

# Baten v. Taylor: Survivorship Clauses Survive the Civil Law

Daryl H. Owen

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sion is bolstered by the removal of the requirement that "the period of time when the purchase is made is alone attended to"<sup>61</sup> by Act 709 of 1979.

*William L. Hearne*

*Baten v. Taylor*: SURVIVORSHIP CLAUSES SURVIVE THE CIVIL LAW

Gordon D. Baten died testate at his domicile in Beaumont, Texas, leaving separate immovable property situated in Louisiana to his wife on the condition that she survive him by thirty days. In the event that the condition was not fulfilled, the property was to go to his nephews. The decedent's sister, his presumptive intestate heir, unsuccessfully attacked the will in district court. The decision was reversed by the Third Circuit Court of Appeal, which held that the disposition conflicted with Civil Code article 1520, prohibiting "substitutions" as defined by that article, and article 1609, which, in the absence of forced heirs, gives the universal legatee seizin of the succession immediately upon the testator's death.<sup>1</sup> Despite the obstacles posed by these two articles, the Louisiana Supreme Court reversed, *holding*: (1) the disposition contained none of the essential characteristics of a prohibited substitution as defined by article 1520, and (2) a universal legacy subject to a suspensive condition does not conflict with the seizin provisions of the Civil Code. *Baten v. Taylor*, 386 So. 2d 333 (La. 1979).

A condition which depends upon the occurrence of a future or uncertain event is classified as either suspensive or resolutive.<sup>2</sup> That which takes effect only upon the happening of the event is said to be suspensive,<sup>3</sup> while that which takes effect immediately but is defeated by the event is deemed resolutive.<sup>4</sup> A testator is free to impose such conditions upon a testamentary disposition,<sup>5</sup> provided that they are not illegal, immoral, or impossible.<sup>6</sup> Conditions such as that in the present case, known generally as survivorship clauses,

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61. LA. CIV. CODE art. 2402 (as it appeared prior to 1979 La. Acts, No. 709; 1978 La. Acts, No. 627).

1. Succession of Gwathmey, 364 So. 2d 226 (La. App. 3d Cir. 1978).

2. LA. CIV. CODE arts. 2021, 2043, 2045.

3. LA. CIV. CODE arts. 2021, 2043.

4. LA. CIV. CODE arts. 2021, 2045.

5. LA. CIV. CODE arts. 1519, 1527, 1698, 1699.

6. LA. CIV. CODE arts. 1519, 1527, 2031.

have been widely accepted in common law jurisdictions.<sup>7</sup> However, the validity of such clauses under Louisiana law has long been questioned by some commentators.<sup>8</sup> In part, this doubt resulted from the fear that such clauses constitute prohibited substitutions as defined in Civil Code article 1520.<sup>9</sup>

Substitutions originated in early Rome, where they were of two types—direct and indirect.<sup>10</sup> The former is exemplified by the vulgar substitution.<sup>11</sup> So called because of its frequent usage, the vulgar substitution was simply a means whereby a testator could avoid intestacy. A substitute legatee was designated to receive the succession in the event that the first named legatee refused to accept or was unable to do so.<sup>12</sup> In such a case, the substituted legatee received directly from the testator himself. In an indirect substitution, the ultimate beneficiary received, not from the testator, but through an intermediary designated by the testator.<sup>13</sup> Indirect substitutions included the pupillary and exemplary substitutions.<sup>14</sup> The pupillary substitution allowed a father who had a child below the age of puberty to provide a substitute for the child in the event that he outlived the testator, yet died before reaching the age of testamen-

7. T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 147 at 828-29 (2d ed. 1953); J. DUKEMINIER & S. JOHNSON, *FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTEREST, AND ESTATE PLANNING* 244 (1972); J. RUBIN & A. RUBIN, *LOUISIANA TRUST HANDBOOK* 177 n.16 (1968). In at least one state, such survivorship clauses have been codified as the rule rather than the exception. The Ohio Code provides: "When the surviving spouse, or other heir at law, legatee or devisee dies within 30 days after the death of the decedent, the estate of such first decedent shall pass and descend as though he had survived such surviving spouse, or other heir at law, devisee or legatee." OHIO REV. CODE ANN. § 2105.21 (Anderson).

However, a testator may indicate in his will that the above statute shall not apply to property bequeathed by him. *Barrick v. Fligle*, 146 N.E.2d 330 (Ohio 1957).

8. Kelleher, *The Marital Deduction Under Louisiana Law*, 26 TUL. L. REV. 154 (1952); Nathan, *Common Disasters and Common Sense in Louisiana*, 41 TUL. L. REV. 33 (1966); Oppenheim, *The Testate Succession*, 36 TUL. L. REV. 1, 21 (1961); Wisdom & Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119, 139-40 (1952).

