marriage can be the work of the relatives of the spouses or 'even of strangers' (Civil Code art. 1082), as well as of the spouses themselves."); Terré & Lequette, *supra* note 2, no. 548, at 442 ("A contractual institution can be consented by a relative (ascendant, collateral) of one of the spouses or by a stranger (Civil Code art. 1082)."); Marty & Raynaud, *supra* note 2, no. 532, at 411 ("And article 1082 expressly permits the ascendants and collaterals of the spouses and even strangers to introduce into the contract of marriage a condition of goods that the disposing party will leave at his death . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 771, at 961–62 ("[C]ontractual institution by contract of marriage can be made either by a stranger or by a relative of the spouses, ascendant or collateral."); 11 Aubry & Rau, *supra* note 2, § 739, at 505, *in* 3 Translations 583 ("A contractual institution may be made by third persons as well as by the ascendants or collateral relations of the future spouses."); 3 Colin & Capitant, *supra* note 2, no. 1739, at 893 ("The institution can be made by any person—by the parents of the future spouses, by strangers, and by the spouses themselves."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3166, at 545 ("'Institution by contract', or donation of future interests, can be made either by a stranger, or by a relative of the spouses, ascendant or collateral."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3884, at 828 ("According to the tenor of the terms of this text [Article 1082], any person, whether or not a relative of the future spouses, can make for their benefit the disposition that the article authorizes."); 6 Demolombe, *supra* note 2, no. 282, at 317 ("A donation of goods to come can be made either by the father or mother or other ascendants of the spouses, or by their collateral relatives, or even by strangers who are not related in any way to the spouses. This is to say, in the end, that it can be made by any person . . . ."); 4 Marcadé, *supra* note 2, no. 278, at 208 ("A donation of goods to come can be made by any person, whether or not he is a relative of the donee; our article explains itself on this point categorically."); Coin-Delisle, *supra* note 2, art. 1082, no. 9, at 557 ("Donations of goods to come . . . can be made by *all persons* who are capable of disposing inter vivos . . . . The enumeration that Article 1082 [formal source of old article 1735] makes of father, mothers, ascendants, collateral relatives and even strangers is intended to express more fully that the favor of donations by contract of marriage is not measured by the quality of the donors, but by the nature and quality of the contract . . . ."); 3 Toullier, *supra* note 2, no. 830, at 225–26 ("This donation . . . can be made by any person who is capable of disposing, be it the ascendants or collateral relatives of the spouses or even by strangers . . . .").

26. The use of the word "may" here is significant. Although one who wishes to make a donation in contemplation of a prospective marriage "may" do so by

governed by the rules applicable to donations *inter vivos* in general,[27] including the rules pertaining to the reduction of

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setting the donation up so that it conforms to the special requirements of this chapter, he "need not" do so, but rather "may," instead, set it up so that it conforms only to the general requirements for donations *inter vivos*. This principle, although it was not expressly set forth in the old legislation, is hardly new; rather, it is but an implication of the well-established rule that where a donation made in contemplation of a prospective marriage does not conform to the special requirements set out in the law that pertains specifically to "marital donations", it will nonetheless be upheld provided it conforms to the general requirements set out in the law of donations *inter vivos* in general. *See generally* Malaurie & Aynès, *supra* note 2, no. 692 ("Matrimonial liberalities, save for donations by contract of marriage . . . , are submitted to the general prerequisites for the validity of donations."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 736, at 914 ("[T]he donation must be made by contract of marriage. If not, it must be clothed in the ordinary form."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3143, at 538 ("The law favors only donations made to the future spouses in their marriage contract. Donations by a separate instrument are in all respects subject to general law. Especially the principle of irrevocability applies to them . . . ."); Coin-Delisle, *supra* note 2, art. 1081, no. 2, at 551 ("It is essential not to confuse [these] two things that are very much alike, yet of which one is more extended than the other: favor 'of marriage' and favor 'of the contract of marriage'. Each has its own privileges, and it is not always permissible to transport those of the one to the other. Donations *inter vivos* of present goods, made in favor of marriage, can be found in an act of donation that is separate from the marriage contract: all the authors say so, the word 'though' [*see* La. Civ. Code art. 1734 ("Every donation inter vivos, *though* made by marriage contract . . . .") presupposes it, and the general law desires it; for the first four chapters of this title have established rules for all donations *inter vivos*, without distinguishing the determinative cause of the liberality; and the special chapter on donations by marriage contract has as its objective not to restrain the liberty of donations, but to extend it.") In this latter case, however, the donation will produce only those effects that are specified in the law of donations *inter vivos* in general rather than those that are specified in this chapter. *See infra* note 29.

27. New article 1734, first paragraph, second sentence, does two things at once. First, insofar as it applies to donations of *present* property, it merely reproduces the substance of old article 1734 in slightly different form. *See supra* note 11. In this respect, the new article makes no change in the law. Second, insofar as it applies to donations of property *to be left at death*, it renders explicit a principle that was implicit in the old legislation, namely, that these donations, no less so than donations of present property, are subject to the general rules governing donations *inter vivos* as a matter of default. *See, e.g.*, 6 Demolombe, *supra* note 2, no. 263, at 294 ("The other articles, which govern donations *inter vivos*, are applied to donations by contract of marriage in all cases . . . ."); 15 Laurent, *supra* note 2, no. 178, at 221 ("Because the code qualifies it as a donation, it is necessary to conclude that the rules of donations *inter vivos* remain applicable to the donation of property to be left at death . . . ."); 4 Marcadé, *supra* note 2, no. 276, at 206 ("The exceptional liberalities with which our chapter and the following chapter are occupied are never anything but donations *inter vivos*, which remain subject to the ordinary rules . . . ."); Coin-Delisle, *supra* note 2, art. 1082, no. 6, at 556 ("The Code civil has made of them [donations of property to be left at death] a genre subordinated to that of donations *inter vivos*, to the rules of which one must have recourse . . . ."); *see also* 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2,

donations that exceed the disposable portion,[28] but only insofar as those general rules are not modified by the following Articles.[29]

A donation *inter vivos* by a third person in contemplation of a prospective marriage that is not made in accordance with the provisions of this Chapter shall be governed solely by the rules applicable to donations *inter vivos* in general.[30]

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no 3166, at 545 (reasoning that inasmuch as "[a] donation of future interests is a donation [*inter vivos*], as it name and placement in the [Civil] Code indicate," the "required capacity" for such a donation "is the capacity to make *inter vivos* donations, not the capacity to testate"). In this respect, too, the new article does not change the law.

28. The phrase "including the rules that pertain to the reduction of donations that exceed the disposable portion," as used in new article 1734, first paragraph, second sentence, reproduces in more succinct form the substance of old article 1742. It can be argued that the substance of that article ought to have been suppressed, not reproduced: after all, old article 1742 merely reiterated basic principles of the law of forced heirship, principles that, by definition, necessarily apply to all donations, marital donations included. *See* La. Civ. Code art. 1503 ("A donation, inter vivos or mortis causa, that impinges upon the legitime of a forced heir is not null but is merely reducible to the extent necessary to eliminate the impingement.") Concerned, however, that the suppression of this article might lead some interpreters to infer that the Revisers had intended to exempt marital donations from those principles, the Revisers decided to retain a reference thereto in new articles 1734. No change in the law is intended.

29. Although new article 1734, first paragraph, second sentence, last clause ("but only insofar as those general rules are not modified by the following Articles") is new, it does not change the law. To the contrary, it merely renders explicit a principle that was implicit in the old legislation, namely, that to the extent that any of the rules set forth in this chapter conflicts with any of the rules of the law of donations *inter vivos* in general, the former controls. *See, e.g.*, 6 Demolombe, *supra* note 2, no. 263, at 294 (the rules of donations *inter vivos* in general apply to marital donations only "where the legislation has neither explicitly or implicitly provided for any derogations"); 15 Laurent, *supra* note 2, no. 178, at 221 (the rules of donations *inter vivos* in general apply to marital donations "save for derogation that the legislation provides for"); Coin-Delisle, *supra* note 2, art. 1082, no. 6, at 556 (the rules of donations *inter vivos* in general apply to marital donations only when "they are not derogated from by an express text").

30. *a.* Although new article 1734, second paragraph is new, it does not change the law. To the contrary, it merely renders explicit a principle that was implicit in the old legislation, namely, that a donor can, if he so wishes, make a valid donation in contemplation of marriage "outside" the scope of this chapter. For such a donation to be valid, it must, of course, satisfy the requirements established in the law of donations *inter vivos* in general. And if it does so, then it will produce the effects that are specified in that same law. *See supra* note 15.

b. It should be clear that the point of the word "solely" as used in the text of new article 1734 is merely to preclude applying the rules set forth *in this chapter* to such donations. There is no intention to preclude applying *still other* rules to such donations, such as the rules of conventional obligations or of obligations in general.

Old

Art. 1734. Donations *inter vivos* by marriage contract; effect as to unborn children

Every donation *inter vivos* . . . made by marriage contract to the husband and wife or to either of them . . . .

Art. 1739. Presumed acceptance of donation by marriage contract

Donations made by marriage contract can not be impeached or declared void on pretense of a want of acceptance.

New

Art. 1735. Form[31]

The donation shall be made by a single instrument[32] in authentic form.[33] The instrument, which shall expressly state that the donor makes the donation in contemplation of the marriage of the prospective spouses, shall be signed at the same time and at the same place by the donor and by both of the prospective spouses.[34]

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31. The first paragraph of new article 1735 is new. It imposes on the donations regulated by this chapter a form requirement that approximates, but is perhaps a bit more stringent than, the form requirement imposed on such donations by the former legislation, i.e., that they be made by "marriage contract." *See, e.g.,* Civ. Code art. 1734 (1870); *see also supra* note 19 (explaining some of the reasons for this change). It should be noted that although it may have been possible under the old law to effect such a donation in a relatively more relaxed form than that required in the new article (e.g., by an act under private signature duly acknowledged or by separate instruments, one signed by the donor and the other by the donee(s)), that required in the new article has always been far and away the most commonly used form for effecting such a donation. This change in the law, then, should not necessitate a change in practice.

32. By requiring that the donation be accomplished in a "single instrument," the rule of this article derogates from that of article 1540, paragraph 2, which permits the donee to accept the donation by means of a "posterior" act. *See* La. Civ. Code art. 1540.

33. *See* La. Civ. Code art. 1833(A) ("An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed.").

34. The requirement that *both* of the spouses-to-be sign the instrument applies even when the donation is made to only one of them or to one of them and their common children, but not to the other. In such a case, then, the "other" spouse-to-be enjoys a *de facto* "veto" power over the proposed marital donation, for he or she can effectively block it by refusing to sign the instrument. In the event that such a veto occurs, the donor, if he persists in his will to make the donation, will have to do so "outside" the pale of Chapter 8, that is, by means of an "ordinary" donation.

The donation need not be accepted in express terms.[35]

See La. Civ. Code art. 1734, ¶ 2.

35. New article 1735, second paragraph reproduces the substance of old article 1739 in more technically precise form. Interpreted according to its letter, old article 1739 might have seemed to stand for the proposition that the acceptance of a donation made in a marriage contract was "presumed" (just as is the acceptance of a remission. *See* La. Civ. Code art. 1890, sent. 2 (itself another special species of donation *inter vivos*). That, after all, seems to be the plain meaning of the phrase—"on pretense of a want of acceptance." And it was on the basis of this interpretation, it would seem, that the heading of the article—"presumed acceptance"—was devised. But this interpretation is inconsistent with the article's "history." That article can be traced back through a series of verbatim reproductions (article 1732 of the Code of 1825 and article 215, Title II, Book III, of the Digest of 1808) to article 1087 of the French *Code civil*. That source article, French civil law scholars have unanimously concluded, establishes "only a dispensation from the formal express acceptance, which article 932 [La. Civ. Code art. 1540] requires of all donations [*inter vivos*] in principle." *See* 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3146, at 539; *see also* Terré & Lequette, *supra* note 2, no. 536, at 428 ("Article 1087 . . . signifies that these liberalities escape the obligation of an express acceptance imposed on other donations by Article 932."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 738 ("This text dispenses the donation only of the express acceptance that is in principle required for donations by Article 932; but the donation, being a contract, necessitates at least a tacit acceptance. The acceptance can be given in any form whatsoever, for the derogation is one of pure form and not of substance."); 3 Josserand, *supra* note 2, no. 1753, at 968 ("In the terms of Article 1087, . . . an 'express' acceptance by the donee, imposed on ordinary donations by Article 932, is no longer required for donations made by marriage contract; the legislators content themselves here with tacit acceptance."); 6 Huc, *supra* note 2, no. 454, at 587 ("[D]onations made by marriage contract must be accepted, for they constitute contracts. However, [Huc quotes Article 1087] . . . . This is to say that they are not submitted, as are other donations, to the necessity of an express acceptance."); 6 Demolombe, *supra* note 2, no. 250, at 280 ("[T]he acceptance, which must be express in ordinary donations inter vivos (art. 932), can be tacit in donations by marriage contract; but it is nonetheless always necessary that these donations themselves be accepted. Every donation, of whatsoever kind it may be, can only be formed by a contract; now, there is a contract only by the consent of the parties."); 15 Laurent, *supra* note 2, no. 161, at 204–05 ("This disposition is rather poorly written; one could believe that donations made by marriage contract do not have to be accepted. Such is not—such cannot be—our law. . . . To understand the bearing of article 1087, one must relate it to article 932, which provides that a donation inter vivos does not engage the donor and had no effect except from the day on which it is accepted in 'express terms' . . . . It is necessary to exempt donations that form a part of marriage contracts from this provision. Such is the end of Article 1087; it does not free donations by marriage contract from the requirement of acceptance, for acceptance is nothing other than consent, and the donee must necessarily consent; the law dispenses them from express acceptance, it contents itself with tacit acceptance, that is to say, it places donations made by marriage contract back under the domain of the common law . . . of 'Obligation'".); 4 Marcadé, *supra* note 2, no. 1087 ("Because donations made to the future spouses in their marriage contract are viewed with favor, one could not allow them to be submitted to that disposition so severe—let us rather say so heinous—of Article

Old

Art. 1740. Nullity of donation in default of marriage

Every donation made in favor of marriage falls, if the marriage does not take place.

New

Art. 1736. Condition[36]

932, which requires an acceptance 'in express terms' on pain of nullity. . . . [T]he lack of a special and formal declaration in this regard will no longer provide a justification . . . for annulling the donation."); 4 Troplong, *supra* note 2, no. 2469, at 643 ("From this one sees that Article 1087 does not distance itself from the principle that every donation must be accepted. But, differently from Article 932, it contents itself with a tacit acceptance, whereas Article 932 requires an express acceptance in order donations."); Coin-Delisle, *supra* note 2, art. 1087, no. 1, at 586 ("This article . . . corrects, for donations by marriage contract, the severity of French law on the forms of acceptance; it does not dispense with the acceptance, but with the solemnities of the acceptance . . . ."); 3 Grenier, *supra* note 2, at ("But it would not be necessary that there be a formal acceptance. This results from Article 1087 . . . .").

36. For the most part, new article 1736 reproduces the substance of old article 1740 in a more technically sophisticated form. Old article 1740, without making reference to the institution of "condition," provided that a donation by marriage contract "falls" if the marriage does not take place. French civil law scholars, in attempting to construct a theoretical explanation for this rule, have nearly unanimously concluded that the rule rests on the notion that every such donation is made subject to the implied condition *si nuptiæ sequantur* ("if the marriage follows"). *See* Malaurie & Aynès, *supra* note 2, no. 692, at 365 ("Donations made in favor of marriage . . . are submitted to the condition *si nuptiæ sequantur*."); 3 Colin & Capitant, *supra* note 2, no. 1706, at 879 ("They [donations in favor of marriage] are subordinated to the condition *si nuptiæ sequantur*."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, nos. 3849–3850, at 813–14 ("The legislation rightly considers that a donation made in view of a certain marriage is tacitly subordinated, in the intention of the donor, to the conclusion of this marriage. Thus, if this condition happens to be defeated, the donation will fall, *deficiente conditione deficit donatio*. One should not conclude from this that, up until the celebration of the marriage, the donation confers no right on the donee(s)-future spouse(s). It creates in their favor a condition right, one that the donor cannot snatch from them by revoking the donation; for it is tied under the condition *si nuptiæ sequantur*."); 6 Huc, *supra* note 2, no. 454, at 588 ("[T]he efficacity of these donations is subordinated to the accomplishment of the suspensive condition that the marriage will take place . . . ."); 6 Demolombe, *supra* note 2, no. 253, at 282 ("[A] donation made by marriage contract is subordinated to the suspensive condition that the marriage will take place . . . ."); 15 Laurent, *supra* note 2, no. 167, at 208 ("A donation made in favor of marriage is a conditional donation; having no other objective than to favor the marriage, such a donation is for that very reason made under the condition that the marriage in favor of which it has taken place be accomplished."); 4 Marcadé, *supra* note 2, no. 1088, at 227 ("A donation made in favor of a marriage is necessarily submitted to the condition that this marriage will

The donation[37] shall be made subject to the suspensive

be realized . . . ."); 3 Toullier, *supra* note 2, no. 824, at 224 ("They [donations in favor of marriage] are supposed to be made under the condition of the marriage . . . ."); 9 Duranton, *supra* note 2, no. 746, at 755–56 ("But they [donations in favor of marriage] are all thought to be made under the tacit condition of the marriage in view of which they have taken place . . . ."); *see also* 3 Josserand, *supra* note 2, no. 1756, at 969 (noting that it is "customary" to explain the rule of this article in terms of the supposed condition *si nuptiæ sequantur*). *But cf.* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 740, at 923 (suggesting that a better explanation for the rule might be "failure of cause"); 3 Josserand, *supra* note 2, no. 1756, at 969 (same). Thus, between the new article and the old there is only this one difference—that the former makes explicit the theory behind both. To the extent that new article 1736 merely makes this theory explicit, it, of course, does not change the law.

