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Charles A. Snyder

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to the intent necessary to constitute the crime. In so doing, it recognizes that the purpose of the statute is to protect the emotionally and sexually immature rather than all females under a certain age. It recognizes that age may be indicative of sexual immaturity and that in such cases a mistake of age would lack a reasonable basis. In so recognizing, it does not ignore the intent of the male, but simply infers that, in particular circumstances, the male must have intended to take advantage of an immature girl. As a result, each case can be treated on its facts and such abuses of justice as the previous rule fostered can be avoided.

As has been seen, the central issue in statutory rape seems to be that of operative consent. The *Hernandez* decision does not go far enough to confront this issue directly. It allows mistake of age to be a defense, but does not extend the defense to cases where, although there is no mistake of age, the girl is sexually mature and comprehends the nature of her consent. If, as seems likely, the statute was not designed to protect this wise but underage female, it follows that one should treat as rebuttable the presumption that a young girl lacks the capacity to consent. The defendant should be allowed to introduce evidence to show that the girl understood the significance of the act and her consent should therefore have the same effect as that of a legally mature female. It is submitted that the female's capacity to grant operative consent could be a question for the jury, just as it is in rape cases where the girl is alleged to be mentally incompetent. This rebuttable presumption would continue to protect the naive and innocent, but the law would no longer punish the man who copulates with a girl fully capable of understanding the significance of her participation.

Richard A. Tonry

FEDERAL ESTATE AND GIFT TAX: EFFECT OF LOUISIANA POWERS TO REVOKE INTER VIVOS DONATIONS

The basic incident of taxation by the federal estate or gift tax¹ is the transfer of property. The estate tax is imposed on the transfer of property at death² and on certain inter vivos

1. See INT. REV. CODE of 1954, subtitle B.

2. *Id.* §§ 2001, 2031, 2051. See *Chase Nat'l Bank v. United States*, 278 U.S. 327 (1928); *McCaughn v. Fidelity Trust Co.*, 34 F.2d 443 (3d Cir. 1929);

transfers which have the same effect as transfers on death and so should be taxed identically.³ The federal gift tax is imposed on the transfer of property by gift,⁴ and was enacted primarily

Lederer v. Northern Trust Co., 262 Fed. 52 (3d Cir. 1920). For a more complete explanation, see LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES §§ 2.1-2.4 (1962).

3. INT. REV. CODE of 1954, §§ 2033-2042.

Id. § 2042: "The value of the gross estate shall include the value of all property—

"(1) Receivable by the executor.—To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

"(2) Receivable by other beneficiaries.—To the extent of the amounts receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term 'incident of ownership' includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded five percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term 'reversionary interest' includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the secretary or his delegate. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate."

4. *Id.* §§ 2501, 2502, 2503, 2521. Though the tax liability is the primary obligation of the donor, the tax law provides for a lien on the property in the event of nonpayment by the donor. *Id.* § 6324(b): "Lien for Gift Tax.—Except as otherwise provided in this subsection (c) (relating to the transfers of securities), the gift tax imposed by chapter 12 shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a bona fide purchaser, mortgagee, or pledgee for an adequate and full consideration in money or money's worth shall be divested of the lien herein imposed and the lien, to the extent of the value of such gift, shall attach to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a bona fide purchaser, mortgagee, or pledgee for an adequate and full consideration in money or money's worth."

Id. § 6325(a): "Release of the lien.—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

"(1) Liability satisfied or unenforceable.—The Secretary or his delegate finds that the liability for the amount assessed, together with all the interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for . . ."

Thus the donee can be required to pay the gift tax from the gift he received. Such a possibility troubled the courts in cases in which the status of revocable gifts were at issue, since the donee could lose the gift on which he had paid the gift tax. See *Porter v. Commissioners*, 288 U.S. 436 (1933).

It was finally recognized by the Supreme Court that the donee who paid the tax would always have a cause of action against the revoking party for the amount paid, and if the revoker were the donor, he would have a credit available

to prevent avoidance of the estate tax by inter vivos transfers.⁵

Neither tax statute, however, defines explicitly the types of transfers reached. Insofar as the statutes speak of transfers, they employ concepts of property law taken from a common law background. The federal law is thus dependent on state property law concepts of a transfer. Little difficulty is experienced in applying the concept of a death tax to Louisiana successions. Problems may arise, however, in determining the impact of the federal estate tax on lifetime transfers governed by Louisiana law. Similarly, it may be difficult to determine when the transfer is complete within the requirements of the gift tax under Louisiana law.

The moment of imposing the gift tax is the time when the donor relinquishes ownership and control over the property.⁶ A transfer complete for gift tax purposes usually is sufficiently complete to transfer ownership of the property from the donor's estate.⁷ It is possible, however, to have a transfer which is sufficiently complete to be taxed as a gift, but not sufficiently complete to remove the donation from the donor's estate. Thus, for example, a gift made in contemplation of death is subject to both taxes.⁸ Other types of gift in the same category include trans-

for himself, since he would have finally paid the tax. See *Phillip-Jones Corp. v. Parmley*, 302 U.S. 233 (1937).

This astute determination by the Court solves any problem of double taxation on a transfer. Though this double taxation is within the power of Congress, it should be remembered that the gift tax is meant to supplement the estate tax. See note 5 *infra*. *Sanford v. Commissioner*, 308 U.S. 39, 45 (1939): "The gift tax statute does not contemplate two taxes upon a gift not made in contemplation of death."

The court said in *Higgins v. Commissioner*, 129 F.2d 237 (1st Cir. 1942), *cert. denied*, 317 U. S. 658 (1942), that *Sanford* was not to be understood to mean, however, that a transfer inter vivos is never subject to gift tax, if, notwithstanding the transfer, the property is to be included in the gross estate for estate taxation.

5. Committee Reports on the 1932 act stressed prevention of both income and estate tax avoidance. H.R. Rep. No. 708, 72d Cong., 1st Sess. 28 (1932); Sen. Rep. No. 665, 72d Cong., 1st Sess. 40 (1932). See also Magill, *The Federal Gift Tax*, 40 COLUM. L. REV. 773 (1940); Warren, *Correlation of Gift and Estate Taxes*, 55 HARV. L. REV. 1 (1941); Harris, *Legislative History of Federal Gift Taxation*, 18 TAXES 531, 533 (1940).

6. See *Robinette v. Helvering*, 318 U.S. 184 (1943); *Smith v. Shaughnessy*, 318 U.S. 176 (1943); *Sanford v. Commissioner*, 308 U.S. 39 (1939); *Burnet v. Guggenheim*, 288 U.S. 280 (1933) (landmark case); *Higgins v. Commissioner*, 129 F.2d 237 (1st Cir. 1942), *cert. denied*, 317 U.S. 658 (1942); *Herzog v. Commissioner*, 116 F.2d 591 (2d Cir. 1941); *Hernstadt v. Hoey*, 47 F. Supp. 874 (S.D.N.Y. 1942).