9. Civil Code article 1520 provides:

Substitutions are and remain prohibited, except as permitted by the laws relating to trusts. Every disposition not in trust by which the donee, heir, or legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir, or the legatee.

10. C. AUBRY & C. RAU, *DROIT CIVIL FRANÇAIS* § 693 (6th ed. Esmein 1954) in C. LAZARUS, 3 CIVIL LAW TRANSLATIONS 305 (1969).

11. *Id.*

12. Tucker, *Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantical Reappraisal*, 24 LA. L. REV. 439 (1964).

13. C. AUBRY & C. RAU, *supra* note 10.

14. *Id.*

tary capacity.<sup>15</sup> The exemplary substitution allowed an ascendant to appoint a substitute to a descendant permanently insane or incapable of testation from some other defect.<sup>16</sup>

The Roman word "substitution" was applied only in the above mentioned contexts.<sup>17</sup> The device by which a testator charged his donee, instituted heir, or legatee to preserve and deliver a bequest to a third person was known in Roman law as a *fideicommissum*.<sup>18</sup> Known in France as the "*substitution fidicommissaire*,"<sup>19</sup> this device allowed a testator to pass his property in sequence from one successor to another an indefinite number of times.<sup>20</sup> With the economic decline of the French nobility, this process became an invaluable expedient for the preservation of landed wealth. Since the property was rendered inalienable, the fiduciary was forced to remain rich in spite of himself, and the family fortune was protected.<sup>21</sup> The French Revolution suppressed such a perpetuation of wealth, along with the feudal and aristocratic system. The new prohibition against this sort of substitution facilitated the mobility of property and released land from the limitations which had kept it out of commerce.<sup>22</sup> This prohibition was subsequently codified and is now article 896 of the French Civil Code.<sup>23</sup> Brown and Moreau Lislet undoubtedly borrowed

15. W. BUCKLAND, *A MANUAL OF ROMAN PRIVATE LAW* 185 (1928).

16. *Id.* at 186.

17. Tucker, *supra* note 12, at 444.

18. W. BUCKLAND, *supra* note 15, at 218. This practice originally arose when a man wanted to benefit his community or to give something to another without going through the process of making a new will. In such cases it was common practice to direct a beneficiary to deliver the property to another. This could be done in the will itself, a codicil, or by word of mouth, and such donations were not originally enforceable. However, they grew in popularity, and as they began to be made in favor of the public itself, they soon became recognized as legal and enforceable; a public official, the praetor *fideicommissarius*, was appointed to deal with them. *Id.*

19. Tucker, *supra* note 12, at 445 & 449.

20. *Id.* at 445.

21. 3 M. PLANIOL, *CIVIL LAW TREATISE* pt. 2, no. 3269 at 589-90. The use of substitutions was so abused that they were eventually regulated. The Ordinance of Orleans (1560), reestablished by the Ordinance of 1747, limited substitutions to two degrees, not counting the first disposition. Some would have preferred to abolish them completely. *Id.*, no. 3271 at 590.

22. *Id.*, no. 3272 at 590. There is evidence that the desire to release the land from its limitations was also political, promoting great popular support for the revolution. *Id.*

23. FRENCH CIV. CODE art. 896 (J. Crabb trans. 1977). This article provides: "Substitutions are prohibited. Any disposition whereby a donee, appointed heir or legatee would be charged with conserving and giving to a third party is void, even with regard to the donee, appointed heir or legatee."

heavily from the text of this French article,<sup>24</sup> which formed the basis for our present article 1520.<sup>25</sup>

All substitutions are not prohibited in Louisiana. The vulgar substitution of article 1521 has always been permitted.<sup>26</sup> Only the substitution defined by article 1520 is disallowed.<sup>27</sup> In view of the many types of substitutions and their convoluted history, it is not surprising that the Louisiana courts have groped ineffectively for a comprehensive definition of exactly what is prohibited by article 1520.<sup>28</sup> Indeed, the jurisprudence in this area has been rife with conflicting interpretations and confusion.<sup>29</sup> Frequently, the courts have had difficulty in distinguishing a prohibited substitution from the separate grants of naked ownership and usufruct authorized by arti-

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24. With two exceptions the language of article 40 of the Louisiana Digest of 1808 is virtually identical to that of French Civil Code article 896. The Louisiana article contained an additional prohibition against fidei commissa. Because of this prohibition, there was no longer any need for a "trebillianick" portion of the succession. This was the portion that the instituted heir was entitled to keep when charged with a fiduciary bequest. LA. DIGEST of 1808, ch. IV, art. 40.

The second change of note was from the conjunctive "and" to the disjunctive "or" between the words "preserve for" and "to return." This change was almost certainly a simple oversight on the part of Brown and Moreau Lislet, see Tucker, *supra* note 12, at 464, which was finally corrected in 1962. At the same time, the third paragraph of article 1520 relative to the trebellianic portion was deleted. 1962 La. Acts, No. 45.