37. There is at least one point at which old article 1740 and new article 1736 clearly differ: the scope of the former was broader than is that of the latter. As the text of old article 1740 clearly indicates, that article applied to all donations "in favor of marriage," not just those made in "marriage contracts," but also those made in the form of ordinary donations *inter vivos*. French scholars, commenting upon the formal source of old article 1740—*Code civil* article 1088—have unanimously interpreted that article in just this way. *See, e.g.*, 4(2) Mazeaud, *supra* note 2, no. 1554, at 726 ("*Code Civil* article 1088 . . . figures in the chapter 'Of donations made by contract of marriage,' but it applies a general rule . . . . Thus, one declares caducious even donations by a separate act. "); Terré & Lequette, *supra* note 2, no. 538, at 431 ("In the terms of Article 1088 of the Code Civil, 'every donation made in favor of the marriage will be caducious if the marriage does not follow.' . . . It likewise does not matter whether the donation has been consented to by marriage contract or by a separate act."); 3 Colin & Capitant, supra note 2, no. 1706, at 879 ("[T]here are two particularities that are applied to all donations made 'in view of a particular marriage,' no matter what may be the act that contains them: . . . They are subordinated to the condition *si nuptiæ sequantur*."); 3 Josserand, *supra* note 2, no. 1806, at 989–90 ("[T]he principle [that only donations made by marriage contract are subject to the special rules on marital donations] displays certain temperaments; by the very force of things, the circumstances in which the donation is made act upon its destiny . . . It is thus that the donation becomes caducious if the marriage in view of which it was made is not celebrated."); Coin-Delisle, *supra* note 2, art. 1088, no. 1, at 586 ("[T]his rule [that of *Code civil* article 1088] is applicable even to donations made outside the marriage contract that have no other cause [than to favor the marriage]."); 4 Troplong, *supra* note 2, no. 2471, at 645 ("And note that it is not only donations set out in a marriage contract that are submitted to this cause of caducity; so also are all donations whatsoever, even those that are made outside the marriage contract, provided that they have as their end to favor a marriage."); *see also* 6 Huc, *supra* note 2, no. 454, at 588 ("The rule of Article 1088 is applicable to donations . . . of movable objects, made from hand to hand to a future spouse in view of a particular marriage that does not come to pass.") New article 1736, by contrast, applies to donations in favor of marriage made in conformity with this chapter (the equivalent, as has already been explained, of donations in favor of marriage formerly made by marriage contract), but not to donations in favor of marriage made in the form of ordinary donations *inter vivos*.

Does this "change in scope" effectively "change the law?" To be more precise, should one conclude that donations in favor of marriage made in the form of ordinary donations *inter vivos*–those that have been removed from the scope of this

condition[38] that the prospective marriage shall take place.

Old

None

New

Section 2. Donations of Present Property[39]

chapter's "implied suspensive condition of marriage" rule—must now be understood to be made free of such a condition? Not at all. Because there is no longer any special legislation that applies to such donations, the question whether a given donation of this kind has been made subject to an implied suspensive condition that the marriage take place will be governed by general principles, to be precise, by the law of "conditional obligations." *See* La. Civ. Code arts. 1767–1776. Under those rules, it could be appropriate, depending on the circumstances, to infer that the donation in question was made subject to such an implied suspensive condition. *See* La. Civ. Code art. 1768 ("Conditions may be . . . implied by law, the nature of the contract, or the intent of the parties."); *see generally* Litvinoff, *supra* note 15, § 5.4, at 81–82 (explicating article 1768).

38. *See* La. Civ. Code art. 1767, ¶¶ 1 & 2 ("A conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.")

39. *a.* The expression "donation of present property," as used in this revision and in old articles 1735 and 1744, refers to a donation of property that, at the moment at which the donation is made, is already in some sense part of the donor's patrimony. *See* Terré & Lequette, *supra* note 2, no. 436, at 356 ("'Present goods' include not only goods of which the donor is already the owner, but, more expansively, goods on which he has a simply conditional right; it is a matter, even in such cases, of goods that already figure in his patrimony."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 439, at 568–69 ("In the end, present goods are those that, at the moment of the donation, figure in the patrimony of the donor under one title or another."); Baudry-Lacantinerie & Colin, *supra* note 12, no. 1436, at 638 ("Present goods are those that figure in the patrimony of the donor, at the moment of the donation, or that must enter into it later on by virtue of a then-existing right, the acquisition of which no longer depends on his will."); 6 Huc, *supra* note 2, no. 217, at 281–82 ("All the goods which, at the moment of the donation, figure in the active [part of the "patrimony"] and not in a hypothetical manner, as well as the hoped-for products of these goods are 'present goods' . . . ."); *see also* 3 Josserand, *supra* note 2, no. 1354, at 770 ("[F]rom the moment at which he [the donor] is invested with a right, even if it be imperfect, this right is considered to have the status of a present good and, therefore, can form the object of a donation."); 3 Marcadé, *supra* note 12, no. 672, at 575 ("The expression 'present goods,' then, offers here a sense that is much larger than in ordinary cases: it embraces all the things, all the values, on which it is possible for the donor to confer a certain right immediately.") Thus, the category "present property" includes not only those rights that the donor has acquired "purely and simply" (that is, without any term or condition), but also those that he has acquired subject to a "suspensive term" or a "suspensive condition." *See* Terré & Lequette, *supra* note 2, no. 436, at 356 ("'Present goods' include not only goods of which the donor is already the owner, but, more expansively, goods on which he has a simply conditional right; . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 439,

at 568 ("One understands by 'present goods' not only those of which the donor is already the owner, with or without term . . . , but also those on which he yet has only a right that is suspended by a condition. In fact, a conditional right is already, in itself, a 'present' good and can be the object of a transmission."); 10 Charles Aubry & Charles Rau, Droit Civil § 675, at 622 (Paul Esmein rev., 6th ed. 1954), *in* 3 Translations, *supra* note 2, at 179 ("One must consider as present property not only property existing at the time of the donation and property to which the donor has an actual right, but also future things that will belong to him if they materialize, as well as property on which he has only rights subject to a suspensive condition."); 3 Josserand, *supra* note 2, no. 1354, at 770 ("[T]hus it is that one can give a good on which one has only an ownership interest that is affected with a term or even a condition . . . ."); 12 Laurent, *supra* note 12, nos. 414–415, at 500–01 (quoting Furgole for the proposition that "present goods" are involved "when it is a matter of a vested right of the donor, or of an action that he is competent to bring, or that he could be competent to bring upon the occurrence of some condition that can have an effect retroactive to the day of the act that established the right or the action"). The category is not so broad, however, as to include rights that the donor merely hopes or plans to acquire, for example, rights that may fall to him by inheritance when his father dies. *See* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 439, at 568 ("On the contrary, a good that the donor proposes to acquire and on which he still has no right, or a good that belongs to one of his parents, the succession of which he is counting on receiving, is not a 'present' good."); 10 Aubry & Rau, *supra* note 39, § 675, at 179, *in* 3 Translations 622 ("Conversely, the property as to which the donor has only a simple expectancy, such as property that he may be called to receive in a succession not yet opened, cannot be considered as present property . . . ."); 12 Laurent, *supra* note 12, no. 415, at 501 (noting that a presumptive heir's "hope" of sharing in the *de cujus*' succession is not a present thing because it "does not given him any action nor any right, be it current or even conditional").

b. Like an ordinary donation *inter vivos*, a marital donation of "present property" is effective (that is, transfers ownership) immediately ("at present," to use the words of Louisiana Civil Code article 1468). *See* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 741, at 925 ("A donation by contract of marriage [of present goods] produces its effect between the parties, not dating from the celebration of the marriage, but from the date of the donation."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3875, at 822 ("The donor will have recourse to a donation of present goods when he will intend to deprive himself currently and irrevocably."); 6 Huc, *supra* note 2, no. 455, at 589 ("A donor who wants the ownership of the given goods to pass immediately to the donee spouse . . . will proceed by way of a donation of present goods."); 6 Demolombe, *supra* note 2, no. 266, at 296 ("[T]he donation of present goods . . . presently and irrevocably seizes the donee and, as a result, disseizes the donor, who is bound to deliver the goods to him from the day of the celebration of the marriage . . . ."); 15 Laurent, *supra* note 2, no. 176, at 218–19 ("The most important consequence that results from article 1081 is that the ownership of the goods passes immediately to the donee spouse . . . . The donee is seized of them, and he can dispose of the objects given . . . ."); 4 Marcadé, *supra* note 2, no. 1081, at 206–07 ("The general rules to which donations made by marriage contract remain submitted, when their objects consist only of present goods, are: . . . the present and irrevocable disseizing of the donor."); 4 Troplong, *supra* note 2, no. 2341, at 485 ("These donations of present goods . . . immediately seize the donee . . . ."); 3 Toullier, *supra* note 2, no. 821, at 224 ("A donation of present goods, made to the spouses by marriage contract,

Old

Art. 1734. Donations *inter vivos* by marriage contract; effect as to unborn children

Every donation *inter vivos* . . . made by marriage contract to the husband and wife or to either of them . . .

It can not take effect for the benefit of children not yet born.

New

Art. 1737. Beneficiaries

The donor may donate any of his present property to both or one of the prospective spouses.[40] The donation may not, however, be made to their common descendants, whether already born or to be born.[41]

Old

None

New

Section 3. Donations of Property to be Left at Death[42]

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disseizes the donor as does any other donation *inter vivos* and transfers to the donee the ownership of the given goods.").

40. The first sentence of new article 1737 reproduces the substance the part of the first sentence of old article 1734. The new sentence does not change the law.

41. The second sentence of new article 1737 reproduces the substance of the second sentence of old article 1734 in more technically precise form. The new sentence does not change the law.

42. *a.* In the old legislation that which is now referred to as "property that the donor will leave at his death" (see the heading to Section 3 and the articles that follow it) was at times referred to as "property they shall leave on the day of their decease" (for example, old article 1735) and at other times as "future property" (for example, old articles 1737, 1738, and 1745). The new expression represents a more modern restatement of the former of these old expressions.

In reformulating the old legislation, the Revisers decided, first, that the new legislation should use only one expression to refer to the property in question, rather than two, and, second, that as between the two expressions used in the old legislation, the longer one—"property they shall leave on the day of their decease"—is preferable. The reason for the first decision is obvious enough: using multiple expressions for the same referent does nothing but invite confusion. The reason for the second decision is not so obvious and, therefore, requires some explanation.

The second decision rested on an assessment of the "comparative advantages" of the alternative expressions. It must be admitted that the abandoned expression, that

is, "future property," has several clear advantages over the one the Revisers retained: "future property," for one thing, is shorter and, for another thing, is more closely parallel to the expression used to describe the other kind of property that may form the object of a marital donation—"present property." But "future property" has a disadvantage vis-a-vis "property that the donor will leave at his death," a disadvantage so serious that it outweighs those advantages: the expression "future property" is equivocal and, as a result, is apt to be misunderstood.

The expression "future property" is polysemic, that is to say, depending on the context in which it is used, the expression "future property" may have either, or both, of two meanings. First, it may refer to property that the donor has not yet acquired as of the time of the donation, but that he plans to acquire thereafter. Second, it may refer to such property that the donor may still happen to have (whether or not he has already acquired it as of the time of the donation) at the time of his death, in other words, his "estate." *See* Terré & Lequette, *supra* note 2, no. 545, at 440; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 767, at 957; 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3879, at 826; 9 Duranton, *supra* note 2, no. 680, at 670; *see also* 11 Aubry & Rau, *supra* note 2, § 739, at 501–02, *in* 3 Translations 580–82.

Now, in the context of the law of marital donations, the expression "future property" is used *in this latter sense and that sense only*. That this is so becomes clear when one reads the articles that refer to future property in the light of (1) other articles on the same subject matter (an *in pari materia* analysis) and (2) their history (a historical source analysis):

(1) *In pari materia.* Throughout the former articles on marital donations, the expression "future property" (a translation of the French expression *biens à venir*) was used interchangeably with the expressions "property that the donor will leave at his death" (a translation of the French expression , and "property they shall leave on the day of their decease" (a translation of the French expression), both of which, of course, are indicative of the second of the two senses mentioned above. In none of these articles, however, does one find an expression such as "property that he will later acquire," "after-acquired property," or the like, which might have been indicative of the first sense.

(2) *History.* A donation of "property that the donor will leave at his death" is the equivalent of what, in the law of the French *ancien régime*, was referred to as *l'institution contractuelle d'héritier* ("contractual institution of heir") or *l'institution contractuelle* ("contractual institution") for short, expressions that French civil law scholars continued to use even after the drafters of the *Code civil* had coined the neologism *la donation de biens à venir* (donation of future property) to replace them. *See* 4(2) Mazeaud, *supra* note 2, no. 693, at 34 ("The contractual institution, or donation of future property, . . . is exceptionally authorized in marriage contracts or between spouses during the marriage."); Terré & Lequette, *supra* note 2, no. 545, at 440 ("The contractual institution, also named a donation of future property . . . ."); Malaurie & Aynès, *supra* note 2, no. 750, at 393 ("Despite the hostility that the Revolution bore toward it [i.e., the contractual institution], the *Code civil* retained it, but only for matrimonial donations. The *Code civil* withdrew from it the denomination 'contractual institution' . . .; the *Code civil* called it 'donation of future property' . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 767, at 957–58 ("The donation of future property, or contractual institution, is a donation whose object is all or part of the goods that the donor will leave at his death."); 3 Josserand, *supra* note 2, nos. 1765–1767, at 972 ("Exceptionally, the legislation admits a donation can bear on future property, on the goods that the disposing party will

leave at his death . . . ; the operation consented to under these conditions traditionally takes the name 'contractual institution'."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3879, at 826 ("In serious language, the ancients called the disposition in question here 'contractual institution,' a marvelous choice of expression for it is tantamount to a definition. . . . The donation of goods to come is, in fact, as we have just seen, an institution of an heir made by a contract of marriage; it is an irrevocable gift of a succession, a *datio successionis*, as Cujas said."); 6 Huc, *supra* note 2, no. 456, at 590 ("From Article 1082 results a kind of institution of heir made by contract of marriage, from which the denomination 'contractual institution' is attributed to this genre of disposition."); 15 Laurent, *supra* note 2, no. 177, at 219 ("It [the donation of future property] is that which one called, in the ancient law, the 'contractual institution,' because the donor institutes an heir by contract."); 6 Demolombe, *supra* note 2, no. 271, at 306 ("In these characteristics [those set forth in the articles that pertain to the donation of "future property"], it is easy to see the mode of disposition that enjoyed so great a role in our ancient jurisprudence under the name . . . contractual institution . . . ."), no. 273, at 309 ("[I]t is important to recognize that the donation of future property proceeds, in our Code, from the contractual institution and that if it must be, first of all, interpreted according to the new texts, it will often be necessary to have recourse to the principles that governed this ancient mode of disposition."); 4 Marcadé, *supra* note 2, no. 278, at 208 ("The disposition in question here is that which, following the received usage, we have often designated by the name 'contractual institution'."); 4 Troplong, *supra* note 2, no. 2343, at 491 ("The genre of disposition of which our articles [*Code civil* articles 1082 and 1083] speak is known in the law under the name of 'contractual institution'."); Coin-Delisle, *supra* note 2, art. 1082, no. 1, at 554 ("After the donation of present property, the Code passes to the donation by marriage contract of all or part of the goods that the disposing party will leave at his death. This is an abnormal genre of donation, which is part donation and part succession and which, under the ancient law, took the name 'contractual institution'."); 3 Toullier, *supra* note 2, no. 830, at 225 ("The second kind of donation that the Code permits one to make by marriage contract is that of all or part of the goods that the donor will leave at his death . . . . It is that which in earlier times was called a contractual institution."); 9 Duranton, *supra* note 2, no. 671, at 671 ("One calls this donation [of goods to come] 'contractual institution' because by means of it one institutes an heir and one does it through a contract, in an irrevocable manner . . . ."); *see also* 11 Aubry & Rau, *supra*, § 739, at 501, *in* 3 Translations 580 (entitling the discussion of "donations of goods to come" as "Of donations of all or part of the succession of the disposer, or of the contractual institution of heir"). As the very wording of the longer of these two traditional expressions—*l'institution contractuelle d'héritier*—suggests, a contractual institution makes of its beneficiary a *successor* to the disposing party, in other words, it confers on its beneficiary an interest in the disposing party's *estate*. *See* 4(2) Mazeaud, *supra* note 2, no. 694, at 36 ("The contractual institution, or donation of future property, is a contract whereby the *de cujus* . . . engages himself to leave to another person . . . his estate (universal institution), an aliquot share of his estate (institution by universal title), or certain particular goods in his estate (institution by particular title). Thus, the estate ends up devolving, in whole or in part, by the will of the *de cujus* expressed in a contract."); Terré & Lequette, *supra* note 2, no. 545, at 440 ("The contractual institution, also named a donation of future property, is 'the act whereby one of the parties . . . disposes for the benefit of another . . ., who accepts, either all or part of the goods that

compose his estate or this or that good that will be found within it'."); Malaurie & Aynès, *supra* note 2, no. 750, at 393 ("The contractual institution is a contract whereby the disposing party confers on the beneficiary the right to take goods in his estate."); 3 Josserand, *supra* note 2, no. 1765, at 972 ("[I]t bears on the goods or certain of the goods that the disposing party will leave at his death; it is in the succession of the disposing party that the rights of the instituted party will be exercised . . . .") & 973 ("[I]t is analyzed, as Laurière qualified it, as a 'gift of an estate'."); 6 Demolombe, *supra* note 2, no. 271, at 306 ("[T]he contractual institution, which Laurière has defined [as follows]: 'An irrevocable gift of an estate or of part of an estate, made by marriage contract, for the benefit of the spouses . . .'."); 4 Troplong, *supra* note 2, no. 2343, at 491 ("[T]he contractual institution [is] define[d] thusly: 'It is an irrevocable gift of an estate or of part of an estate . . . '."); Coin-Delisle, *supra* note 2, art. 1082, no. 7, at 556 ("[L]et us try to sketch an abridged tableau of what the contractual institution was in the regions of customary law in the final state of that law . . . It was a donation by contract of marriage of the entire estate or of part of the estate of the disposing party . . . It was a gift of an estate . . . ."). Now, a contractual institution, by definition, confers an interest in one's estate, that is, the property that one will "leave at one's death."

