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# Private Law: Successions and Donations

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## SUCCESSIONS AND DONATIONS

Carlos E. Lazarus\*

## NATURE OF SUCCESSION

Succession is a mode of acquiring the ownership of things. The term is thus defined in Louisiana Civil Code article 871 as the transmission of the inheritance to the heirs of the deceased. Depending upon the context in which the term is used, "succession" means also the inheritance or the patrimony of the deceased, *i.e.*, the property rights and obligations of the deceased as they existed at the time of his death,<sup>1</sup> or the right whereby the heirs take possession of the inheritance.<sup>2</sup> In *Jones v. Dibert, Bancroft & Ross Co.*,<sup>3</sup> the plaintiff, administratrix of the succession of her deceased father, sought to compel the defendant corporation, of which the deceased had been a stockholder, to furnish her the financial reports of the corporation required to be furnished by Louisiana R.S. 12:102. The issue, as the court presented the case, was whether the succession of the deceased stockholder could be considered a stockholder of record and thus assert the rights prescribed by the statute.<sup>4</sup> It is well settled, said the court, "that upon the death of an individual his succession evolves and exists as a separate and distinct legal entity and will continue in existence until terminated by proceedings had pursuant to an administration conducted by an administrator or executor, or, an unqualified acceptance by the heirs."<sup>5</sup> It therefore concluded that the succession representative had the right to the information required by the statute.

It would have been more consonant with the concept of Louisiana law that the patrimony of the deceased is transmitted to his heir at the moment of his death<sup>6</sup> to say that the plaintiff as the *heir and juridical representative* of the person

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1. LA. CIV. CODE arts. 872-73.

2. *Id.* art. 874.

3. 308 So. 2d 369 (La. App. 1st Cir. 1975).

4. *Id.* at 371. For a discussion of the issues which concern the Louisiana Business Corporations Law, LA. R.S. 12:1-178 (1968), see *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Corporations*, 36 LA. L. REV. 455, 457 (1976).

5. 308 So. 2d at 371.

6. LA. CIV. CODE art. 940.

of the deceased,<sup>7</sup> was entitled to the information required. The "succession" of the deceased may very well remain a tangible thing until merged by confusion with the patrimony of the heir upon the latter's acceptance, but it can hardly be said that this "succession" is a juridical person or legal entity. The redactors of the Louisiana Civil Code of 1825 rejected and discarded the legal entity concept, at one time adopted in the Digest of Laws of 1808,<sup>8</sup> in favor of "le mort saisit le vif."<sup>9</sup>

#### COMMORIENTES

The transmission of the succession takes place immediately upon the death of the *de cuius*, but only persons living at that time have the capacity to inherit.<sup>10</sup> The transmission of the inheritance, therefore, depends upon proof being made that the successor was alive at the instant of the death of the *de cuius*. When two persons reciprocally entitled to inherit from one another have died at about the same time, it becomes necessary to establish the order of their deaths, for, despite the reciprocity of their rights, only the survivor has the capacity to inherit from the predeceased. If it is impossible to establish the order of their deaths by positive proof or by other admissible evidence from which an inference can be drawn as to the order of their deaths, they are incapable of succeeding to each other, and their successions will be transmitted to their other heirs *ab intestato*, as if neither of them had survived the other.<sup>11</sup>

When those who are reciprocally entitled to inherit from one another perish in the same event, such as a shipwreck or a conflagration, the Louisiana Civil Code makes a particular

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7. *Id.* art. 884. The word "stockholder" in the statute could have been construed to include the heirs of the stockholder.

8. La. Digest of 1808, bk. III, ch. VI, sec. I, art. 74: "Until acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased who was the owner of the estate."

9. See comments in PROJET OF LA. CIVIL CODE OF 1825, 1 LA. LEGAL ARCHIVES 115, 123 (1937) recommending suppression of La. Digest of 1808, bk. III, ch. VI, sec. I, art. 74.

10. LA. CIV. CODE art. 940: "A succession is acquired by the legal heir who is called by law to the inheritance, immediately after the death of the deceased to whom he succeeds." LA. CIV. CODE art. 953: "In order to be able to inherit, the heir must exist at the moment the succession becomes open."