25. By Act 45 of 1962, the legislature corrected the error mentioned at note 24, *supra*. In addition, the prohibition against fidei commissa was eliminated. Finally, article 1520 for the first time alluded to the authorization of certain substitutions by the Trust Code. See LA. R.S. 9:1721-2252 (Supp. 1964 & 1979). See note 38, *infra*.

26. LA. CIV. CODE art. 1521. The vulgar substitution of article 1521 is virtually the same as that of Roman times; it is a disposition whereby another party is called to take the gift in case the donee or legatee does not take it. The vulgar substitution does not have, as does a prohibited substitution, the objectionable characteristic of removing property from commerce, but is merely a device for preventing a lapsed legacy. Nabors, *Restrictions Upon the Ownership of Property—Trusts, Fidei Commissa and Substitutions*, 4 TUL. L. REV. 1 (1929).

27. LA. CIV. CODE art. 1520.

28. As Justice Barham noted in his concurring opinion in *Succession of Walters*, 261 La. 59, 73, 259 So. 2d 12, 17 (1972), "[t]oo much has . . . been written by too many on article 1520 for clarity to exist."

29. For example, in *Succession of Strauss*, 38 La. Ann. 55 (1886), a testamentary disposition in favor of minors was conditioned upon their attaining majority, the shares of those who did not survive accruing to those who did. The disposition was upheld, with the court specifically approving double conditional legacies. Yet, in *Succession of McCann*, 48 La. Ann. 145, 19 So. 220 (1895), a will with an identical provision was held invalid as containing all the evils of a prohibited substitution. Finally, in *Heikamp v. Solari*, 54 So. 2d 347 (La. App. Orl. Cir. 1952), a disposition made to the testator's sister and upon her death to the testator's niece and grandnieces was upheld, the disposition in favor of the nieces being found merely precatory and reputed as not written.

cle 1522.<sup>30</sup> Once a prohibited substitution was found to exist, there was often disagreement as to the effect of the substitution upon the will.<sup>31</sup>

While the jurisprudence fails to demonstrate a consistent treatment of substitutions, legislative enactments in the area have generally expanded the instances in which a substitution is permissible. In 1921, the Louisiana Constitutional Convention adopted a provision which prohibited the legislature from authorizing substitutions or fidei commissa.<sup>32</sup> In order to clear the path for a new trust code, amendments were made to the constitution<sup>33</sup> and article 1520,<sup>34</sup> providing that substitutions in trust were not prohibited.<sup>35</sup> At the

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30. See *Succession of Williams*, 169 La. 696, 125 So. 858 (1930); *Succession of Ledbetter*, 147 La. 771, 85 So. 908 (1920); *Succession of Law*, 31 La. Ann. 456 (1879). The problem of distinguishing a substitution from creation of a usufruct has been clarified by *Succession of Blossom*, 194 La. 635, 194 So. 572 (1940). See generally, Nabors, *An Analysis of the Substitution—Usufruct Problem Under articles 1520 and 1522 of the Louisiana Civil Code*, 4 TUL. L. REV. 603 (1929).

31. One line of cases maintained that in the event of a prohibited substitution, the entire testament is null. *Crichton v. Gredler*, 256 La. 156, 235 So. 2d 411 (1970); *Succession of Simms*, 250 La. 177, 195 So. 2d 114 (1966); *Succession of Johnson*, 223 La. 1058, 67 So. 2d 591 (1953). The opposing line holds that a prohibited substitution results in the total nullity of a particular bequest but does not affect the remaining valid dispositions of the will. *Succession of Smart*, 214 La. 63, 36 So. 2d 639 (1948); *Succession of Ledbetter*, 147 La. 771, 85 So. 908 (1920). This controversy was finally resolved in *Succession of Walters*, 261 La. 59, 259 So. 2d 12 (1972), in which the latter position was adjudged correct.

32. LA. CONST. art. IV, § 16 (1921). Presumably, this prohibition against substitutions meant only those defined by article 1520. Otherwise, the substitutions authorized by article 1521 would also be proscribed.

33. See 1962 La. Acts, No. 521.

34. See 1962 La. Acts, No. 45.

35. The Louisiana Constitution of 1921 had authorized the creation of trust estates for a specified period. LA. CONST. art. IV, § 16 (1921). This provision was amended several times, usually in order to lengthen the period of time for which trust estates might be authorized. *Tucker*, *supra* note 12, at 472. While the amendments, undoubtedly intended to prepare for a new trust code, it is quite likely that they were intended also to alter the interpretation then being given the constitutional provision and article 1520 by a series of cases in which the creation of substitutions within a trust estate was not allowed. *Succession of Guillory*, 232 La. 213, 94 So. 2d 38 (1957); *Succession of Meadors*, 135 So. 2d 679 (La. App. 2d Cir. 1961).