Though it should, then, be clear that the expression "future property," as used in the law of marital donations, has only the latter of the two senses enumerated above, there is reason to fear that this truth nevertheless is one with which at least some lawyers are unacquainted. That the risk of misunderstanding on this point is real was demonstrated during the LSLI Council's discussion of the S&D Committee's Projet. If one can judge from the illustrations of donations of "future property" that they offered up, several council members assumed that the expression "future property," as used in the context of marital donations, refers to some specific item of property (e.g., a tract of land) that the donor does not yet own at the time at which he makes the donation, but that he plans to acquire thereafter; in other words, they assumed that the expression, as used in this context, has the *first* of the two senses enumerated above. Relying on that assumption, these members reached the conclusion that a "donation of future property" is, in reality, not a true donation at all, but rather a "promise to donate property to be acquired in the future." In point of fact, this understanding of "donation of future property" is fundamentally flawed, for it rests on an erroneous assumption: as I have just demonstrated, "future property," in this context, has the *second* of the two senses enumerated above. But that is beside the point. The point, rather, is this: if even some of the leaders of the state's official law reform body misunderstood "future property," as used in this context, then chances are others would as well.

b. Like a donation *mortis causa*, to which it has a close affinity in terms of *effects*, a donation of property to be left at death does not transfer ownership until the donor dies. *See* 4(2) Mazeaud, *supra* note 2, no. 701, at 40 ("[T]he instituter, like the testator, remains owner of the goods that are the object of the institution up until his death. . . . The institute has on them, during the life of the instituter, only an eventual right . . . .) & no. 703, at 42 ("The contractual institution confers on the institute the title of successor to the goods included in the institution . . . ."); Terré & Lequette, *supra* note 2, no. 545, at 440 ("The expression 'donation of goods to come' puts into relief that the fact that the donee will benefit from the disposition only at a future date. The formula 'contractual institution' shows that a successor has been instituted by a contract in lieu of doing it by a testament. . . . Like a testament, it is an act whereby he who disposes does so for a time when he will no longer exist."); Marty & Raynaud, *supra* note 2, no. 534, at 413 ("[B]y its object,

it [the contractual institution] bears on hereditary rights; it is the 'gift, by contract of marriage, of a right of succession.'" In fact, it produces effects only at the death of the instituter. . . . At the death of the disposing party, the contractual institute is treated as a legatee . . . . Thus, the term contractual institution expresses well the nature of this liberality. It is an institution of a legatee by contract; its object is rights of a successorial nature; it organizes a contractual succession; it is a pact on a future succession that, by exception, is permitted."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 767, at 957 ("[B]y its result, the donation of goods to come is a liberality of last will, analogous to a legacy.") & no 776, at 970 ("The contractual institution is a donation of a succession and this succession, at the moment at which the act is passed, has still not opened. As a result, it does not effect an immediate transmission of ownership; up until his death, the instituter remains the owner of all his goods."); 11 Aubry & Rau, *supra* note 2, § 739, at 515, *in* 3 Translations 591 ("From the day of the institution, the institute is contractually invested with the title of heir or of successor of the donor, and irrevocably seized of the rights of succession conferred upon him. But he does not become the owner of the property forming the subject matter of the institution until the death of the donor; and the transmission of ownership which operates in his favor has no retroactive effect."); 3 Colin & Capitant, *supra* note 2, no. 1744, at 895 ("The instituted heir, by virtue of the contract, acquires an irrevocable right to [share in] the succession of the instituter. But he has no current right on the goods that form the object of the institution. The mind is immediately forced to recognize a rapprochement between the situation of the contractually institued her and that of a forced heir."); 3 Josserand, *supra* note 2, no. 1785, at 980 ("[T]his right is an 'inheritance' right, in the since that it will be exercised only in the estate of the disposing party . . . ."), no. 1788, at 981 ("At the death [of the instituting party], the quality of 'heir' prevails over that of 'donee' in the instituted party; the instituted party is in the situation of an heir, more precisely, of a 'legatee' . . . ."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3910, at 838 ("From the fact that it [the contractual institution] is a gift of an estate, it follow that it confers on the institute no current right, but only an eventual right: it is that proper to all succession rights."), no. 3922, at 841 ("The contractual institution is . . . , then, opened as are all successions, that is to say, by the death of the instituter."); 6 Huc, *supra* note 2, no. 456, at 590 ("That which characterizes it [the contractual institution] . . . is that . . . the donor does not currently disseize himself and that he keeps the free disposition of his goods, the donee having a right only on the goods that will exist at the moment of the [donor's] death."), no. 458, at 594 ("[T]he emolument attached to this title [that of the institute] can be experienced only at the death of the instituter . . . . [T]his title does not cause the goods included in the institution to enter at present into the contractual heir's patrimony . . . . The putting into work of this right is, then, necessarily subordinated to the predecease of the instituer. At this moment, the institutes, who [up until then] had only accepted the quality of 'presumptive heirs,' can [now] accept the quality of definitive heirs . . . ."); 6 Demolombe, *supra* note 2, no. 272, at 308 ("It is a combination which, without currently disseizing the disposing party of the ownership of his goods, nevertheless assures the transmission of it to the spouses at the time of his death . . . ."), no. 322, at 353 ("'[A]s for the emolument, it can not be truly known except at the death [of the instituter]'."); 15 Laurent, *supra* note 2, no. 183, at 225 ("This is what characterizes the contractual institution: the donor does not currently disseize himself and he keeps the free disposition of his goods; the donee has a right only to the goods that will exists at the time of [the donor's] death."), no. 223, at 262 ("The contractual institution is the gift of all or part of the estate of the donor. Thus, the

Old

Art. 1735. Donations by marriage contract stipulated to take effect at donor's death

Fathers and mothers, the other ascendants, the collateral relations of either of the parties to the marriage, and even strangers, may give the whole or a part of the property they shall leave on the day of their decease, both for the benefit of the parties, and for that of the children to be born of their marriage, in case the donor survive the donee.

Such a donation, though made for the benefit of the parties to the marriage, or for one of them, is always, in case of the survivorship of the donor, presumed to be made for the benefit of the children, or descendants to proceed from that marriage.

New

Art. 1738. Beneficiaries[43]

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institute is an heir by virtue of a contract [made] during the lifetime of the very person he is called to succeed."); 9 Duranton, *supra* note 2, no. 672, at 672, & no. 700, at 700 ("A contractual institution is opened by the natural or civil death of the instituter, for it is nothing other than the attribution or the gift of an inheritance, in whole or in part . . . .")

43. For the most part, new article 1738 merely reproduces the substance of old article 1735 in clearer form. This "substance" consists of two elements.

i. Permissible beneficiaries—The first is the categories of permissible beneficiaries. As was true under old article 1735, under new article 1737 a marital donation may be made by a third person in favor of any one of the following four (4) classes of potential donees: (i) one spouse alone, without the other and without the common descendants of the spouses; (ii) both spouses together, but without the common descendants of the spouses; (iii) one spouse along with the common descendants of the spouses; and (iv) both spouses together, along with their common descendants. *See* Marty & Raynaud, *supra* note 2, no. 533, at 412 ("By this donation, the third person can gratify [both] spouses or one of them. If the donation is made in only in favor of [both] spouses or of one them, it is presumed, in the absence of the disposing party's will to the contrary, to be made [as well] for the benefit of the children or descendants to be born of the marriage . . . ."); 11 Aubry & Rau, *supra* note 2, § 739, at 508, *in* 3 Translations 585–86 ("The contractual institution may be made in favor of the future spouses conjointly or one of them only. It may be restricted to the future spouses or extended to the children and descendants to be born of their marriage . . . ."); 6 Huc, *supra* note 2, no. 456, at 591 ("Anyone having the required capacity . . . can, then, dispose of his goods to come, by way of a contractual institution: 1) for the benefit of one of the future spouses only, to the exclusion of the children to be born; 2) for the benefit of the two spouses, to the exclusion of the children to be born; 3) for the benefit of the two spouses, or of one of them, and of the children to be born . . . ."); 4 Marcadé, *supra* note 2, no. 281, at 210 ("It [a donation of goods to come] can be made either 1) for

the benefit of one of the spouses, or 2) for the benefit of both of them, or 3) for the benefit of one or both of them and of the posterity to be born of the marriage.") A donation made to donees in the third or fourth of these categories entails a kind of vulgar substitution, for the common descendants can receive the thing(s) donated only if the spouses cannot or will not. *See* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 965 ("[T]he institution of the children creates in their favor a vulgar substitution . . . ."); 11 Aubry & Rau, *supra* note 2, § 739, at 508, *in* 3 Translations 586 ("[I]n this case [i.e., where the donation is stipulated in favor of the children], the children . . . are vulgarly substituted for the institutes, that is, are called to receive the benefit of the institution in default of the latter. This vulgar substitution takes place by operation of law . . . ."); 3 Josserand, *supra* note 2, no. 1774, at 976 ("The legislature presumes that the instituter has intended to include in his liberality the children that will issue from the marriage; it is a kind of vulgar substitution that is inscribed in the legislation . . . ."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3893, at 832 ("[T]he legislation recognizes . . . the existence of a tacit vulgar substitution for the benefit of the children."), no. 3895, at 833 ("In the silence of the donor, the legislation, as we have just said, presumes a vulgar substitution, but only for the benefit of the children and descendants to be born of the marriage."); 6 Huc, *supra*, no. 456, at 592; 6 Demolombe, *supra* note 2, no. 287, at 324; 9 Duranton, *supra* note 2, no. 679, at 680 ("[T]he effect of the presumption that calls them [the children], in the event that the donee should die before the donor, is to cause the goods to pass to them by virtue of a kind of tacit vulgar substitution . . . .") *But cf.* 4 Marcadé, *supra* note 2, no. 284, at 212–13 (contending that the substitution of the children to their parents in such a donation differs from a typical vulgar substitution in that whereas the latter occurs anytime that the institute either cannot or will not take the donation, the former occurs only when the institute cannot take it and then only when the cause of this inability is that the institute has predeceased the instituter). Regarding vulgar substitutions in general, see La. Civ. Code art. 1521 (1870).

Such a donation may not be made in favor of the common descendants alone (that is, in isolation from the spouses themselves), a so-called "donation *per saltum*." Although the French jurisprudence, with the blessing of most twentieth century French scholars, eventually ruled that article 1082 of the French *Code civil*—the formal source of our former article 1735—did not, in fact, prohibit donations *per saltum*, *see, e.g.*, 4(2) Mazeaud, *supra* note 2, no. 699, at 40, earlier French scholars had more or less unanimously reached the opposite conclusion. *See, e.g.*, 11 Aubry & Rau, *supra* note 2, § 739, at 509, *in* 3 Translations 586 ("It is no longer possible to limit the benefit of the contractual institution to these children or descendants by instituting them *per saltum*, to the exclusion of their father and mother."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3898, at 833 ("[T]he children to be born of the marriage could not themselves be instituted *principaliter*, by passing, as one of our old authors put it, over the heads of the spouses, that is to say, without the spouses' having been instituted in the first line; for the legislation authorizes the institution of the children only subsidiarily to that of their parents."); 6 Demolombe, *supra* note 2, no. 289, at 325 ("But could the donor, on the contrary, exclude the spouses and give only to the children to be born? Certainly not! And such a disposition would null . . . according to the text of article 1082, which authorizes giving only *as much to the spouses as to the children* . . . ."); 15 Laurent, *supra* note 2, no. 201, at 243 ("The legislation does not say that the donor can directly institute the children to be born to the exclusion of the spouses. And, inasmuch in this exceptional matter, everything requires the most rigorous interpretation, it is necessary to decide that that which the legislation does not permit is by the same

prohibited . . . ."); 4 Marcadé, *supra* note 2, no. 281, at 210 ("But it [the contractual institution] cannot take place for the descendants only; it is necessary that it be addressed to the spouses and to the descendants: to the spouses (or to one of them) first of all and to their descendants thereafter; for the legislation permits a disposition for the benefit of the children only 'in the case in which the donor survives the donee spouse'."); Coin-Delisle, *supra* note 2, art. 1082, no. 27, at 562 ("It [article 1082] no longer permits, as did the old law, one to institute contractually the children to be born of the marriage, without instituting the spouses. One must call the spouses or one of them principally, and the children come only upon their default."); 4 Troplong, *supra* note 2, no. 2360, at 516 ("Article 1082 . . . does not adopt the system of *l'Ordonnance de 1731*, which permitted one to make contractual institutions for the benefit of the children to be born, by passing over the heads of the future spouses. The children can be called only as vulgar substitutes to their progenitors, who are necessary donees of the first order."); 9 Duranton, *supra* note 2, no. 678, at 676 ("The donation could not even be made solely for the benefit of the children to be born of the marriage and not, first of all, for the benefit of the spouses."); *see also* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 966 ("Would it be permitted to institute contractually the children to be born of the marriage without instituting the spouses themselves? The majority of the authors of the 19th century decided in the negative; it seemed to them that the children are allowed to benefit from the liberality only under the title fo substitutes and only if the donation has been made, in the first line, to one of the spouses."). As between these competing interpretations of the French source article, the latter (the earlier), it is believed, more likely coincides with that of the drafters of the Digest of 1808 and the Code of 1825, who reproduced that article. Seeing no need to "change the law" on this point, the Revisers elected to codify that interpretation.

ii. Presumption of substitution—The second is the presumption of substitution, that is, that the donation is presumed to entail a substitution in favor of the children. The rationale for the presumption is that it is supposed to reflect the "probable intention of the instituter." 4(2) Mazeaud, *supra* note 2, no. 699, at 39; *see also* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 966 ("It [the presumption] is conformed to the purpose of the institution and to the customary intention of the parties, who think of the children no less than of the spouses."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3893, at 832 ("The contractual institution, as we have seen, is a donation made in favor of marriage. The legislation concludes from this that, in the intention of the donor, the institution is addressed not only to the spouses themselves, but also to the family that the marriage is going to found."); 6 Demolombe, supra note 2, no. 286, at 323–24 (quoting, with approval, this excerpt from Auroux des Pommiers' commentary on the complementary article of the *Coutûme d'Auvergne*: "'For,' he says, 'upon delving into the intention of him who has made a contractual institution, one will find that his design is to benefit not only the spouse whom he has instituted, but also that spouse's children . . . .'"). According to the overwhelming weight of doctrinal opinion, the presumption is rebuttable. *See* 4(2) Mazeaud, *supra* note 2, no. 699, at 40 ("But the presumption . . . is only a 'simple presumption'. It is possible for the donor to set it aside expressly by stipulating that in the case of the predecease of the spouse or of one of them, the institution will be caducious."); Terré & Lequette, *supra* note 2, no. 547, at 442 ("It [the institution], in the absence of a contrary stipulation, likewise benefits the children to be born of the marriage, doing so by operation of law. (Civ. Code art. 1082.)"); Marty & Raynaud, *supra* note 2, no. 533, at 412 ("[I]t [the institution] is presumed, in the absence of a contrary will

on the part of the disposing party, to have been made for the benefit of the children or the descendants to be born of the marriage . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 966 ("But is a simple presumption of will; if he wants to do it, the donor can exclude the children from the benefit of the institution . . . ."); 11 Aubry & Rau, *supra* note 2, § 739, at 508, *in* 3 Translations 586 ("This vulgar substitution takes place by operation of law, independently of any declaration of the donor who, if he intends to restrict the effect of the contractual institution to the future spouse in whose favor it was made, must do so expressly."); 3 Colin & Capitant, *supra* note 2, no. 1741, at 894 ("The presumption . . . is not of public order. The instituter could set it aside by an express declaration and decide, by a formal clause, that the contractual institution will be caducious if the institute dies before him."); 3 Josserand, *supra* note 2, no. 1774, at 976 (the presumption "is not of public order, and can be set aside by an express clause, but, in the absence of a reservation of this kind, follows automatically."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3894, at 832 ("Moreover, one has there only a presumption that would fall before a contrary manifestation of will by the donor. . . . Thus, the donor could, through a formal clause in the donation, exclude the children to be born from the benefit of the disposition, by saying, for example, that the predecease of the donee-spouse, with or without posterity, will render the donation caducious."); 6 Huc, *supra* note 2, no. 457, at 591 ("The children can be excluded from the contractual institution, which will, then, turn out to be restrained to the spouses alone or to one of them. But in order for it to be so, a special clause of exclusion of the children is necessary."); 6 Demolombe, *supra* note 2, no. 288, at 325 ("Could the donor exclude the children to be born of the marriage from the benefit of his donation? Certainly yes!, in our opinion, despite the dissent of Coin-Delisle . . . . For Article 1082 establishes only a simple presumption of will, one susceptible of being destroyed by the manifestation of a contrary will on the part of the donor . . . ."); 4 Marcadé, *supra* note 2, no. 282, at 210 ("But if it is permissible to call the descendants [to the institution], it is not obligatory . . . . It is true that these descendants are seen with such favor that, if the donor does not speak of them, the donation is by operation of law presumed to have been made for their benefit. But this is only a presumption, and this rule, for that reason, would disappear before a declaration of a different will."); 9 Duranton, *supra* note 2, no. 677, at 675–76 ("The presumption that calls [to the institution] the children and descendants to be born of the marriage in the case of the predecease of the donee can be set aside . . . by a declaration of the donor."). *But cf.* Coin-Delisle, *supra* note 2, art. 1082, nos. 29–33, at 562–63 (contending that the presumption is irrebuttable).

The donor may donate all or any[44] of the property that he

44. In one respect, new article 1738 resolves an uncertainty in old article 1735. French doctrinal writers have debated whether a donation of the kind contemplated by French *Code civil* article 1082, the formal source of old article 1735, can be made (i) under a "particular title" as well as (ii) under a "universal title" or under what we, in Louisiana, would now call a "general title." *See generally* La. Civ. Code arts. 1585–1587 (rev. 1997) (defining "universal," "general," and "particular" legacies, respectively). Though there have been one or two dissenters through the years, the overwhelming majority of the writers have answered this question in the affirmative. *See* Mazeaud, *supra* note 2, no. 694, at 36 ("The contractual institution, or donations of goods to come, is a contract whereby the *de cujus* . . . engages himself to leave to another person . . . his succession (universal institution), a share of his succession (institution by universal title), or certain determinate goods in his succession (institution by particular title)."); Terré & Lequette, *supra* note 2, no. 547, at 442 ("The contractual institution can have for its object the ensemble of the goods of the instituter; it is then universal. It can likewise bear on an arithmetical fraction of the goods or on the movables or the immovables or a share of them; it is then by universal title. Finally, it can be applied to this or that good; it is then by particular title."); Malaurie & Aynès, *supra* note 2, no. 753, at 395 ("The donation can have for its object all or part of the goods that the donor will leave at his death; it is then either universal or by universal title. . . . More rarely, the donation bears on a particular good or a sum of money; it is then by particular title."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 770, at 960–61 ("Thus, the institution can have for its object the universality of the goods of the disposing party, an aliquot share of these same goods, or one or several determinate goods."); 11 Aubry & Rau, *supra* note 2, § 739, at 504, *in* 3 Translations 582 ("The subject matter of a contractual institution may be either the universality or a portion of the universality of the succession of the donor, the totality or portion of the movable or immovable patrimony that he will leave at his death, or particularly designated succession property."); 3 Josserand, *supra* note 2, no. 1777, at 977 ("[T]he instituter has complete latitude in determining the object—the seat of his liberality—which can be applied: 1) Either to all the goods he will leave at his death; the disposition then has a universal character; 2) Or a quotient of the said goods; he disposes, in this case, generally; 3) Or one or several determinate goods; 4) Or, finally, a sum of money to be taken away from the estate. . . . [W]ith the latter two types, he [the institute] presents himself as a transferee under particular title . . . ."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3907, at 836–37 ("A contractual institution can include 'all or part' of the future property of the instituter. These words have here the same sense as in [French *Code civil*] art. 893, which gives the definition of a testament. Thus, the word 'part' designates not only an aliquot share, such as a third or a fourth, but also the particular goods that make up the mass. In a word, a contractual institution can be: (1) Universal . . . . (2) By universal title . . . . (3) By particular title . . . ."); 6 Demolombe, *supra* note 2, no. 279, at 314 ("The donation of goods to come can include 'all or part of the goods' that the donor 'will leave at his death' (art. 1082), that is to say, either the universality or a share of the universality of the succession; or all the immovables or all the movables or a fixed share of the immovables or movables; or, finally, hereditary goods individually designated, certain bodes of goods, or certain quantities, for example, this or that house, these or those horses, this or that credit against a third person, or this or that sum to be taken from the estate."); 15 Laurent, *supra* note 2, no. 190–193, at 232–34 ("A contractual institution can include all or part of the goods that the donors will leave at their death. . . . He [the donor] can

will leave at his death (1) to both or one of the prospective spouses or (2) to both or one of them and, in the event that they or he predecease the donor or, once the donor's succession is opened, they or he either renounce the donation[45] or are declared unworthy to receive it,[46] to

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. . . give all the goods that he will leave at his death; in this case, the donation is universal and resembles a universal legacy . . . . A contractual institution can also include only a part of the estate of the instituter. It can be by universal title, like a legacy. . . . Can a contractual institution include particular goods? . . . One answers that . . . 'part of the goods" has a technical sense: it is applied not only to a universality, but also to particular goods."); 4 Troplong, *supra* note 2, no. 2364, at 521 ("It follows from there [the text of article 1082] that a contractual institution is sometimes universal, sometimes by universal title. But that is not all: inasmuch as he who can do the most can also do the least, one must say that the instituter is *a fortiori* the master of making his institution by only a particular legacy; a contractual institution, being a testament by contract, lends itself to the same varieties as does the testament itself."); *see also* 4 Marcadé, *supra* note 2, no. 280, at 209 (noting that the term "part," as used in the phrase "all or part of the goods" that the donor will leave at his death, contemplates both "a disposition by universal title" and "a disposition by particular title"). *But cf.* 9 Duranton, *supra* note 2, no. 676, at 674 ("By 'part' of the goods that the donor will leave on the day of his death, one understands not specific and determinate objects . . . . Thus, one understands by this word 'part' a part constituting a universal title . . . ."). And our courts, relying on the predominant French doctrine, reached precisely the same conclusion regarding our old legislation. *See* Succession of De Bellisle, 10 La. Ann. 468 (1855). New article 1738 incorporates this interpretation by use of the words "*any or all* of the property that he will leave at his death."

