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COMMENTS

DONATIONS À CAUSE DE MORT: A CIVILIAN SOLUTION TO CHARACTERIZATION OF GRATUITOUS TRANSFERS THAT ELUDE DONATIVE CLASSIFICATION UNDER THE LOUISIANA CIVIL CODE

Introduction

The Louisiana Civil Code, like its French counterpart, recognizes only two methods of making gratuitous dispositions, the donation inter vivos and the donation mortis causa.1 The Code defines a donation inter vivos (between living persons) as an act2 in prescribed form3 “by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it.”4 A donation mortis causa (in contemplation of death) is defined as an act which takes effect “when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable.”5 Additionally, a donation in contemplation of death is valid only if made by last will or testament.6 Notwithstanding the strictures of the Code’s donative scheme, Louisiana acknowledges the validity of gratuitous designations of beneficiaries in United States Savings Bonds,7 life insurance policies, annuity policies and pen-

2. Although defined as an “act” in article 1468, a donation inter vivos is essentially a gratuitous contract that is perfected by the acceptance of the donee. Once properly accepted, the contract is irrevocable, except for cause. See La. Civ. Code arts. 1559-69.
3. LA. CIV. CODE art. 1536 provides that the donation inter vivos of an immovable or an incorporeal shall be by act passed before a notary public and two witnesses “under penalty of nullity.” Article 1538 likewise subjects the donation inter vivos of a movable to the formal act requirement of article 1536. However, article 1539 excepts from the formality requirement the manual gift of a corporeal movable, provided it is accompanied by actual delivery. For a discussion of this exception, see Comment, Manual Donations of Obligations, 9 Tul. L. Rev. 602 (1935).
5. Id. art. 1469.
6. LA. CIV. CODE art. 1570 provides in pertinent part: “No disposition mortis causa shall henceforth be made otherwise than by last will or testament. Every other form is abrogated . . . .” Rules for the requisite formalities of testaments are found in Civil Code articles 1574-1604.
7. Louisiana is required to recognize the designation of a beneficiary in a United States Savings Bond as a valid method of gratuitous disposition by virtue of
sion benefit plans, even though such designations, unlike donations inter vivos, are not in solemn form and are almost always revocable, and unlike donations mortis causa, are not made by last will or testament.

Since these gratuitous designations of beneficiaries in donative plans and policies elude both the mode and form of donations authorized by the Code, they create difficulty with respect to Louisiana's laws on forced heirship. In order to acquire his légitime, a forced heir has an action for reduction of donations, whether inter vivos or mortis causa, that exceed the disposable portion of the decedent's estate. To ascertain what reduction is appropriate, an active mass of the succession is formed by adding to the assets the decedent owned at death all "property disposed of by donation inter vivos" (the process of aggregation). Therefore, in every potential case of infringement on the forced portion, it is essential to classify the allegedly excessive gratuitous disposition in order to determine if it is a "donation" properly subject to inclusion in the formulation of the active mass of the succession and to the action for reduction. In the instance of the gratuitous designation of a beneficiary in a life insurance policy, Louisiana courts, with eventual legislative approval, early branded the disposition sui generis, rather than a donation subject to the Code's process of aggregation and remedy of reduction, and uniformly the supremacy of the federal treasury regulations governing bonds as against state donative law. See note 63, infra.

8. One may, of course, designate an irrevocable beneficiary in a life insurance policy, annuity policy or pension benefit plan, provided that such designation is permissible under the respective policy or plan.

9. Provisions establishing the institution of forced heirship and regulating the calculation of the legitime and disposable portion are found in Civil Code articles 1493-95. See Seccession of Turnell, 32 La. Ann. 1218 (1880); Clarkson v. Clarkson, 13 La. Ann. 422 (1858); 11 C. Aubry et C. Rau, Droit Civil Francais § 679 (6th ed. Esmein 1954) in C. Lazarus, 3 Civil Law Translations § 679 (1969) [hereinafter cited as Aubry et Rau]; The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Successions and Donations, 29 La. L. Rev. 193, 194 (1969) (wherein legitime is defined as that part of a succession that is "essentially inalienable, for it is protected against gratuitous dispositions inter vivos or mortis causa, and more emphatically, because the gratuitous alienation thereof to the detriment of forced heirs is expressly prohibited. Thus, the right to the legitime has always been recognized as a right of succession . . . .").


11. Id.

12. Id. arts. 1502-05. Although perfected by acceptance, the donation inter vivos is nevertheless subject to the implied resolutory condition that, should it at the donor's death prove to exceed the disposable portion of the estate as then ascertained, it will be reduced to the extent of such excess.

13. Id. art. 1505.

have permitted this donative device to defeat the right of the forced heir to his légitime. But, with respect to gratuitous designations of beneficiaries in United States Savings Bonds, annuity policies and pension benefit plans, the judiciary has not been consistent in characterizing the dispositions, labelling bonds variously donations inter vivos or mortis causa, denoting benefit plans contractual designations or valid gratuitous dispositions, and electing not to classify annuity policies at all, although the beneficiaries of all such designations have been deemed accountable to forced heirs.

This comment intends to show that the aforesaid gratuitous designations of beneficiaries escape the Code's donative characterization, and instead should be classified as donations à cause de mort. This denomination would effectuate uniform treatment of the designations and provide meaningful protection to the fundamental, constitutionally guarded rights of forced heirs under Louisiana’s legal order.

**Historical Basis of the Donation à Cause de Mort**

**Roman Law**

At Roman law, there were various methods of making gratuitous dispositions, including that later referred to by the French as the donation


16. Succession of Guerre, 197 So. 2d 738 (La. App. 4th Cir.), *cert. denied*, 250 La. 933, 199 So. 2d 926, 250 La. 929, 199 So. 2d 925, 250 La. 928, 199 So. 2d 925 (1967); Succession of Videau, 197 So. 2d 655 (La. App. 4th Cir.), *cert. denied*, 250 La. 920, 199 So. 2d 922 (1967); Succession of Weis, 162 So. 2d 791 (La. App. 4th Cir. 1964).

17. Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730 (1952); Succession of Stothart, 303 So. 2d 315 (La. App. 2d Cir. 1974).


20. Succession of Rabouin, 201 La. 227, 9 So. 2d 529 (1942).

21. 3 MARCADÉ, *EXPLICATION DU CODE CIVIL* n° 436-37 (7th ed. 1873) [hereinafter cited as MARCADÉ]. Methods for gratuitous disposition of property at Roman law included the donation inter vivos, the direct institution of an heir (a testamentary disposition whereby the donor designated the person whom he desired as his universal representative), and the institution fideicommissary and the legacy fideicommissary, referred to generically as fideicommissa (testamentary dispositions whereby the donor designated a person, the institute, to receive the whole or part of his estate, subject to the charge of preservation for and remission to another, the substitute, of a specified portion of the estate). For a discussion of the
à cause de mort. The donation à cause de mort (in contemplation of death) was an imperfect donation inter vivos, essentially revocable at the donor's discretion, which became definitive only upon the death of the donor, such that, if the donee predeceased the donor, the donation was deemed never to have taken place. The condition of the donor's prior death could be suspensive or resolutory: if the former, the donee received nothing until the donor died; but if the latter, the donee took the object of the donation subject to its return if the condition failed to occur. A classic example of the donation à cause de mort is found in Marcadé's illustration, "I give you these things now; but if I escape from the danger that threatens me, you will return them to me." Thus, the hallmark of the donation was actually the transferor's power to revoke the gift at will.

**French Law**

Because the revocability tenet of the donation à cause de mort was generally contrary to custom, an attempt was made in France in 1731 to regulate its use through legislative requirement that the donation be in the
form authorized for testaments. However, since this requirement affected only the form of the transfer, the donation continued to exist substantively intact in regions of France where it had long been used.

The Code Napoléon of 1804 purported to uniformly abolish the donation à cause de mort as a mode of gratuitous disposition in France. Article 893 of the Code provided that only two kinds of donations, inter vivos and testamentary, were authorized; article 944 expressly prohibited donations made on conditions solely within the donor’s discretion. The rationale of these provisions was to discourage donations of property that otherwise would remain in the family for descent and distribution by requiring for their validity permanent dispossession of the objects of the donations.

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27. The Parlement of Paris, in a decision of February 3, 1713, had held that testamentary dispositions of property were void if not in the form required for testaments. 3 PLANIOL, supra note 22, at § 2521. Article 3 of the Ordinance of 1731 codified the decision as follows (in pertinent part): “All donations à cause de mort . . . shall henceforth have no effect, even in the regions where they are expressly authorized by law or by custom, unless they are made in the same form provided for testaments or codicils, so that in the future there shall only be two forms of disposing of property, one of which is the donation inter vivos, and the other testaments or codicils.” See 10 AUBRY ET RAU, supra note 9; 3 PLANIOL, supra note 22, at § 2521.

