

# Donations - Testaments - Captation Under Article 1492

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## DONATIONS — TESTAMENTS — CAPTATION UNDER ARTICLE 1492

Civil Code article 1492 provides: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation."<sup>1</sup> While Louisiana courts have not been hesitant to apply the article, they have encountered difficulty in determining what proof is prohibited, particularly under the term "captation." This Note will undertake an analysis of "captation" in light of its origin and judicial application.

Under French law prior to the French Civil Code<sup>2</sup> a testamentary disposition could be annulled if it were shown that the testator was motivated by an unjust anger<sup>3</sup> or as a result of fraudulent artifices practiced by the legatee to induce the disposition.<sup>4</sup> The former disposition was stricken on the fiction that the anger left the testator bereft of reason,<sup>5</sup> while the latter fell under the notion that the testator's will was not completely free.<sup>6</sup> The fraudulent practices sufficient to annul a disposition involved either falsely inspiring in the testator hatred against his heirs, or generating affection toward the legatee based on false grounds.<sup>7</sup> These practices were termed captation.<sup>8</sup>

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1. LA. CIVIL CODE art. 1492 (1870).

2. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2877-2885 (1959); Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 508 (1934); Comment, 34 TUL. L. REV. 585, 590 (1960). See also *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894).

3. This was known as the action *ab irato*. Originally it was limited to forced heirs of the testator, but later it was extended to cover all collateral heirs. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2877 (1959); Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 508 (1934).

4. This broad phrase is used to describe what was termed fraudulent captation. For a discussion of the meaning of the term see text accompanying note 14 *infra*. The requirement that the captation be fraudulent to annul a disposition is taken from the Louisiana court's appreciation of the French law as expressed in *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476, 481 (1894). See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2884 (1959).

5. See Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 508 (1934). *But see* 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2877 (1959).

6. See Comment, 34 TUL. L. REV. 585, 591 (1960).

7. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2880, 2884 (1959). Under this notion, then, falsely informing the testator that his heirs were preparing to interdict him or were guilty of some crime would be cause for nullity if it were shown that the disposition was made under this inducement.

8. Captation has been broadly defined as "the act of one who succeeds in controlling the will of another, so as to become the master of it." *Zerega v. Percival*, 46 La. Ann. 590, 606, 15 So. 476, 480 (1894). The court gives a further defini-

The French soon discovered that a rule which allowed nullity of dispositions for fraudulent captation opened the courts to scores of litigants who, eager for a share of a testator's estate, would not hesitate to allege and attempt to prove all manner of scandal and foul play on the part of legatees.<sup>9</sup> To end these abuses, the Commission for the French Civil Code recommended an article to prohibit attacks on dispositions based on captation.<sup>10</sup> Yet, the framers of the French Civil Code, fearful lest the Code would be said to sanction fraud, deleted the provision, leaving their Code silent on the subject.<sup>11</sup> Nevertheless, the redactors of the Louisiana Code of 1808 included it,<sup>12</sup> and it now appears as article 1492.<sup>13</sup>

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tion which, either in spite of or because of its literary flair, may be helpful: "Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those amenities, by those caresses, by those ready services, by those officious little presents, usual among friends, and by all those methods which, ordinarily, render us agreeable to others, and enable us to secure their good will." *Id.* at 606, 15 So. at 480. The court was referring, of course, to captation generally and not to fraudulent captation. For a further exposition of the term see Succession of Jacobs, 109 La. 1012, 34 So. 59 (1903).

9. Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 509 (1934): "[The rule] . . . led to numerous scandalous litigations, in which family controversies, private relations, and marital difficulties of a confidential order were paraded for the benefit of the idly curious, the malicious, and the purveyor of material for blackmailing. Spouses who had masked their differences throughout a lifetime of discretion, found the veil of secrecy torn rudely aside. Reputations maintained honorably for long years were blasted without need or end. The courts discovered themselves an asylum for petty grievances and fancied wrongs; the law became a repository of scandal and salacity." See *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894).

10. The article, as quoted in Comment, 34 TUL. L. REV. 585 n.40 (1960), reads: "*La loi n'admet point la preuve que la disposition n'a été faite que par haine, colère, suggestion ou captation.*" A different version of the article is quoted in Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 509 (1934): "*La loi n'admet pas que la preuve la disposition n'a été faite que par haine, colère, suggestion ou captation.*" The French text of the article, as incorporated into La. Civil Code art. 18, p. 213 (1808) reads as follows: "*On n'admet point la preuve, que la disposition ait été faite par haine, colère, suggestion ou captation.*" 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 819 (1940).