45. In drafting new article 1738, the Revisers chose to abandon the phrase "in case the donor survive the donee," as that phrase was used in old article 1735, in favor of the phrase "in the event that they or he predecease the donor or, once the donor's succession is opened, they or he either renounce the donation." The purpose of the change is to resolve an uncertainty in old article 1735, one that was carried over from its formal source, article 1082 of the French *Code civil*. Through the years French scholars have split over the question whether, under that article, a renunciation by the donee(s)-spouse(s) has the same effect as his (their) predeceasing the donor. Those who have answered this question in the negative base their conclusion on an argument *a contrario*: because the legislation specifically mentions only one possible cause of substitution—that the institute-spouse might no longer exist—all other possible causes of substitution, including that a spouse might renounce the institution, are impliedly excluded. These scholars, then, argue that substitution takes place in favor of the common descendants only when a spouse *can* not take the donation, that is, when he predeceases the donor, but not when a spouse *will* not take it, that is, when he renounces it. By contrast, the scholars who have answered the question in the affirmative base their conclusion on the interpretive maxim *lex statuit de eo quod plerumque fit* (the legislation addresses that which *generally* happens). In their view, the legislators, in mentioning only the case in which the institute *can* not take the donation, intended only to mention the most common cause of substitution by way of illustration, but not to exclude other possible causes, especially not causes closely analogous to that mentioned. Thus, for these scholars, substitution takes place in favor of the descendants not only when a spouse *can* not (due to his death) take the

donation but also when he *will* not (due to renunciation) take it. In the course of time, the majority of French scholars have rallied to the latter interpretation. *See* Terré & Lequette, *supra* note 2, no. 550, at 445 ("It happens differently when the institute has children. His renunciation permits them to receive the goods included in the institution . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 784, at 984 ("Renunciation benefits those who would have had a right to the goods given if the contractual institution had not taken place. In particular, if there was a co-institute, some substituted institutes, or some subsequent donees, they will benefit from the contractual institution and not the legal heirs."); 11 Aubry & Rau, s*upra* note 2, § 739, at 523, *in* 3 Translations 598 ("All the rules above set forth relative to the predecease of both of one of the instituted spouses . . . are also applicable to their respective renunciation of the benefit of the institution . . . made in their favor."); 3 Colin & Capitant, *supra* note 2, no. 1748, at 897 ("[E]ven if the institute is still living, but renounces the institution, his children can receive it."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3929, at 843 ("[D]oes the institute's renunciation, as does his predecease, give an opening to the right of his children? The affirmative is generally admitted and, it seems to us, with good reason."); 4 Demante & Colmet de Santerre, *supra* note 2, no. 255*bis*, at 485 ("[T]he descendants are called to receive the donation any time that would receive a true succession, to which they would be called after their parent, in particular in the event that he should renounce . . . . [S]everal articles show that the legislators were able to write the words 'in the case where the donor would survive' for these: 'in the case where the donee would not receive."); 6 Demolombe, *supra* note 2, no. 329, at 365–66 ("[W]e think it is necessary to say of renunciation—be it by the spouse or spouses who have been instituted or by the children and descendants who have been substituted—that which we have said of their predecease, namely, that the renunciation of the one, in the same way as his predecease, opens the right of the others."); 9 Duranton, *supra* note 2, no. 702, at 702 ("And it is the same if . . . he [the donee-spouse] renounces; it [the institution] has an effect in their [the children's] interest; they are tacitly and vulgarly substituted to their parent in the case in which he will not receive the right, no matter what may be the cause."). *But cf.* 15 Laurent, *supra* note 2, no. 234, at 275–76 (championing the first interpretation); 4 Marcadé, *supra* note 2, no. 284, at 212–13 (same); Coin-Delisle, *supra* note 2, art. 1082, no. 43, at 565 (same). Convinced that the majority "got it right," the Revisers adopted the second interpretation.

46. New Article 1738 provides that the substitution of the common descendants occurs not only when a spouse cannot (due to his death) or will not (due to his renunciation) take the donation, but also when a spouse is "declared unworthy to receive it." This change, too, settles an uncertainty in old article 1735, one that it had inherited from its formal source, article 1082 of the French *Code ivil.* The majority of French civil law scholars, reasoning that the regime of "unworthiness of successors" does not apply to *contractually-instituted* heirs (but, rather, applies only to *legal* heirs, that is, those identified by the legislation that governs intestate successions), have concluded that a donee-spouse cannot be stripped of his rights to the donation on the theory that he was "unworthy" to receive it. *See, e.g.,* 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3930, at 843; 6 Demolombe, *supra* note 2, no. 330, at 366–67; 4 Marcadé, *supra* note 2, no. 284, at 213. There have, however, been at least two dissenters from this otherwise unanimous opinion, one modern—Planiol—and one ancient—Duranton. *See* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 965 ("From the fact that they have been instituted on the default of their parents, the children, whatever may be the reason for this default—predecease, renunciation, *unworthiness*—, are called in their own right

their common descendants,[47] whether already born or to be born.[48]

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and not be representation . . . .") (emphasis added); 9 Duranton, *supra* note 2, no. 702, at 702 ("And it is the same if . . . he [the donee-spouse] is unworthy to receive the benefit of the disposition . . .; it [the institution] has an effect in their [the children's] interest; they are tacitly and vulgarly substituted to their parent in the case in which he will not receive the right, no matter what may be the cause. . . . Article 1082 was not intended to limit the right of the children to the sole case of the predecease of the donee in relation to the donor; its only purpose was to call the children 'in default' of their parent."). Whichever of these opinions may be superior as a matter of interpretive technique, that of Planiol and Duranton is clearly superior as a matter of public morality, as even some of those in the "majority" have acknowledged. *See, e.g.*, 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3930, at 843 ("The unworthiness of the institute raise the same question as does his renunciation. One could not possibly resolve this question differently from the other, if one could . . . admit that the institute can be pushed aside on account of unworthiness."). Accordingly, this Revision codifies their opinion.

47. In this new article, the term "descendants" has been substituted for the term "children" as that term was used in old article 1735. The sole purpose of this change is to achieve improved technical precision in the statement of the law. The term "children" as used in old article 1735 undoubtedly was intended, from the very beginning, to refer to all "descendants," regardless of degree, rather than to descendants of the first degree only. *See* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 965 ("By 'children' it necessary to understand descendants."); 6 Demolombe, *supra* note 2, no. 292, at 327–28 ("Under this denomination 'children to be born of the marriage', one must, in addition, include . . . grandchildren and, more generally, 'the posterity' that issues from this marriage."); 4 Marcadé, *supra* note 2, no. 281, at 210 ("It [the contractual institution] can be made for all the children, grandchildren, great-grandchildren to be born of the marriage; for if the first paragraph speaks only of children, the second is careful to say children 'and descendants'.").

48. In yet another respect, new article 1738, depending on one's point of view, either resolves an uncertainty or fills a lacuna in old article 1735. According to old article 1735, a marital donation made by a third person can be made, by way of substitution, in favor of the "children to be born of the marriage." This expression, interpreted strictly and in accordance with the ordinary meaning of its terms, might seem to be restricted to common descendants of the spouses who will not be born until *after* the marriage is celebrated. Nevertheless, interpreters of Article 1082 of the French *Code civil* have concluded that that expression extends even to the common illegitimate, "premarital" children of the spouses. *See* 4(2) Mazeaud, *supra* note 2, no. 699, at 40 ("To 'children to be born of the marriage' it is necessary to assimilate children legitimated by marriage, since they are, as of the marriage, in the situation of legitimate children."); Terré & Lequette, *supra* note 2, no. 547, at 442 n.5 ("To 'children to be born' are assimilated children already born who come to be legitimated by the marriage in view of which the donation is made."); Malaurie & Aynès, *supra* note 2, no. 752, at 395 ("The notion of 'descendants to be born of the marriage' covers not only the legitimate children that are issued from it, but also the children legitimated . . . by the two spouses . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 967 ("[But illegitimate children already born and legitimated by marriage are assimilated to 'children to be born of the marriage'. No doubt the legislation speaks only of 'children to be born,' but legitimated children are in an exceptional situation that assimilates them to

The donation is presumed to be made in favor of the common descendants of the spouses, even if, in the act of donation, the donor does not mention them.

Old

Art. 1736. Extent of irrevocability of donation by marriage contract

A donation, in the form specified in the preceding article, is irrevocable only in this sense, that the donor can no longer dispose of the objects comprised in the donation on a gratuitous title unless it be for moderate sums, by way of recompense or otherwise.

The donor retains till death the full liberty of selling and mortgaging, unless he has formally barred himself of it in the whole or in part.

New

Art. 1739. Limited irrevocability[49]

A donation of property that the donor will leave at his death is irrevocable only in the sense that the donor may no longer dispose of the property by gratuitous title, save for

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legitimate children."); 11 Aubry & Rau, *supra* note 2, § 739, at 507, *in* 3 Translations 584 ("Under the term 'children to be born' on must likewise include the children already born and who of will have been legitimated by the marriage in favor of which the disposition was made."); 3 Josserand, *supra* note 2, no. 1776, at 976 (possible contractual institutes include "the children who will be born of their [the future spouses'] union—or that this union would legitimate—, for one knows that legitimated children are assimilated, for the future, to legitimate children . . . ."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3895, at 833 ("To the children born of the marriage, everyone agrees should be added children legitimated by this marriage, for they are considered to be 'anticipated' fruits of it."); 6 Huc, *supra* note 2, no. 456, at 591 (a contractual institution can be made "for the benefit of . . . the children to be born of their [the spouses'] union, to whom one must assimilate children already born who will be legitimated by the envisioned marriage"); 6 Demolombe, *supra* note 2, no. 292, at 327 ("Under this denomination 'children to be born of the marriage', one must include, in addition, children already born who would be legitimated by the marriage . . . ."). New article 1738 incorporates this interpretation by its use of the expression "common descendants, whether already born or to be born." *Compare* Quebec Civ. Code art. 1840 (". . . only the future spouses, the spouses, . . . and *their common children born or yet born*, if they are born alive and viable, may be donees.") (emphasis added).

49. With the exception noted in the next gloss, *see infra* note 50, new article 1739 merely reproduces the substance of old article 1736 in clearer, more concise form. To this extent, it does not change the law. *See generally* Succession of Moran, 535 So. 2d 369, 372, 373 (La. 1988); Riddell v. Riddell, 146 La. 37, 39–40, 83 So. 369, 370 (1919); Criswell v. Seay, 19 La. 528 (1841).

dispositions of modest value.[50] Nevertheless, the donor remains the owner of the property and, as such, retains the full

50. The phrase "by way of recompense or otherwise," as used in old article 1736, has *not* been reproduced in new article 1739. The point of this change is to resolve an uncertainty in the former article, one that was carried over from its formal source of, Article 1083 of the French *Code civil*. Interpreters of the French source article have developed two competing interpretations of the expression "or otherwise" as it is used in the phrase "by way of recompense or otherwise." The first interpretation, which can be called "literal," is founded on the supposed ordinary sense of the word "otherwise." As Marcadé, a proponent of this interpretation, explained: one "cannot inquire into the cause of the gift. From the moment that the gift is of 'modest value' (in relation to the fortune of the disposing party), the disposition will be valid." For Marcadé, then, "otherwise" means "for *any* reason whatsoever." 4 Marcadé, *supra* note 2, no. 291, at 216; *see also* Coin-Delisle, *supra* note 2, art. 1083, at 575–76. The second interpretation, which can be called "historical," is founded on the historical sources of the French *ancien régime* from which the article was drawn. Reading the phrase "or otherwise" in the light of those sources, the proponents of this interpretation reasoned that the word "otherwise" must be understood to mean—and to be limited to—"other *analogous* reason." 15 Laurent, *supra* note 2, no. 221, at 260–61; *see also* 11 Aubry & Rau, *supra* note 2, § 739, at 512–13 & n.48, *in* 3 Translations 589; 3 Colin & Capitant, *supra* note 2, no. 1745, at 896; 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3915, at 839; 6 Demolombe, *supra* note 2, no. 317, at 350; 4 Troplong, *supra* note 2, no. 2350, at 500; 3 Toullier, *supra* note 2, no. 834, at 226. Donations made for analogous reasons include (i) those made for pious causes and (ii) those made as "customary gifts." 11 Aubry & Rau, *supra* note 2, § 739, at 512–13 & n.48, *in* 3 TRANSLATIONS 589; 3 Colin & Capitant, *supra* note 2, no. 1745, at 896; 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3915, at 839; 6 Demolombe, *supra* note 2, no. 317, at 350; 15 Laurent, *supra* note 2, no. 221, at 260–61; 4 Troplong, *supra* note 2, no. 2350, at 500; 3 Toullier, *supra* note 2, no. 834, at 226. Examples of donations made for a "pious cause" are (i) a donation to a church or other charitable organization and (ii) a donation to "the poor." 15 Laurent, *supra* note 2, no. 221, at 261; *see also* 3 Colin & Capitant, *supra* note 2, no. 1745, at 896; 6 Demolombe, *supra* note 2, no. 317, at 350; 3 Toullier, *supra* note 2, no. 834, at 226.

As between these competing interpretations, the Revisers preferred the former, primarily for reasons of administrative efficiency. In the Revisers' judgment, inquiry into the purpose of the donor's "modest" post-donation gifts, which is of dubious utility to start with, could sometimes prove expensive and time-consuming.

liberty of disposing of it by onerous title,[51] in the absence of an express stipulation to the contrary.[52]

Old

None

New

Art. 1740. Division following substitution of common descendants[53]

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51. The donor's residual power of onerous "disposition" entails, of course, not only the power to transfer full ownership of the property, be it by sale, exchange, *dation en paiement*, or otherwise, but also the power to create on the property real rights less than full ownership, be they principal real rights (e.g., predial servitude or usufruct) or accessory real rights (e.g., mortgage or pledge). *See* 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 777, at 973–74 ("The instituter can sell, exchange, mortgage his goods, burden them with servitudes . . . ."); 3 Colin & Capitant, *supra* note 2, no. 1745, at 895 ("[T]he instituter remains the owner of the goods included in the institution and . . ., for this reason, he keeps the right of disposing of them by onerous title, of burdening them with real rights."); 3 Josserand, *supra* note 2, no. 1782, at 979 ("As to acts by onerous title, the instituter can make them, without any regard to . . . the 'juridical nature' or the importance of the acts to be accomplished: sale; exchange; creation of a mortgage, a servitude, or any other dismemberment of ownership . . . ."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3918, at 840 ("He [the instituter], then, retains the unlimited right to dispose of the goods by onerous title: he can exchange them, burden them with a mortgage, and sell them, even subject them to the charge of paying a life rent . . . ."); 6 Huc, *supra* note 2, no. 458, at 593 ("He [the instituter] can, then, alienate them by onerous title or burden them, by the same kind of title, with real rights—mortgages, servitudes, etc."); 15 Laurent, *supra* note 2, no. 214, at 254 ("Since the donor can alienate, he can also burden the goods with real rights—mortgage and servitudes. The right is incontestable."); *see also* 9 Duranton, *supra* note 2, no. 708, at 704–05 (citing an 1815 case in which the court upheld a servitude that the instituter, by onerous title, had created on the object of the institution).

52. The use of the phrase "in the absence of an express stipulation to the contrary" is intended to signal that the rule set forth immediately theretofore is "suppletive" (sometimes also called "permissive") rather than "imperative" (sometimes also called "mandatory" or "prohibitive"). On the distinction between these two categories of rules, *see* A.N. Yiannopoulos, Civil Law System: Louisiana and Comparative Law § 116, at 222–23 (2d ed. 1999); Alejandro M. Garro, *Codification Technique and the Problem of Imperative and Suppletive Laws*, 41 La. L. Rev. 1007, 1007–12 (1981).