11. Which means that the commorientes will be considered as having died simultaneously. This is implicit from the provisions of LA. CIV. CODE arts. 76, 953.

exception to determine the order of death. If there are no circumstances of the fact from which the order of death can be ascertained, the necessary proof is replaced by the presumptions established in articles 938 and 939. As an exception to the rule that the prior death of the *de cujus* must be proved, the presumptions must be strictly construed. They cannot be extended by implication or by analogy, and moreover, all the conditions required by article 936 must concur.<sup>12</sup> Thus, when the reciprocal right to inherit does not exist,<sup>13</sup> or when it exists solely by virtue of a testament,<sup>14</sup> the presumptions are inapplicable. In short, the presumptions are intended to be used only to determine the order of death in the devolution of a succession *ab intestato*.<sup>15</sup>

In *Collins v. Becnel*,<sup>16</sup> defendant attempted to invoke the survivorship presumptions to defeat the rights of the plaintiffs to sue for the wrongful death of their sister who, along with her only child, had been killed in an automobile accident. Defendant theorized that since it was impossible to determine from the circumstances of the fact which of the commorientes had died first, the presumptions applied. Hence, the child, presumed to have survived the mother, had the right to sue rather than the brothers and sisters. The court, however, properly concluded that articles 938 and 939 cannot be extended to determine the beneficiaries of wrongful death actions, under Louisiana Civil Code article 2315, for neither the

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12. (1) The commorientes must be reciprocally entitled to inherit from one another; (2) the commorientes must have perished in the same accident; (3) there must not be any circumstances from which the order of their deaths can be established.

13. For example, the commorientes are husband and wife and there are children of the marriage; the commorientes are the blood parent and his child who has been adopted by another, in which case the child retains the right to inherit from his blood parent, but the parent loses his right to inherit from his child. LA. CIV. CODE art. 214.

14. See *Succession of Langles*, 105 La. 39, 29 So. 739 (1900), holding that since mother and daughter were reciprocally entitled to inherit from one another, the fact that they had also made reciprocal testaments disposing of their estates in favor of each other and thus conforming to what the law had established in their favor, did not operate to preclude the application of the survivorship presumptions. It is implicit in the decision that if the reciprocal right had existed solely by virtue of the reciprocal testaments, the presumptions would not have been applicable. See also 4 M. PLANIOL ET G. RIPERT ET H. VIALLETON, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS*, Nos. 32 *et seq.* at 67 (2d ed. 1956).

15. Planiol, *supra*, note 14 at 76.

16. 297 So. 2d 506 (La. App. 4th Cir. 1974).

survival nor the wrongful death action is a right of inheritance.<sup>17</sup>

#### COLLATION

In *Estate of Schwegman v. Schwegman*,<sup>18</sup> plaintiff attacked a conveyance of a parcel of land by the *de cuius* to one of his children, alternatively as a simulation or a donation in disguise subject to collation. The decedent conveyed the land in 1966 in the form of a sale for a recited price of \$6,500. At the time of the death of the *de cuius* in 1969, the property had an appraised value of \$43,000. It having been established that the vendor had not remained in possession of the land and that the recited price had actually been paid, the court held that neither article 2444 nor 2480 of the Civil Code was applicable.<sup>19</sup> There being no proof of the value of the land at the time of the sale, it was impossible for the court to determine whether the price paid was below one-fourth its actual value<sup>20</sup> or whether the price paid was a very low price;<sup>21</sup> it remanded the case to the lower court to determine this vital issue.

17. Cf. *Doucet v. Travelers Ins. Co.*, 91 F. Supp. 864 (W.D. La. 1950). *See Hoy v. Stuyvesant Ins. Co.*, 141 So. 2d 908 (La. App. 2d Cir. 1962) (Father and child were killed in an auto accident. There being no way of establishing the order of their deaths, and when the suit for wrongful death was filed by the brothers and sisters of the deceased child, applying the presumption, the court held that the father had died first so that, there being no surviving parent nor children of the deceased child, under the then provisions of LA. CIV. CODE art. 2315, the right to sue for wrongful death belonged to the brothers and sisters of the deceased child). It is suggested, however, that the same result could have been reached without the application of the presumptions had the court adopted the rationale of *Collins v. Becnel*, i.e. neither the father nor the child had actually survived each other. Cf. LA. R.S. 22:645 (1958); *Morelock v. Aetna Life Ins. Co.*, 222 La. 712, 63 So. 2d 612 (1953).