One could envision that after the amendments in 1962, this line of cases would be judicially overturned. Yet, in *Succession of Simms*, 250 La. 177, 195 So. 2d 115 (1965), the court ignored the new legislation and clung tenaciously to the *Guillory-Meadors* position. It was not until *Succession of Stewart*, 301 So. 2d 872 (La. 1974), that the court abandoned this rationale and upheld a trust provision containing a substitution. This case was by far the most liberal interpretation given a trust instrument to that date and indicated a tendency towards liberal construction for future cases. 1 G. LEVAN, *THE LOUISIANA ESTATE PLANNER* 11 (1974).

same time the prohibition against fidei commissa was deleted.<sup>36</sup> With enactment of the Trust Code in 1964<sup>37</sup> substitutions in trust were expressly made permissible if authorized by that code.<sup>38</sup> However, the basic prohibition in article 1520 has remained intact.

It is little wonder that commentators familiar with this history advised practitioners against the use of conditional testamentary donations such as that in the present case.<sup>39</sup> Yet, fear of drafting a prohibited substitution was not alone in justifying the caution urged by those commentators. Such conditional donations also were believed to conflict with the traditional civil law notion of seizin.<sup>40</sup>

The concept of seizin, like the notion of prohibited substitution, dates to the Roman era. In Rome, all heirs other than family heirs

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36. See, 1962 La. Acts, No. 45. The fidei commissum was frequently equated with the common law trust to support the notion that such trusts were prohibited in Louisiana. Succession of Ward, 110 La. 75, 34 So. 135 (1903); Succession of Beauregard, 49 La. 1176, 22 So. 348 (1897); *Partee v. Hill*, 12 La. Ann. 767 (1857). Yet, at least one commentator feels that the term "fidei commissum" was in no way intended by the redactors to prohibit the common law trust. "It would seem completely unjustifiable to imagine that a scholar with the breadth of learning in the Civil Law of Moreau Lislet would have used a technical term of the Roman civil law, with the precise connotation of fidei commissum, to prohibit the use of an alien legal concept." Tucker, *supra* note 12, at 465. Rather, it is probable that the term "fideicommissum" was intended to prohibit the Spanish concept of the fiduciary substitution known as the "fideicommissaria." *Id.* at 465-66.

This argument has much to commend it. As Tucker points out, the redactors, had they intended to prohibit trusts, could easily have said, "substitutions and trusts are prohibited." If one adopts the Tucker theory, i.e., prohibited substitutions and fidei commissa meant the same thing, then for years the ordinary common law trust was prohibited in Louisiana due to erroneous judicial interpretation.

37. LOUISIANA TRUST CODE: LA. R.S. 9:1721-2252 (Supp. 1964 & 1979). See 1964 La. Acts, No. 338.

38. LA. R.S. 9:1723 & 1736 (Supp. 1964). Section 1723 provides: "A disposition authorized by this Code may be made in trust although it would contain a prohibited substitution if it were made free of trust." LA. R.S. 9:1723 (Supp. 1964). In *Crichton v. Gredler*, 256 La. 156, 235 So. 2d 411 (1970), the Louisiana Supreme Court took the position that this provision was meaningless in light of LA. R.S. 9:1971 (Supp. 1964), which provides: "The interest of a principal beneficiary is acquired immediately upon the creation of a trust, subject to the exceptions provided in this Code." The court in *Crichton* reasoned that since no substitutions were authorized expressly by the Trust Code, and since the interest of the principal beneficiary must be acquired immediately upon creation of the trust, then section 1971 implicitly prohibited the creation of substitutions in trust. 256 La. at 168-73, 235 So. 2d at 416-17. A forceful dissent by Chief Justice Sanders expressed misgivings about the court's treatment of the substitution problem in light of the new Trust Code provisions. 256 La. at 173, 235 So. 2d at 417. In *Succession of Walters*, 261 La. at 73, 259 So. 2d at 17 (1972) (Barham, J., concurring), Justice Barham, who voted with the majority in *Crichton*, reassessed his former position concerning prohibited substitutions and advocated that the judiciary do likewise.

39. See note 10 & 12, *supra*.

40. See note 10, *supra*, and accompanying text.

acquired the inheritance only by a special act of acquisition and by entry upon the succession. During the interval between the death of the testator and the entry, the inheritance was deemed vacant.<sup>41</sup> To avoid holding the succession in abeyance, the French adopted the fiction that the patrimony is transmitted to the heir precisely at the moment of the testator's death.<sup>42</sup> From that moment, the heir is substituted for the deceased, thereby assuming his rights and obligations.<sup>43</sup> However, this concept should be distinguished from *seizin*, which is procedural in nature.