28. 10 AUBRY ET RAU, supra note 9, at § 645 n.1.

29. See the text accompanying notes 36 & 37, infra.

30. See 10 AUBRY ET RAU, supra note 9, at § 645 n.1. As with Civil Code articles 1468 and 1469, form is of the essence for the validity of donations inter vivos and testamentary under their source provisions, articles 894 and 895, respectively, of the Code Napoléon. See 3 MARCADE, supra note 21, at § 437. 3 PLANIOL, supra note 22, at §§ 2510 & 2523 (proper form of donations inter vivos); id. at §§ 2515 & 2681 (proper form of donation mortis causa).

31. See 10 AUBRY ET RAU, supra note 9, at § 645; 3 PLANIOL, supra note 22, at § 2522. In thus prohibiting all donations made on conditions solely within the donor’s will, the Code Napoléon, perhaps anomalously, treats donations generally more rigorously than obligations, notwithstanding the former’s essence of beneficence. For although a contractual obligation is essentially irrevocable, inasmuch as one party thereto cannot dissolve the contract unilaterally, and although it is usually considered null if contracted under a condition dependent solely upon the obligor’s will [art. 117 (L.A. CIV. CODE art. 2034)], yet, if the parties to a contractual obligation nevertheless stipulate that the contract depends upon the will of the obligor “to do or not to do a certain act,” [art. 1175 (L.A. CIV. CODE art. 2035)] or upon the will of the obligee “for its duration” [art. 1176 (L.A. CIV. CODE art. 2036)], the obligation contingent thereupon is deemed valid [arts. 1175-76 (L.A. CIV. CODE arts. 2035-36)]. Why the favorable treatment the Code affords contractual obligations was not extended to the donation, in view of its gratuitous nature, appears to defy theoretical explanation and is likely owing to custom. See 11 AUBRY ET RAU, supra note 9, at § 699 n.4-3.

32. 11 AUBRY ET RAU, supra note 9, at § 699 n.5.
French commentators noted that, even though articles 893 and 944 effectively rendered the donation à cause de mort nugatory as a mode of gratuitous transmission, only the tenet of revocability was in fact incompatible with donative principles of the Code.\textsuperscript{33} In instances when a donation was made irrevocably, the Code did not purport to prohibit the gift because of its contingency upon the donee’s surviving the donor;\textsuperscript{34} rather, article 943 expressly permitted donations to be subordinated to any condition not dependent solely on the donor’s will for execution. Thus, the condition in an inter vivos donation that the donee outlive the donor did not have the effect of resuscitating the prohibited donation à cause de mort, for the donor would no longer be at liberty to dispose of the subject property to the prejudice of the donee.\textsuperscript{35}

Despite the obvious rejection of the power of revocation in the inter vivos donation, the Code Napoléon nonetheless specifically authorized certain donations—those between spouses and those by marriage contract—that directly preserved the essential characteristic of the donation à cause de mort, its revocability.\textsuperscript{36} Consequently, to conclude that the donation à cause de mort was abolished completely in France is an apparent misconception.\textsuperscript{37}

\textit{Louisiana Law}

Such was the status of the donation à cause de mort at French law at the time of the adoption of the Louisiana Digest of 1808. The redactors of

\textsuperscript{33} 10 \textit{id.} at § 645; 3 \textit{Planiol, supra} note 22, at § 2522.

\textsuperscript{34} See note 33, \textit{supra}.

\textsuperscript{35} 3 \textit{Planiol, supra} note 22, at §§ 2604-08. \textit{See 11 Aubry et Rau, supra} note 9, at § 699 n.3, wherein it is further suggested that the occurrence of the condition of the donor’s prior demise would have a retroactive effect to the time of the gratuitous disposition that would nullify any interim acts of the donor prejudicing the right of the donee to the object of the donation.

\textsuperscript{36} \textit{See 10 Aubry et Rau, supra} note 9, at § 645; 3 \textit{Marcadé, supra} note 21, at § 437; 3 \textit{Planiol, supra} note 22, at § 2522. Code Napoléon articles 947 and 1083 (\textit{La. Civ. Code} arts. 1532 and 1736, respectively) provide that gratuitous disposition by marriage contract is expressly exempt from the observation of certain formalities generally mandated for the validity of donations inter vivos, including the requirement of Code Napoléon article 944 (\textit{La. Civ. Code} art. 1529) that such donations not be made on conditions the execution of which is dependent solely upon the will of the donor. Code Napoléon art. 1086 (former \textit{La. Civ. Code} art. 1749, \textit{repealed by} \textit{La. Acts} 1942, No. 187). \textit{Cf. La. R.S.} 9:2351-52 (1950) (providing that donations between spouses during marriage are revocable at the donor’s will).

\textsuperscript{37} \textit{See 10 Aubry et Rau, supra} note 9, at § 645 (listing of other valid gratuitous transmissions in which the donor retains revocatory power over the object of the donation, including life insurance contracts).
the Digest adopted provisions almost verbatim from articles 893, 943 and 944 of the Code Napoléon, and the Louisiana Civil Code of 1870 retained them virtually intact as articles 1467, 1527 and 1529, respectively. Hence, the Civil Code provides that gratuitous dispositions may be accomplished only by donations inter vivos or testamentary. A donation inter vivos requires a prescribed acceptance during the donor’s life and must divest the donor presently and irrevocably of the object of the donation in favor of the subject of his beneficence, whereas a testamentary disposition does not require acceptance during the donor’s life and is always revocable. Furthermore, an inter vivos donation with a condition the accomplishment of which is in the donor’s sole power is null, while one with a condition not so dependent and not reprobated by law is valid. And, although the validity of the donation between spouses generally is no longer recognized unless irrevocable, the validity of the donation by marriage contract to children to be born of the marriage is still acknowledged, notwithstanding its concomitant revocability. In 1901, the Louisiana Supreme Court, in Succession of Sinnott v. Hibernia National Bank, expressly dealt with the nature of the donation à cause de mort under Louisiana law. Sinnott involved a contest be-

38. L.A. CIV. CODE art. 1467. Although article 1469 refers to donations in contemplation of death as mortis causa, article 1570 expressly states that mortis causa dispositions may be made only by testaments.
40. Id. art. 1468. But cf. Quirk v. Smith, 124 La. 11, 49 So. 728 (1909) (holding that although a donation inter vivos cannot be revoked by unilateral act of the donor, nothing prevents the donee and donor together from annulling the act of donation and restoring themselves to their original position).
41. L.A. CIV. CODE art. 1469.
42. Id. arts. 1469, 1690-96.
43. Id. art. 1529.
44. Id. art. 1527.
45. Id. art. 1749, repealed by La. Acts 1942, No. 187. Cf. L.A. R.S. 9:2351-52 (1950) (providing that where the donation between spouses is made by notarial act, the donor spouse “may reserve the right of revocation by express stipulation therein”).
46. L.A. CIV. CODE arts. 1734-35.
47. Id. arts. 1532, 1736.
49. The following five appeal court decisions have acknowledged the prohibition against the donation à cause de mort, citing for authority Sinnott: Succession of Simpson, 311 So. 2d 67 (La. App. 2d Cir.), cert. denied, 313 So. 2d 839 (1975) (citing Delaune and Crain, infra this note); Crain v. Crain, 175 So. 2d 665 (La. App. 1st Cir. 1965); Succession of Delaune, 138 So. 2d 41 (La. App. 1st Cir. 1962);
between a testamentary executrix and the alleged donee of inter vivos gifts made by the decedent. During her life, Mrs. Sinnott had given to Mrs. Langtry several shares of stock,\(^5\) stipulating, "They are yours. At least, after my death they are yours,"\(^51\) and "I want you to keep them after I am dead."\(^52\) Against Mrs. Langtry's claim of ownership of the stock via donation, the executrix argued that, because the stock in fact belonged to Mrs. Sinnott during her lifetime and could belong to Mrs. Langtry only at the donor's death, the transaction was a prohibited donation à cause de mort and hence null. After a vain attempt to distinguish between the donation inter vivos, the donation mortis causa and the donation causa mortis of the common law,\(^53\) the court observed:

There is nothing . . . 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, as was perhaps done in the present case. . . .\(^54\)

However, following this completely accurate observation, the court inexplicably concluded:

In order to have been a manual gift inter vivos, it was essentially necessary that the donor should have "devested [sic] herself at once and irrevocably of the thing given, in favor of the donee who accepted it." The moment the effect of the donation was to be postponed to the death of the donor, it became an unauthorized donation causa mortis.\(^55\)

In so holding, the court was patently in error, for the proscription of the donation à cause de mort was due to its revocability at the donor's will, not to its resolubility upon the death of the donee prior to that of the


50. Mrs. Sinnott also had given Mrs. Langtry some furniture under the same stipulation; however, the validity of the donation of the furniture was not at issue on appeal. See note 60, infra.