53. New article 1740 fills a lacuna in the old legislation. Neither former Chapter 8 nor former Chapter 9 directly addressed the question of the manner in which "property to be left at death" is to be divided among the common descendants of the spouses in the event that that property should fall to them by way of substitution. French civil law scholars, addressing the same lacuna in the correlative chapters of their *Code civil*, the formal sources of our former chapters, have unanimously concluded that this property should be divided in the same manner as the *de cujus'* estate should be divided among his descendants in an

intestate succession. *See* 11 Aubry & Rau, *supra* note 2, § 739, at 522–23, *in* 3 Translations 597 ("The children in the first degree partition by heads. The descendants of the children who have predeceased the donor concur with the surviving children. The partition in this case is by roots. The children in the first degree, or the descendants of a more remote degree, who have died before the donor without children or descendants, are deemed never to have existed with regard to the institution, the emoluments of which are partitioned among the survivors in the manner previously indicated."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3928, at 842–43 ("If the descendants of the institute are all in the first degree, they share by heads the goods included in the disposition. On the contrary, if one or several of the children of the institute have predeceased the donor and have left descendants, then a partition by roots is appropriate; these descendants come by representation of their predeceased progenitor. This is the tradition, and in a matter that is altogether traditional, such a consideration is decisive."); 6 Demolombe, *supra* note 2, no. 328, at 364–65 ("[I]f they [the children] have left descendants, then one must conclude: (1) that these descendants, though they are in the second or the third degree, etc., will come to partition the benefit of the institute with the surviving children, though they are in the first degree; (2) that, in these cases, the partition must be made not by heads but by roots. Because it ought to be the same as well in the case in which all of the children of the first degree have predeceased, the institution will be received by their descendants in equal or unequal degrees. . . . What, in fact, did the instituter want in making, by contract of marriage, this donation of his goods to come to the spouses and to the posterity that will be born of the marriage? He has wanted, in some fashion, to found the future patrimony of the family that is going to be formed; and it is to recognize his true intention to submit the devolution of the contractual succession, which he has established, to the same rules as those that govern the devolution of the legitimate succession."); 15 Laurent, *supra* note 2, no. 233, at 275 ("How are the rights of the children governed when one or all of them are predeceased, leaving descendants? The question is whether one applies to he contractual institution the rules that govern successions *ab intestat*; will there be room for representation? If the question were to be decided according to the principles that the Code Civil has established in the matter of representation, then one would have to say that there is no room for representation. The contrary opinion, however, is taught by all the authors. We see only one means of justifying this opinion: it is the authority of tradition."); 4 Marcadé, *supra* note 2, no. 285, at 213 ("It is not expressed in our text, but it must appear certain that the Code, . . . in transmitting in this way the goods to the whole of the descendants, as if were a matter of a succession, intends to apply rules analogous to those of successions. Thus, if the donee should die before the donor, leaving at the same time children and grandchildren, those of these grandchildren who should still have their parent could not receive . . .; those grandchildren whose parent would have predeceased the donor would represent him so as to concur with the other children, their aunts and uncles; and if all the children were predeceased, so that there were only grandchildren, they would share the property by roots and not by heads."); 3 Toullier, *supra* note 2, no. 843, at 228 ("[T]he children and descendants of the donee, who are called [to the institution] upon his default when he predeceases the donor, 'succeed' to the goods given, that is, the children by heads and the grandchildren by roots: because the donor wanted the donation to benefit the entirety of the descendants of the donee, the donor is presumed to have wanted them to benefit in the same order as that in which they would have succeeded to him had they been his descendants."); 9 Duranton, *supra* note 2, nos. 684, at 683 ("If the predeceased donee leaves children of the marriage

If the common descendants of the spouses find themselves substituted to both or one of the spouses, the property to which the common descendants are entitled shall be divided among them in accordance with the provisions of Chapter 2 of Title I of Book III.

Old

Art. 1741. Failure of donation to spouse by survival of donor

Donations made to the husband or the wife, on the terms of Articles 1735 and 1737, fall if the donor survive the donee and his or her posterity.

New

Art. 1741. Caducity; causes and effects[54]

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and grandchildren of a child who had died before or after him, these grandchildren, taken together, have the part of the institution that would have belonged to their father, had he still been alive at the death of the donor: they represent him . . . .") & no. 686, at 684–85 ("Inasmuch as it is by representation of their fathers and mothers that the grandchildren come to the institution, the partition must be made by roots and not by heads. This is important where one of the children of the first degree left a greater number of children living at the date of the donor's death than did the other children of the first degree. This right of representation has always been recognized by the authors who have written on the matter . . . . In fact, the instituter is presumed to have wanted the descendants of the marriage to profit from the disposition in the case of the predecease of their father or mother. He wanted all the descendants of the donee to succeed to him in the same order as that in which they would have succeeded if they'd been his own descendants, that is, . . . with the rights resulting from a partition effected by roots and not by heads."); 3 Grenier, *supra* note 2, no. 419, at 26 ("[W]here the contractual heir predeceases the disposing party, the children and the grandchildren of this contractual heir 'succeed' to the institute, the children by heads and the grandchildren by roots. . . . [I]t is always presumed that the instituter had the intention, by virtue of the very fact that he wanted the institution to benefit the entirety of the descendants, that the benefit be in the same order in which the descendants would have succeeded to him if they had been his own descendants. . . . When descendants are called, by virtue of a contract, to receive a succession, they are always presumed to be in the ordinary order of successions."). New article 1740 codifies that unanimous doctrinal opinion.

54. To the extent that the first paragraph of new article 1741 addresses the effect of the predecease of all of the donees ("[i]f every one of the donees, including the substitutes, predeceases the donor"), that paragraph simply reproduces the substance of old article 1741 in clearer and more explicit form. On this point the new legislation, as did the old before it, simply expresses the ancient French law rule that donations of property to be left at death are necessarily made *in casum supervitæ* (in case of survival). No change in the law is intended. *See generally* Doucet v. Broussard, 6 Mart. (n.s.) 196 (La. 1827).

If every one of the donees, including the substitutes, predeceases the donor or, once the donor's succession is opened, renounces the donation or is declared unworthy to receive it, the donation becomes of no effect at all. The object of the donation falls to the donor's heirs or legatees, as the case may be.

[55]If the donation has been made to both spouses and to their common descendants, and if one of the spouses predeceases the donor or, once the donor's succession is opened, renounces the donation or is declared unworthy to receive it, the donation becomes of no effect only with respect to that spouse. To that extent, accretion takes place in favor of the surviving spouse, if the donation has been made to the spouses jointly, or substitution takes place in favor of their common descendants, if the donation has been made to the spouses separately.[56]

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55. The succeeding paragraphs of new article 1741 (paragraphs 2–4), which are new, serve either to fill lacunae or to settle uncertainties in old article 1741. That article, like its formal source, Article 1089 of the French *Code civil*, made no provision for (i) causes of caducity other than the predecease of the donee or (ii) the effects of caducity caused by the predecease of fewer than all of the donees. Over time French scholars reached a fairly solid consensus regarding how the lacunae and uncertainties from which their article suffers should be filled and resolved. *See generally* Terré & Lequette, *supra* note 2, no. 550, at 445; 3 Colin & Capitant, *supra* note 2, no. 1748, at 897; 3 Josserand, *supra* note 2, nos. 1790 & 1792, at 983; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 784, at 983–84; 6 Demolombe, *supra* note 2, nos. 325–327, at 362–64, & no. 329, at 365–66; 15 Laurent, *supra* note 2, nos. 231–232, at 273–74, & no. 246, at 285–86. Persuaded that these French doctrinal proposals are sound, the Revisers elected to "write them in" to new article 1741, with only one minor variation. The "minor variation" is this: unlike the majority of French scholars, who excluded "unworthiness" from the list of possible causes of caducity, the Revisers, as was explained earlier, decided to include it. *See supra* note 45.

56. *a.* Like the provisions of the French *Code civil* on which it was modeled, our former legislation did not expressly address the question whether marital donations of property to be left at death, like donations *mortis causa*, could be made "jointly" as well "separately," *see* La. Civ. Code art. 1588 (defining "joint" and "separate" legacies), and, if so, whether, in such a case, the spouses would enjoy a "right of accretion." *See id.* art. 1592 (providing for a right of accretion among joint legatees). Of those doctrinal writers who have addressed these questions under French law, the overwhelming majority have answered them in the affirmative. *See* 11 Aubry & Rau, *supra* note 2, § 739, at 523, *in* 3 Translations 597 ("If one of the spouses conjointly instituted dies before the donor and the other survives, the part of the predeceased spouse accrues to the survivor."); 6 Demolombe, *supra* note 2, no. 326, at 362 ("[I]f the two spouses have been instituted, then one must distinguish. Have they been instituted conjointly? The part of the predeceased will accrete to the survivor. . . . It is clear to us that, in this instance, the testamentary character of the contractual institution must prevail [over its character as a donation inter vivos] . . . and the rationale on which the right of

accretion for legacies is founded exist just the same in contractual institutions . . . ."); 15 Laurent, *supra* note 2, no. 229, at 270 ("If the two spouses have been instituted and if one of them predeceases [the donor], will his part accrete to his spouse? The majority of the authors admit the right of accretion between co-donee spouses when they have been instituted conjointly. Article 1044, which establishes the right of accretion for the benefit of legatees to whom a legacy has been conjointly made, is applied [by analogy] . . . ."); 4 Troplong, *supra* note 2, no. 2363, at 520 ("The question has been asked whether the right of accretion is available in the matter of a contractual institution. But there is no good reason to think that one ought not to recognize it. The contractual institution is only an irrevocable testament; it disposes of only the estate; thus, one should apply to it the rules of accretion for testaments."); 3 Toullier, *supra* note 2, no. 844, at 228 ("[T]he right of accretion takes place for the benefit of the other spouse, and he should receive all the goods included in the donation. It is a gift mortis causa, and in this connection there are, in favor of accretion, the same reasons as there are in the matter of legacies. All the ancient authors recognized the right of accretion in this case, and one sees no reason for rejecting it under the domain of the Code, for this accretion is founded on the presumed will of the donor."); 3 Grenier, *supra* note 2, no. 422, at 55–56 ("We have seen that . . . there is room for accretion for the benefit of legatees . . . where the legacy has been made to several of them conjointly. . . . Should it be the same among those who are contractual donees in the same contract of marriage and on the same terms? Dumoulin, in his note on Article 17 of Title 14 of *la Coutûme d'Auvergne*, foresaw this case and decided for accretion. . . . Ricard, [author of a treatise on] donations, was of the pro-accretion opinion. Nearly all the authors who have explained themselves on this matter since then have shared this sentiment. Furgole, [in his commentary] on Article 1, Title 2 of *l'Ordonnance de 1747*, showed that such is also his view. I do not see a reason under the current legislation for abandoning this opinion. . . . [T]he contractual institution, though an irrevocable donation, bears only on a succession, a fact that has led some authors so far as to say that the contractual institution is an 'irrevocable testament'. And in this connection, there are the same reasons for accretion as there are in the matter of legacies.") New article 1741 incorporates that interpretation.

b. The rules of accretion for joint donations of property to be left at death differ from those for joint legacies in at least one important respect. The rule "where a joint legacy becomes caducious as to one of the co-legatees, accretion takes place in favor of the remaining co-legatee" is only a *general* rule, that is, one that admits of an exception, namely, "if the co-legatee as to whom the legacy has become caducious is or was a descendant or a privileged collateral of the testator, then his share falls to that co-legatee's descendants (at least under most circumstances)." *See* La. Civ. Code art. 1593. By contrast, the rule "where a joint donation of property to be left at death becomes caducious as to one of the co-donee-spouses, accretion takes place in favor of the remaining co-donee-spouse" is an *absolute* rule, that is, it admits of *no* exceptions.

This deviation between the two sets of rules is not the result of an accident; it is, rather, the result of a deliberate choice, that is, a choice not to introduce into the rules of accretion for joint donations of property to be left at death an exception of the kind found in Article 1593. What were the reasons for this choice? First, there was the Revisers' desire for simplicity. The rules of accretion for joint donations of property to be left at death are already complicated enough without the addition of yet another complex rule. Second, there were the Revisers' doubts regarding the technical soundness of the exception set up in that article. As one of the Revisers herself rightly noted some time ago, that exception, in addition to being ineptly

> If the donation has been made to both spouses, but not to their common descendants, and if one of the spouses predeceases the donor or, once the donor's succession is opened, renounces the donation or is declared unworthy to receive it, the donation becomes of no effect only with respect to that spouse. To that extent, the object of the donation accretes to the surviving spouse, if the donation has been made to the spouses jointly, or falls to the donor's heirs or legatees, as the case may be, if the donation has been made to the spouses separately.[57]
>
> If the donation has been made to one spouse only and to the spouses' common descendants, and if the donee spouse predeceases the donor or, once the donor's succession is opened, renounces the donation or is declared unworthy to receive it, the donation becomes of no effect with respect to the donee spouse. Substitution takes place in favor of the spouses' common descendants.[58]

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drafted (it uses "accretion" in a patently unscientific way), will often have the effect of frustrating the intention of the testator and, for that reason, presents significant "planning" challenges to those who draft testaments. *See* Cynthia Ann Samuel, *The 1997 Successions and Donations Revision—A Critique in Honor of A.N. Yiannopoulos*, 73 Tul. L. Rev. 1041, 1065–68 (1999).

57. Regarding the distinction between "joint" and "separate" donations of property to be left at death, see *supra* note 55.

58. Despite its seeming comprehensiveness, new article 1741 does not, in fact, address all of the various "caducity scenarios" that might possibly arise, but rather only those that most commonly arise. Among the other, less common scenarios that it does not address are those that could arise from the caducity of a donation that, though it is made in favor of both the two spouses and their common descendants, contains a stipulation that the descendants shall be substituted to *only one* of the spouses. Though these scenarios, then, "fall between the cracks" of new article 1741, it should not be difficult to dispose of them if and when they should arise. In devising solutions, one could proceed in either of two ways, which, though quite different, are nonetheless not necessarily incompatible. First, one could proceed "by analogy," in particular, "extend" to such scenarios the rules of new article 1731 as might seem appropriate. Second, one could appeal to "history." Despite their undoubted rarity, these scenarios have attracted the attention of a number of French scholars. The consensus among these scholars regarding how such scenarios should be dealt with is reflected in this excerpt from Aubry and Rau's treatise:

> If one of the spouses conjointly instituted dies before the donor and the other [spouse] survives, the part of the predeceased spouse accrues to the survivor. The latter is thus preferred to the children and descendants, issue of the marriage, *unless they have been substituted for the predeceased only, in which case they will prevail over the survivor.*
>
> On the contrary, where the spouses, though they are both instituted, have not been instituted conjointly, the portion of the predeceased does not accrue to the survivor. It is received by the children and descendants, when they have been substituted, either for both spouses or for the

Old

None

New

Art. 1742. Acceptance or renunciation of succession[59]

predeceased spouse. *It lapses when they have been substituted only for the surviving spouse.*

11 Aubry & Rau, *supra* note 2, § 739, at 523, *in* 3 Translations 597 (emphasis added). *See also* 6 Demolombe, *supra* note 2, no. 326, at 363 ("[A] surviving spouse who has been conjointly instituted will, in the event of the predecease of the other spouse, be preferred to the children who have issued from the marriage. *It would, however, be otherwise if the children had been substituted to only the predeceased spouse; in that case, they would prevail over the surviving spouse*, by virtue of the principle that a vulgar substitution is 'stronger' that the right of accretion.") (emphasis added).

59. Although new article 1742 is new, it does not change the law. It merely renders explicit a principle that was implicit in the former legislation, namely, that inasmuch as the donee of a marital donation of property to be left at death becomes entitled to a part of the donor's "estate," he, like any other "successor" of the donor, has the right to accept or renounce the donor's succession. *See* 4(2) Mazeaud, *supra* note 2, no. 703, at 42 ("The contractual institution confers on the institute the title of successor to the goods included in the institution . . . . Thus, the institute, at the death of the instituter, has the same option as a legatee . . . (acceptance or renunciation)"; Terré & Lequette, *supra* note 2, no. 550, at 445 ("Like them [legatees], he [the institute] is the title-holder of a right of option: . . . he can accept or renounce. . . . Now, among the consequences that his title as future successor entails figures precisely this option. The consequences of the option are the same as for a legatee."); Malaurie & Aynès, *supra* note 2, no. 755, at 397 ("The institute has an option: by accepting the contractual institution, he has, in fact, accepted only the principle of heirship rights. He can, according to the state of the succession, accept the institution [or] repudiate it . . . ."); Marty & Raynaud, *supra* note 2, no. 534, at 413 ("At the death of the disposing party, the contractual institute is treated as a legatee as to the right of option . . . ."); Flour & Soileau, *supra* note 2, no. 426, at 279 ("At this moment [the death of the instituter], . . . [t]he situation of the institute becomes . . . that of a legatee . . . . As a result, the same right of option belongs to him as belongs to every successor called by legislation or designated by testament. He can accept or repudiate the institution . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 780, at 979 ("When the succession of the donor is opened, the institute, as a true heir by contract, can, like any heir, opt between acceptance . . . [and] renunciation."); 3 Josserand, *supra* note 2, no. 1788, at 981–82 ("At the death [of the donor], the [institute's] character as an 'heir' prevails over his character as a 'donee': the institute is in the situation of an heir, more precisely, of a legatee . . . . As a result, [h]e has the choice . . .: acceptance . . . [or] renunciation."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3923, at 841 ("The contractual institution is opened for the benefit of the institute when he survives the instituter. The institute can then, as could an heir, accept the institution . . . or repudiate it . . . ."); 6 Demolombe, *supra* note 2, no. 331, at 367 ("The institute can, after the death of the instituter, accept or repudiate the benefit of the

The donee of a donation of property that the donor will leave at his death has the right to accept or renounce the succession of the donor in accordance with the provisions of Chapter 6 of Title I of Book III.

Old

None

New

Art. 1743. Universal succession; liability for estate debts

The donee of a universal or general donation of property[60] that the donor will leave at his death, as a universal successor of the donor, is answerable for the debts of the estate of the donor in accordance with the provisions of Chapter 13 of Title I of Book III.[61]

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institution, as could a legitimate heir."); 15 Laurent, *supra* note 2, no. 236, at 277 ("The contractual heir has a right that is in every respect identical to that of an heir *ab intestat*; he has the right to accept or to repudiate . . . ."); 4 Troplong, *supra* note 2, no. 2356, at 508 ("As to a renunciation by the institute that takes place after the death of the disposing party, it is valid . . . . By making an heir in imitation of the legislation, the institution puts this heir under the common law. Now, every heir . . . has the right to repudiate. This is what was expressly established in favor of the contractual heir by Article 223 of *la Coutûme de Bourbonnais*. Reason would proclaim it even if the article did not dictate it.").

60. As used in new article 1743, the term "universal donation" refers to a donation *inter vivos* that bears the characteristics of a "universal legacy," as described in Louisiana Civil Code article 1585 (rev. 1997), and the term "general donation," to a donation *inter vivos* that bears the characteristics of a "general legacy," as described in Louisiana Civil Code article 1586 (rev. 1997). These donations stand in contrast to what might be termed a "particular donation," that is, a donation *inter vivos* that bears the characteristics of a "particular legacy" as described in Louisiana Civil Code article 1587 (rev. 1997).

On the intimate relationship between "universal" marital donations and "universal" legacies, see Fowler v. Boyd, 15 La. 562 (1840).