7. See LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* § 24.4 (1962).

8. INT. REV. CODE of 1954, § 2035: "(a) GENERAL RULE.—The value of the gross estate shall include the value of all property (except real property situated outside the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale

fers with retained possession or enjoyment.⁹ The Supreme Court has often held that the federal estate and gift taxes are not mutually exclusive,¹⁰ and Congress, therefore, has provided that if a transfer becomes subject to the estate tax after having been taxed as a gift, the gift tax payment may be used as a credit against any estate tax.¹¹

VOID AND VOIDABLE GIFTS

Even if the donor does not expressly reserve the power to avoid or revoke a donation, state law may prescribe the conditions under which donations can be voided or revoked. Some donations are void at their inception by reason of some inherent defect or stipulation of law. Others can be revoked. But the economic result in either event is the same: the property returns to the donor.

In most states the causes for which inter vivos donations can be revoked are not as numerous as those in Louisiana.¹² There are, in addition, many powers "to amend, alter, revoke, or terminate"¹³ in trust law that are analogous to many of the causes for revocation of gifts set forth in the Louisiana Civil Code.

Outright Gifts

The law of every state provides some conditions for voiding inter vivos donations. If a lifetime gift is made that is subject to revocation when the donor dies, this property may be included

for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

"(b) APPLICATION OF GENERAL RULE.— If the decedent within a period of 3 years ending with the date of his death (except in a case of a bona fide sale . . .) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . . but no such transfer . . . made before such 3 year period shall be treated as having been made in contemplation of death."

Any gift made within three years of death would not be exempt from the gift tax because it was made in contemplation of death. *Id.* § 2503(a). Such is the rule since one dies not knowing that death will come within three years. See *Sanford v. Commissioner*, 308 U.S. 39 (1939).

9. *Commissioner v. Marshall*, 125 F.2d 943 (2d Cir. 1942).

10. See, e.g., *Smith v. Shaughnessy*, 318 U.S. 176 (1943); *Sanford v. Commissioner*, 308 U.S. 39 (1939). It has been suggested, however, that even though a gift will be included in the donor's estate, it is generally better to make the donation because of the operation of the credit for gift taxes and removal of the amount paid as taxes from the donor's estate. See Phillips, *Income, Gift and Estate Taxation of Living Trusts*, 42 TAXES 374 (1964).

11. INT. REV. CODE OF 1954, § 2012.

12. Cf. *Wisdom & Pigman, Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119 (1952).

13. See note 15 *infra*, and accompanying text.

in his taxable estate.¹⁴ The Internal Revenue Code spells out with seeming precision the revocable gifts which are and are not to be included in the gross estate:

“The value of the gross estate shall include . . . all property . . . where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . by the decedent alone or by the decedent in conjunction with any other person . . . to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent’s death.”¹⁵

The Regulations and Code are mute as to the gift tax treatment of transfers voidable by the donor, his representative, or others because of some element in the transaction.¹⁶ However, the courts have held that if the donor has the power to revoke a transfer, it is immaterial whether the power to revoke arises by specific reservation or by operation of law.¹⁷ Most of the cases in this area have arisen in connection with the estate tax, but the reasoning of the court is sometimes useful in ascertaining whether a gift tax becomes due when the transfer is initially made.¹⁸

Insanity

In dealing with a donation voidable by reason of the donor’s insanity, although he had not been adjudged *non compos mentis*, the United States Fourth Circuit Court held in *Safe Deposit & Trust Co. v. Tait*¹⁹ that the donation to the donor’s wife was complete and hence was not to be included in his gross estate for estate tax purposes. The court reasoned that the “practical mind” would not consider the property as part of the decedent’s estate,²⁰ furthermore, the government could not reach the prop-

14. INT. REV. CODE OF 1954, § 2037(a)(1).

15. *Id.* § 2038.

16. See 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 16.04 (1942); *but cf.* Rev. Rul. 62-13, 1962-2 CUM. BULL. 180.

17. *Howard v. United States*, 125 F.2d 986 (5th Cir. 1942); *Hughes v. Commissioner*, 104 F.2d 144 (9th Cir. 1939); *Estate of McIntosh*, 25 T.C. 794 (1956); *Keiffer v. Commissioner*, 44 B.T.A. 1265 (1941).

18. *But cf. Smith v. Shaughnessy*, 318 U.S. 176 (1943). The test of a complete transfer for purposes of the gift tax is not whether the transfer is complete under the estate tax, but whether the property has passed beyond the control of the donor. *Cf. LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAX* § 24.4 (1962). The test, however, in most cases will be the same.

19. 54 F.2d 383 (D. Md. 1931); 3 F. Supp. 51 (D. Md. 1933), *aff'd*, 70 F.2d 79 (4th Cir. 1934).

20. 54 F.2d 383, 387 (D. Md. 1931). The court did hedge its broad rejection of the government’s contention with the thought that a tax evasion motive behind the failure to attack the conveyance might call for a different judicial response.

erty since the decedent's succession representative had failed to make a direct attack on the conveyance.²¹

In Louisiana the donor must be of sound mind²² at the time of the donation²³ for it to be valid. The Code conditions²⁴ are substantially the same as those found in *Safe Deposit & Trust Co. v. Tait*²⁵ and thus there is no reason to believe that the results of a similar Louisiana case would differ.

Since the gift tax was intended to supplement the estate tax, the logical extension of the decision is that if the donation was sufficiently complete to remove the property from the donor's taxable estate, it was complete as a gift when made and hence was then subject to the gift tax.²⁶

Minority

Under the Civil Code a minor lacks the capacity to make an inter vivos donation.²⁷ The jurisprudence has characterized the prohibited gift as a relative nullity.²⁸ The power to void the gift is intended for the protection of the minor, and when he becomes of age, he may ratify or disaffirm the transaction.²⁹ The same rule applies at common law.

The *Allen* case,³⁰ which dealt with a gift by a minor, held that so long as the right to disaffirm exists, the gift remains incomplete. The gift would become taxable at the moment the power to revoke expired.³¹ In cases in which the power is termi-

21. *Ibid.*

22. LA. CIVIL CODE art. 1475 (1870): "To make a donation either *inter vivos* or *mortis causa*, one must be of sound mind."

23. *Id.* art. 1472: "It is sufficient if the capacity of giving exists at the moment the donation is made."

24. See *id.* arts. 1788, 1789.

25. 54 F.2d 383 (D. Md. 1931), 3 F. Supp. 51 (D. Md. 1933), *aff'd*, 70 F.2d 79 (4th Cir. 1934).

26. 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 16.04 (1942). See notes 5 and 8 *supra*, and accompanying text.

27. LA. CIVIL CODE art. 1476 (1870): "A minor under sixteen years can not dispose of any property, save, however, the dispositions contained in the ninth chapter of this title."

Id. art. 1477: "The minor above sixteen can dispose only *mortis causa* (in prospect of death)."