51. 105 La. at 708, 30 So. at 234 (1901).
52. Id. at 709-10, 30 So. at 235.
53. The donation causa mortis of the common law is directly traceable to the Roman donation à cause de mort. It is similarly inter vivos in nature, and made in contemplation of death. Thus, the court's distinction is inaccurate. See E. Clark, L. Lusky & A. Murphy, Gratuitous Transfers 393-97 (2d ed. 1977); M. Kaser, Roman Private Law 327-28 (6th ed. R. Dannenbring transl. 1968); The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Successions and Donations, 36 La. L. Rev. 362, 373 (1976).
54. 105 La. at 713-14, 30 So. at 237.
55. Id. at 716, 30 So. at 238.
As the court initially admitted, a donation subject to the suspenseful condition of the donor's demise, a contingency neither contra bonos mores nor within the donor's will, is clearly valid in Louisiana. Likewise, the donor's prior death can be stipulated as a valid resolutory condition. Arguably, the validity of a donation à cause de mort should not have been at issue in Sinnott because the donation inter vivos of the subject stock was invalid for another reason. It was not in the authentic form prescribed for donation of incorporeal movables, and this should have foreclosed inquiry into the donor's retention of revocatory powers over the donation. Therefore, the court's conclusion could be characterized as pure, and moreover erroneous, dictum.

If the Sinnott language is viewed as dictum, no Louisiana case has ever expressly voided a donation for being a genuinely prohibited donation à cause de mort. Moreover, in view of the Civil Code's express authori-

56. See the text at notes 25, 26, & 33-35, supra.
57. LA. CIv. CODE art. 1527.
58. Articles 1534 and 1535 expressly allow the donor to stipulate for the right of return of the gift, should he survive either the donee or the donee's descendants. The effect of the return is a cancellation of all alienations of the property made by the donee or his descendants. See 3 PLANIOL, supra note 22, at §§ 2615-27A (on contractual reversion, wherein he states the right is not contrary to the rule "donner et retenir ne vaut" because it succinctly expresses the intent of the donor who wishes to make a personal gift, but does not desire that it pass to strangers after the donee's death).
60. As to the alleged gift of furniture (not at issue on appeal), corporeal movables may be given validly by mere delivery (LA. CIv. CODE art. 1539); thus, provided delivery was accomplished, the donation of the furniture should have been upheld notwithstanding the stipulation that the gift was to be ineffective until the donor's death. Mrs. Sinnott clearly divested herself presently and irrevocably of the furniture at the time she made the donation because her power thenceforth to dispose adversely of the property was irrevocably lost. Cf. Matulevitch v. American Ry. Express Co., 6 Orl. App. 106 (La. App. 1923) (citing Sinnott as authority for the proposition that a manual inter vivos gift of a corporeal movable, a diamond ring, was unenforceable as a donation à cause de mort absent delivery before the donor's death).
61. However, appellate court decisions have voided donations, improperly labelling them donations causa mortis in the process. See, e.g., Succession of Simpson, 311 So. 2d 67 (La. App. 1st Cir.), cert. denied, 313 So. 2d 839 (1975) (donation inter vivos of immovable property by authentic act from parent to children held, in disregard of Civil Code article 1536, a prohibited donation causa mortis because of extrinsic evidence that the donor did not intend to divest herself
zation of certain revocable donations and judicial recognition of revocable gratuitous designations of beneficiaries in various plans and policies, the seed of the donation à cause de mort would seem firmly planted in Louisiana's legal system.

**Revocable Gratuitous Designations of Beneficiaries Recognized in Louisiana**

**United States Savings Bonds**

Louisiana acknowledges that the federal treasury regulations governing United States Savings Bonds superimpose on state law methods for disposing of property gratuitously in addition to the stricti juris forms for donations outlined in the Code. This acknowledgement includes state recognition that proceeds of savings bonds belong to the designated co-


62. See the text and notes 45-47, supra.


The pertinent federal treasury regulations governing United States Savings Bonds include: 31 C.F.R. § 315.7 (1973) (establishing three permissible bond forms: sole ownership, co-ownership ("X or Y") or beneficiary ("X payable on death to Y"); § 315.20 (1973) (providing that no judicial determination will be recognized that impairs the survivorship rights established on behalf of co-owners or beneficiaries); § 315.60 (1973) (providing that during the lives of co-owners of co-ownership bond, bond will be paid to either upon separate request, and upon such payment, the other shall cease to have any interest in the bond); § 315.61 (1973) (providing that when one co-owner dies before the co-ownership bond is redeemed, the surviving co-owner becomes absolute owner); and § 315.66 (1973) (providing that beneficiary bonds, though payable to the owner during his lifetime, become the absolute property of the beneficiary at the owner's death).

64. The leading Louisiana case, Winsberg v. Winsberg, 220 La. 398, 404; 56 So. 2d 730, 731 (1952), noted: "[W]e are confronted with the fact that the U.S. Savings bond plan establishes an additional method of disposing of property ... superimposed by Federal law and which is to be considered effective notwithstanding that it is not in the form prescribed by our Code." *See also* Succession of Gladney, 223 La. 949, 67 So. 2d 547 (1953); Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 (1953); Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947); Succession of Land, 212 La. 103, 31 So. 2d 609 (1947); Succession of Stothart, 303 So. 2d 315 (La. App. 2d Cir. 1974); Succession of Guerre, 197 So. 2d 738 (La. App. 4th Cir.), *cert. denied,*
owner or payable-on-death beneficiary of a bond in full ownership with
the right to immediate possession by virtue of the bond agreement.\textsuperscript{65} Even
though Louisiana is powerless to alter the named payee of a savings
bond,\textsuperscript{66} the jurisprudence is settled that donations of bonds, whether in co-
ownership or payable-on-death beneficiary form, are subject to the state-
protected right of the forced heir to his \textit{litime}.\textsuperscript{67} The rationale is that the

\textsuperscript{65} Decisions so holding as to the payable-on-death beneficiary bond are:
Winsberg \textit{v.} Winsberg, 220 La. 398, 56 So. 2d 730 (1952); Succession of Stothart,
303 So. 2d 315 (La. App. 2d Cir. 1974); Succession of Mulqueeny, 172 So. 2d 326
(La. App. 4th Cir.), \textit{aff'd in part, rev'd in part}, 248 La. 659, 181 So. 2d 384 (1965);
Succession of Mulqueeny, 156 So. 2d 317 (La. App. 4th Cir.), \textit{cert. denied}, 245 La.
92, 93-94, 157 So. 2d 234 (1963). Decisions so holding as to the designated co-owner
bond are: Succession of Gladney, 223 La. 949, 67 So. 2d 547 (1953); Slater \textit{v.}
Culpepper, 222 La. 962, 64 So. 2d 234 (1953); Succession of Geagen, 212 La. 574, 33
So. 2d 118 (1947); Succession of Land, 212 La. 103, 31 So. 2d 609 (1947); Succession
of Guerre, 197 So. 2d 738 (La. App. 4th Cir.), \textit{cert. denied}, 250 La. 933, 199 So. 2d
926, 250 La. 929, 199 So. 2d 925, 250 La. 928, 199 So. 2d 925 (1967); Succession of
Videau, 197 So. 2d 655 (La. App. 4th Cir.), \textit{cert. denied}, 250 La. 920, 199 So. 2d 922
(1967); Succession of Weis, 162 So. 2d 791 (La. App. 4th Cir. 1964).

\textsuperscript{66} See note 65, \textit{supra}.

\textsuperscript{67} See generally Comment, \textit{Problems in Classification of Particular Property
\textit{cited as Problems in Classification}]. In the leading case of \textit{Winsberg v. Winsberg},
220 La. 398, 56 So. 2d 730 (1952), the Louisiana Supreme Court acknowledged
savings bonds of the payable-on-death beneficiary type as an additional mode of
gratuitous property transmission mortis causa. The court further posited, however,
that the federal treasury bond regulations were designed to facilitate the federal
government and not “to interfere with the enforcement of the laws of descent and
distribution of the various States,” (\textit{id. at 405}, 56 So. 2d at 732) and concluded that
all state substantive provisions regarding testaments, other than those regarding
form, should be applied in determining property rights and liabilities. The court then
held, in accordance with article 1705, which provides that “a testament is revoked by
the posterior \textit{[anterior?] the birth of a legitimate child to the testator,” that the birth
of a posthumous child after issuance of bonds revoked the donation mortis causa of
bonds, noting, “[a]nd while Louisiana may not require that the bonds be paid to
anyone other than the named beneficiary, it undoubtedly has the power which was
reserved to it by the Tenth Amendment of the Federal Constitution, to decree that
the beneficiary or payee is indebted to the estate of the former owner, or his heir, in
an amount equal to the value of the gift.” \textit{Id. at 407}, 56 So. 2d at 732.