The notion of *seizin* was formulated textually in article 318 of the *Customs of Paris* as: "*Le mort saisit le vif, son hoir les plus proche, & habile à luy succeder.*"<sup>44</sup> As explained by Pothier:

*Le mort . . .* he whose succession is at issue, from the instant of his natural or civil death, which is the last moment of his life; *saisit . . .* is deemed to place in possession, of all his rights and property;

*le vif son hoir les plus proche . . .* he who has survived him and who, as his closest relation, is called to be his heir.<sup>45</sup>

Thus, the French system embodies the dual concepts of ownership and *seizin*.<sup>46</sup> *Seizin* denotes possession in a civil sense<sup>47</sup> and further denotes the person responsible for the property in the administrative sense.<sup>48</sup>

Before 1825, under the laws then in force in Louisiana, the Roman tradition was followed—the succession was not transmitted to the heir until accepted by him.<sup>49</sup> The redactors of the Code of 1825 recommended the suppression of this rule, preferring instead

41. M. KASER, *ROMISCHES PRIVATRECHT* § 71 (6th ed. 1968), reprinted in R. DANENBRING, *ROMAN PRIVATE LAW* 305 (2d ed. 1968).

42. FRENCH CIV. CODE arts. 711 & 781 (J. Crabb trans. 1977); 9 C. AUBRY & C. RAU, *DROIT CIVIL FRANÇAIS* § 709 (6th ed. Esmein 1954) in 4 C. LAZARUS, *CIVIL LAW TRANSLATIONS* 97 (1971). Cf. LA. CIV. CODE arts. 870 & 1007.

43. C. AUBRY & C. RAU, *supra* note 21, at § 723 in C. LAZARUS, *supra* note 10, at 485. This doctrine was also adopted by the Spanish in *LAS SIETE PARTIDAS* bk. 6, tit. 5, L. 1 (Lislet & Carleton trans. 1820), and the SPANISH CIVIL CODE in articles 657 and 661.

44. *COUTUMES DE LA PREVOSTÉ DE PARIS, NOUVEAU COUTURIER*, Tome III, art. 318.

45. *OEUVRES DE POTHIER*, Tome I, Sec. III at 178 (1811) (writer's trans.).

46. *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Successions and Donations*, 33 LA. L. REV. 199, 201 (1973).

47. 1 G. BAUDRY-LACANTINERIE, *TRAITE DE DROIT CIVIL DES SUCCESSIONS* 116 (1905); C. AUBRY & C. RAU, *supra* note 42, at § 609 in C. LAZARUS, *supra* note 42, at 101-02.

48. C. AUBRY & C. RAU, *supra* note 10, at § 723 in C. LAZARUS, *supra* note 10, at 485.

49. LA. DIGEST of 1808, ch. VI, sec. VI, arts. 122 & 124.

the idea that the rights of the heir be vested from the moment of the decedent's death.<sup>50</sup> The redactors then formulated the text of what now constitutes Civil Code articles 940 through 949 and, in so doing, clearly contemplated a scheme identical to the French concept of *seizin*, as evidenced by the comment: "The doctrine by which the heir became seized of full right of the succession left to him, being foreign to the Roman and Spanish laws, we have taken the disposition of this chapter from the best authors who have written on the subject, such as Pothier and others."<sup>51</sup>

Under the Civil Code scheme, one of three classes of heirs becomes seized of the succession immediately upon the death of the deceased.<sup>52</sup> In the event that there are no forced heirs, who are the first group to receive under the plan of the Civil Code,<sup>53</sup> the universal heir becomes seized of the succession.<sup>54</sup> Should both of these classes be vacant, *seizin* is imparted to the legitimate heirs of the deceased.<sup>55</sup> Thus, because an irregular heir does not fall within one of the above mentioned classes, he would acquire ownership of his hereditary share immediately upon the death of the testator, yet

50. PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825, 1 LOUISIANA LEGAL ARCHIVES 115 (1937).

51. *Id.* at 117. Thus, as the court noted in 1831, a major change was effected in Louisiana successions law. *O'Donald v. Lobdell*, 2 La. 229, 302 (1831). The court further noted that, while creditors have the power to call upon an heir to accept or renounce a succession, the failure of the heir to do so does not place the succession in abeyance. "The law has expressly said, that the heir represents the succession, and is seized of it from the moment it is opened." *Id.* at 303-04. However, just five years later in *Davis's Heirs v. Elkins*, 9 La. 135 (1836), the same court ignored this line of reasoning, clinging instead to the untenable proposition that until an heir accepts or renounces the succession, the succession is in suspense. The court's authority for this holding was Civil Code article 940, now article 946, which provides:

Though the succession be acquired by the heir from the moment of the death of the deceased, his right is in suspense, until he decides whether he accepts or rejects it. If the heir accepts, he is considered as having succeeded to the deceased from the moment of his death; if he rejects it he is considered as never having received it.

LA. CIVIL CODE art. 946.

In speaking of the acquisition of the succession, this article is referring to the ownership of the succession as dealt with by the present article 940, which states: "A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person . . ." LA. CIV. CODE art. 940. That this concept is distinct from possession is shown by Civil Code article 941: "The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession . . ." LA. CIV. CODE art. 941.