28. See *Johnson v. Aldin*, 15 La. Ann. 505 (1860).

29. *Ibid.*

30. *Commissioner v. Allen*, 108 F.2d 961 (3d Cir. 1939), *cert. denied*, 309 U.S. 680 (1940), noted in 53 HARV. L. REV. 690 (1940), 88 U. PA. L. REV. 631 (1940); *cf.* Brandeis, *State Gift Taxes—Their Relation to Death Taxes*, 26 IOWA L. REV. 479, 488-89 (1941).

31. The difficulty with this opinion is that the circuit court failed to continue its own logic. See 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 16.04 (1942). In answering the contention that the varying periods allowed for disaffirmance would cause administrative hardships, the court denied there was any difficulty.

nated by death, the property transferred by the gift would appear to be included in the gross estate of the donor.³² However, we have seen that a contrary result was reached in the *Safe Deposit* case where the court thought that the likelihood of revocation was remote. In the event they were both followed, then a gift with a power to revoke reserved by operation of law would not be a taxable transfer under either tax. The *Allen* and *Safe Deposit* cases were decided by different circuits, and the cases may represent irreconcilable interpretations of the effect of voidable gifts in the federal tax statutes.

In Louisiana an unemancipated minor lacks authority to accept any donation other than a manual gift.³³ Donations may be accepted by the minor's tutor, his parents, or by other legitimate ascendants; but until the donation is accepted by one of those persons or by the minor upon reaching majority, the donor has the power to revoke the gift.³⁴ As long as the power to revoke remains, the inter vivos donation would not be complete, and thus not subject to the gift tax. If the donor dies before the acceptance, the property would certainly appear includible

in the present case and observed, in addition, that the running of the state statute of limitations had completely barred any possible disaffirmance. Yet the court upheld the Commissioner's assessment of the gift tax as of the date that the settlor reached majority, although at that time the power to recall the gift was apparently still potent. Under the New Jersey law the power had expired in 1939, according to the court, 108 F.2d at 966. The date was convenient for administrative purposes, but it fails to correspond with the reasoning of the court, which emphasizes the moment of time the power to disaffirm is lost. Cf. Paul, *Debt and Basis Reduction Under the Chandler Act*, 15 TUL. L. REV. 1, 13 (1940), to the effect that the argument of administrative convenience may cover a multitude of legislative sins. It may also account for interpretation sins.

The court suggested that the Commissioner may obviate administrative hardship by promulgating regulations fully protecting the infant's right of disaffirmance. However, if state law were in conflict with the regulations, the tax might still be imposed at a time when the right to recall the property was still outstanding. Cf. Note, 53 HARV. L. REV. 690, 691 (1940). However, by the time the circuit court rendered the decision the period allowed by disaffirmance under state law had expired. It has been suggested by one commentator that the *Allen* decision is persuasive in light of Congress' apparent failure to legislate a gift tax section with reference to voidable donations. This same commentator also generalized the *Allen* decision to the following: "A transfer fully enforceable as between the respective parties constitutes a taxable gift, irrespective of the rights of special classes to intervene." 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 16.04 (1942).

32. INT. REV. CODE of 1954, § 2038.

33. See LA. CIVIL CODE art. 1546 (1870).

34. *Ibid.* See *Williams v. Horn*, 170 La. 663, 129 So. 122 (1930). In fact, it would be said that any donation inter vivos is revocable until accepted by the donee, because it is not binding upon the donor until such acceptance is made. LA. CIVIL CODE art. 1540 (1870). The problem is made more dramatic by the time element in the case of minors. *But see id.* art. 1541: "Yet, if the donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects given, the donation, though not accepted in express terms, has full effects."

in the donor's gross estate for estate tax purposes under the language of section 2038.³⁵ It is possible, nonetheless, that the "practical mind"³⁶ would prevent inclusion where it is clear that revocation was far from the donor's intentions.

Fraud

A donor can revoke a donation for fraud; however, if he has not moved to set it aside, then the subtle ramifications to be drawn from the doctrine of ratification would be applicable. Administratively, a tax collection system might not be capable of incorporating such a subtle standard.³⁷ Analytically, revocability of a donation induced by fraud is similar to revocation by insanity and minority and should be treated the same. The applicable Louisiana rights and procedures³⁸ would probably not produce a result different from the common law counterpart.

Community Property

The Texas community property system has provoked gift and estate tax suits concerning the result of the power to revoke inter vivos donations.³⁹ These cases deal with a donation of community property by the husband with or without the consent of the wife. When the husband had made a donation of community property without the wife's consent, and she had not had the donation set aside, the value of her share of the property donated was held included in her estate.⁴⁰ The court reasoned that, until the wife's death, she could have set aside the donation on possible grounds of fraud, and thus the wife's share of the donation took effect when her power was terminated at death. The court said, however, that if the husband had been able to show that there were absolutely no grounds to rescind the donation for fraud, his wife's share of the property would not have been included in her estate.⁴¹ Thus the burden was placed on the husband to prove that the wife's share of the com-

35. See note 15 *supra*, and accompanying text.

36. See discussion of Safe Deposit & Trust Co. v. Tait, 54 F.2d 383 (D. Md. 1931), 3 F. Supp. 51 (D. Md. 1933), *aff'd*, 70 F.2d 79 (4th Cir. 1934) in note 19 *supra*, accompanying text.

37. As to the relevance of administrative considerations, see *Helvering v. Midland Mut. Life Ins. Co.*, 300 U.S. 216 (1937).

38. See LA. CIVIL CODE arts. 1819, 1847, 1849, 1881, 1882 (1870).

39. *Estate of Lucey v. Commissioner*, 13 T.C. 1010 (1949); *Francis v. Commissioner*, 8 T.C. 822 (1947); *Fleming v. Commissioner*, 3 T.C. 974, *aff'd* on other issues, 155 F.2d 204 (5th Cir. 1946).

40. *Estate of Lucey*, 13 T.C. 1010 (1949).

41. *Id.* at 1017.

munity property donated without her consent was not includible in her estate. The court reached this result on the basis of *dicta* in the *Francis* case⁴² which held the total gift to be complete if both spouses consented.

In Louisiana, as in Texas, the husband is prohibited from donating or fraudulently disposing of the community's immovable property.⁴³ Though the right of action under Louisiana law is different from the right of action in Texas since it places the burden of proof on the wife,⁴⁴ the important distinguishing feature of the Louisiana provisions is that the wife does not have a power of revocation, as in Texas, but merely a suit against the husband's estate for damages.⁴⁵ As to the wife, the economic results of the Texas and Louisiana procedures are substantially the same: the wife receives either the property or its value via a cause of action predicated on the theory of fraud. Under Texas law, the donee might be required to relinquish one-half of the donation, but the husband loses nothing; under Louisiana law, however, the whole donation stands and the husband's estate is liable to the wife for half its value. Thus in Louisiana the only property to be included in the wife's estate is the value of her cause of action against the husband.