The \textit{Winsberg} view appeared fairly unchallenged until 1962, when the United
States Supreme Court rendered the decision in \textit{Free v. Bland}, 369 U.S. 663 (1962), a
case arising under the community property laws of Texas. There, the court an-
nounced that the federal regulations governing ownership and payment of bonds were not intended merely to provide a convenient method of bond payment, but also conferred the right of ownership on the payee of the bond. A Texas law that required the surviving co-owner spouse of a co-ownership bond to account to the deceased spouse's estate by way of reimbursement was held to be an interference with the power of the federal government to borrow money that must yield under the weight of the Supremacy Clause—a result strongly suggesting that the remedy (full reimbursement) permitted in *Winsberg*, if not the entire thrust of the decision, might have been constitutionally awry. See Note, 37 Tul. L. Rev. 116, 118 (1962). However, the court in *Free* did emphasize that "the [bond] regulations are not intended to be a shield for fraud and relief would be available in a case where the circumstances [of the bond designation manifest] fraud or a breach of trust tantamount thereto . . . ." 369 U.S. at 670 (1962). See *Note, The Effect of Survivorship Provisions in United States Savings Bonds Upon Louisiana Inheritance and Community Property Laws*, 11 Loy. L. Rev. 311 (1963), for early predictions on the scope of the fraud exception.

Then, in 1963, in *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964), a case arising under the community property laws of Washington, in which the decedent's husband purchased a payable-on-death beneficiary bond with community funds and named his brother as payee, the Supreme Court held that the husband had committed an act in fraud of his wife's community interest and that the wife had a one-half interest in the proceeds. "It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington law and which would not be transferable by her husband but for the survivorship provisions of the federal bonds." *Yiatchos* at 309. See *Problems in Classification*, supra, at 118-19 (suggests that the fraud exception of *Free* as interpreted by *Yiatchos* may have meant that the use of savings bonds to deprive anyone of a property interest under state law was fraud).

Resolution of the effect of *Free* and *Yiatchos* on Louisiana's forced heirship laws was not decided until 1968 in one of a pair of related Louisiana court of appeal cases, *Succession of Guerre*, 197 So. 2d 738 (La. App. 4th Cir.), cert. denied, 250 La. 933, 199 So. 2d 926, 250 La. 929, 199 So. 2d 925, 250 La. 928, 199 So. 2d 925 (1967). *See also Succession of Videau*, 197 So. 2d 655 (La. App. 4th Cir.), cert. denied, 250 La. 920, 199 So. 2d 922 (1967). After analyzing the two federal decisions, the court concluded, "[w]e read *Yiatchos as* interpreting *Free v. Bland* to mean that co-ownership or survivor bonds are not intended under Federal Treasury Regulations to be used as a device to circumvent the established laws of the states enacted for the protection of the rights of its citizens and thus deprive them of property rights guaranteed by state laws." 197 So. 2d at 743. The court then specifically held: "[t]herefore, we construe any attempt by a parent to breach this right by the means of converting his estate into United States Savings Bonds, payable to himself or a stranger or to a stranger upon his death, as a circumvention of the laws of Louisiana enacted for the protection of forced heirs from unwarranted disinherison. This is a wrong no less grievous than a breach of fiduciary trust in management of community property to the prejudice of his wife's vested property right." *Id.* at 744. The *Guerre* court then held that the forced heirs involved had an action for reduction of the subject bonds in order to acquire their légitime.

Thus, after *Guerre*, Louisiana jurisprudence apparently views all bond beneficiary designations as subject to the claims of forced heirs. Recently, though, in *Succession of Stoathart*, 303 So. 2d 315 (La. App. 2d Cir. 1974), the court, while
federal bond regulations were promulgated primarily for fiscal purposes and were not intended to afford a device for circumventing property rights guaranteed by state law.68 Furthermore, regardless of the type of bond involved, the right of the forced heir to his légitime is deemed to include the correlative rights to add fictitiously the value of all bond designations to the active mass of the succession and to reduce any excessive bond donation impinging on the forced portion.

Because the Code's action for reduction is limited literally to inter vivos and mortis causa donations, and the process of aggregation fictitiously returns only inter vivos donations to the active mass,69 the courts apparently deemed it essential to assimilate gratuitous bond designations to donations inter vivos and mortis causa in order to invoke the measures that protect the rights of forced heirs. Regarding the savings bond designation of the payable-on-death beneficiary type, the Louisiana Supreme Court, in 1952, in *Winsberg v. Winsberg*,70 decided that such a designation constitutes an additional method of donation mortis causa, since, by its nature, the designation is made in contemplation of death;71 and yet, acknowledging the validity of the above proposition, refused to subject the bond involved to another substantive provision of state law on testamentary dispositions, specifically rejecting application to the bond of the Louisiana rule that a legacy is revoked by a revocation contained in a subsequent will. The court further noted that, in light of the limited fraud exception recognized in *Yiatchos* and *Guerre*, *Winsberg* may be too far afield in subjecting bonds to Louisiana substantive law and especially in requiring the payee to account for the full value of the bond rather than just the forced portion. However, there lingers a real factual question in *Stothart* as to whether the testator intended a revocation at all; perhaps the court's criticism of *Winsberg* is merely dictum. See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Successions and Donations*, 36 La. L. Rev. 362, 369-79 (1976).

68. *Winsberg v. Winsberg*, 220 La. 398, 404-05, 56 So. 2d 730, 732 (1952): "Indeed, it seems manifest that the regulations of the Treasury Department for the payment of savings bonds . . . were designed solely to facilitate the Government, by providing a simple method for the liquidation of these obligations, so that it would not be subjected to the inconvenience and delays attendant to the settlement of conflicting or disputed claims." *Succession of Guerre*, 197 So. 2d 738 (La. App. 4th Cir.), cert. denied, 250 La. 933, 199 So. 2d 926, 250 La. 929, 199 So. 2d 925, 250 La. 928, 199 So. 2d 925 (1967): "A superimposition upon the laws of Louisiana of such a device as an additional method of disherison [sic] of forced heirs could not conceivably serve any federal interest, such as we have conceded in respect to the superimposition upon our law of that device as an additional method of transmitting or disposing of property." See also *Succession of Gladney*, 223 La. 949, 954-58, 67 So. 2d 547, 549-50 (1953); *Problems in Classification, supra* note 67, at 119 n.49.

69. See notes 11-13, supra.

70. 220 La. 398, 56 So. 2d 730 (1952).

71. *Id.* at 402-03, 56 So. 2d at 731: "That the designation by the purchaser of
the court held a bond payee indebted to a forced heir for the full value of a payable-on-death bond,\textsuperscript{72} rather than merely for the amount by which the bond exceeded the disposable portion, which would have been the proper remedy for an excessive mortis causa donation. Then, in 1965, the court, while stating that the proceeds of a payable-on-death beneficiary bond did not form part of a decedent’s estate,\textsuperscript{73} affirmed an appellate court case\textsuperscript{74} that ordered the addition of the value of such bonds to the active mass of the subject succession\textsuperscript{75} even though only donations inter vivos are inculcable in this calculation under the Code’s donative scheme.

With regard to the savings bond designation of the co-ownership type, the supreme court, in a 1947 decision,\textsuperscript{76} without characterizing the subject co-ownership bond designations as donations inter vivos or mortis causa, nevertheless reserved to a forced heir the right “to claim his full legitime and to claim collations because of these gifts.”\textsuperscript{77} In a later case,\textsuperscript{78} the court again declined to categorize the co-ownership bond, although it noted that the bond designation is decidedly not a donation mortis causa.

Federal Savings Bonds of a beneficiary, to whom bonds become payable on the purchaser’s death, constitutes a donation mortis causa, as defined by Article 1469 of the Civil Code, is no longer an open question in this State. It was held in Succession of Raborn . . . that such bonds were gifts ‘made in contemplation of death’ . . .”\textsuperscript{79} See also Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947) (court reasoned that a husband’s purchase with community funds of payable-on-death beneficiary bonds in favor of a stranger entitled his wife to an amount equivalent to one-half the value of the bonds at the husband’s death, for to hold otherwise would constitute a disposition mortis causa of the wife’s community interest); The Work of the Louisiana Supreme Court for the 1951-1952 Term—Successions and Donations, 13 LA. L. REV. 272, 275 (1953).

\textsuperscript{72} 220 La. at 407, 56 So. 2d at 730 (1952).

\textsuperscript{73} But see United States v. Chandler, 410 U.S. 257 (1973), holding that the value of bonds given to a co-owner must be included in the donor’s gross estate for tax purposes where the bonds have not been properly reissued. The decision acknowledges that there is not a valid donation until the acceptance necessary to perfect the gift—reissuance—occurs. Until reissuance, the co-ownership bond remains at the co-owner-donor’s disposal. See Note, 8 U. RICH. L. REV. 99 (1973).