18. 298 So. 2d 795 (La. 1974).

19. LA. CIV. CODE art. 2444: "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." LA. CIV. CODE art. 2480: "In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale."

20. Had it been below one-fourth its actual value, the transaction would have been classified as a donation under LA. CIV. CODE art. 2444.

21. Had it been a very low price, the difference between the price paid

## TESTAMENTARY DISPOSITIONS

*Formal Requirements*

By far the most important decision in this area is *Succession of Boyd*<sup>22</sup> in which the Louisiana Supreme Court upheld an olographic testament dated "2-8-72." For many years the jurisprudence had been confused and indecisive as to the extent to which extrinsic evidence was admissible to resolve uncertainties or ambiguities in dates appearing in olographic testaments. For a time, it was believed that the two *Succession of Gaudin* cases decided by the First Circuit Court of Appeal<sup>23</sup> had settled the question in favor of the admissibility of such evidence, but subsequent decisions<sup>24</sup> soon reverted to the strict rule of *Succession of Beird*<sup>25</sup> that an olographic will in which the slash date form is used is invalid for lack of a date certain, the date being an essential part of the testament that must be determined from the face of the testament itself, and that must be so written as to leave no room for doubt or speculation. In *Boyd*, the Louisiana Supreme Court finally puts at rest the controversy. After a thorough review of the jurisprudence, it adopts the rationale of the *Gaudin* decisions and holds that although an absent date cannot be supplied, there is no reason why extrinsic evidence should not be admissible to prove an uncertain date. *Id certum est quod certum reddi potest.*<sup>26</sup> *Beird* and its progeny are overruled.

In *Succession of Smith v. Domangue*<sup>27</sup> the testator's nuncupative will by public act, written in English, was attacked as a nullity on the alleged grounds that the testatrix knew no English; hence, she must have dictated the testament to the bilingual notary in French, the only language she was alleged to have known.<sup>28</sup> The issue was, therefore, whether the tes-

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and the fair price of the thing sold would be subject to collation under LA. CIV. CODE art. 1248.

22. 306 So. 2d 687 (La. 1975).

23. 140 So. 2d 384 (La. App. 1st Cir. 1962); 98 So. 2d 711 (La. App. 1st Cir. 1957).

24. *Succession of Koerkel*, 174 So. 2d 213 (La. App. 1st Cir. 1965); *Succession of Mayer*, 144 So. 2d 896 (La. App. 4th Cir. 1962).

25. *Succession of Beird*, 145 La. 756, 82 So. 881 (1919).

26. That is certain which is made certain.

27. 297 So. 2d 171 (La. App. 1st Cir. 1974).

28. In such a case the will is invalid, there being no opportunity for comparison between what is dictated and what is actually taken down by the notary. *DeBaillon v. Fuselier*, 159 La. 1044, 106 So. 559 (1925).

tatrix could speak and understand the English language. On this point, the conflicting testimony did not weigh sufficiently heavy in favor of the opponents, and accordingly, the court held that the plaintiff in nullity had failed to discharge his burden of proof as required by article 2933 of the Code of Civil Procedure.<sup>29</sup>

### *Rights of Legatee to Things Bequeathed*

Louisiana Civil Code article 1638 provides that if the thing bequeathed has been mortgaged by the testator for his own debt or for that of another, the legatee takes the thing subject to the encumbrance unless the testator has *expressly* provided otherwise.<sup>30</sup> In *Succession of Waterman*,<sup>31</sup> by the first disposition in her will the testatrix directed all her just debts to be paid out of her residuary estate.<sup>32</sup> She then made several bequests including a legacy of a parcel of ground valued at \$25,000 which was then encumbered with a \$10,000 mortgage to secure an indebtedness of the testatrix. The Louisiana Supreme Court construed the direction of the testatrix as constituting an express disposition requiring the payment of secured and unsecured debts from the residuary estate,<sup>33</sup> and accordingly, held that the mortgage on the prop-