52. See LA. CIV. CODE arts. 914, 1607.

53. LA. CIV. CODE art. 1607.

54. LA. CIV. CODE art. 1609.

55. LA. CIV. CODE art. 1613.

would be unable to exercise any of the rights of the deceased for lack of seizin.<sup>56</sup>

As the foregoing demonstrates, ownership is to be distinguished from seizin. Civil Code articles dealing with acquisition of ownership are substantive provisions, transferring ownership of the succession immediately upon the decedent's death. Seizin, on the other hand, is a procedural concept dealing with the legal investiture of possession of the succession property. As stated by the court in *Tulane University v. Board of Assessors*,<sup>57</sup> seizin should not be seen as "excluding, or affecting in the slightest degree, the ownership vested in the heir or universal legatee. [Rather] . . . it is a holding for the true owner, and merely for the purpose of administration."<sup>58</sup>

Prohibited substitutions and seizin were examined in substantial detail by the court in *Baten*. Adopting the Law Institute's interpretation of article 1520 as authoritative, the court determined that none of the three requisite elements of a prohibited substitution were present. As described in the Report of the proposed Trust Code, these elements are:

- (1) A double liberality, or a double disposition in full ownership, of the same thing to persons called to receive it, one after the other;
- (2) Charge to preserve and transmit, imposed on the first beneficiary for the benefit of the second beneficiary;
- (3) Establishment of a successive order that causes the substituted property to leave the inheritance of the burdened beneficiary and to enter into the patrimony of the substituted beneficiary.<sup>59</sup>

The court reasoned that since the widow would not have received the succession in full ownership if she had failed to survive her husband for thirty days, there was no double disposition in full ownership. The nephews would have received the legacy only if she had failed to receive it, taking it *directly* from the testator with their ownership vesting retroactively to the date of his death.<sup>60</sup> As to the charge to preserve, the court found the thirty-day suspensive period too brief to create such a charge.<sup>61</sup> Thus, the second element was ab-

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56. *The Work of the Louisiana Appellate Courts for the 1971-72 Term—Successions and Donations*, *supra* note 46, at 203-04.

57. 115 La. 1025, 40 So. 445 (1905).

58. 115 La. at 1029, 40 So. at 447.

59. *Report by the Louisiana State Law Institute to Accompany the Proposed Trust Code*, 1964 La. Acts, No. 338.

60. 386 So. 2d at 337.

61. *Id.*

sent. Finally, for the same reasons that there was no double disposition in full ownership in the first place, the will did not create a successive order whereby the property would leave the patrimony of the widow to enter those of the nephews.<sup>62</sup> Thus, the court stated that the *Baten* disposition contained none of the essential elements of a prohibited substitution—all three of which must be present before a disposition will be invalidated.<sup>63</sup>

In its discussion of seizin, the court, perhaps for the first time, sharply distinguished between seizin and ownership: "Whether an heir acquires seizin . . . depends not on his ownership of succession property, but on whether he is a member of the class of heirs entitled to seizin of a particular succession according to the codal order of priority."<sup>64</sup> Stating that a testator could impose upon his legacy any conditions not contrary to law or good morals, the court reasoned that the Civil Code did not prohibit expressly or impliedly a universal legacy subject to a suspensive condition.<sup>65</sup> Any interpretation to the contrary would "create an arbitrary restriction on the testator's authority."<sup>66</sup> The court also stated that since the universal legatee was installed under a suspensive condition, the testator's legitimate heirs became seized of the succession at the moment of death, remaining provisionally seized until the condition was fulfilled.<sup>67</sup> Since seizin was not suspended by the testator's disposition of his property, the court upheld the will.<sup>68</sup>

The *Baten* decision should provide clarity in two traditionally confused areas of Louisiana law, *viz.*, prohibited substitutions and seizin. The adoption of the Law Institute's recommended criteria for determining what constitutes a prohibited substitution<sup>69</sup> should help resolve judicial conflict on the matter, while at the same time bringing Louisiana law into conformance with that of France, where such clauses are generally recognized as valid.<sup>70</sup> Crucial to finding that

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62. *Id.*

63. *Id.* at 337-38.

64. *Id.* at 340.

65. *Id.* at 339.

66. *Id.*

67. *Id.* at 340.

68. *Id.* at 340-41.

69. See text at note 58, *supra*.

70. See M. PLANIOL, *supra* note 21, pt. 2, no. 3295, at 601. The *Baten* court made the statement that all of the jurisprudence construing article 1520 must be reassessed since, by amendment, the legislature has harmonized our definition of substitutions with French doctrine. 386 So. 2d at 337. One may question whether this indicates a willingness to allow all the French exceptions to the prohibition against substitutions. These are: (1) the disposable portion may be given to a child subject to the requirement that he transfer the same to his children, and (2) a disposition in favor of a

the survivorship clause did not meet these criteria was the court's interpretation of the condition as suspensive. Had the condition been found resolutive, the ownership of the wife would have become absolute immediately upon the testator's death. If she had then failed to live thirty days, that ownership would have terminated in favor of the nephews. Thus, they would have received the property indirectly from the testator, and only after it had passed through the wife's patrimony. It is just such an indirect substitution that is prohibited by article 1520.