The article also prohibited proof of dispositions having been made through hatred, anger, and suggestion. This Note is limited to a discussion of captation, though most of the material applies equally to the other terms.

The term "suggestion" has been given several meanings. The court in *Zerega v. Percival* indicates that the term is "often used as a synonym for 'captation,' but it is applied specially to those means of persuasion employed to alter the will of a testator, and to prompt him to make a disposition different from that which he had in view." *Zerega v. Percival*, 46 La. Ann. 590, 606, 15 So. 476, 481 (1894). See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2880-2884 (1959).

11. See Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 509 (1934). See also 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2883 n.21 (1959).

12. La. Civil Code art. 18, p. 212 (1808).

13. The article did not appear in the projet to the Code of 1825, though it was placed in that code as article 1479. See 3 LOUISIANA LEGAL ARCHIVES, COMPILED

The scope of the prohibition of article 1492 seems clear in light of its French source. The dispositions which were tainted under the jurisprudence were those in which the testator had an active desire to dispose to the particular legatee; the nullity was declared only because of a fault in his motive for so exercising his free will. Under article 1492 a testator's motivation for disposing and the acts which induced this motive are not to be impugned when there was an active desire by the testator to make the disposition. And, a fortiori, article 1492 has no application whenever the disposition is not one which the testator was desirous of making as, for example, a disposition made under duress or threats of violence.<sup>14</sup>

The early Louisiana decisions<sup>15</sup> seemed to recognize the scope of article 1492 set out above. However, later cases have made statements so broad that they in fact obscure these distinctions. Thus it has been stated that the article prohibits proof of duress,<sup>16</sup> force,<sup>17</sup> violence,<sup>18</sup> and all acts, conduct or motives of the testator.<sup>19</sup> Nevertheless these decisions contain statements entirely consistent with the clear import of the article,<sup>20</sup> and the

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EDITION OF THE CIVIL CODES OF LOUISIANA 819 (1940).

14. A good example of the allegations which would come under the scope of the article is found in *Succession of Price*, 172 La. 606, 134 So. 907 (1931). There the plaintiff sought annulment on the grounds that the legatee used his influence to prejudice the testator against his family and ingratiate himself in her affections for the purpose of securing the property for himself. The court held, properly, that proof of these allegations were prohibited under article 1492.

15. *E.g.*, *Texada v. Spence*, 166 La. 1020, 118 So. 120 (1928); *Succession of Jacobs*, 109 La. 1012, 34 So. 59 (1903); *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894). The decisions are collected in Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 512-16 (1934); Comment, 34 TUL. L. REV. 585, 590-97 (1960).

16. *E.g.*, *Cormier v. Myers*, 223 La. 259, 65 So. 2d 345 (1953); *Succession of Yeates*, 213 La. 541, 35 So. 2d 210 (1948).

17. *E.g.*, *Cormier v. Myers*, 223 La. 259, 65 So. 2d 345 (1953).

18. *E.g.*, *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894).

19. *E.g.*, *Succession of Schlumbrecht*, 138 La. 173, 70 So. 76 (1915). Other terminology has been used by the courts, particularly the common law phrase "undue influence." The common law surrounding that term is different from the civil law approach under article 1492 (see Comment, 34 TUL. L. REV. 585, 586 (1960)), but the court in *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894) seemed to indicate that an allegation of undue influence would be taken as an allegation of captation or suggestion and treated accordingly.

20. Most of the cases merely cite *Zerega*, quoting large portions of that opinion with approval. *E.g.*, *Succession of Franz*, 232 La. 310, 94 So. 2d 270 (1957); *Succession of Yeates*, 213 La. 541, 35 So. 2d 210 (1948); *Succession of Schlumbrecht*, 138 La. 173, 70 So. 76 (1915). The difficulty in ascribing weight to the statements made by the courts arises out of the fact that the evidence proffered is not shown in the opinions. Thus there appears to be no way of knowing whether the parties were indeed attempting to show duress or violence. The problem is more serious in the cases in which the court has stricken allegations of duress and violence on an exception of no cause of action. It would seem that such an exception could not be maintained under article 1492 if the petition alleged, for example, duress or violence.

inconsistent pronouncements may be mere indiscreet choices of words. It seems unthinkable that the court would not annul a disposition shown to be made under fear of harm or other duress.<sup>21</sup>