29. Under LA. CODE CIV. P. art. 2933, the plaintiff in nullity always bears the burden of proving the invalidity of a nuncupative testament by public act. In *Succession of Currie*, 297 So. 2d 742 (La. App. 1st Cir. 1974), the testator executed a nuncupative testament by private act affixing his mark thereto instead of signing it. The proponents failed to prove that the testator did not know how to sign or that he was disabled from so doing, and accordingly the testament was declared invalid. See LA. CODE CIV. P. art. 2903. In *Succession of Cutrer*, 297 So. 2d 543 (La. App. 4th Cir. 1974), suit was brought to annul an olographic testament on the grounds that it had not been written by the testator. Although the action in nullity was instituted more than three months from the probate of the testament, the court found it unnecessary to apply LA. CODE CIV. P. art. 2932 because the preponderance of the evidence in any event established that the will had actually been written and signed by the testator.

30. See also LA. CIV. CODE art. 1441: "The particular legatee, who, in consequence of the hypothecary action has paid the debt or abandoned the property mortgaged, has no recourse against the heir of the testator, because, by receiving the legacy, he is considered as having received it with the incumbrances with which it was charged."

31. 298 So. 2d 731 (La. 1974).

32. *Id.* at 732: "FIRST: I direct that all my just debts, funeral expenses and expenses in connection with the administration of my estate be paid out of my residuary estate, as soon as practicable after my death."

33. The court reasoned that since unsecured debts are taken from the

erty bequeathed had to be canceled before delivery to the legatee. Should the common practice of inserting in wills payment-of-debts clauses be discontinued?

In *Succession of Platt*,<sup>34</sup> O. F. Platt owned an undivided interest in a tract of land in Bossier Parish. He died at his domicile in Texas in 1952 leaving a testament naming his wife Hattie as his universal legatee. This testament was duly admitted to probate in Texas and Hattie was sent into possession. In 1965 Hattie died testate designating Jessie and Rose Glover as her universal legatees of all her property "wherever situated." Her will was also admitted to probate in Texas. Authenticated copies of these proceedings were subsequently presented to the district court in Bossier Parish, which ordered them deposited and recorded in the registry of the court to be executed in accordance with law. The court also rendered judgment recognizing the Glovers as universal legatees of Hattie and, as such, entitled to Hattie's undivided interest in the Bossier Parish property. The sisters and other relations of O. F. Platt then filed a petition seeking to have the wills declared null and ineffective, assuming the untenable position that Hattie had never acquired the property in dispute because she had failed to file the will of her deceased husband for probate in Louisiana; that this prevented her from becoming the owner of the Bossier Parish property, and that as a result, she could not have bequeathed it to her own legatees.

Basing its decision on Louisiana Civil Code articles 940 and 944, the court held that, as the testamentary universal legatee of her husband, Hattie was called by law to the inheritance immediately after the death of her husband, and that, having succeeded to her husband's rights in the property from the instant of his death, she could transmit the succession to her own heirs. The result is correct. However, articles 940 *et seq.* relate to the *succession ab intestato* wherein the heir becomes the owner of the effects comprised in the succession of the *de cujus* at the moment of his death and can therefore transmit it to his own heirs, even though he has died without previously having accepted the succession. It would have been more appropriate to apply article

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residuary estate by operation of law, the disposition or direction of testatrix would be meaningless unless it referred to secured debts as well.

34. 300 So. 2d 503 (La. App. 2d Cir. 1974).



1626, which gives every legatee, whether by particular title or otherwise, a right to the thing bequeathed from the moment of the death of the testator. The right then may be transmitted by the legatee to his own heirs or legatees.<sup>35</sup>

### *Interpretation of Legacies*

“I desire what money I may have—checking account at Calcasieu Marine National Bank 2 certificates in First Federal and Loan Association, handled as Mrs. Arguello sees fit.”