Article 1749 of the Louisiana Civil Code, now repealed,⁴⁶ contained a provision that all inter-spousal donations remained

42. *Francis v. Commissioner*, 8 T.C. 822 (1947). However, where the spouses consented to the donation to a trust, of which the husband was the trustee with full discretionary powers, the gift was held to be complete only to the extent of the wife's portion. *Fleming v. Commissioner*, 3 T.C. 974, *aff'd* on other issues, 155 F. 2d 204 (5th Cir. 1946).

43. LA. CIVIL CODE art. 2404 (1870): "The husband is the head and master of the partnership or community of gains; he administers the effects, disposes of the revenues which they produce, and may alienate them by an onerous title without the consent and permission of his wife.

"He can make no conveyance *inter vivos*, by gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud to the injury of his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud."

44. *Ibid.*

45. *Ibid.*

46. *Id.* art. 1749, *repealed*, La. Acts 1942, No. 187: "All donations made between married persons during marriage, though termed *inter vivos*, shall always be revocable.

"The revocation may be made by the wife, without her being authorized to that effect by her husband, or by a court of justice."

revocable by the donor. The Fifth Circuit held that this made any inter-spousal donation incomplete for estate tax purposes⁴⁷ because: (1) This was an *absolute* right of revocation, not contingent on the happening of any event; and (2) it was immaterial whether the power was expressly reserved by the donor or provided for by law. The taxpayers in that suit contended that everything in their power had been done to make the gift complete,⁴⁸ but the court countered that, even if a taxpayer does all he can to make an irrevocable gift, if the gift remains revocable upon the exercise of a power vested in the donor by operation of law, the gift is still to be considered as revocable for estate and gift tax purposes. Though the repeal of the article avoids this problem with regard to inter-spousal donations, the case gives valuable insight into how the court will reason in analogous situations.

If the right to revoke is solely in a third party, there is a completed gift because the test is the giving up of all control by the donor and thus such a right to revoke clearly has no value to the estate. Litigated situations include donations set aside by creditors⁴⁹ or by a subsequent transferee because of non-recording.⁵⁰ However, in cases where the estate may set aside the transfer, there is a valuable cause of action which exists in favor of the estate which should be included to the extent of its value.⁵¹

If the purported transfer, such as a simulation, is void under state law, as opposed to voidable, the transfer should be disregarded completely in computing estate and gift tax liability.⁵²

47. *Howard v. United States*, 125 F.2d 986 (5th Cir. 1942).

48. The taxpayers' argument was based on *Weil v. Commissioner*, 82 F.2d 561, 563 (5th Cir. 1936).

49. *McCann v. Commissioner*, 87 F.2d 275 (6th Cir. 1937); *Logan v. Denman*, 15 AFTR 791, 323 CCH Fed. Tax Serv., ¶ 9436 (N.D. Ohio 1932), *appeals dismissed*, 63 F.2d 999, 1008 (6th Cir. 1933); *Estate of Gilis*, BTA Memo. Op., May 8, 1939, CCH Dec. 10,681-C; *Estate of Murfey*, BTA Memo. Op., March 18, 1941, CCH Dec. 11,731-D; LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 16.04 (1962); 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 406 (1942).

50. *Cf. Rose v. Commissioner*, 65 F.2d 616 (6th Cir. 1933).

51. See 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 4.06 (1942); *cf. Commissioner v. Waterbury*, 97 F.2d 383 (2d Cir. 1938), *cert. denied*, 305 U.S. 638 (1938); *Higgins v. White*, 93 F.2d 357 (1st Cir. 1937).

52. *Kirkpatrick v. Sanders*, 261 F.2d 480 (4th Cir. 1958), *cert. denied*, 359 U.S. 1000 (1959); *Barbara F. Thompson*, P-H TAX CT. REP. & MEM. DEC. 1959-183; *cf. George L. Elliot*, 23 B.T.A. 354 (1931); *Williams P. Metcalf*, 7 T.C. 153 (1946), *aff'd*, 47-2 U.S.T.C. § 10,566 (6th Cir. 1947); *Smith v. Commissioner*, 140 F.2d 759 (3d Cir. 1944); *Logan v. Denman*, 15 F.A.T.R. 791 (N.D. Ohio 1932), *appeal dismissed*, 63 F.2d 999, 1008 (6th Cir. 1933); *Cahn*, LOCAL LAW IN FEDERAL TAXATION, 52 YALE L.J. 799, 820 (1943).

Trust Situations

There is an analogy between the powers which may be vested in trustees at common law, and the powers granted Louisiana forced heirs by the provisions of the Civil Code. Therefore, the cases in the gift and estate tax field involving transfers to trusts have developed rules that are useful in analyzing the possible results of the provisions of Louisiana law relative to donations inter vivos. The Internal Revenue Code provides skeleton rules for estate tax applicable to donations outright or in trust in which the donor has so conditioned his donation that (1) the transfer takes effect only at his death,⁵³ or (2) the decedent-donor alone, or in conjunction with any other person, has the power, as of the death of the donor "to alter, amend, revoke, or terminate" a transfer.⁵⁴

In addition, the value of property donated is included in the donor's estate if the decedent has retained a reversionary interest in the property and the value of this interest immediately before his death exceeds five percent⁵⁵ of the value of the property. In this context the term "reversionary interest" includes a possibility that the property transferred by the decedent may either return to him, to his estate, or be subject to his power of disposition.⁵⁶

The Supreme Court has held that it will look to the economic results of a transfer to determine whether the interest is reversionary.⁵⁷ If upon examination the results are found tantamount to a retained interest, the court will not distinguish because of conveyancing law technicalities.⁵⁸ Furthermore, no distinctions for tax purposes will be made between trust and non-trust situations⁵⁹ or between the return to the donor by operation of law

53. INT. REV. CODE of 1954, § 2037.

54. *Id.* § 2038.

55. A provision first added to the tax law by the Technical Changes Act of 1949, § 7; 63 Stat. 891 (1949).

56. INT. REV. CODE of 1954, § 2037(b) (*Special Rules*).

57. *Helvering v. Hallock*, 309 U.S. 106 (1940), *overruling Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Union Trust Co.*, 296 U.S. 48 (1935). See LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* 80-98 (1962), for a full discussion of the development.

58. See *Goldstone v. United States*, 325 U.S. 687 (1945); *Helvering v. Clifford*, 309 U.S. 106 (1940); *Klein v. United States*, 283 U.S. 231 (1931); *accord*, *Commissioner v. Singer*, 161 F.2d 15 (2d Cir. 1947); *Lloyd's Estate v. Commissioner*, 141 F.2d 758 (3d Cir. 1944); *Graff v. Commissioner*, 117 F.2d 247 (7th Cir. 1941).