61. *a.* Although new article 1743 is new, it does not change the law. It merely renders explicit rules that were implicit in the former legislation. It has long been recognized that "universal" and "general" contractual institutes qualify as "universal successors" of the donor and, as such, share responsibility for his debts. *See* 4(2) Mazeaud, *supra* note 2, no. 703, at 42 ("He [the institute] is likewise treated, in principle, as a universal legatee, a legatee under universal title, or a particular legatee . . . as to the obligation of paying the debts of the succession . . . ."); Terré & Lequette, *supra* note 2, no. 550, at 445 ("He [the institute] will apprehend the assets of the estate and will be bound to acquit the debts of the estate under the same conditions as a legatee."); Malaurie & Aynès, *supra* note 2, no. 755, at 397 ("He [the institute] is in the same condition as legatee; as a result, if the institution is universal, . . . his obligation for the debts are identical to those of a universal legatee."); Marty & Raynaud, *supra* note 2, no. 534, at 413 ("At the death of the disposing party, the contractual institute is treated as a legatee as to . . . the

obligation for debts."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 781, at 981 n.1 ("The institute by particular title is entirely freed from the debts and charges of the instituter's estate; his situation in this regard is the same as that of a particular legatee."); 11 Aubry & Rau, *supra* note 2, § 739, at 521–22, *in* 3 Translations 596 ("The rules governing the obligations of legatees concerning the payment of debts or charges of the succession, other than legacies, are also generally applicable to donees of future property. Thus, when the institution is universal . . ., the donee is personally bound . . . for the payment of all the debts and charges of the succession . . . . On the contrary, . . . the donee by universal title [is] personally bound for the payment of the debts and charges of the succession only in proportion to their hereditary portions . . . . Finally, a donee by particular title is not personally liable for the payment of debts and charges of the succession of the donor."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3909, at 837–38 ("The distinctions that we have just established [universal institutes, institutes by universal title, and particular institutes] present a very great importance from the standpoint of the regulation of the insituter's debts. All these debts are at the charge of the institute if the institution is universal; the institute must support them only in proportion to the fraction that he is called to receive if the institution is by universal title; finally, he need not contribute to them if the institution is by particular title. All of these solutions are just so many consequences of the maxim: *Aes alienum universi partimonii, non certarum rerum, onus est.*"); 6 Demolombe, *supra* note 2, no. 337, at 373 ("As to the payment of the debts and charges of the estate, the institutes are bound for them in same cases and in the same manner as are legatees, for, from this standpoint, both the ones and the others are altogether the same . . . . [T]he institute is not bound for the debts when the institution bears solely on one or several particular objects; . . . on the contrary, he is bound when the institution bears on the universality or on a share of the universality, and he is then bound personally, that is to say, directly to the creditors . . . ."); 15 Laurent, *supra* note 2, no. 241, at 283 ("Are the contractual heirs bound for the debts and, if so, how? . . . There is one point on which everyone is in agreement: it is that universal successors are bound for the debts, whereas particular successors are not. From this it follows that donees by particular title, in the same way as legatees by particular title, are not bound for the debts of the estate, but that this obligation is incumbent on the universal donees or the donees by universal title."); 9 Duranton, *supra* note 2, no. 718, at 709–10 ("One who has been contractually instituted is personally bound for the debts and charges of the estate, with due regard for the quotient that has been given to him, or if what has been given to him is the immovables or the movables or a quotient of one or the other, in proportion to the value of the goods included in the institution . . . . It is necessary, in this regard, to refer to what we have said about contribution to the debts by heirs and by legatees under universal title.").

b. Despite first appearances, the rule of new article 1743 does not conflict with that of Article 1552 ("The universal donee is bound to pay the debts of the donor, which existed at the time of the donation, but he can discharge himself therefrom by abandoning the property given."). That article, properly interpreted, applies only to donations of *present* property. This proposition rests on two considerations. First, there is an argument *pro subjecta materia.* Article 1552 is set forth in (Book III, Title II) Chapter 5, which, by virtue of Article 1528, concerns only donations of "present property." Second, there is a historical argument. The apparent formal source of Article 1552 was a passage in Pothier's treatise on donations *inter vivos. See* Rudolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 Tul. L. Rev. 1, 67 (1972) (Appendix B). The pertinent part of that passage reads as follows: "In regard to

Old

Art. 1737. Donation of present and future property with annexed statement of donor's debts, rights of donee

A donation in favor of marriage may be made cumulatively of the property present and future, provided, that to the act be annexed a statement of the debts and charges of the donor, existing on the day of the donation, in which case the donee, on the decease of the donor, may accept merely the present property, renouncing the surplus of the property of the donor.

Art. 1738. Obligations of donee in absence of donor's statement of debts

If the statement, mentioned in the preceding article, has not been annexed to the act containing a donation of present and future property, the donee shall be obliged to accept or reject that donation wholly; and in case of acceptance, he shall claim only the property existing on the day of the donor's decease, and he shall be liable to the payment of all the charges and debts of the succession.

New

None[62]

Old

CHAPTER 9. OF DONATIONS BETWEEN MARRIED PERSONS, EITHER BY MARRIAGE CONTRACT OR DURING THE MARRIAGE

universal donees of *present property*, they are bound for debts the donor owed at the time of the donation . . . ." Robert Pothier, Traité des Donations Entre-Vifs sec. III, art. I, § II, *in* 13 Oeuvres de Pothier 286 (nouv. ed. 1823) (emphasis added). Thus, the "source rule" of the article applied only to donations of "present property."

62. Unlike the old legislation (*see* old articles 1734 and 1743), the revision makes no provision for donations of present *and* future property, a kind of donation that, at once, partook of the characteristics of donations of present property, on the one hand, and the characteristics of property to be left at death, on the other. *See generally* Terré & Lequette, *supra* note 2, no. 554, at 448–49; 5 Planiol & Ripert, Traité Pratique, *supra* note 2, nos. 788–793, at 987–92; 3 Toullier, *supra* note 2, nos. 847–863, at 229–31. In this respect, the revision follows the S&D Committee's Projet. As that committee correctly concluded, this peculiar kind of donation long ago fell into desuetude in Louisiana.

New

CHAPTER 9. OF INTERSPOUSAL DONATIONS[63] INTER VIVOS

Old

Art. 1743. Reciprocal donations between spouses

Married persons can, by marriage contract, make to each other reciprocally, or the one to the other, what donations they think proper, under the modifications hereafter expressed.

Art. 1746. Disposable portion between spouses

One of the married couple may, either by marriage contract or during the marriage, give to the other, in full property, all that he or she might give to a stranger.[64]

New

Art. 1744. Donations between future or present spouses; in general[65]

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63. As used in this heading, the phrase "interspousal donations" serves as a convenient shorthand expression for referring to the two kinds of donations to which the chapter is addressed, namely, marital donations between future spouses and marital donations between present spouses.

64. Old article 1746 was a curious beast. Like the sources whence it sprang—Article 1739 of the Code of 1825 (as originally enacted), Article 222 of Book III, Title II of the Digest of 1808; and Article 1094 of the French *Code civil*—old article 1746 established the basic principle that spouses could make donations to each other *constante matrimonio*, something spouses had not been able to do under classical Roman law, the *ius commune*, or the law of certain regions of France under the *ancien régime*. *See generally* 6 Demolombe, *supra* note 2, nos. 434–436, at 475–80. But unlike those sources, it did not then go on to set up any special "disposable portions" for the donor of such a donation. *See generally id.* nos. 488–498, at 531–49. Thus, whereas in those sources the last phrase—"all that he or she might give to a stranger"—had real significance to it, inasmuch as it referred to one of these special disposable portions, in OA 1746 the phrase had no real significance, for it referred only to the "ordinary" disposable portion. In that regard, then, the article was merely redundant of the general law of forced heirship.

This peculiar feature of old article 1746—that its last phrase was superfluous—was not, in fact, unique to that article; rather, old article 1746 "inherited" the feature from its immediate source, Article 1739 of the Code of 1825, as it had been revised in 1850. *See* 1850 La. Acts 300.

65. *a.* For the most part, new article 1744 merely reproduces the substance of old articles 1743 and 1746. To this extent, it does not change the law.

b. New article 1744 is to marital donations between future spouses what new article 1734 is to marital donations by third persons. For that reason, what I have said above in the glosses to the latter, *see supra* notes 23–29, is applicable *mutatis mutandis* to the former.

A person may[66] make a donation *inter vivos* to his future or present spouse in contemplation of or in consideration of their marriage[67] in accordance with the provisions of this Chapter. Such a donation shall be governed by the rules applicable to donations *inter vivos* in general,[68] including the rules that pertain to the reduction of donations that exceed the disposable portion,[69] but only insofar as those general rules are not modified by the following Articles.[70]

A donation *inter vivos* by a person to his future or present spouse in contemplation of or in consideration of their marriage that is not made in accordance with the provisions of this Chapter shall be governed solely by the rules applicable to donations *inter vivos* in general.[71]

Old

Art. 1744. Donations by marriage contract of present property

. . .

Every donation inter vivos, of present property, made between married persons by marriage contract, . . . is subject to all the rules above prescribed for those kinds of donations.

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66. On the significance of the word "may" as used in this article, see *supra* note 25 (explaining the significance of the word "may" as used in new article 1734).

67. *a.* As used in this article, the phrase "in contemplation of . . . marriage" has the same meaning as does the same phrase as used in new article 1734. *See supra* notes 23 & 19. Thus, it refers to what in the former legislation was referred to as a donation between spouses by marriage contract.

b. As used in this article, the phrase "in consideration of . . . marriage" refers to what in the former legislation was referred to as a donation between spouses during the marriage.

68. On the significance of the phrase "the rules applicable to donations *inter vivos* in general" as used in this article, see *supra* note 26 (explaining the significance of that same phrase as used in new article 1734).

69. The phrase "including the rules that pertain to the reduction of donations that exceed the disposable portion" reproduces the substance of the last phrase of old article 1746, "all that he or she might give to a stranger," which, as I explained earlier, did nothing but reiterate basic principles of the law of forced heirship *See supra* note 62. As used in this new article, then, the phrase has much the same significance as does the same phrase as used in new article 1734. *See supra* note 28 (noting that that phrase, as used in that article, reproduces the substance of old article 1742, the former Chapter 8 counterpart to former Chapter 9's old article 1746).

70. On the significance of the phrase "only insofar as those general rules are not modified by the following Articles" as used in this article, see *supra* note 28 (explaining the significance of that same phrase as used in new article 1734).

71. On the significance of the final paragraph of this new article, see *supra* note 29 (explaining the significance of the final paragraph of new article 1734, a paragraph that closely parallels the paragraph in question here).

Art. 1745. Donations by marriage contract of present or future property

A donation of property in future, or of property present and in future, made between married persons by marriage contract, whether simple or reciprocal, shall be subject to the rules established by the preceding chapter, with regard to similar donations made to them by a third person, ...

New

Art. 1745. Applicability of rules on donations in contemplation of marriage by third person[72]

The provisions of Chapter 8 of this Title shall apply *mutatis mutandis* to such donations, with the following modifications.

Old

Art. 1745. Donations by marriage contract of present or future property

A donation of property in future, or of property present and in future, made between married persons by marriage contract, whether simple or reciprocal, . . . shall not be transmissive to the children, the issue of the marriage, in case of the death of the donee before the donor.

New

Art. 1746. Objects and beneficiaries[73]

The donation, which may consist of any of the donor's present property or all or any of the property that the donor will leave at his death,[74] may be made to the donor's future or

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72. New article 1745 reproduces, in somewhat expanded form, part of the substance of old articles 1744 and 1745, namely, those parts of them that subjected marital donations between future spouses to the rules on marital donations by third persons. It does not change the law.

73. For the most part new article 1746 merely reproduces various rules that are reflected in much of the former legislation, specifically, old articles 1743–1746. It does not change the law. *Cf.* Succession of Russo, 246 So. 2d 26, 28 (La. App. 4th Cir. 1971); *id.* at 31 (Lemmon, J., concurring); Succession of Hoa, 1 La. Ann. 142 (1846).

74. The reference here to "property that the donor will leave at his death," which is "new," at least in the sense that it had no counterpart in the former legislation (old articles 1743–1746), is intended resolve an uncertainty in that legislation. None of the articles in former Chapter 9 specifically authorized a person to make a donation to his spouse, *during the marriage*, of property that he would leave at his death. Nevertheless, French scholars, despite the fact that the

parallel provisions of their *Code civil* are likewise silent at this point, have *unanimously* concluded that such donations are permissible. *See* 4(2) Mazeaud, *supra* note 2, no. 698, at 38–39 ("Outside a contract of marriage, a donation of goods to come can be realized only by one spouse for the benefit of the other. . . . Who can be the beneficiary of a contractual institution? The answer varies depending on whether the institution is made outside or within a contract of marriage. . . . . Contractual institution made outside of a contract of marriage: only one of the spouses can be instituted by his spouse."); Terré & Lequette, *supra* note 2, no. 553, at 447 ("It is under this form [i.e., contractual institutions made *constante matrimonio*] that donations of goods to come between spouses are most often practiced."); Marty & Raynaud, *supra* note 2, no. 535, at 413 ("The validity of the contractual institution between spouses during the marriage. —Although no text expressly declares such an institution valid, its validity is generally admitted . . . ."); Flour & Soileau, *supra* note 2, no. 445, at 291 ("[D]onations between spouses . . . — always like donations by contract of marriage—can bear on goods to come. To tell the truth, the licitness of the donation of goods to come between spouses is not directly provided for by any text . . . . But one admits it in a quasi-unanimous fashion; and it is considered to be indisputable in practice."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 769, at 960 ("Contractual institutions between spouses during the marriage are submitted to the rules of donations between spouses."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3208, at 561 ("Although not specifically provided in the statute, it is understood that the spouses can mutually make donations both of present and of future property interests."); 11 Aubry & Rau, *supra* note 2, § 744, at 543, *in* 3 Translations 613 ("[D]onations between spouses during marriage . . . may consist not only of present property, but also of all or of a part of the property that the donor will leave at his death."); 3 Josserand, *supra* note 2, no. 1815, at 994 ("[D]onations between spouses . . . can bear on either the donor's present goods or on his future goods: the contractual institution and also the cumulative donations of present goods and goods to come are permitted between spouses . . . ."); 6 Huc, *supra* note 2, no. 470, at 610–11 ("Donations between spouses must, then, be treated as ordinary donations, from which differ solely in these respects: . . . they can . . . bear on the donor's goods to come . . . ."); 6 Demolombe, *supra* note 2, no. 455, at 497 ("A donation between spouses can include either present goods only, goods to come only, or cumulatively present goods and goods to come."); 15 Laurent, *supra* note 2, no. 314, at 352 ("[O]ne must apply to donations between spouses . . . the rules of contractual institutions when the spouses make to each other a donation of goods to come or of present goods and goods to come."); 4 Marcadé, *supra* note 2, no. 329, at 236 ("During the marriage the spouses can make to each other the diverse species of donations provided for in the previous chapter [Chapter 8]. . . . [E]ven though the liberality is only of goods to come, it can be addressed . . . ."); Coin-Delisle, *supra* note 2, no. 2, at 600 ("Donations between spouses can have as their object present goods, or present goods and goods to come cumulatively, or goods to come only . . . ."); 3 Toullier, *supra* note 2, no. 917, at 247 ("[G]ifts between spouses during the marriage, though they be by their nature donations *à cause de mort*, for example, if they contain only the goods that the donor will leave at his death, can nevertheless be made in the form of donations *inter vivos* . . . ."); 9 Duranton, *supra* note 2, no. 775, at 780 ("They [interspousal donations *constante matrimonio*] can be made by *inter vivos* acts, even by universal title of the goods that the spouses will leave at their deaths."); *see also* 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 4009, at 874; no. 4011, at 875; & no. 4020, at 878 (explicating rules applicable to donations of future property made by one spouse to

present spouse. The donation may not, however, be made to their common descendants, whether already born or to be born.[75]

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another during their marriage). New article 1744 incorporates this interpretation.

75. This final sentence of the new article reproduces the substance of the final clause of old article 1745 ("except that it shall not be transmissive to the children, the issue of the marriage, in case of the death of the donee before the donor") in clearer and more technically accurate form. Commenting on the same clause in French *Code civil* article 1093—the formal source of our old article 1745—French scholars have complained that the wording of the clause expresses rather poorly the real intention behind it. As Marcadé put it, "our article expresses itself inexactly." 4 Marcadé, *supra* note 2, no. 324, at 233 (emphasis in original). But just what the clause was, in fact, intended to do is a matter of debate. According to some (a sizeable minority), the clause was intended only to establish that an *interspousal* donation of property to be left at death (in contrast to a donation of property to be left at death made by a third person) should not be presumed to have been made for the benefit of the children of the marriage. For these interpreters, the clause was not intended to prohibit a donor from extending this benefit to the children, provided he do it clearly. *See, e.g.*, 3 Josserand, *supra* note 2, no. 1803, at 988–89; 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 3993, at 866–67. But according to others (a majority, including *all* of those who have written most recently), the clause was intended to have a more profound effect, namely, to preclude the donor from extending this benefit to the children. *See* 4(2) Mazeaud, *supra* note 2, no. 699, at 39 ("Who can be the beneficiary of a contractual institution? The answer varies depending on whether the institution is made outside or within a contract of marriage. . . . Contractual institution made outside of a contract of marriage: only *one of the spouses* can be instituted by his spouse.") (emphasis in original); Flour & Soileau, *supra* note 2, no. 453, at 296 ("Contrarily to a contractual institution make by a third person, one made between spouses or between future spouses cannot benefit the children born of the marriage."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 773, at 968 ("According to Article 1093, a donation of goods to come between future or present spouses is not transmissible to the children to be born of the marriage. If, for whatsoever reason, the institute cannot benefit from the institution, the children born of the marriage could not be substituted to him. An express derogatory clause could not be stipulated. This is an important difference with the donation made by a third person in a contract of marriage."); 4 Demante & Colmet de Santerre, *supra* note 2, no. 269*bis*, at 513 ("It results clearly from the article that the vulgar substitution of the children is not to be understood in donations between future spouses. But one would not give to the article all the bearing that it ought to have if one interpreted it as only refusing the children this tacit eventual vocation. It is necessary to go farther and to recognize that not event he express will of the donor could call the children to be born [to the institution] upon the default of the donee spouse."); 6 Demolombe, *supra* note 2, no. 416, at 463 ("As to donations of goods to come, Article 1093 expresses itself thusly: . . . that the children issued from the marriage are not vulgarly substituted to the donee spouse.") & no. 417, at 464 ("These considerations provided sufficient proof that the children to be born could not possibly be substituted vulgarly to the donee spouse, not even by an express disposition in the contract of marriage."); 4 Marcadé, *supra* note 2, no. 324, at 233 (the clause "signifies that the donation . . . not only will not be extended to the children by operation of law . . ., but also that it is not extendable to these children [by will]—that *it cannot be made* for them.") (emphasis original); 4 Troplong, *supra* note 2, no. 2539, at 703 ("It is asked if

Old

Art. 1743. Reciprocal donations between spouses

Married persons can, by marriage contract, make to each other reciprocally, or the one to the other, what donations they think proper . . . .

New

Art. 1747. Form[76]

The donation shall be made by a single instrument in authentic form. The instrument, which shall expressly state that the donor makes the donation in contemplation of his prospective marriage or in consideration of his present marriage, as the case may be, shall be signed at the same time and at the same place by the donor and by the donee.