In *Succession of Baldwin*,<sup>36</sup> the court held that this language in the will of the testatrix contained a disposition committed to the choice of a third person. It was therefore null under the provisions of Louisiana Civil Code article 1573. And in *Succession of Harris v. Pierce*,<sup>37</sup> the court admitted extrinsic evidence to identify the legatee who was referred to in the testament simply as “the person who is taking care of me at the time of my death.”<sup>38</sup>

### *Revocation of Testaments*

In 1952 the Louisiana Supreme Court, although concluding that the purchase of United States savings bonds payable upon death to a designated beneficiary constituted an additional method of making a donation in prospect of death, nevertheless held that, as a donation *mortis causa*, it was subject to all the substantive Civil Code provisions pertaining to testamentary dispositions, particularly article 1705, which operates a revocation of a testament antedating the birth of a

35. LA. CIV. CODE art. 1626: “Every legacy under a particular title gives to the legatee, from the day of the testator’s death, a right to the thing bequeathed, which right may be transmitted to his heirs or assigns; and this takes place as well in testamentary dispositions, universal or under a universal title, as in those made under a particular title. . . .”

36. 309 So. 2d 808, 809 (La. App. 3d Cir. 1975).

37. 297 So. 2d 738 (La. App. 1st Cir. 1974).

38. The evidence disclosed that the defendant was furnishing room and board for the testatrix, keeping house for her, and sleeping with her at night. See LA. CIV. CODE art. 1714: “In case of ambiguity or obscurity in the description of the legatee, as, for instance, when a legacy is bequeathed to one of two individuals bearing the same name, the inquiry shall be which of the two was upon terms of the most intimate intercourse or connection with the testator, and to him shall the legacy be decreed.”

legitimate child.<sup>39</sup> In *Succession of Stothart*,<sup>40</sup> it was argued that if the beneficiary designation in a bond is revoked by operation of law by the subsequent birth of a child, it should likewise be revoked by a revocation contained in the subsequent will of the *de cuius*. The Second Circuit Court of Appeal rejected this argument. It held that, in light of *Free v. Bland*,<sup>41</sup> and *Yiatchos v. Yiatchos*,<sup>42</sup> and later Louisiana decisions,<sup>43</sup> the subsequent execution of a testament purporting to leave the remaining assets of the testator "such as cash, bonds, savings certificates or otherwise," to designated legatees did not have the effect of revoking or otherwise affecting the status of United States bonds payable upon death. It concluded that, except when forced heirship or community rights are at issue, the designated beneficiary of the bonds is the absolute owner of them. In passing, the court theorized that, in view of the decisions of the United States Supreme Court, *Winsberg v. Winsberg*<sup>44</sup> might not have been decided the same way today, particularly in so far as it required the beneficiary to account for the full value of the bonds.

#### DONATIONS INTER VIVOS

##### *Animus Donandi*

In *T. L. James & Co. v. Montgomery*,<sup>45</sup> when the deceased visited his oldest son he had with him \$11,940 in cash in a brown paper bag, he rented a safety deposit box in the name of the son, and he placed the money in the box. None of this money was removed or used by the son until after the death of his father. In this suit, the widow of the deceased father, apparently invoking Louisiana Civil Code article 2404,<sup>46</sup>

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39. *Winsberg v. Winsberg*, 220 La. 398, 56 So. 2d 730 (1952).

40. 303 So. 2d 315 (La. App. 2d Cir. 1974).

41. 369 U.S. 663 (1962).

42. 376 U.S. 306 (1964).

43. *Succession of Guerre*, 197 So. 2d 738 (La. App. 4th Cir. 1967); *Succession of Videau*, 197 So. 2d 655 (La. App. 4th Cir. 1967).

44. 220 La. 398, 56 So. 2d 730 (1952).

45. 308 So. 2d 481 (La. App. 1st Cir. 1975), *cert. denied*, 310 So. 2d 856 (1975). For discussion of other issues in this case, see *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Trusts and Estate Planning*, 36 LA. L. REV. 446 (1976).

46. LA. CIV. CODE art. 2404: "But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of the husband, in

sought the return of the money by the son alleging that it represented the proceeds of the sale of community immovables sold by her husband. Considering the circumstances surrounding the transaction,<sup>47</sup> the court concluded that the father did not intend to make a manual gift of the money to the son.