\textsuperscript{75} 248 La. at 664, 181 So. 2d at 386: “The United States Savings bonds mentioned above were payable on death . . ., but, although they are to be fictitiously added to the estate to calculate the legitime, they are not otherwise part of the estate.”

\textsuperscript{76} Succession of Land, 212 La. 103, 31 So. 2d 609 (1947).

\textsuperscript{77} Id. at 133, 31 So. 2d at 619.

\textsuperscript{78} Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 (1953).
because it neither specifically purports to nor evinces an intent to effectuate a gift in contemplation of death. Then, in 1964, an appellate court for the first time expressly denominated the designation of a beneficiary in a co-ownership bond as a mode of donation inter vivos superimposed by federal law, and further noted, in dictum, that the value of the co-ownership bond is includible in the calculation of a forced heir’s legitime, but without detailing a method of inclusion. Finally, in 1968, the Louisiana Supreme Court denied review in a pair of related appellate court decisions that both recognized designations in co-ownership bonds as donations inter vivos and also acknowledged the rights of the respective forced heirs to proceed against the payees of the subject bonds "in the same manner as if an equal amount of money had been given to them through the medium of donation inter vivos." 

Thus, notwithstanding the difference in judicial characterization of the co-ownership and the payable-on-death beneficiary bonds, the rights of the alternate co-owner and those of the beneficiary-on-death to receive bond proceeds are limited by the obligation to account to a forced heir for invasion of the forced portion. Succinctly, the courts include in the formulation of the active mass of the succession and subject to the action for reduction gratuitous bond designations regardless of the type of bond involved.

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79. *Id.* at 970, 64 So. 2d at 737 (a community property case recognizing the surviving spouse as owner of a co-ownership bond in the name of the husband or wife, but as indebted to deceased spouse’s estate for one-half the value of the bonds).

80. Succession of Weis, 162 So. 2d 791 (La. App. 4th Cir. 1964).

81. *Id.* at 793-94, citing as authority Succession of Land, 212 La. 103, 31 So. 2d 609 (1947). See the text at notes 76-77, *supra*.

82. 162 So. 2d at 794: "It is to what extent these bonds figure in calculating the inheritance tax or a legitime or an interference with the rights of a child born subsequently to the naming of a payee on death that the state law governs." See also *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Successions and Donations*, 25 LA. L. REV. 291, 315 (1965); Wisdom & Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 Tul. L. REV. 119 (1952).

83. Succession of Guerre, 197 So. 2d 738 (La. App. 4th Cir.), *cert. denied*, 250 La. 933, 199 So. 2d 926, 250 La. 929, 199 So. 2d 925, 250 La. 928, 199 So. 2d 925 (1967); Succession of Videau, 197 So. 2d 655 (La. App. 4th Cir.), *cert. denied*, 250 La. 920, 199 So. 2d 922 (1967).

84. 197 So. 2d 738, 745 (La. App. 4th Cir.), *cert. denied*, 250 La. 933, 199 So. 2d 926, 250 La. 929, 199 So. 2d 925, 250 La. 928, 199 So. 2d 925 (1967).

85. Logically, both types of bond designations should be subject to collation (La. Civ. Code arts. 1227-88) and to reduction in the inverse order in which they are made (*id.* art. 1507) in the manner of inter vivos donations, rather than on a pro rata basis (*id.* art. 1511), as would be the case for mortis causa dispositions.
Since the federal treasury regulations governing United States Savings Bonds were framed without reference to or regard for state donative classifications, there is no justification for the courts' wrenching codal donative concepts in order to accommodate a scheme of gratuitous transmission the Code does not envision. Characterization of a co-ownership bond designation as a donation inter vivos disregards that donation's crucial feature of irrevocability, since the purchaser of a co-ownership bond may alter the designated co-owner of the bond at his choosing. Additionally, the alternate co-owner of a co-ownership bond need not perfect his ownership thereof by the mode of acceptance prescribed for a donation inter vivos. Similarly, assuming *arguendo* that federal bond regulations superimpose on state law a method for gratuitous disposition "mortis causa," permitting the value of the payable-on-death beneficiary bond to be added with other assets to form the active mass of the succession disregards the Code's reservation of aggregation to the donation inter vivos alone and infuses the bond designation with an unauthorized dual personality.

Rather than to twist the Code's donative concepts in an effort to classify United States Savings Bonds, it would seem preferable to acknowledge that a bond designation constitutes a method of gratuitous transmission beyond the purview of the Code's donative scheme. Characterization as a donation *à cause de mort* would properly close the resulting classification hiatus. Foremost, it would correctly describe a fundamental element of savings bonds, the donor's right to change the beneficiary (revocability). Moreover, like both types of bond designations, the donation *à cause de mort* is a donation inter vivos in nature, while, like the payable-on-death beneficiary bond designation, it is made in contemplation of death and its effect is contingent on the death of the donor prior to that of the donee. Classification of a gratuitous bond designation as a donation *à cause de mort* would not immunize bond beneficiaries from accounting to forced heirs for invasion of the légitime because of both the inter vivos nature of the donation and the fundamental nature of forced heirship. Rather, under the suggested classification, the courts uniformly could safeguard the rights of forced heirs with respect to bond designations through use of the Code's mechanisms for regulation of inter vivos donations (aggregation and reduction) without resort to a strained interpretation of the *stricti juris* system of donative classification.

86. 31 C.F.R. § 315.60 (1973).
87. See the text and note 109, infra.
**Insurance Policies**

The Louisiana Civil Code was shaped virtually without reference to insurance, principally because the real growth of insurance law in the United States and on the continent occurred after the redaction of the Louisiana Digest of 1808 and the Louisiana Civil Code of 1825. In the absence of guiding legislation, courts early eschewed the attempt to apply the Code’s provisions governing donations to the gratuitous designation of a third party beneficiary of a life insurance policy, notwithstanding their ostensible common nature of beneficence. Rather, the courts classified the life insurance contract as *sui generis*, fully exempt from the Code’s donative regulations, both substantive and procedural, and governed by rules peculiar to itself. One such unique rule the judiciary formulated

88. See generally Nabors, *Civil Law Influences Upon the Law of Insurance in Louisiana*, 6 Tul. L. Rev. 369, 369-72 (1932). The Louisiana Digest of 1808 expressly provided that insurance law was “foreign from this code” (Digest, Book 3, Title 12, Article 1), probably in contemplation that a code of commerce would be drafted that would govern insurance law. *Id.* at 369. However, Nabors observed: “After the adoption of the Civil Code of 1825, which omitted the clause ‘foreign from this code,’” it was not possible to argue that the Civil Code according to its specific terms [arts. 1827, 3184, 3204] had no application to insurance.” *Id.* at 371. Articles 1827, 3184 and 3204 of the Code of 1825, each with passing reference to “insurance,” were continued as articles 1833, 3217 and 3237, respectively, in the Civil Code of 1870.

89. *Id.* at 369-70.


91. *Sizeler v. Sizeler*, 170 La. 128, 127 So. 388 (1930); *Mutual Life Ins. Co. v. Thomas*, 170 So. 2d 895, 896 (La. App. 4th Cir. 1965) (forced heirs denied proceeds of a group life insurance policy: “[It] has been horn book law in Louisiana for many years that the beneficiaries of an insurance policy prevail over all because insurance is sui generis and not subject to the codal restrictions relative to donations.”); *Ticker v. Metropolitan Life Ins. Co.*, 11 Orl. App. 55, 60 (La. App. 1917) (forced heirs denied proceeds of life insurance policy notwithstanding that ancestor left no other property besides the policy: “As we appreciate the jurisprudence of this state, a life insurance policy is a contract *sui generis* governed by rules peculiar to itself, the outgrowth of judicial precedent and not of legislation.”).

92. *T. L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1976); *Sizeler v. Sizeler*, 179 La. 128, 127 So. 388, 389 (1930) (“[T]he rules of our Civil Code relating to donations inter vivos or motis causa have no application to life insurance policies. . . .”); *Sherwood v. New York Life Ins. Co.*, 166 La. 829, 118 So. 35 (1928); *Succession of Rockvoan*, 141 So. 2d 438, 440 (La. App. 4th Cir. 1962) (court rejected second wife’s attack on proceeds payable to son of her husband’s first marriage on the ground that the designation of a beneficiary was a donation invalid because not evidenced by authentic act: “[S]ince the proceeds of life insurance...
was that the proceeds of a life insurance policy, if payable to a named beneficiary, inured to the beneficiary directly and did not form part of the decedent's estate. 93

The result of this jurisprudential treatment was that designation of a beneficiary in a life insurance policy could effectively defeat the right of the forced heir to his légitime, 94 as well as his ancillary rights to demand reduction of excessive donations, 95 aggregation of inter vivos donations 96 and collation. 97 Justification for this result was based upon the sui generis nature of life insurance and the proposition that, because life insurance proceeds did not become exigible during the insured's lifetime, they were not a part of his estate and therefore were not properly subject to claim by forced heirs. 98 Only if the policy was payable to the insured's estate did

form no part of the decedent's estate the rules of the Civil Code relating to donations inter vivos or mortis causa have no application as respects life insurance policies. . . ."; Ticker v. Metropolitan Life Ins. Co., 11 Orl. App. 55 (La. App. 1914).