The donation need not be accepted in express terms.

donations between spouses of goods to come . . . can be made expressly and subsidiarily for the benefit of the children to be born of the marriage. Though the legislation does not explain itself here with respect to this pact in a direct manner, we believe that it is within the thought of the legislation not to authorize it."); Coin-Delisle, *supra* note 2, art. 1093, no. 4, at 592 (referring to the contrary opinion as an error). The revision incorporates this latter interpretation.

76. *a.* Insofar as the form requirements established by new article 1747 apply to donations made between *future* spouses *before* their marriage, the article makes only minimal changes to current law. For an explanation of these changes, see *supra* notes 30 & 19 (explaining the changes made to the form requirements for marital donations by third persons).

b. Insofar as these form requirements apply to donations made by *present* spouses *during* their marriage, the article changes the law. Under the former law, such donations needed only to conform to the "ordinary" form requirements for donations *inter vivos* in general. *See* Terré & Lequette, *supra* note 2, no. 543, at 436 ("In form, donations between spouses obey . . . the common law. Made in authentic form, they must be accepted by the donee . . . and accompanied by a descriptive list if their object is movables."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 755, at 940 ("Form of donations between spouses. —Application of the common law. —Donations that the spouses make to each other during the marriage are submitted to the rules of form for donations *inter vivos*. They must be received by a notarial act and in the presence of . . . instrumental witnesses . . . ."); 3 Toullier, *supra* note 2, no. 917, at 247 ("[G]ifts between spouses during the marriage . . . can nevertheless be made in the form of donations *inter vivos*; but, in this case, they are subjected to all the exterior formalities that the Code prescribes for donations *inter vivos*, including, as a result, express acceptance . . . ."). It is the opinion of the redactors that this distinction in the former "marital donations" law was arbitrary, that there is, in fact, no good reason not to subject all marital donations to precisely the same form requirement.

Old

Art. 1744. Donations by marriage contract of present property, survivorship of donee

Every donation inter vivos, of present property, made between married persons by marriage contract, shall not be deemed to be done on the condition of the survivorship of the donee, if that condition be not formally expressed . . . .

New

Art. 1748. Right of return not presumed [77]

If the donation consists of present property, it is presumed not to have been made subject to the resolutory condition that the donor survive the donee or survive the donee and his descendants.

Old

Art. 1747. Emancipated minor, capacity to give by marriage contract

The husband or wife, if a minor emancipated, can, by marriage contract, give to the other, either by simple or by reciprocal donation, whatever can be given by a party who has attained the age of majority.

Art. 1748. Unemancipated minor, authorization to give by marriage contract

A minor, not emancipated, can give only with the consent of those relations whose consent is requisite for the validity of the marriage; and with that consent, he or she can give all that

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77. *a.* New article 1748 reproduces, with a few subtle modifications, part of the substance of old article 1744, namely, that part which provides that donations of present property between future spouses "shall not be deemed to be done on the condition of the survivorship of the donee, if that condition be not formally expressed." Both articles instantiate approaches to the same question: whether the donation should be considered to have been made subject to such a condition. The old approach required one to consider whether or not the donor had "formally expressed" such an intention; if, but only if, the donor had done so, then the question would receive an affirmative answer; if the donor had not done so, then a negative answer. The new approach requires one to begin by presuming that the question deserves a negative answer. This presumption can, however, be rebutted by evidence that the donor intended the contrary, be it "direct" evidence, that is, the donor's words, or "indirect" evidence, that is, behavior of the donor from which such an intent can reasonably be inferred.

b. Regarding the disposition of the rest of the substance of old article 1744, see *supra* note 46.

the law permits a married person of full age to give to his or her consort.

If the relations, whose consent is necessary, be dead, the minor not emancipated can not give without the authorization of a court of justice.

New

None[78]

Old

Art. 1750. Irrevocability of donations, effect of birth of children

Those donations shall not be revoked by the birth of children, provided they do not exceed the quantum, which married persons are permitted to dispose of to each other, to the prejudice of their forced heirs, as is above provided.

New

None[79]

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78. Old articles 1747 and 1748, which established a special regime of donative capacity for donations made between prospective spouses by marriage contract—a regime that differed in some respects from the regime of donative capacity for donations in general, *see* La. Civ. Code art. 1476 *et seq.* (rev. 1991)—have been suppressed. In the judgment of the Revisers, the special regime, which was relatively more lenient than the general regime, failed to protect adequately the interests of prospective spouses who are minors. The effect of suppressing these articles will, of course, be that donative capacity for donations between prospective spouses will henceforth be governed by the regime of donative capacity for donations in general, which is established in Chapter 2 of Title II of Book III of the Civil Code. *See* La. Civ. Code arts. 1470–1481.

79. Old article 1750 has been suppressed because it was unnecessary. To see why this is so, it is helpful, first, to analyze the old article into its component parts, namely, (i) the general rule (found in the first part of the article) that interspousal donations made *constante matrimonio* "shall not be revoked by the birth of children" and (ii) the exception to that rule (found in the rest of the article) that such donations can nevertheless be revoked if they "exceed the quantum which married persons are permitted to dispose of to each other to the prejudice of their forced heirs," i.e., the disposable portion.

General rule—When the general rule was first established, *see* La. Dig. bk. III, tit. II, art. 224, ¶ 3 (1808); La. Civ. Code art. 1743 (1825), it served a useful purpose, namely, to exempt interspousal donations made *constante matrimonio* from the then-existing still more general rule that a donation *inter vivos* would be revoked if the donor, after having made the donation, were to have a child. *See* La. Dig. bk. III, tit. II, art. 66, ¶ 3 (1808); La. Civ. Code art. 1546(4) (1825). So concluded French scholars regarding the parallel provisions of the *Code civil*,

namely, *Code civil* article 960 (formal source of La. Dig. bk. III, tit. II, art. 66 (1808)) and *Code civil* article 1096 (formal source of La. Dig. bk. III, tit. II, art. 224 (1808)). *See* 4(2) Mazeaud, *supra* note 2, no. 1516, at 692 ("The only donations that escape revocation [due to the donor's having a child] are those made *inter se* by future spouses in a marriage contract or by spouses during the marriage."); Terré & Lequette, *supra* note 2, no. 527, at 423 ("[D]onations made by one spouse to another . . . escape revocation [due to the donor's having a child]. Despite the formula utilized, this exception covers not only donations between spouses, but also donations between future spouses by contract of marriage."); Flour & Soileau, *supra* note 2, no. 167, at 109 ("The principle [of Article 960] admits of an important exception. Neither donations between future spouses made on the occasion of marriage nor donations between spouses made during marriage are revocable for this cause."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 518, at 655 ("There is an exception [to the rule of Article 960] only for donations made by one of the spouses to the other, be it by marriage contract or during the marriage (*infra*, no. 764)."); & no. 764, at 953–54 ("The donation [between spouses *constante matrimonio*] is . . . not revocable for the birth of a child (Art. 1096, § 3)."); 11 Aubry & Rau, *supra* note 2, § 709, at 298, *in* 3 Translations 417 ("Donations between spouses, whether made in consideration of marriage or during the marriage, are the only ones that are not revoked upon the birth of children."); 3 Colin & Capitant, *supra* note 2, no. 1700, at 875 ("Exceptions.—The only donations that escape our cause of revocation [*i.e.*, birth of a child as per Article 960] are . . . [d]onations between spouses during the marriage (Art. 1096, line 3)."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, nos. 2660, 2661, at 298 ("All donations, irrespective of their nature and form, are in principle rescindable on grounds of the subsequent birth of a child. . . . Only donations between spouses, whether made in the marriage contract or during the marriage, are exempt from this rule."); 3 Josserand, *supra* note 2, nos. 1593–1594, at 887–88 ("In principle, all donations are revocable for the occurrence of a child . . . . By exception certain donations escape the menace of revocation. . . . These are, finally, donations made between spouses during the marriage (art. 1096, § 3)."); 1 Baudry-Lacantinerie & Colin, *supra* note 11, no. 1665, at 730 ("[A]s we will see, Article 1096 extends the exception [to the general rule of revocation for subsequent birth of a child, established in Article 960], to donations that one of the spouses makes to the other during the marriage."); 13 François Laurent, Principes de Droit Civil Français no. 80, at 79 ("There is in Article 1096 a third exception [to the rule of Article 960]. Donations made between spouses during marriage are not revoked by the arrival of children."); 3 Marcadé, *supra* note 12, no. 729, at 626 ("There is, in addition, an exception to our article [Art. 960] for donations made between spouses during marriage: Article 1096, in declaring them revocable at the will of the donor, at the same time declares that they will never be revoked by the birth of a child."); Coin-Delisle, *supra* note 2, art. 960, no. 9, at 299 ("Article 1096 makes another [exception to Article 960] in favor of donations between spouses during marriage. . . . [B]ut the birth of a child allows it to subsist . . . .") & art. 1096, no. 12, at 602 ("The general law establishes three causes for the revocation of donations . . . the birth of a child: Article 1096 says positively that the birth of a child does not revoke donations between spouses . . . ."); 3 Troplong, *supra* note 14, at 292 ("*L'Ordonnance de 1731* submitted all donations whatsoever to revocation [for subsequent birth of a child]. The *Code Napoléon* adopted this principle and admitted an exception only in favor of donations on account of marriage, made between the spouses . . . .") (headings to nos. 1387 & 1388); 3 Toullier, *supra* note 2, no. 309, at 91 ("The disposition of Article 960 is . . . general . . . . The legislation

Old

Art. 1745. Donations by marriage contract of present or future property

A donation of property in future, or of property present and in future, made between married persons by marriage contract, whether simple or reciprocal, . . . shall not be transmissive to the children, the issue of the marriage, in case of the death of the donee before the donor.

New

Art. 1749. Donation of property to be left at death; caducity[80]

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also excepts donations made by one spouse to the other . . . since the marriage ([Arts.] 960 & 1096)."); 7 Duranton, *supra* note 14, no. 587, at 496 n.1 ("Mr. Delvincourt concludes as we do that these sorts of donations [interspousal donations made *constante matrimonio*] are not revoked by the arrival of children."). But Article 1546(4) of the Code of 1825 was itself repealed in 1855. And when that happened, the first part of Article 1743 of the Code of 1825 (predecessor to old article 1750), of course, lost its *raison d'être.*

Exception.—The exception, from the very beginning, did nothing but reiterate basic principles of the law of forced heirship (and in a technically imprecise manner at that—the drafters spoke of "revocation" where they should have spoken of "reduction"). Because those principles, by definition, have always applied to all donations, old article 1750 (like its predecessors in the Code of 1825 and the Digest of 1808) was, to this extent, redundant.

80. *a.* Insofar as new article 1749 concerns donations of property to be left at death made between *future* spouses *before* their marriage, it draws out some of implications of the rule that had been stated in old article 1745, "A donation of property in future . . . shall not be transmissive to the children, the issue of the marriage, in case of the death of the donee before the donor," and that is now restated in the last sentence of new article 1746, "The donation may not, however, be made to their common descendants, whether already born or to be born." On the meaning of these passages in old article 1745 and new article 1746, see *supra* note 75. To this extent, new article 1749 makes no change in the law whatsoever. *See generally* Stratton v. Rogers, 11 La. Ann. 380 (1856).

b. Insofar as new article 1749 concerns donations of property to be left at death made between *present* spouses *during* their marriage, it fills a lacuna in the current legislation. The proposed rule is that which French doctrinal writers and French courts have unanimously developed to fill the same lacuna in their legislation (the formal source of ours). *See* Terré & Lequette, *supra* note 2, no. 553, at 448 ("As to its effects, the contractual institution between spouses . . . obeys the same rules of caducity . . . as do donations of present goods between spouses, *except that the predecease of the donee leads to its caducity.*") (emphasis added); Flour & Soileau, *supra* note 2, no. 453 ("There is one thing special about donations [between spouses] of goods to come: it becomes caducious by the predecease of the donee. . . . Thus, one applies here the same rule as one applies to a contractual institution between future spouses by marriage contract."); 11 Aubry & Rau, *supra* note 2, § 744, at 547, *in* 3 Translations 617 ("When the donation between spouses

is of future property, the death of the donee before the donor results in the caducity thereof, just as the prior death of the donee results in the caducity of donations of future property when made between spouses by marriage contract.") & n.25 ("In this connection, Art. 1093 furnishes an analogous argument applicable to donations between spouses during the marriage. Moreover, as the subject matter of donations of future property is ordinarily a part of the succession of the disposer, and ad the donee must therefore become the universal successor for the latter, it is only natural that his prior death should render the donation caducious."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 779, at 977–78 ("Between spouses a contractual institution in a marriage contract or during the marriage becomes caducious by the predecease of the donee spouse even if there are children issued from the marriage (it having been recognized that Article 1093 [formal source of old article 1745] applies to contractual institutions during the marriage even though it addressed only to contractual institutions [before] the marriage)."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3211, at 562 ("A donation of future interests between spouses is obviously subject to the condition of survivorship of the donee, for he is called to succeed the other spouse."); 3 Josserand, *supra* note 2, no. 1820*bis*, at 998 ("A donation between spouses is subordinated to the survival of the donee when the donation bears on future goods; it is then treated, in this regard, as if it had been made in a marriage contract."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 4020, at 878 ("[I]t is, in fact, without difficulty that donations of future goods . . . made between spouses *constante matrimonio*, become caducious by the predecease of the donee spouse; that is the general law for donations of this nature."); 4 Demante & Colmet de Santerre, *supra* note 2, no. 276*bis*, at 531 ("[A]nother cause of resolution, predecease of the donee. The donation must conserve its entire effect, despite this event, provided it's not a matter of one of those donations that, by their nature, are subjected to revocation in the event of the predecease of the donee, as are donations of future goods."); 6 Demolombe, *supra* note 2, no. 473, at 518–19 ("[T]he donation of future goods . . . is, by contrast, caducious by the predecease of the donee spouse. . . . [W]hen one sees, in particular, that Article 1093 [formal source of old article 1745] declares that a donation of future goods made by marriage contract, which is irrevocable, becomes caducious by the predecease of the donee spouse, how could one possibly contend that the same caducity does not affect a donation of future goods made during the marriage, which is revocable? It is the case, in fact, that the donation of future goods amounts to an eventual succession right, which requires that the donee survive the donor . . . ."); 15 Laurent, *supra* note 2, no. 339, at 375 ("If the object of the donation is future goods, . . . it falls by the predecease of the donee; that is the general law in this matter . . . ."); 4 Marcadé, *supra* note 2, no. 330, at 236–37 ("Since the predecease of the donee renders a donation of future property caducious even when the donation is made to the spouses by a third party or by one spouse to another in their marriage contract, it is clear that [such a] donation could not be more powerful here [i.e., during marriage] where it is always revocable and that the caducity pronounced in the first two cases applies *a fortiori* to the third."); 4 Troplong, *supra* note 2, no. 2662, at 851–52 ("The question of knowing whether a donation between spouses becomes caducious by the predecease of the donee before the donor . . . is no longer controverted when it is a question of goods that the donor will leave in his estate. In this latter case, the caducity is certain. The right of the donee, which is [merely] eventual up until the death of the donor, is opened [only] at this time. We have seen that the donee must be capable at that time in order to acquire [anything]. Now, the first condition of capacity is that he exist. If he dies before the opening of the succession of the donor, he has acquired

When the donation consists of property that the donor will leave at his death, it becomes of no effect and the object thereof thereupon falls to the heirs or legatees of the donor spouse, as the case may be, if the donee predeceases the donor or, once the donor's succession is opened, renounces the donation or is declared unworthy to receive it.

Old

None

New

Art. 1750. Donations of property to be left at death made during marriage; revocability

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nothing and could not possibly transmit anything to his successors."); 9 Duranton, *supra* note 2, no. 776, at 781 ("There could not possibly be any doubt that these donations of future goods become caducious by the predecease of the donee spouse; for they are nothing other than institutions of heirs made during the marriage, with the donor having power to revoke them. Now, if the same donations are made by marriage contract, which, under this title, are irrevocable, are not transmissible to the children born of the marriage in the event that the donee spouse predeceases the donor spouse (Article 1093), then *a fortiori* those which are made only during the marriage ought to become caducious by the predecease of the donee, even though he leave children issued from the marriage.").

In all other respects, the relationship between new article 1749 and the old law of the caducity of marital donations made by future or present spouses is much the same as the relationship between new article 1741 and the old law of the caducity of marital donations made by third persons. To that extent, what was said above about the latter relationship, *see supra* notes 54–58, should be true *mutatis mutandis* of the former relationship as well.

A donation made during marriage of property that the donor will leave at his death is freely revocable,[81] notwithstanding any stipulation to the contrary.[82]

Old

Art. 1754. Disguised donations or through persons interposed prohibited

Husbands and wives can not give to each other, indirectly, beyond what is permitted by the foregoing dispositions.

All donations disguised, or made to persons interposed, shall be null and void.

Art. 1755. Donees considered as persons interposed

All donations, made by one of the married parties to the children or to any one of the children of the other party by a

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81. New article 1750 is, at once, new and old. It is "new" in the sense that it changes current law; it is "old" in the sense that it re-establishes the law that was in place before the current law. The current law with respect to the revocability of interspousal donations—that they are *ir*revocable—did not come into effect until 1942 with the repeal of Civil Code article 1749 (1870). That article had theretofore provided that such donations, "though termed *inter vivos*, shall always be revocable." La. Civ. Code art. 1749 (1870). The reason for the change was to facilitate avoidance of federal and estate gift taxes. In 1942, the federal Fifth Circuit was required to consider the gift and estate tax consequences of several donations *inter vivos* that a decedent had made to his wife during their marriage. Howard v. United States, 125 F.2d (5th Cir. 1942). The court ruled that "because of Article 1749, the decedent possessed at his death a power of revocation within the terms of the estate tax statute, and therefore the value of the gifts must be included in his gross estate." John W. Kopecky, Comment, *Spousal Donations in Louisiana and the Federal Estate Tax*, 1 Loy. L. Rev. 194, 203 (1942). The sole point of the suppression of article 1749, then, was to "solve" the "problem" created by this decision, that is, to assure that, in such donations in the future, the donated thing would be reclassified, for gift/estate tax purposes, as the property of the donee-spouse rather than the property of the donor-spouse. Unfortunately, the scope of the solution went far beyond what was necessary to cure the problem, specifically, the solution was applied not only to interspousal donations of *present property*—the only kind of interspousal donation that was problematic—but also to interspousal donations of *property to be left at death*, as to which there was no such problem. In any event, later on the "problem" created by federal estate and gift tax law, as it that law had been interpreted in *Howard*, "went away" thanks to the creation of the so-called "marital deduction" for such taxes (the present source of which is I.R.C. § 2056). Thus, the *raison d'être* for the post-*Howard* "reform" no longer exists, especially not as it applied to interspousal donations of future property.