A related but different question was presented in *Allen v. Allen*.<sup>48</sup> Mr. and Mrs. Allen opened a joint savings account in a California bank in their own names, ostensibly for their minor children. They retained the authority to make withdrawals at any time. The question presented was whether the funds on deposit were assets of the community formerly existing between the spouses, or whether they belonged to the children. The latter question, in turn, depended upon whether the parents had made a valid donation *inter vivos*. Relying on *Gibson v. Hearne*,<sup>49</sup> the Second Circuit Court of Appeal held that the deposit for the minors constituted a valid donation of the money under article 1539,<sup>50</sup> a good delivery having been effected through the deposit in the name of the parents as fiduciaries of the minors.<sup>51</sup> The fact that the parents retained control of the money on deposit at all times did not seem to bother the court. It observed that the "donees" were minors and that authority to withdraw had to vest in someone, namely in the parents in their fiduciary capacity.<sup>52</sup>

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support of her claim on one-half of the property, on her satisfactorily proving the fraud."

47. It appeared that the deceased and his wife were having marital difficulties, that his wife had filed suit against him for separation, that he had changed the beneficiary both in his retirement plan and in his life insurance contract in favor of the oldest son, and that three months after the suit for separation was filed, he committed suicide. 308 So. 2d at 483.

48. 301 So. 2d 417 (La. App. 2d Cir. 1974).

49. 164 La. 65, 113 So. 766 (1927).

50. LA. CIV. CODE art. 1539: "The manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality."

51. On the question as to the donors' *animus donandi* the court said: "The donor's intent to make irrevocable donations of the funds deposited into the accounts is manifest from the evidence. [The testimony] was that this was done for tax purposes, which necessarily presupposes an irrevocable gift to lawfully receive the tax advantage of separate incomes. The accounts were continuously carried on in the names of the fiduciaries for the named minor . . . no funds were ever withdrawn in the more than ten years since the initial donations were made." *Allen v. Allen*, 301 So. 2d 417, 419 (La. App. 2d Cir. 1974).

52. The fact still remains that the donor did not divest himself of the

*Suspensive Conditions*

A donation *inter vivos* is a gratuitous contract whereby the donor divests himself at present and irrevocably of the thing given and which becomes perfect only upon acceptance by the donee.<sup>53</sup> It should follow, therefore, that when a donor makes a donation *inter vivos* in the form provided by law and it has been duly accepted by the donee in precise terms, its validity cannot be attacked. The donor's motive for making it should be of no consequence, even if the donation is designed to deprive forced heirs of their legitime.<sup>54</sup>

Nevertheless, in *Succession of Simpson*,<sup>55</sup> in which the *de cuius* made a donation *inter vivos* of an immovable to some of her children, evidenced by an act passed before a notary and two witnesses and duly accepted by the donees in authentic form, and the donation and the acceptances of all donees had been duly recorded as required by law, the court declared the donation null because it found, from the evidence adduced,<sup>56</sup> that the donor had no intention to divest herself of the property until after her death. A gift during the life of the donor, the court said, not to take effect until after the death of the donor and not in the form of a testament is a donation *causa mortis* reprobated by our law.

With this conclusion the writer cannot agree. Donations *inter vivos* may be made subject to any conditions not other-

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thing given. See LA. CIV. CODE art. 1468. Cf. *Succession of Grubbs*, 170 So. 2d 256 (La. App. 2d Cir. 1964), cert. denied, 247 La. 409, 171 So. 2d 666 (1965) (the husband deposited \$10,000 in a savings account in the name of his wife, retaining the authority to withdraw, and it was held that the operation was not an effective donation of the money, but an attempted donation of an incorporeal movable, void for lack of form under LA. CIV. CODE arts. 1468, 1536). See also LA. CIV. CODE art. 1531, providing that where the donor has reserved to himself the liberty of disposing of any object comprised in the donation there is no donation.

53. LA. CIV. CODE arts. 1468, 1540.

54. Cf. LA. CIV. CODE art. 1492. In such a case the remedy is to seek a reduction of the donation if it impinges on the legitime of the forced heirs. LA. CIV. CODE art. 1502.

55. 311 So. 2d 67 (La. App. 2d Cir. 1975).