59. See, e.g., *Graff v. Commissioner*, 117 F.2d 247 (7th Cir. 1941). For cases that had previously distinguished between trust and non-trust situations see, e.g., *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Union Trust Co.*, 296 U.S. 48 (1935).

or by specific reservation.⁶⁰ If the possibility that the property would revert in the donor is so "remote" that for all practical purposes there is no "tie to bind the property to the donor's estate," the interest has been held not to fall within the inclusion rule of the court.⁶¹

Historically, the inclusion in the gross estate of the interest retained in these cases came under the "retained interest" section,⁶² but the regulations imply use now of the "power to amend" section.⁶³ The choice of sections used is important since retained interest is conditioned by the five percent provision which would cover remoteness of time or contingency; whereas the power to amend is not statutorily subject to such a restriction.⁶⁴ Thus if the government is using the "power to amend"

60. See *Estate of Speigel v. Commissioner*, 335 U.S. 701 (1949).

61. See *Frances Biddle Trust*, 3 T.C. 839 (1944); *Estate of Goodyear*, 2 T.C. 885 (1943). For an excellent discussion of the area see Pedrick, *Grantor Powers and Estate Taxation: The Ties That Bind*, 54 N.W. U.L. REV. 527 (1959).

62. See *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929) (power reserved by the decedent grantor alone was sufficient for the imposition of the estate tax under antecedent to INT. REV. CODE of 1954, § 2037).

63. Fed. Tax Regs. § 20.2038: "(a) In General.—The value of the gross estate shall include the value of all property (except real property outside the United States) - - -

"(1) Transfers After June 22, 1936 — To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate consideration in money or money's worth), by trust or otherwise, . . .

"1 Revocable Transfers — (a) In General— A decedent's gross estate includes under section 2038 the value of any interest in property transferred by the decedent, whether in trust or otherwise, if the enjoyment of the interest was subject at the date of the decedent's death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate, or if the decedent relinquished such power in contemplation of death. However, section 2038 does not apply . . .

"(1) To the extent that the transfer was for an adequate and full consideration in money or money's worth (see § 20.2043-1);

"(2) If the decedent's power could be exercised only with the consent of all parties having an interest (vested or contingent) in the transferred property, and if the power adds nothing to the rights of the parties under local law; or

"(3) To a power held solely by a person other than the decedent. But, for example, if the decedent had the unrestricted power to remove or discharge a trustee at any time and appoint himself trustee, the decedent is considered as having the powers of the trustee. However, this result would not follow if he only had the power to appoint himself trustee under limited conditions which did not exist at the time of his death . . ."

64. *But cf. id.* 2038-1(b): "*Date of existence of power.* A power to alter, amend, revoke, or terminate will be considered to have existed at the date of the decedent's death even though the exercise of the power was subject to a precedent giving of notice or even though the alteration, amendment, revocation or termination would have taken effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power exercised. In determining the value of the gross estate in such cases, the full value of the property transferred subject to the power is discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. In this connection, see especially § 20.2031-7.

section as the basis of its suit, the taxpayer is left in the precarious position of having to employ language from cases brought under the predecessor of "the retained interest" section of the present Code.

It should be noted, in addition, that the power to "amend, revoke, or terminate" has almost always been extended to the fullest possible scope⁶⁵ so that any power to change the relationship of the original parties to the donation,⁶⁶ to revoke partially,⁶⁷ to accelerate or withhold distribution of the corpus of a trust⁶⁸ has been held to fall within the scope of the section.

However, the Treasury Department has lessened the impact of this view somewhat by the self-imposed restriction in making contingent powers non-taxable if the contingency has not occurred as of the date of decedent's death.⁶⁹ Furthermore a circuit court of appeals decision⁷⁰ held that a donor may retain powers of distribution and allocation among beneficiaries without subjecting the gift to estate tax. The criterion is that the power must be exercisable only in accordance with a predetermined, fixed standard. The rationale of the rule is that if the standard is reasonable, the distribution and allocation would be merely a ministerial act, and a court of equity could enforce the standard. However, this circuit court decision should be discounted since the Supreme Court cases interpreting section 2038 have extended this section to the fullest possible limits.⁷¹

In considering the gift tax, the key to exclusion from the tax is the reservation by the donor of any "string" to the gift and the gift becomes taxable only on the release of all "strings" by the donor. Similar problems as to what constitutes a "string" exist in gift taxation as in estate taxation, but the litigation of

However, section 2038 is not applicable to a power the exercise of which was subject to a contingency beyond the decedent's control which did not occur before his death (e.g., the death of another person during the decedent's life). See, however, section 2036(a)(2) for the inclusion of property in the decedent's gross estate on account of such power."

65. See Pedrick, *Grantor Powers and Estate Taxation: The Ties That Bind*, 54 Nw. U.L. Rev. 527, 538 (1959).

66. *Porter v. Commissioner*, 288 U.S. 436 (1933).

67. *Estate of Gramm*, 17 T.C. 1063 (1951).

68. *Lober v. United States*, 346 U.S. 335 (1953).

69. Fed. Tax Regs. § 20.2038-1(b); see *Helvering v. Tetzlaff*, 141 F.2d 8 (8th Cir. 1944).

70. *Jennings v. Smith*, 161 F.2d 74 (2d Cir. 1947).

71. See Pedrick, *Grantor Powers and Estate Taxation: The Ties That Bind*, 54 Nw. U.L. Rev. 527, 537 (1959).

the former cases has been sparse, and for the most part unenlightening.⁷²

If the grantor's reacquisition of the trust corpus is dependent upon the lone exercise of another's discretion, the "adverse" or "nonadverse" character of the other person's interest in the property becomes important in determining whether there is a gift. Though the Code defines the terms, the delineation of persons "adverse" and "nonadverse" has not been clearly drawn.⁷³ Generally a person is "nonadverse" if he loses no economic advantage by following the dictates or wishes of the donor or if by his relationship with the donor he is susceptible to carrying out the donor's wishes through persuasion.⁷⁴ If the power holder is "nonadverse," then the "string" is tantamount to being held by the donor and the gift will not be subject to gift tax.⁷⁵ In situations in which the "string" holder is "adverse," the donor seems to have cast away the binding element sufficiently to constitute a complete transfer without regard to whether the donee is now holding all the strings.⁷⁶ The estate tax provision is inconsistent with the gift tax rule; even though a donation is subject to the powers "to alter, amend, revoke, or terminate" lodged in a third party, whether "adverse"⁷⁷ or "nonadverse,"⁷⁸ the property is not included in the gross estate of the donor decedent. This rule has developed because the estate tax contains no provision for the taxation of a donation to which a

72. See 4 RABKIN & JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 58.09.

73. INT. REV. CODE of 1954, § 672: "(a) ADVERSE PARTY.—For purposes of this subpart, the term 'adverse party' means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power which he possesses respecting the trust.

"(b) NONADVERSE PARTY.—For purposes of this subpart, the term 'nonadverse party' means any person who is not an adverse party."

The "substantial" requirement is as elusive as "adverse" itself. "Substantial" has, however, been held to make ineffective any interest which is too contingent or remote or which is too small in relation to the size of the trust. *Mary A. Cushing*, 38 B.T.A. 948 (1939).