82. The final phrase of new article 1750, "notwithstanding any stipulation to the contrary," is intended to signal that the rule set forth theretofore is "mandatory," rather than "suppletive." On the distinction between these two categories of rules, see *supra* note 52.

former marriage, and such as are made by the donor to relations to whom the other party is presumptive heir on the day of the donation, although the latter may not survive the relation who is the donee, shall be deemed made to persons interposed.

New

Art. 1751. Disguised donations and donations to persons interposed[83]

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83. Though new article 1751, as will be explained below, reproduces the substance of the *second* paragraph of old article 1754, neither this nor any of the other new articles reproduces the substance of the *first* paragraph of that old article. The suppression of that old provision does not, however, change the law. As it had been interpreted by the French courts and by the overwhelming majority, if not the entirety, of French scholars, the first paragraph of *Code civil* article 1099, the formal source of old article 1754, first paragraph, stood only for the rather unremarkable proposition that "indirect donations" made between future or present spouses were "reducible if they exceeded the disposable portion." *See* 4(2) Mazeaud, *supra* note 2, no. 1550, at 714 ("While line 1 [of Article 1099] declares that indirect donations between the spouses ought to be reduced when they surpass the disposable portion, line 2, which takes aim at donations between spouses that are disguised or made to persons interposed, pronounces their nullity . . . ."); Flour & Soileau, *supra* note 2, no. 462, at 301 ("Is it a question of an 'indirect donation'? The first line alone is applicable and this literally . . . [I]t signifies, on the one hand, that the indirect donation is valid [and] on the other hand, that it is reducible if it threatens the forced portion."); Marty & Raynaud, *supra* note 2, no. 640, at 482 ("When it's a question of a 'disguised' donation, the donation is null. By contrast, an 'indirect' donation would be valid and would only be reducible in a case of a threat to the forced portion . . . ."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 157, at 212 ("[T]he 'indirect' donation is recognized as valid and is simply reducible if it exceeds the disposable portion . . . ."); 3 Colin & Capitant, *supra* note 2, no. 1582, at 821 ("These indirect donations ought to be submitted simply to ordinary rule of reduction. If they surpass the disposable portion only in part, they will be reduced in this measure and will subsist for the surplus."); 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3253, at 578 ("Such a donation [an "indirect" donation] is made openly without the attempt to hide anything. If it exceeds the disposable portion, the courts have held it simply subject to reduction, by application of Art. 1099, par. 1 . . . ."); 3 Josserand, *supra* note 2, no. 1852, at 1017 ("[I]ndirect liberalities are all simply submitted to reduction, just as if they had been made directly (1099, § 1)."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 4103, at 917 ("Indirect liberalities are not hidden; they are made in the light of day; thus, their existence is easily discovered. Our legislature has found it sufficient to apply to them the same rule as is applied to direct liberalities: like these last, they will be reducible to the disposable portion in cases of excess. This is the rule posed by the first paragraph of Article 1099."); 6 Huc, *supra* note 2, no. 486, at 632 ("The jurisprudence of the supreme court recognizes that Article 1099 entails two distinct rules: the first, which submits indirect but open donations only to reduction . . . ."); 4 Demante & Colmet de Santerre, *supra* note 2, no. 279*bis*, at 545 ("Article 1099 contains two parts that are difficult to harmonize . . . . In fact, in the first line, the donations are presented as reducible and in the second, as null . . . ."); 6

A donation of property that the donor will leave at his

Demolombe, *supra* note 2, no. 610, at 713 ("Let us set aside the case in which the liberality has been made by one of the spouses to the other indirectly, but without disguise or the interposition of a person. It is clear that this liberality will be valid in its entirety if it does not exceed the disposable portion and that it will only be subject to reduction if it does . . . ."); 15 Laurent, *supra* note 2, no. 404, at 453 ("We believe with the French jurisprudence that the legislation distinguishes indirect liberalities from liberalities that are disguised or made to persons interposed. The former are valid, but subject to reduction; the latter are null."); 4 Marcadé, *supra* note 2, no. 355, at 263 ("Simple indirect donations are only 'reducible' to the extent of the disposable portion as indicated by the preceding articles . . . ."); 4 Troplong, *supra* note 2, no. 2742, at 921 ("Now, when the donation is simply indirect without being disguised, Article 1099 limits itself to attacking the donation by way of reduction."); 9 Duranton, *supra* note 2, no. 830, at 853 ("In regard to these indirect advantages, the legislation does not pronounce the nullity of the contracts or other acts or facts whereby they might have been procured for one spouse at the expense of the other; the legislation limits itself to declaring that the spouses cannot given each other indirectly 'beyond' they which they are permitted to give by the foregoing dispositions. Thus, up to the concurrence of the disposable portion, the advantage must be maintained, since it is only the excess that is prohibited . . . ."). Now, the rule of that article, so understood, was redundant, of both (i) the rule of old article 1746, *see supra* note 64, which has been reproduced in new article 1744, *see supra* note 69, and (ii) the rule of the law of donations in general that "excessive" donations may be reduced, *see supra* note 28. The mere suppression of a redundancy, by definition, cannot "change the law."

death is absolutely null[84] if it is disguised or made to a person

84. The expression "absolutely null," as used in new article 1751, replaces the expression "null and void," as used in old article 1755. This change in terminology is one of form, not one of substance. The same change has already been made in other parts of the Civil Code. *See, e.g.,* La. Civ. Code art. 2030.

Under new article 1751, as under old article 1755, that a particular interspousal donation is disguised or is made to a person interposed is not only a necessary but also a *sufficient* condition for its nullity. No other condition, for example, that the donation "exceed the disposable portion," need be satisfied. *See* 4(2) Mazeaud, *supra* note 2, no. 1550, at 714 ("[I]f they ["indirect" donations] exceed the disposable portion, they will only be reduced, and they will subsist to the extend that they do not invade the forced portion. Are disguised donations between the spouses submitted to the same regime? The negative appears certain, [so suggests] a reading of *Code civil* Article 1099. While the first line declares that 'indirect' interspousal donations must be reduced when they surpass the disposable portion, the second line, which is aimed at interspousal donations that are disguised or are made to persons interposed, pronounces their nullity . . . ."); Terré & Lequette, *supra* note 2, no. 557, at 450 ("[T]he donation is entirely annihilated in every case, even if it does not threaten the forced portion."); Malaurie & Aynès, *supra* note 2, no. 725, at 389 ("It [the nullity] can be invoked by the donor's forced heirs even if the disposable portion is not surpassed."); Marty & Raynaud, *supra* note 2, no. 638, at 481 ("[A]ccording to the jurisprudence, this nullity is incurred by all interspousal donations that are disguised or made to persons interposed, even if they remain within the limits of the disposable portion."); Flour & Soileau, *supra* note 2, no. 462, at 302 ("The remaining question is under what conditions the nullity is incurred. For a long time, it was contended that nullity was incurred only in the case in which the donation surpassed the disposable portion. Today the contrary has been definitively established. Nullity is pronounced even though the donation has not threatened the forced portion."); 11 Aubry & Rau, *supra* note 2, § 744, at 541, *in* 3 Translations 612 ("The nullity of these donations [i.e., disguised donations] may be asserted by the forced heirs of the donor although the disposable quantum may not have been impaired by the disguised donation."); 2 Baudry-Lacantinerie & Colin, *supra* note 2, no. 4106, at 919 ("Because the legislation regulates in absolute terms, we do not hesitate to extend the nullity that it pronounces to all donations that are disguised or made to persons interposed. We do not think that it ought to be applied to these donations only so far as they surpass the disposable portion or so far as the disposing party intentionally surpassed this quotient."); 4 Demante & Colmet de Santerre, *supra* note 2, no. 279*bis*, at 546–47 ("To restrain the second line of Article 1099 to donations that exceed the disposable portion would be . . . to distinguish where the text does not distinguish . . . . The dissimulation of the character of the donation or of the person of the true donor should always lead to the nullity of the act, because the dissimulation will always have had as its end to elude the rules of the legislation."); 6 Demolombe, *supra* note 2, no. 614, at 715 ("[I]n all cases, the liberality is null for the whole, whether it exceeds or does not exceed the disposable portion, and without there being any room to inquire into the design for which the liberality was employed. As draconian as this doctrine may appear to be, our opinion is that it is the most conformed to the text of Article 1099 and to the motivations that led the legislators to establish it . . . ."). *But cf.* 3(2) Planiol & Ripert, *Traité Élémentaire*, *supra* note 2, no. 3257, at 579 ("Most decisions . . .state that only excessive donations that interfere with the reserve portion are subject to annulment. Donations within the limit of the special disposable portion are perfectly valid.").

interposed to his spouse.[85]

A note of explanation regarding Planiol's apparent self-contradiction is in order here. At the time at which Planiol wrote his *elementary* treatise, the French jurisprudence was split, a slight majority of it supporting the position reflected in that treatise, that is, that a disguised donation or a donation to a person interposed was null only if it exceeded the disposable portion. By the time that Planiol wrote his *practical* treatise, however, the situation had drastically changed. In the intervening years, the French courts on whose decisions Planiol had relied when he had written his earlier treatise had reversed themselves and joined the opposition, largely in response to criticisms that French scholars had leveled at those decisions.

85. The first paragraph of new article 1751 reproduces the substance of the second paragraph of old article 1754 in clearer form. No change in the law is intended. *See generally* Scott v. Briscoe, 37 La. Ann. 178, 179–81 (1885).

Though the new article does not *change* the old law, it does, nevertheless, *resolve an uncertainty in* the old law. That uncertainty concerned whether the prohibition against "donations to persons interposed," like the prohibition against "disguised donations," applied *both* to donations between *future* spouses *before* marriage and to donations between *present* spouses *during* marriage or, unlike the prohibition against "disguised donations," applied only to donations between *present* spouses *during* marriage, but not to donations between *future* spouses *before* marriage.

In interpreting *Code civil* article 1099 (the formal source of our old article 1754), the French courts and a good number of French scholars opted for the former alternative interpretation. Relying on the language of the article, in particular, that it fails to distinguish overtly between different kinds of interspousal donations, and its position within Chapter IX, in particular, that it comes at the end of the chapter (*argumentum pro subjecta materia*), these interpreters concluded that the prohibition against donations to persons interposed applies to *both* kinds of interspousal donations—*pre*-marital as well as *inter*-marital. *See* Terré & Lequette, *supra* note 2, no. 558, at 451 ("The nullity [established by Article 1099] strikes not only donations agreed to by the spouses during the marriage, but also donations between future spouses made in anticipation of the marriage."); Flour & Soileau, *supra* note 2, no. 462, at 301 ("This jurisprudence [interpreting Article 1099], which is *jurisprudence constante*, is applied not only to donations between spouses, but also to donations between future spouses."); 5 Planiol & Ripert, Traité Pratique, *supra* note 2, no. 158, at 215 ("The nullity [established by Article 1099] is applied as well to nullities made by marriage contract as to those made during the marriage . . . ."); 3 Josserand, *supra* note 2, no. 1853, at 1017 ("The sanction [of Article 1099] is applicable to all liberalities between the spouses, without distinguishing . . . according to whether they have been inserted in a marriage contract or have taken place in the course of the marriage."); 6 Demolombe, *supra* note 2, no. 606, at 708 ("We present these articles [1099 and 1100] as though they entail rules common to [all] dispositions between spouses, be it by marriage contract or during the marriage . . . ."); Coin-Delisle, *supra* note 2, arts. 1099–1100, no. 2, at 611 ("Solely by virtue of the fact that Articles 1099 and 1100 are placed at the end of Chapter IX, they establish general rules that are common to all of the kinds of interspousal dispositions treated in Chapter IX . . . . Thus, Articles 1099 and 1100 concern . . . donations made by contract of marriage as well as those made during the marriage . . . .").

One can question this interpretive analysis on several grounds, to start with, whether it shows as much fealty to the "plain meaning" of the text as those who make it suppose. Though it is true that the text does not distinguish between different kinds of interspousal donations *overtly*, it is possible that the text does so

covertly. The first line of the article states that "[t]he spouses cannot . . . ." Interpreted strictly, the word "spouses," of course, refers to persons who are *already married*. And if the term has that meaning here, then the scope of the article must, by definition, be limited to donations made *during the marriage* (as opposed to those made before the marriage, at a time when the parties would not yet be "spouses" properly so called). *See generally* Marty & Raynaud, *supra* note 2, no. 640, at 482 ("The donations that are annullable [under Article 1099] are donations between spouses that are disguised or made by way of a person interposed. One must suppose, first of all, a 'donation between spouses' . . . . But in this regard the jurisprudence assimilates to donations *between spouses* those that are made *between future spouses*, in anticipation of the marriage. This extension of the domain of the prohibition . . . .") (emphasis added).

But there is a still more fundamental flaw in this interpretive analysis. The analysis reflects a strictly (some might say rigidly) "exegetical" approach: it starts and stops with an examination of the article's text and position. Though such an analysis is good as far as it goes, it does not go far enough: sound interpretation merely starts with "exegesis"; it does not stop there. To interpret legislation properly one must go beyond the text itself to consider, among other things, the purpose for which it was enacted; in other words, one must supplement exegesis with "teleology." *See* La. Civ. Code art. 10 ("When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.").

When one does that, that is, approaches the interpretive task teleologically, one finds that the latter alternative interpretation gets the upper hand over the former. To see why this is so, one must first understand the *telos*—the end or purpose—of the prohibition against donations to persons interposed. Having done that, one can then appreciate the significance of this *telos* for resolving the interpretive question presented.

Identification of the telos.—On this point, it must be acknowledged, there has been and continues to be considerable confusion, at least among French scholars. This confusion stems, in no small measure, from the widespread, but, in my judgment, erroneous assumption, that the prohibition against donations to persons interposed serves the same purpose(s) as does the prohibition against disguised donations. Operating on the basis of this assumption, French scholars have offered up two possible explanations for the prohibitions. First, the prohibitions are said to create a deterrent to attempts to use interspousal donations to skirt the law of forced heirship. On this theory, the prohibitions announce the following warning: "If you make a disguised donation to your spouse or a donation to a person interposed to your spouse for the purpose of trying to defeat the 'forced heirship' rights of your children, then we will not rest content with merely reducing the donation, but, instead, we will strike it down altogether." Second, the prohibitions are said to create a deterrent against attempts to use interspousal donations to skirt the requirement that interspousal donations (or, at least, some of them) be "revocable." On this theory, the prohibitions announce the following warning: "If you make a disguised donation to your spouse or a donation to a person interposed to your spouse for the purpose of trying to defeat the requirement that (some) interspousal donations must be revocable, then we will not rest content with merely recognizing that the donation, is, in fact, revocable but, instead, we will strike it down altogether." *See generally* 4(2) Mazeaud, *supra* note 2, no. 1550–2, at 515–16; Terré & Lequette, *supra* note 2, no. 557, at 450–51; Malaurie & Aynès, *supra* note 2, no. 717, at 384; Flour & Soileau, *supra* note 2, no. 464, at 303; Marty & Raynaud, *supra* note 2, no. 639, at 482; 5 Planiol & Ripert, *supra* note 2, no.

762, at 949–52.

Now, it should take only a moment's reflection to recognize that though the prohibition against disguised donations might well serve both of these purposes, the prohibition against donations to persons interposed could only possibly serve the latter. The former prohibition might serve either or both of these purposes, for the type of transfer at which it takes aim—disguised donations between spouses—might possibly be used by a reasonable person as part of a rational plan to avoid either or both of the "laws" in question, that is, the law of forced heirship and/or the law of revocability of interspousal donations. The "disguise" the donation wears—it appears to be a "sale"—if the deception succeeds, would put the transfer, at once, outside both the law of forced heirship (only *donations* are subject to reduction) and the law of interspousal donations, including the "revocability" requirement (only interspousal *donations* are subject to revocation). The latter prohibition, by contrast, might serve only the latter of the two supposed purposes, for the type of transfer at which it takes aim—a donation by one spouse to someone interposed to the other spouse—though it might be used by a reasonable person as part of a rational plan to avoid the law of irrevocability of interspousal donations, could never possibly be used by such a person as part of such a plan to avoid the law of forced heirship. Such a transfer, unlike a disguised donation, appears, on its face, to be a donation, in other words, its very appearance acknowledges what it in reality is a donation. For this reason, the transfer would, of course, appear to be (as it would be in reality) subject to the law of forced heirship. Thus, making the donation to a person interposed could not possibly be part of a rational plan to put the transfer outside the scope of that law. But making the donation in this fashion could—and, if the deception succeeds, would—put the transfer outside the scope of the law of interspousal donations, including the "revocability requirement." That is so because such a donation, though it in reality is between the spouses, appears to be between a spouse and a third person. For these reasons, the only intelligible explanation for the prohibition against interspousal donations to persons interposed is that it serves to deter attempts to evade the revocability requirement for (some) such donations.

Interpretive significance of the telos.—If, as I have argued, the sole purpose of the prohibition against interspousal donations to persons interposed (as opposed to the prohibition against disguised interspousal donations) is to deter attempts to get around the "revocability" requirement for such donations, then that prohibition could not possibly have been intended to apply to *pre-marital* donations between *future* spouses. That is so because donations of *that* kind, unlike *inter-marital* donations between *present* spouses, are *not subject to that requirement*, in other words, they need not be revocable—indeed, they are required to be irrevocable! It simply makes no sense to apply a rule that is designed to deter violations of another rule to situations to which that other rule does not even apply. In short, applying the prohibition in question to such donations would, in the words of Civil Code article 9, "lead to absurd consequences." *See generally* Flour & Soileau, *supra* note 2, no. 464, at 303 (noting that the theory that the purpose of Article 1099 is to deter attempts to circumvent the requirement that interspousal donations be revocable "has absolutely no validity for donations prior to the marriage, which are not revocable"); Marty & Raynaud, *supra* note 2, no. 640, at 482 ("The donations that are annullable [under Article 1099] are donations between spouses that are disguised or made by way of a person interposed. . . . [T]he jurisprudence assimilates to donations between spouses those that are made between future spouses, in anticipation of the marriage. This extension of the domain of the prohibition is incomprehensible if one founds the prohibition on respect for the rule

The following are reputed to be such person interposed:[86]

(1) a child of the donee spouse who is not among the spouses' common children; or

(2) a person to whom the donee spouse is a presumptive successor[87] at the time when the donation is made, even if the donee spouse does not thereafter survive that person.

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of revocability, for donations between future spouses are not revocable.").

For these reasons, the Revisers concluded that as between the first and second alternative interpretations of old article 1754, the latter is preferable. New article 1751 has been written in such a way as to instantiate that interpretation.

86. The second paragraph of new article 1751 reproduces the substance of old article 1755 in clearer, more concise form. It does not change the law.

87. The term "successor," as used in new article 1751, replaces the term "heir," as used in old article 1755. This change in terminology is one of form, not one of substance. The same change has already been made in other parts of the Civil Code. *See, e.g.*, La. Civ. Code art. 876.