93. T. L. James & Co. v. Montgomery, 332 So. 2d 834 (La. 1976); Sizeler v. Sizeler, 170 La. 128, 127 So. 388 (1930); Sherwood v. New York Life Ins. Co., 166 La. 829, 834, 118 So. 35, 37 (1928) ("It is well settled also that the proceeds of such policies form no part of the estate of the deceased and inure to the beneficiary directly and by the sole terms of the policy itself."); Succession of Hearing, 26 La. Ann. 326 (1874); Succession of Rockvoan, 141 So. 2d 438, 440 (La. App. 4th Cir. 1962) ("It is well established by the decisions of our Supreme Court that the proceeds or avails of life insurance, if payable to a named beneficiary and not to the estate or to the heirs . . . of the insured, belong to the beneficiary named"); Williams v. Equitable Life Assur. Soc., 57 So. 2d 600 (La. App. Orl. Cir. 1952); The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Successions and Donations, 27 LA. L. REV. 450 (1967); Note, 17 TUL. L. REV. 321, 322-23 (1942).

94. In New York Life Ins. Co. v. Neal, 114 La. 652, 38 So. 485 (1905), the insured designated his concubine as beneficiary; the designation was attacked by his forced heirs and, contrary to all earlier jurisprudence, the court held that the children were entitled to nine-tenths of the proceeds in accordance with article 1481. Neal was overruled in the landmark decision of Sizeler v. Sizeler, 170 La. 128, 127 So. 388 (1930), wherein a niece married her uncle in a state that allowed marriage between Jewish people within that degree of consanguinity; the two moved to Louisiana, where the husband later purchased a life insurance policy in which he named his wife beneficiary. After his death, his children from a former marriage sued for the proceeds thereof alleging that the marriage was null under Louisiana law because donations of movables to concubines are permissible only up to one-tenth of the estate. The court held that a life insurance policy is sui generis, not subject to the laws of donations inter vivos or mortis causa, and immune from claims by forced heirs.


96. See note 95, supra.

97. E.g., Vinson v. Vinson, 105 La. 30, 29 So. 701 (1901).

98. Succession of Rabouin, 201 La. 227, 9 So. 2d 529 (1942); Sizeler v. Sizeler,
the proceeds enter his succession and become amenable to claim by forced heirs.99

In 1940, the legislature enacted a statute that confirmed and codified the *sui generis* view of life insurance proceeds developed by the courts.100 Later, another statute was passed which expressly declared that the lawful beneficiary of a life insurance policy is entitled to the proceeds thereof without regard to claims by forced heirs.101

170 La. 128, 127 So. 388 (1930); Vinson v. Vinson, 105 La. 30, 29 So. 701 (1901). In *Vinson*, the tutrix of the insured’s child by a third marriage sued to compel three children by the first two marriages to collate the proceeds of a life insurance policy that decedent made payable to them. The court noted: “In our view, the perfect equality sought among the heirs is the equality which requires ordinarily that there shall be an equal division of the property among the heirs. This does not embrace the amount of the policy which never belonged to the one from whom the heirs inherit, and that was not, in the eye of the law, obtained from him, and therefore was not transmitted as a right to his estate to compel collation.” *Id.* at 33, 29 So. at 702. One writer criticized this rationale as follows: “The argument is obviously a technical one which was framed in the process of rationalizing to justify the decision. It ignores the fact that the right to the proceeds arose out of a contract made by the deceased.” Nabors, *supra* note 88, at 390. See also Daggett, *General Principles of Succession on Death in Civil Law*, 11 Tul. L. Rev. 399, 405 (1937); *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Successions and Donations*, 29 La. L. Rev. 450 (1967); Note, 17 Tul. L. Rev. 321, 322-33 (1942).


100. LA. R.S. 22:1521 (1950) (originally enacted as La. Acts 1940, No. 292, §§ 1, 2) provided:

“Donations inter vivos of life insurance policies, and the naming of beneficiaries therein, whether revocably or irrevocably, are not governed by the provisions of the Revised Civil Code of 1870 or any other laws of this state, relative to the form of donations inter vivos.

This Section does not effect a change in the laws of this state nor does it indicate that the laws relative to the form which donations inter vivos must take ever applied to donations inter vivos of life insurance policies or to the naming of beneficiaries therein.”

The second paragraph was amended by La. Acts 1968, No. 157, §§ 1 & 2, to read: “This section is remedial and retrospective. All donations inter vivos of life insurance policies made on or before July 31, 1968 are valid and effective, whether or not such donations were made in the form prescribed by the Civil Code or by any other laws of this state.” *See* Oppenheim, *The Donation Inter Vivos*, 43 Tul. L. Rev. 731, 738 (1969), explaining the amendment as follows: “In order to further assure that, for federal tax purposes, the insured may surrender the incidents of ownership and remove the proceeds of the policy from his estate, particularly in instances of interspousal donations, the relevant statutes have been amended to assure retroactive effect to all such donations.”

The courts were correct in the determination that proceeds of a life insurance policy defy the Code's donative classification. The supreme court long ago acknowledged the power of an insured to alter the beneficiary of his life insurance policy at will, if permissible under the policy, and recognized, as a corollary, that no beneficiary of a policy acquires any vested interest therein until the death of the insured. Thus, the insured's power of revocation negates characterization of a life insurance designation as a donation inter vivos. And, while the above characteristic tends favorably toward its classification as a testamentary disposition, an insurance policy lacks requisite testamentary form.

However, even though the life insurance beneficiary designation eludes the Code's donative classification, it is preferable to characterize it as a donation à cause de mort, rather than to apply the nondescript sui generis label. Denomination as a donation à cause de mort, which is in essence a revocable inter vivos donation made in contemplation of death, accurately characterizes the principal features of the life insurance designation—revocability and dependency on the donor's prior demise for lawful beneficiary . . . of a life insurance policy . . . shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured . . . and against the heirs and legatees of either such person, and such proceeds and avails shall be exempt from all liability for any debt of such beneficiary, payee, or assignee, or estate existing at the time the proceeds or avails are made available for his own use.”

103. See, e.g., Berry v. Franklin State Bank, 186 La. 623, 173 So. 126 (1937); Dorsett v. Thomas, 152 La. 60, 92 So. 734 (1922); Alba v. Provident Sav. Life Assur. Soc'y, 118 La. 1021, 43 So. 663 (1907). But see Catalano v. United States, 429 F.2d 1058 (5th Cir. 1968), in which the court, interpreting Louisiana law, concluded: “That a policy of insurance, issued at the instance of the husband, upon his own life, in favor of his wife, inures to her separate benefit from the date of its issuance, and that the interest so acquired by the wife is not then or thereafter affected by the fact that the premiums are paid by the husband from the funds of the community.” Id. at 1060-61. The case is criticized in Comment, The Confusion of Catalano: Transfers of Ownership Versus Irrevocable Beneficiary Designation, 16 Loy. L. Rev. 415 (1970), which contends that the case misconstrued Louisiana law and that an insured has the privilege of reserving his right to change the beneficiary of his life insurance policy because the right of a beneficiary to death proceeds is only an expectancy which can be divested at any time.

104. There is, of course, no superimposition of form as is true in the instance of United States Savings Bonds.

105. Contra, Comment, Interspousal Donations of Life Insurance Policies in Louisiana, 40 Tul. L. Rev. 131, 148-49 (1965), wherein the author submits that judicial treatment of life insurance as sui generis has infused the term with a sufficient degree of meaning so as to allow dispositions of insurance problems without resort to Code provisions on donations.
efficacy. Instead, by labelling the life insurance designation *sui generis*, the courts ipso facto foreclosed application of all donative regulations, including measures that protect the interests of forced heirs. One writer had early admonished:

The [theory] that the articles of the Civil Code on donations do not apply to insurance may tend to lead to an incorrect result because it . . . obscures a proper analysis of the problem. The rules of the Civil Code on donations should not be considered as binding in insurance cases because they were framed without specific reference to insurance. . . . The decisions seem to indicate that the Louisiana courts do not feel free to apply some of the rules on donations and to deny the application of the others. The courts sometimes seem to have gone further than admitting that they are not bound by the donations articles and have concluded that they cannot reach a result which a Code article sanctions. 106

Perhaps had the courts instead characterized the life insurance designation as a donation *à cause de mort*, which categorization inherently emphasizes the inter vivos donative nature of the contract rather than its non-Code origin, there would not have been automatic rejection of the Code’s donative protectionist measures. An analytical quandary results from the attempt to appreciate the courts’ and legislature’s determination that the life insurance designation somehow involves questions of public policy different from those involved in inter vivos and mortis causa donations as regards the rights of forced heirs.