The court, in concluding that the condition was suspensive, based its interpretation in part upon the brevity of the survivorship period. This approach is unfortunate. The condition is suspensive because it suspends the right of the donee until the happening of an uncertain event. The length of time that these rights are suspended is immaterial in determining whether the condition is suspensive *vel non*.<sup>71</sup>

The determination that the condition was suspensive also greatly affected the court's treatment of seizin. One could easily argue that as the universal legatee, the testator's wife should have become seized of the property immediately upon her husband's death.<sup>72</sup> The court rejected this rationale, holding instead that because the wife was suspensively installed, there was, in effect, no universal legatee until the suspensive condition occurred. The testator's legal heirs became seized for the duration of this period, and a gap in seizin was avoided. After termination of the suspensive period, the disposition became fully effective, and the testator's wife acquired full seizin. The resolution of this problem, although laudable, is of diminished practical importance, since, as the court noted, article 3211 of the Louisiana Code of Civil Procedure gives the succession representative full seizin of the deceased's property.<sup>73</sup>

While clarifying two ancient doctrines of the civil law, *Baten* also introduces an entirely new concept. For the first time in Louisiana, judicial sanction has been accorded to survivorship clauses.<sup>74</sup> A testator may now provide that should a legatee fail to survive the legator for a stipulated period, the succession is to descend upon an alternative legatee. For example, a testator owning a piece of family

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brother or sister may be subject to the requirement that it be transferred to the children born in the first degree of said brother or sister. FRENCH CIV. CODE arts. 1048-49 (J. Crabb trans. 1977).

71. See LA. CIV. CODE arts. 2021, 2043.

72. LA. CIV. CODE arts. 915, 1607.

73. LA. CODE CIV. P. art. 3211.

74. J. RUBIN & A. RUBIN, *supra* note 7.

property may provide that in the event the first donee does not meet the survivorship condition, that property shall go to the testator's heirs, rather than to the heirs of the donee. This allows greater freedom of testation and is certainly consistent with the civil law notion of familial wealth. Further, such provisions will allow a testator to shorten the great lengths to which courts have occasionally gone in order to determine the sequence of death.<sup>75</sup> Finally, since there will be only one transmission of the patrimony, a testator may avoid double taxation in rapid succession.<sup>76</sup>

Despite its clarity, however, several questions remain unanswered by *Baten*. The first and most obvious is the period of time that a testator may stipulate for the survival of his legatee. Here, the thirty-day suspensive condition was deemed brief enough not to constitute a charge to preserve. There is language in the opinion which seems to indicate that had the condition been longer in duration, the court might have declared it resolutive and, therefore, a charge to preserve.<sup>77</sup> If such an approach is taken by the court, then a longer condition, even though apparently suspensive, could result in finding a prohibited substitution. As discussed above, such rationale is inappropriate.<sup>78</sup> A preferable restraint to lengthy suspensive conditions is found in article 1519. An objectionably long suspensive period could be invalidated as an illegal, immoral, or impossible condition. This approach would allow the court to address unequivocally what

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75. *E.g.*, *In re Estate of Rowley*, 257 Cal. App. 2d 324, 65 Cal. Rptr. 139 (1968) (by computing the relative speed of the two autos involved in the crash, the coroner determined that the legatee had survived the testatrix by 1/150,000 of a second); *In re Buc-ci's Will*, 57 Misc. 2d 1001, 293 N.Y.S.2d 944 (1968) (after an airplane crash, determination that the wife's blood contained carbon monoxide generated by a gasoline fire was sufficient to show that wife had survived husband).

76. The harsh consequences of double taxation under Louisiana's inheritance tax provisions have been avoided by the judicial fiction of seizin in law, as opposed to seizin in fact. Under this concept the heir is seized in law immediately upon the death of the testator. Yet, the heir is not subject to taxation until actually sent into possession, *i.e.*, seized in fact. *Succession of Martin*, 234 La. 566, 100 So. 2d 509 (1958); *Succession of Bynum*, 137 So. 2d 697 (La. App. 1st Cir. 1962). *See* LA. R.S. 47:2401-2435 (Supp. 1956 & 1979).

Under the provisions of the federal estate tax, 26 U.S.C. §§ 2001-2209 (1976), a credit is provided for estate tax paid on property transferred by a prior decedent. *See* 26 U.S.C. § 2013 (1976). While this provision likewise provides some relief from double taxation, the judicial approval of survivorship clauses affords a testator greater flexibility in tax and estate planning.