74. *Ibid.*; see *Commissioner v. Vander Weele*, 254 F.2d 895 (6th Cir. 1958), *aff'd* 27 T.C. 340 (1956); *Estate of Gramm*, 17 T.C. 1063 (1951), acquiesced in by Treas. Dept. Rev. Rul. 62-13, 1962-2—CUM. BULL. 180.

75. *But cf.* Fed. Tax Regs. § 25.2511-2(b) where nonadverse trustee's discretion is subject to a fixed or ascertainable standard, which is supported by *Albert D. Lasker*, 1 T.C. 208 (1942), *rev'd on other grounds*, 138 F.2d 989 (7th Cir. 1943); see *Herzog v. Commissioner*, 129 F.2d 237 (1st Cir. 1942), *cert. denied*, 317 U.S. 658 (1942).

76. *Burnet v. Guggenheim*, 288 U.S. 280 (1933).

77. *Commissioner v. Dravo*, 119 F.2d 97 (3d Cir. 1941); *Anna B. Kneeland*, 34 B.T.A. 816 (1936).

78. *Hugh M. Beuler Trust*, 2 T.C. 1052, *aff'd sub nom.*, *Commissioner v. Irving Trust Co.*, 147 F.2d 946 (2d Cir. 1945); *Herzog v. Commissioner*, 116 F.2d 591 (2d Cir. 1941); *Lester Hofheimer Estate*, 2 T.C. 773 (1943), *rev'd on other grounds*, 149 F.2d 733 (2d Cir. 1945).

power of revocation exists only in one other than the deceased donor.⁷⁹ It is obviously incongruous that the reservation of a power of passive acquiescence in a revestment⁸⁰ should be non-taxable, while the reservation of a power by express consent to such revestment⁸¹ should be taxable, but the rule seems to be so formulated.⁸² Thus it is possible that there is an inconsistency which allows a donation subject to powers held by "nonadverse" persons not to be taxable either under the estate or the gift tax, and thus a donor can hold the "string" without being caught "holding the whole bag."

DISCUSSION AND ANALYSIS OF THE LOUISIANA STIPULATIONS

The federal gift and estate tax effects of the Louisiana provisions discussed under this section have not been litigated. The purpose of this section will be to analyze the gift and estate tax aspects of the possible revocation of inter vivos donations in Louisiana.

*Powers of Forced Heirs*⁸³

In Louisiana, the children of the deceased, or the parents of the deceased if he died without issue, are forced heirs.⁸⁴ There

79. See INT. REV. CODE of 1954, § 2038(a) (1), quoted in text accompanying note 15 *supra*. It has been held that sections 2037 and 2038 are not the basis of a tax on this type transfer. See *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929); *Helvering v. City Bank Farmer's Trust Co.*, 296 U.S. 85 (1935).

80. *E.g.*, where the donor provides for an adverse trustee who has power to revest the donor with the corpus of the trust.

81. *E.g.*, where the power to revest corpus is in the donor by specific reservation.

82. Fed. Tax Regs. § 20.2038-1(a) (3).

83. Forced heirship is an institution unique to Louisiana and therefore the powers vested in the forced heirs have no counterpart at common law. See Comments, 38 TUL. L. REV. 372 (1964), 37 TUL. L. REV. 710 (1963). LA. CONST. art. IV, § 16, prohibits the abolition of forced heirship.

84. LA. CIVIL CODE art. 1493 (1870): "Donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half if he leaves two children; and one-third, if he leaves three or a greater number.

"Under the name *children* are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent."

Id. art. 1494: "Donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both, provided that where the legal portion of the surviving father, mother or both is less than one-third the forced portion shall not be increased to one-third, but shall remain at the legal portion."

Id. art. 1495: "In the cases prescribed by the last two preceding articles, the heirs are called *forced heirs*, because the donor can not deprive them of the portion of his estate reserved to them by law, except in cases where he has a just cause to disinherit them."

There are, however, no reported cases dealing with parents as forced heirs in an action for collation.

are a number of actions that can be brought by forced heirs, including the action to demand collation,⁸⁵ the action to reduce excessive donations,⁸⁶ and the action to declare a simulation.⁸⁷

A. *Collation*.⁸⁸ The purpose of collation is to establish equality among the descendant forced heirs who come to the succession of their ancestor.⁸⁹ Collation is based on the assumption that an ancestor wishes to deal equally with his descendant forced heirs.⁹⁰ Therefore, if a person gives one of his forced heirs a donation, it is assumed to be an *advancement d'hoirie*, an advance on the share the donee will receive at the donor's death.⁹¹ Unless the donor's intention to favor the donee with an extra portion has been formally evidenced, as prescribed by the Civil Code, or the donation was a manual gift,⁹² the donee's co-heirs can require him to collate this donation received from the ancestor if the donee wishes to share in the estate of the ancestor.⁹³ Collation is a procedure, then, whereby these donations are returned to the mass of the succession.⁹⁴ The return may be accomplished by actual return of the property to the mass of the succession⁹⁵ or taking a reduced amount from the succession; in the latter case the reduction corresponds to the value of the donation.⁹⁶ The right to demand collation is reserved to forced heirs, and it cannot be demanded by any other heir or by the legatees or creditors of the succession to which the collation is due.⁹⁷

If the donor does not at the time of the donation state in the required manner that the donation to a forced heir is meant as an advantage or extra portion, he may still do so at a later time.⁹⁸ As long as the donor does not exercise his option to

85. See *id.* arts. 1227-1288.

86. *Id.* arts. 1502-1518.

87. *Id.* art. 2239.

88. Collations will be dealt with only in regard to the gift and estate tax aspects. For a full discussion of the action for and problems of collation, see Comment, 26 TUL. L. REV. 203 (1952).

89. LA. CIVIL CODE art. 1229 (1870); see *Doll v. Doll*, 206 La. 550, 560, 19 So. 2d 249, 252 (1944); *Bethelot v. Fitch*, 44 La. Ann. 503, 10 So. 867 (1892); *Benoit v. Benoit's Heirs*, 8 La. 228, 230 (1835).

90. LA. CIVIL CODE art. 1229 (1870); CROSS, LOUISIANA SUCCESSIONS § 92 (1891).

91. See note 90 *supra*.

92. LA. CIVIL CODE arts. 1231-1233 (1870).

93. See *id.* art. 1237.

94. *Id.* art. 1229; see Oppenheim, An Introduction to the Louisiana Law of Successions, 4 L.S.A. — LA. CIVIL CODE 1, 70 (West ed. 1952).

95. LA. CIVIL CODE arts. 1251, 1252.

96. *Id.* arts. 1251, 1253.

97. *Id.* arts. 1235, 1236.

98. *Id.* art. 1232.

bestow an extra portion on the forced heirs, the donated property has been considered not severed from the donor's estate.⁹⁹ Severance does not come until partition, when the donated property is classified as an absolute donation or as an advancement of inheritance.¹⁰⁰ By merely analyzing the legal consequences, it could be argued that the gifts fit within the Internal Revenue Code provisions including in the donor's estate a gift subject to power to amend.¹⁰¹ As was seen in the summary of the tax law, the jurisprudence has construed section 2038 to include any power to change the relationship of the parties, as well as to accelerate the distribution.¹⁰² With these interpretations of section 2038, the power to make the gift absolute retained by the donor seems to be within the scope of the section's inclusions.