56. "A letter written by Mrs. Simpson addressed to all of her children clearly indicates that she executed the donations of the described immovable property . . . purely to punish Ben and Wayne Simpson for their lack of cooperation with her and the remainder of their brothers and sisters . . . The testimony and evidence were to the effect that Mrs. Simpson remained in possession—in fact, never gave up possession of her home in Arcadia." 311 So. 2d at 73.

wise reprobated by law.<sup>57</sup> They may even be made subject to the suspensive condition that they shall not take effect until after the death of the donor,<sup>58</sup> or subject to the resolutive condition that the donation shall be resolved if the donor survives the donee.<sup>59</sup> The prior death of the donor can thus be stipulated as either a suspensive or resolutive condition. It is true that in *Succession of Sinnott v. Hibernia National Bank*,<sup>60</sup> the court attempted to distinguish between donations *inter vivos*, donations *causa mortis* and donations *mortis causa*, stating that the donation *causa mortis* is a gift during the life of the donor in expectation of his death, not to take effect until after the death of the donor. But this is a distinction without a difference, the court itself recognizing that:

[T]here is nothing, however, in our law which prevents a donor from imposing upon his donation *inter vivos* the condition that it should not be effective until after the death . . . .<sup>61</sup>

Even assuming that the donor did not intend the donation to have any effect until after her death, and admitting that the testatrix retained possession of the immovable given during her life, it is submitted that the donation was a valid donation and that the donor had irrevocably divested herself of the thing given in that she was thereby precluded from disposing of the same property in favor of others.<sup>62</sup>

### Form

Except in donations of corporeal movables, every donation *inter vivos* must be passed before a notary and two witnesses.<sup>63</sup> In *Teachers' Retirement System v. Vial*,<sup>64</sup> the

57. LA. CIV. CODE art. 1527.

58. *Succession of Sinnott v. Hibernia Nat'l Bank*, 105 La. 705, 30 So. 233 (1901).

59. LA. CIV. CODE art. 1534: "The donor may stipulate the right of return of the objects given, either in case of his surviving the donee alone, or in case of his surviving the donee and his descendants. . . ."

60. 105 La. 705, 30 So. 233 (1901).

61. *Id.* at 713, 30 So. at 237.

62. Where the parent retains possession of the thing given to one or more of his children, the remedy provided is a suit to set aside the same as a simulation if it is proved that the donor actually had no intention to transfer the ownership of the thing given. LA. CIV. CODE art. 2480. *Cf.* LA. CIV. CODE art. 2444.

63. LA. CIV. CODE art. 1536.

64. 317 So. 2d 179 (La. 1975).

Louisiana Supreme Court upheld the constitutionality of the Louisiana Teachers' Retirement System. The court further recognized that the assignment of the death benefits under the system to a designated beneficiary in conformity with the statutory provisions by the mere completion of the appropriate forms constituted an additional method of making donations *inter vivos* without an authentic act.<sup>65</sup> Because it apparently was not re-urged on the application for writs, the Louisiana Supreme Court does not discuss the question argued before the court of appeal, which held, based on prior decisions,<sup>66</sup> that the death benefit payments under the system, like the avails of life insurance contracts, do not form part of the estate of the retiree, but are payable to the designated beneficiary under the terms of the assignment.<sup>67</sup>

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65. "To the extent that the statutes permit the assignment of death benefits by mere completion of a printed form, they clearly conflict with the Civil Code rules on donations. However, where two statutes are in conflict, the statute that is more specifically directed to the matter at issue must prevail as an exception to the statute that is more general in character. Hence, the statutory method by which . . . the death benefits are assigned is an exception to the Civil Code requirements of form ordinarily applicable to donations, and, as such, the assignment is not subject to attack as a donation invalid for want of form." *Id.* at 183. *Cf. Winsberg v. Winsberg*, 220 La. 398, 56 So. 2d 730 (1952) (the U.S. Savings Bond Plan establishes an additional method of making dispositions mortis causa, notwithstanding that it is not in the form prescribed by the Civil Code). *See also* Succession of Weis, 162 So. 2d 791 (La. App. 4th Cir. 1964).

66. Succession of Mendoza, 288 So. 2d 673 (La. App. 4th Cir. 1973); Succession of Rockvoan, 141 So. 2d 498 (La. App. 4th Cir. 1962).

67. Teachers' Retirement System v. Vial, 304 So. 2d 53 (La. App. 1st Cir. 1974). It is interesting to note that neither the court of appeal nor the supreme court discusses the fact that the retiree retains the power to change the beneficiary, and consequently never divests himself irrevocably of the thing given. *Cf. LA. CIV. CODE art. 1468.*