Dicta in certain cases indicate that there is an exception to article 1492 which admits proof of captation when the conduct has taken place at the time of the execution of the will.<sup>22</sup> The rule is derived from statements made in an early case, *Godden v. Executors of Burke*,<sup>23</sup> but analysis of that case reveals no basis for the exception. There the court was not speaking of testaments generally, but of the will made by authentic act. The evidence was proffered not to annul the disposition for captation, but for lack of compliance with the requirements of form<sup>24</sup> for a nuncupative will by public act.<sup>25</sup> Thus it appears that the court held merely that 1492 did not prohibit proof of matters tending to show that the formalities required by law for the execution of a nuncupative will by public act were not followed.<sup>26</sup> Further, the present rule does not appear to be consonant with article 1492. If captation means fraudulent inducements by someone to encourage the testator to make a certain disposition to him,<sup>27</sup> there seems no logical reason to predicate admissibility *vel non* on the time of occurrence of the acts. It is submitted that an inducement made at the execution of the will is no more grievous than one made prior thereto. Of course, as a practical matter captation at the execution of the will is more susceptible of linkage with the reason for the disposition. Nevertheless, article 1492 and the policy behind it do not suggest such a distinction,<sup>28</sup> and it is submitted that it is not justified.

21. For an exhaustive study of the jurisprudence, see Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 512-16 (1934); Comment, 34 TUL. L. REV. 585, 590-97 (1960).

22. *E.g.*, Succession of Franz, 232 La. 310, 94 So.2d 270 (1957); *Texada v. Spence*, 166 La. 1020, 118 So. 120 (1928); *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894). *But see* Succession of Hernandez, 138 La. 134, 70 So. 63 (1915).

23. 35 La. Ann. 160 (1883).

24. See LA. CIVIL CODE arts. 1574-1604 (1870).

25. The question was whether the will could be annulled because it was not dictated to the notary.

26. The court stated: "It is an error to suppose that (article 1492) . . . was designed to prevent the admission of proof to establish the circumstances which transpire at the making of an *authentic will, under charges tending to the nullity of the act*, for want of compliance with the exigencies of the law." (Emphasis added.) *Godden v. Executors of Burke*, 35 La. Ann. 160, 163 (1883).

27. See text accompanying note 14 *supra*.

28. However, if the courts have interpreted article 1492 to include violence, force, and fraud in the execution of a will, the rule may have some merit because of the fact that these actions usually occur at the making of the will.

Proof of captation has been admitted in recent Louisiana cases to show testamentary incapacity,<sup>29</sup> possibly on the theory that the susceptibility of the testator to such pressure tends to show incapacity.<sup>30</sup> Perhaps this rule can be logically distinguished from the prohibition of article 1492,<sup>31</sup> but it is submitted that its application completely undermines the purpose of this article, which is to protect against divulgence of scandalous matter and multitudinous attacks on testaments.<sup>32</sup> Proof of captation is prohibited not because captation is socially desirable but because, as a policy consideration, it was considered better to protect the innocent legatee from spurious attacks than to deprive the guilty one of his legacy. However, when the article can be circumvented by an allegation of testamentary incapacity, the doors to litigation have been opened once more.<sup>33</sup> However, it is certainly arguable that the policy behind ascertaining whether a will was made by a person of sound mind outweighs the possibility of thwarting the policy underlying article 1492.

In conclusion, it may be said that the decisions relating to article 1492 are not entirely satisfactory. The courts, never having been squarely presented with many of the issues, have allowed gratuitous pronouncements to confuse the actual meanings of the terms used in the article. It is submitted that when the court has an opportunity to consider the article again, it should distinguish sharply between fraudulent captation and duress, force, and violence; it should consider the present-at-the-execution exception in the light of this distinction; and it should re-evaluate admissibility to prove incapacity in light of policy considerations.

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29. Succession of Franz, 232 La. 310, 94 So. 2d 270 (1957); *Cormier v. Myers*, 223 La. 259, 65 So. 2d 345 (1953); Succession of Andrews, 153 So. 2d 470 (La. App. 4th Cir. 1963); Succession of Willis, 149 So. 2d 218 (La. App. 2d Cir. 1963).

30. At least this is the reason suggested by the author of Comment, 34 *TUL. L. REV.* 585 (1960).

31. Article 1492 prohibits proof of dispositions made through captation. In cases in which the evidence is offered to show incapacity, an attempt is made to prove that the will was made through insanity.

32. See text accompanying note 10 *supra*.

33. In Succession of Andrews, 153 So. 2d 470 (La. App. 4th Cir. 1963) the court admitted testimony to the effect that "testator gradually became subjected to her (the legatee) dominance and control and was brow-beaten or persuaded by her to leave more and more to her at the expense of his collaterals." *Id.* at 472. This would appear to be the very evidence prohibited by 1492 under the policy of prohibiting scandalous litigation.