Upon economic analysis, however, collation becomes like transactions that have been held not to cause inclusion. When collation takes place, the donor is not revested with the donation; the heirs of the donee are the only ones who can possibly benefit. In addition, collation is only to establish equality among the forced heirs who come to the succession of their ancestor. Thus if all the forced heirs come to the succession in equal standing, no *action* for collation would lie, even though there had been donations inter vivos. Therefore collation is at most a contingent power, and hence it should not cause inclusion of the donation in the donor's gross estate, because no event has occurred to cause the property to return to the estate of the donor.¹⁰³ The forced heir who has received more than his share, without it being stated as an advantage, may renounce the succession and not be subject to a suit for collation by his co-heirs.¹⁰⁴ This renunciation does not, however, absolve this heir from collating an excessive donation in an action for reduction, for such an action can be brought even if the donee is a stranger to the succession.¹⁰⁵

From the gift tax aspect, the retention of the power in the donor to make the gift an extra portion, or more so, the concept of *advancement d'hoirie* should prevent the gift from being subject to the gift tax under the "tie that binds" rule. The applica-

99. *LeBlanc v. Volker*, 198 So. 398 (La. App. Orl. Cir. 1940); *Cross*, LOUISIANA SUCCESSIONS § 310 (1891).

100. See note 99 *supra*.

101. See INT. REV. CODE of 1954, § 2038.

102. See notes 65-69 *supra*, and accompanying text.

103. See Fed. Tax Regs. § 20.2038-1(b).

104. See LA. CIVIL CODE art. 1237 (1870).

105. *Id.* arts. 1231, 1237.

tion of the economic approach, however, would produce a completed transfer as was found under the estate tax discussion.

The strength of the argument for inclusion available to the government suggests the desirability of avoiding the issue. This can be easily accomplished by an indication by the donor that the donation was meant as an advantage or an extra portion. The gift is then so clearly complete as to be beyond debate.

*B. Reduction.*¹⁰⁶ Under Louisiana law a donor is prohibited from disposing of a certain percentage of his property, the forced portion or legitime; the amount of the legitime varies according to the number and relationship of his forced heirs.¹⁰⁷ Upon the death of the donor, all the property owned by the donor at that time is aggregated with the donations made during his lifetime. From this aggregate the debts of the estate are subtracted, and the net amount thus computed is used in determining whether there has been an encroachment upon the legitime.¹⁰⁸ When the prohibition is found to have been violated, the basic remedy available to the forced heir is the action of reduction, which has for its sole purpose the reducing of the deceased's donations, whether to forced heirs or not, to the extent necessary to reinstate the appropriate percentage of the estate for the legitime.¹⁰⁹ The action of reduction, however, can be brought only after the death of the donor; thus all inter vivos gifts retain their full effect during the donor's lifetime.¹¹⁰ The necessary result of these provisions is that the action is contingent upon the percentage requirement not being met at the time of the donor's death¹¹¹ and upon the forced heirs surviving the donor.¹¹² The power to revoke or revoke partially is held by third parties to the donation. Hence, since the power "to amend, alter, revoke, or terminate" is in a third party, the property would not be included in the gross estate of the deceased for estate tax purposes. As for the gift tax, the "adverse" or "nonadverse" characterization of the forced heirs must be determined.¹¹³ This cannot be accomplished at the time of the dona-

106. Reduction will only be discussed as to the effects such an action has on the federal gift and estate tax. For a full discussion of the action and the problems pertaining thereto, see Comment, 38 TUL. L. REV. 372 (1964).

107. See LA. CIVIL CODE arts. 1493-1495 (1870), quoted in note 84 *supra*.

108. For a detailed description of this calculation see Succession of Gomez, 226 La. 1092, 78 So.2d 411 (1955); Note, 29 TUL. L. REV. 803 (1955).

109. See LA. CIVIL CODE arts. 1495, 1515 (1870).

110. *Id.* art. 1507.

111. *Id.* art. 1505.

112. *Id.* art. 1504.

113. See INT. REV. CODE of 1954, § 672(a) and (b), quoted in note 73 *supra*.

tion because the existence and number of the forced heirs cannot be determined until a later time, upon the death of the donor.

*C. Revocation of Simulated Transfers.*¹¹⁴ Simulation is a broad term which includes a variety of transactions by which the parties involved attempt to make it appear that they have entered into one agreement when in fact they have entered into another, or none at all.¹¹⁵

In attacking a simulation, the creditors of the transferor clearly stand in a better position than the transferor himself: they can attack his simulations by any available evidence¹¹⁶ whereas the transferor must produce a counterletter or its equivalent.¹¹⁷ On the other hand, it is also clear that the ordinary heirs or universal successors of the supposed transferor stand in the shoes of the transferor and are subject to the same requirements as the transferor himself.¹¹⁸ The position of the forced heirs is somewhere between that of a creditor and an ordinary heir.¹¹⁹ The forced heirs' claim for the legitime is, in effect, a claim against the supposed transferor, now deceased, which gives them a status analogous to that of creditors; but after the forced heirs have received their forced portion their status is more like that of ordinary heirs.¹²⁰ In order to analyze further the economic consequences of the varying rights of the forced heirs, it is necessary to distinguish between non-transfer simulations and disguised-transfer simulations.

In non-transfer simulations, the supposed transferor actually has no intention to part with ownership at all, and the supposed transferee does not pay the recited purchase price. However, the true intentions and facts are kept secret and it appears as a matter of form that an ordinary transfer has taken place. Upon the donor's death, and the discovery of the simulation, the value of the property would be fictitiously added to the mass of the supposed transferor's succession. If after the proper

114. The law of simulation is fraught with technicalities and distinctions. The author acknowledges his indebtedness to the deft analysis found in Lemann, *Some Aspects of Simulation in France and Louisiana*, 29 *TUL. L. REV.* 22 (1954).

115. *Ibid.*

116. See *Lawson v. McBride*, 121 La. 282, 46 So. 312 (1908) (action in declaration of simulation is imprescriptible); *Testart v. Beloit*, 31 La. Ann. 795 (1879) (unnecessary to be a creditor at time of simulation to attack).

117. *Sherman v. Nehig*, 154 La. 25, 97 So. 270 (1923); *Godwin v. Neustadt*, 42 La. Ann. 735, 7 So. 744 (1890); *Cary v. Richardson*, 35 La. Ann. 505 (1883); *Badon v. Badon*, 4 La. 166 (1832).