Recently, 107 in reaffirming judicial decisions that uphold circumvention of the rights of forced heirs by means of life insurance designation, the Louisiana Supreme Court concluded, “The jurisprudential rule has now been incorporated in our statutory law . . . . It can no longer be changed by court decision, even if we were inclined to do so.” 108 In view of the constitutional protection afforded forced heirs in Louisiana, 109 the court’s observation appears incorrect. It is true that, because the applicable provisions of both the 1921 and 1974 Louisiana Constitutions state that “no law shall be passed abolishing forced heirship,” constitutional attack

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106. Nabors, supra note 88, at 402-03.
108. Id. at 847.
on the life insurance statutes first would require that the court afford the provisions an other than strictly literal interpretation. At the least, this would appear justifiable in a case where the decedent's sole asset consisted of a life insurance policy the proceeds of which were payable to a third party beneficiary.\textsuperscript{10} Under these circumstances, to permit life insurance proceeds to circumvent the claim of a forced heir obviously would result in \textit{abolishing} forced heirship for the heir.

But beyond rendering a decision as to the unconstitutionality of the statutes themselves, the court would also have to acknowledge that prior judicial decisions regarding donations of life insurance policies as \textit{sui generis} and exempt from forced heirship provisions were not in accord with the constitution.\textsuperscript{11} In a constitutional attack on the legislation and jurisprudence, the donation \textit{à cause de mort} classification of a life insurance designation would aptly serve as the vehicle for restoration of the rights of forced heirs. By virtue of the inter vivos nature of the donation, the mechanisms of aggregation and reduction would constitute appropriate enforcement tools.\textsuperscript{12}

\textsuperscript{10} This hypothetical problem was suggested by the facts of \textit{Ticker v. Metropolitan Life Ins. Co.}, 11 Orl. App. 55 (La. App. 1914).
\textsuperscript{11} For the classic example of a judicial decision overruling years of jurisprudence as unconstitutional, see \textit{Erie R.R. v. Tompkins}, 304 U.S. 64 (1938), in which the United States Supreme Court noted, "Thus the doctrine of \textit{Swift v. Tyson} is . . . 'an unconstitutional assumption of powers by courts of the United States . . . .' In disapproving that doctrine . . . we merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." \textit{Id.} at 79-80.
\textsuperscript{12} Short of holding the life insurance statutes unconstitutional, and should the court reject the donation \textit{à cause de mort} characterization, an additional way of attacking the statutes would be to argue that only life insurance \textit{proceeds}, and not \textit{premiums}, are immune from claim by forced heirs. There is jurisprudence and doctrine which suggest that this alternative attack might have viability. See \textit{Succession of Videau}, 197 So. 2d 655 (La. App. 4th Cir.), \textit{cert. denied}, 250 La. 920, 199 So. 2d 922 (1967); \textit{Cohen, Louisiana Civil Law As Applied to Life Insurance}, 12 LA. L. REV. 56, 66, 72 (1951); \textit{Little, Insurance and Federal Estate Tax Recent Developments}, 16 LA. B.J. 17 (1968) (contending that LA. R.S. 22:1521 is limited to proceeds and is inapplicable to premiums); \textit{Comment, Interspousal Donations of Life Insurance in Louisiana}, 40 TUL. L. REV. 131 (1965); \textit{Note, 15 LOY. L. REV. 189} (1968).

\textit{See Comment, Forced Heirs, The Legitime and Loss of the Legitime in Louisiana}, 37 TUL. L. REV. 710, 759-62 (1963) (author faults the Louisiana Legislature for failing to amend the Code to treat adequately the changing financial mores of a society in which insurance plays a major role). \textit{Cf. Swiss Civ. Code} art. 476 (Shick transl. 1915) (adds to the estate of the deceased the surrender value of the insurance claim at the time of the testator's death if the insured transferred the insurance claim to a third party by donation).
Annuity Policies

In 1942, in *Succession of Rabouin*, the Louisiana Supreme Court decided, in contrast to the *sui generis* treatment of life insurance proceeds, that the balance of an annuity policy payable to a named beneficiary forms part of a decedent’s estate, amenable to claim by forced heirs through reduction and includible in the formulation of the active mass of the succession. The rationale for the distinction was that, whereas insurance proceeds payable to a designated beneficiary do not become exigible during the insured’s lifetime and do not comprise a part of his estate, payment under an annuity contract is part of a pool of assets that belongs to the annuitant during his lifetime. In 1944, the legislature overruled the judiciary’s characterization of annuity contract proceeds by enacting a statute that afforded them the same immunity from claim by forced heirs enjoyed by life insurance proceeds. This provision was repealed, however, by the Louisiana Insurance Code of 1948, and the legislature has since expressly provided that the lawful beneficiary of the proceeds of the annuity policy is fully answerable to forced heirs.


114. In *Succession of Pedrick*, 207 La. 640, 21 So. 2d 859 (1945), the supreme court carried *Rabouin* to its logical conclusion and held that the balance of an annuity contract payable to a named beneficiary was a part of the decedent-annuitant’s estate for inheritance tax purposes. See also Wisdom & Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119, 130-39 (1952) (for a general discussion of the tax consequences of annuity contracts).

115. See note 98, supra, for a criticism of this tenet.


118. *Id.* See LA. R.S. 22:1521 (Supp. 1958) (text of which is cited at note 100, supra).

119. La R.S. 22:647(B) (1958). *But cf.* Succession of Lantz, 176 So. 2d 224 (La. App. 2d Cir.), cert. denied, 248 La. 372, 178 So. 2d 659 (1965) (court properly held that where the unpaid balance of an annuity contract had become exigible on account of the annuitant’s death before the repeal of La. Acts 1944, No. 21, the balance should be assimilated to the proceeds of a life insurance policy in accordance with the act, so that the balance passed to the payee by virtue of the terms of the contract, immune from claims by forced heirs). See *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Successions and Donations*, 27 LA. L. REV. 450 (1967).
The courts very properly have not attempted to classify the annuity contract designation as a donation inter vivos or mortis causa, because, as with designations in life insurance policies, the annuity policy designation does not comport with requisite donative form, authentic or testamentary. Moreover, since the annuity contract designation is really an inter vivos donation, which is usually revocable at the annuitant’s will, made in expectation of death and dependent for its effect on the beneficiary’s surviving the annuitant and on there remaining at the annuitant’s death an unpaid balance of the annuity fund, donation à cause de mort is a proper denomination. Judicial subjugation of annuity contract proceeds to the rights of forced heirs through the computation of the active mass of the succession and reduction, despite the literal non-applicability to such proceeds of the Code’s donative remedies, evidences the exact result obtainable by treatment of the proceeds as a donation à cause de mort. However, in addition to depicting correctly the essential donative characteristics of the annuity contract designation, the proposed classification offers a desirable uniform treatment.

Benefit Plans

In 1976, in *T.L. James & Co. v. Montgomery*, the Louisiana Supreme Court held on rehearing that an employee’s written designation, on a printed form, of a beneficiary to receive death benefits from an employee retirement and profit sharing plan is a valid contractual designation, notwithstanding non-compliance with Code provisions regulating the form of donations. The court acknowledged, though, that while the


121. *See The Work of the Louisiana Supreme Court for the 1942-1943 Term—Successions*, 5 L.A. L. Rev. 512, 517 n.6 (1944): “The arguments against computing the residue of an investment such as an annuity in the forced portions are so weak as to appear almost frivolous.”

122. 332 So. 2d 834 (La. 1976).


An important aspect of *T. L. James* which this paper does not consider is its
beneficiary receives the plan benefits in full ownership, he is accountable to any complaining forced heir of the deceased employee if his receipt of the proceeds impinges on the heir’s forced portion. The opinion expressly refused to assimilate payment of death benefits to the contractual beneficiary of a retirement plan with payment of proceeds to the designated beneficiary of a life insurance policy and noted that, absent legislative mandate, the court will not permit employment-based benefit arrangements to negate the fundamental rights of forced heirs.