118. See *McGee v. Finley*, 65 So. 2d 384 (La. App. 2d Cir. 1953).

119. See LA. CIVIL CODE arts. 1502-1518 (1870).

120. See Lemann, *Some Aspects of Simulations in France and Louisiana*, 29 *TUL. L. REV.* 22 (1954).

calculations, the property of the simulation were found to form part of the legitime, the heirs could attack it with the rights of creditors. If the property were not found to be part of the legitime, the forced heirs would have to meet the evidentiary requirements imposed on ordinary heirs. In either case, a successful action results in establishing the nullity of the supposed transfer. As would be true for common law nullities, the transfer should have no effect on the estate or gift tax for no transfer has been accomplished.¹²¹

The disguised-transfer simulation usually arises when the true intention of the parties is to execute a donation, but, instead, they execute an act of sale, valid on its face. Here, the parties actually intend that the ownership of the property pass, but have no intention that the recited price be paid. Simulations attacked by forced heirs have in most cases involved disguised-transfer simulations because this type of transfer is frequently used to conceal a donation to a favored child above and beyond the disposable portion, or to a person not permitted to receive a donation.¹²² If the transfer was in fact a donation to a child, then the other forced heirs can invoke article 2444¹²³ and the collation rules to annul the disguised donation entirely without regard to the legitime.¹²⁴ Under such circumstances the tax position discussed in connection with collation would apply: the property is simply treated as part of the transferor's estate.

If the transferee is someone incapable of receiving from the donor,¹²⁵ then the donation is subject to attack by any interested person. Because it is void, this type of transfer is not subject to the gift tax and the property is included in the gross estate of the deceased donor.

Where the disguised donation was not made to an heir or to a person incapable of receiving, the transfer can still be revealed

121. See note 52 *supra*.

122. A pretended transfer would not take the actual possession of the property out of the estate. A secret transfer, on the other hand, would divest the estate of the property in such a manner that the transfer would not be added back to the mass of the succession for the calculating of the legitime.

123. LA. CIVIL CODE art. 2444 (1870): "The sales of immovable property made by parents to their children, may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value of the immovable sold, at the time of the sale."

124. *Id.* arts. 1502-1518.

125. See *id.* art. 1481 (concubines); art. 1479 (minor's gift to tutors); art. 1483 (gift to natural children or acknowledged illegitimate children); art. 1488 (adulterine or incestuous children); art. 1489 (patients to doctors). See also *id.* art. 1497 (donation omnium bonorum).

as a donation. After a donation is uncovered, however, the forced heirs have no right to attack it unless the donation impinges upon their legitime. The attack to cure impingement would arise under the rights of forced heirs to reduce excessive donations and would be subject to the same estate tax analysis as was that action.

Powers in the Donor under Article 1559

Under Louisiana law, a donor who is a major and of sound mind at the time of the donation is not ordinarily allowed to revoke his donation. Among the exceptions to the general rule of irrevocability are those provided by the four parts of article 1559: ingratitude, non-fulfillment of the eventual conditions, non-performance of the conditions imposed on the donee, and the legal or conventional return.¹²⁶

As to ingratitude and the non-fulfillment or non-performance of conditions, the Civil Code makes the exercise of the power to revoke contingent upon the occurrence of these acts. The regulations of the Treasury Department state that if a contingent power has not vested by the time the donor dies, the donated property will not be considered part of the donor's estate.¹²⁷ This regulation certainly seems applicable to the economic situation created by the conditions of article 1559. Analogous to article 1559 is article 156, which provides for the loss of donations by a spouse who has a judgment for separation or divorce for fault declared against him.¹²⁸ Seemingly, contingent powers of articles 1559 and 156 would also not prevent a donation from being complete for gift tax purposes, for at the time of the donation no one is "holding any strings."

If, however, a power originally contingent has vested by the happening of one of the events provided in article 1559 or 156,

126. *Id.* art. 1559: "Donations *inter vivos* are liable to be revoked or dissolved on account of the following causes:

"1. The ingratitude of the donee;

"2. The non-fulfillment of the eventual conditions, which suspend their consummation;

"3. The non-performance of the conditions imposed on the donee;

"4. The legal or conventional return."

127. Fed. Tax Regs. § 20.2038-1(b), quoted note 64 *supra*.

128. LA. CIVIL CODE art. 156 (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 party would have been entitled; and these dispositions are to take place even in case the advantages and donations were reciprocally made.

and the donor dies before the action to revoke is prescribed, the property should be includible in the gross estate under section 2038. If the donor does not wish to revoke the gift, he should formally relinquish his power to do so.

In legal or conventional revocation¹²⁹ the donor and donee agree that the donation should be revoked. This revocation is valid even should the donor agree to sell the property and donate the proceeds to the donee.¹³⁰ In addition, if the donor joins in warranting the title, the Supreme Court of Louisiana has held there is a tacit revocation.¹³¹ Such conventional revocations become necessary for the donee to convey a merchantable title to donated immovable property since the forced heirs can pursue such property to satisfy their legitime.¹³² *Helvering v. Helmholtz*¹³³ held that a revocation by the consent of all the parties does not constitute a power in the donor or the donor and others within the meaning of section 2038. Nonetheless, it has been suggested that the retention by operation of law of the Louisiana power is tantamount to the donor retaining practical control over the alienation by the donee of a donated immovable.¹³⁴ It was speculated that such a power could be within the scope of section 2038, thus making all donations of immovable property includible in the donor's estate for estate tax purposes.¹³⁵ Such a suggestion, however, tends to over-emphasize the strength of the donor's power. *Helmholtz* was based directly upon the characterization of the interest of the trust beneficiary whose consent was also required, as "adverse." It is submitted that the interest of the donee in Louisiana is as "adverse" as the interest of the beneficiary in *Helmholtz*.¹³⁶ It should also be realized that only the donor will be in a position of power where the donee wishes to sell the donated immovable. In addition, the defect in the merchantable title can be cured by time and even in cases where the defect is still potent, the donee can sell the property by discounting the contingent power of the forced heirs.

129. *Id.* art. 1559(4).

130. *Scudder v. Howe*, 44 La. Ann. 1103, 11 So. 824 (1892).

131. *Atkins v. Johnston*, 213 La. 458, 35 So. 2d 6 (1948).

132. LA. CIVIL CODE art. 1517 (1870).

133. 296 U.S. 93 (1935).

134. See Comment, 38 TUL. L. REV. 372, 389, n.119 (1964).

135. *Ibid.*

136. The beneficiaries and grantors were all members of an immediate family group and the donation to the trust was stock in a family corporation.

CONCLUSION

Where Louisiana powers to revoke differ substantially from the powers found in the other states, the federal estate and gift tax effect on these Louisiana powers are not yet fully settled. In interpolating the position of the Louisiana powers into the tax law, the economic results of the power should be carefully analyzed. If the economic results match an economic result taxed by the Internal Revenue Code, it is likely that the Louisiana stipulation will be taxable also. Likewise, if the results do not fall within a situation taxable by the Code, there is no reason to believe it is taxable merely because excluding language of the Internal Revenue Code uses terms which differ from our civil law terminology.

Charles A. Snyder