In 1976 the legislature enacted a statute which affirms T.L. James in providing that any designation form allowed by a deferred compensation plan is effective for the purpose of naming a beneficiary without requirement of particular donative form, and expands the decision by holding that portions of a retirement benefit reflecting compensation to an employee while married and living under the community of gains is a community asset. See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Matrimonial Regimes, 37 LA. L. REV. 358, 369-71 (1977). See also The Louisiana Estate Planner, Vol. 2, No. 6, at 45 (June, 1976), in which the writer criticizes as unrealistic the court’s assumption that the typical retirement plan maintains a separate account for each employee that accurately reflects the amount of benefits earned by the employee during any given period.

124. 332 So. 2d at 855. That the beneficiary must account to complaining forced heirs results from the court’s holding that employee profit sharing and retirement plan benefits reflect additional earnings of an employee that form a part of his estate.

125. Moreover, the opinion overruled appeal court decisions that had made the analogy and had concluded that, since an employee’s contractual designation of a payee to receive death benefits of a retirement plan was beyond the purview of the codal donative scheme, the benefits did not form part of the employee’s estate and the beneficiary took the proceeds free from the rights of forced heirs (and the surviving spouse in community). Expressly overruled were Succession of Mendez, 288 So. 2d 673 (La. App. 4th Cir. 1974), and Succession of Rockvoan, 141 So. 2d 438 (La. App. 4th Cir. 1962). 332 So. 2d at 853 n.4. Cf. T.L. James & Co. v. Montgomery, 308 So. 2d 481 (La. App. 1st Cir. 1975).

The Official Revision Comments to La. Acts 1976, No. 494, adding LA. R.S. 23: 652 (Supp. 1976) point out, though, that the treatment of deferred compensation plan benefits under the recent legislation is analogous to that of life insurance proceeds insofar as neither kind of benefit forms any part of the donor-employee’s estate; however, treatment clearly differs as regards the claims of forced heirs, to which the beneficiary of the proceeds of a deferred compensation plan, unlike the payee of life insurance proceeds, is fully answerable. See note 134, infra.

126. 332 So. 2d at 852, 853.


129. Id., adding LA. R.S. 23:652(2) (Supp. 1976). The Official Revision Comments to the provision note that since many large payrolls cross state lines, it would
broadening the definition of "plan" to include "plans which provide pensions, retirement, disability or death benefits and deferred compensation by employment, agency, trade union, stock bonus, stock ownership, stock option and profit sharing plans," as well as employee pension benefit plans governed by ERISA. Moreover, the contractual designation remains effective until revoked or terminated in accordance with the plan's procedure. The Official Revision Comments to the 1976 statute cite approvingly the T. L. James determination that the beneficiary entitled to payment of proceeds of a deferred compensation plan is answerable to a complaining forced heir for violations of the forced portion.

T. L. James and the ensuing legislation validating a designation form in a deferred compensation plan as a mode of gratuitous disposition make manifest that gratuitous transactions need neither fit the Code's stricti juris donative forms nor constitute a part of the decedent's estate in order to be subject to the remedies that vindicate the rights of forced heirs. In view of the revocability of designation forms and the contingency of the employee's death before receipt of benefits by the designated beneficiary in the typical deferred compensation plan, as well as its essential nature as an inter vivos donation in prospect of death, such a plan is perfectly suitable to donation à cause de mort characterization. Moreover, for the sake of consistency, the suggested characterization appears preferable to the court's contractual designation treatment.

An additional type of benefit plan not affected by the recent legisla-
tion is the statutorily based teacher's retirement system. Similarly to its treatment of the deferred benefit plan in *T. L. James*, the supreme court has acknowledged that a teacher's written designation, on a printed form, of a beneficiary to receive death benefits from the teacher's retirement system constitutes a valid gratuitous disposition, even though not in the Code's strict donative form. The court has not had occasion to determine whether the designated beneficiary of the death benefits of the plan is accountable to forced heirs. It appears likely that the recipient would be held so answerable, however, based on the supreme court's clear pronouncement in *T. L. James* that forced heirship is not subject to defeat by the gratuitous designation of a beneficiary in a contractual benefit arrangement. For the identical reasons urged for characterizing the deferred compensation plan as a donation *à cause de mort*, the assignment of proceeds under the teacher's retirement system is likewise amenable to classification; furthermore, such a uniform classification seems clearly preferable to treatment of the assignment as an undefined donative disposition.

**Conclusion**

Gratuitous designations of beneficiaries in United States Savings Bonds, life insurance policies, annuity policies and pension benefit plans


138. In *Vial*, the claim of the forced heir for the légitime was moot because the court determined it already had been satisfied by receipt of other succession assets. However, the court of appeal in *Teachers' Retirement System v. Vial*, 304 So. 2d 53 (La. App. 1st Cir. 1974), had held that death benefits under the retirement system did not form part of the teacher's estate and inured directly to the beneficiary by the terms of the contractual designation. This appears in full accord with the *T. L. James* rationale.

139. *See also the Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations, 37 LA. L. REV. 421*, 438-39 (1976): "It would thus appear that whether one treats the retirement benefit as additional compensation to the employee during the marriage (where contributions are made by the employer) or as the separate estate of the employee (where the fund to be distributed consists of the contributions made by the employee under the State Teachers' Retirement System) the end result is the same. In both, the retiree is accountable to the non-employee spouse for one half of the benefits received, and in both the designated beneficiary upon death is accountable to forced heirs for their legitime."
are recognized in Louisiana even though they do not conform to, and originated without reference to, the Code’s donative scheme. Yet, only excessive “donations” that comport with the scheme literally are subject to the rights of forced heirs through aggregation of assets that form the active mass of the succession and reduction. The hiatus that apparently results in the enforcement of the rights of a forced heir with respect to excessive donations via non-Code gratuitous designations is subject to the following varied treatment:

1. The courts treat the United States Savings Bond designation of the co-ownership type as a donation inter vivos that forms part of a decedent’s estate, and that is includible in the formation of the active mass of the succession and subject to reduction if it impinges on the légitime of a forced heir. The payable-on-death beneficiary bond designation is treated as a donation mortis causa that does not form part of a decedent’s estate; however, it is likewise deemed includible in the fictitious collation of the mass of the succession and subject to reduction for infringement on the légitime.

2. The courts and legislation treat life insurance proceeds as sui generis, exempt from all of the Code’s donative provisions and fully immune from claim by forced heirs.

3. The courts and legislation, without attempting donative classification under the Code, treat the proceeds of an annuity policy as part of a decedent’s estate that is includible in the formation of the active mass of the succession and subject to claim by forced heirs via reduction.

4. Due to the fundamental nature of forced heirship, the courts, with legislative approval, treat the proceeds of a deferred compensation plan as a valid contractual designation, subject to claim by forced heirs. It is recognized, however, that these proceeds do not form part of a decedent’s estate.

As a result of these varied approaches, several criticisms are warranted. Judicial classification of United States Savings Bonds of the co-ownership type as donations inter vivos and of the payable-on-death beneficiary type as donations mortis causa is at variance with the Code’s donative scheme, since co-ownership bond designations are revocable and do not require authentic form or a Code-prescribed acceptance, and since payable-on-death beneficiary bond designations do not require testamentary form. In addition, despite classification of the latter type of bond as a donation mortis causa, the courts subject the payable-on-death beneficiary bond designation to the formulation of the active mass of the succession,
in disregard of the Code's reservation of the process to the donation inter vivos alone. Judicial and legislative characterization of life insurance proceeds as *sui generis* correctly acknowledges the non-applicability to such proceeds of the Code's donative classification, but unjustifiably disregards the constitutional protection afforded forced heirs in Louisiana. The courts' application to excessive gratuitous designations in annuity contracts and pension benefit plans of the Code's donative measures that safeguard the rights of forced heirs, without a concomitant attempt to force the designations into classification under the Code's donative scheme, manifests the correct conceptual approach to treatment of the donative designations.

However, in contrast to judicial non-classification of annuity policy proceeds and classification of benefit plan proceeds variously as contractual designations or valid gratuitous dispositions, characterization of all gratuitous designations of beneficiaries as donations *à cause de mort* would achieve the desired protection of forced heirs with an equally desirable uniform conceptual approach. Like the donation *à cause de mort*, the gratuitous designations are inter vivos in nature and have revocability as an essential element. Moreover, in all but the instance of the co-ownership bond designation, the designations are made in contemplation of death and the contingency of the donor's death prior to that of the donee is crucial to their efficacy.

By virtue of a uniform donation *à cause de mort* classification, it would be patently unnecessary to classify a gratuitous designation under the Code's *stricti juris* donative scheme in order to invoke the remedies that protect the rights of forced heirs. Instead, the courts could recognize, as has already been done with regard to proceeds of pension plans, that all excessive donations are subject to the fundamental protection of forced heirship irrespective of express protection under the Code. In view of the inter vivos nature of the donation *à cause de mort*, aggregation and reduction would, by analogy, constitute appropriate enforcement mechanisms for excessive gratuitous designations.

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