In the event that a survivorship clause is included in a will, section 2056 provides that application of the marital deduction will not be precluded if the survivorship clause does not exceed six months. 26 U.S.C. § 2056 (1976).

77. 386 So. 2d at 337.

78. *See* text at note 70, *supra*.

is obviously a question of public policy without resorting to abstract legal methodology. Further, such reasoning is less intrusive on the testator's wishes—a condition in violation of article 1519 is merely reputed as not written.<sup>79</sup> Thus, the disposition would still go to the first donee unburdened by the condition, as opposed to being stricken in its entirety, as in the case of a prohibited substitution. The distinction between the two approaches is important insofar as it affects the will. A prohibited substitution invalidates the entire disposition. However, an illegal, immoral, or impossible condition would merely be reputed as not written, and the initial disposition would stand.

Exactly what period of time might violate public policy, however, is left to speculation and to future judicial resolution. Under the court's reasoning, while there is no gap in seisin, the disposition is not entirely effective until the condition is fulfilled. While the property is not totally removed from commerce during this period, its alienability is affected, since any transfer might be subject to the condition. The amount of time that public policy will permit succession property to be so encumbered could conceivably differ according to the type of property bequeathed or the type of condition imposed. Since survivorship clauses are normally imposed to provide for a common disaster,<sup>80</sup> the allowable suspensive period probably will remain fairly brief. But conditional testamentary donations may be made in other instances. Often a testator will leave property to a minor conditioned upon his attaining the age of majority.<sup>81</sup> In *Succession of McCan*<sup>82</sup> such dispositions were held impermissible, because they contained all the evils of a prohibited substitution. In light of *Baten*, however, this rationale should no longer apply, and whether the court now will sanction a potentially long suspensive period remains an open question.

An additional question raised by *Baten* is whether conditions of survivorship may be imposed upon a forced heir. Article 1710<sup>83</sup> and

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79. LA. CIV. CODE art. 1519. See also LA. CIV. CODE arts. 1517, 1527, 2031. Since a major justification for prohibiting certain substitutions is to prohibit property from being removed from commerce, it is easy to see that a lengthy charge to preserve could be viewed as against public policy. Should the survivorship period be excessively long, for example 100 years, the condition could be treated as impossible within the meaning of article 1519. Arguments that a long suspensive condition violates notions of seisin or constitutes a prohibited substitution, however, are inapposite.

80. See Nathan, *supra* note 8, at 41.

81. *Calvert v. Boullement*, 46 La. Ann. 1132, 15 So. 363 (1894); *Lenora v. Scott*, 10 La. Ann. 651 (1885).

82. 48 La. Ann. 145, 19 So. 220 (1895).

83. LA. CIV. CODE art. 1710.

prior jurisprudence<sup>84</sup> clearly establish that the legitimate portion of a forced heir cannot be encumbered with conditions. But when the donor bequeaths more than the legitimate portion, he perhaps could attach any lawful conditions which would apply to the bequest as a whole.<sup>85</sup> Should the heir dispute the condition, transfer of the forced portion is unaffected.<sup>86</sup> If the legatee takes without disputing the condition, it is assumed that he takes all of the legacy subject to the condition. Should he then fail to meet the requirements of that condition, transfer of the disposable portion would be precluded,<sup>87</sup> although the legatee is still entitled to receive the forced portion.

The minimal impact of *Baten* is to sanction brief suspensively conditional legacies. More broadly, the decision demonstrates a fairly liberal attitude, favoring freedom of testation, which may be manifested in subsequent cases in this area. The tendency seems to be to afford such dispositions a presumption of validity which will stand unless denied by a specific prohibition, and applicable prohibitions will be narrowly construed. To uphold the will in *Baten*, the court had to dispel some entrenched misconceptions concerning several ancient doctrines. That it was able to do so while clarifying the underlying principles of those doctrines is commendable.

*Daryl H. Owen*

*Davis v. Passman*: A PRIVATE CAUSE OF ACTION  
FOR DAMAGES UNDER THE FIFTH AMENDMENT

The plaintiff brought suit seeking damages<sup>1</sup> alleging that Congressman Otto Passman had discriminated against her on the basis of sex by firing plaintiff from her position as his deputy administrative assistant.<sup>2</sup> The United States Supreme Court, reversing

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84. See, e.g., *Succession of Turnell*, 32 La. Ann. 1218 (1880); *Chase v. Matthew's Executors*, 12 La. 357 (1838).

85. *Succession of Turnell*, 32 La. Ann. 1218, 1220 (1880).

86. *Id.*

87. Cf. LA. CIV. CODE art. 1698 (legacy is invalid if the legatee dies before the condition can be fulfilled).

1. The petitioner also sought equitable relief in the form of reinstatement, but Congressman Passman's election defeat rendered this claim moot.

2. The federal district court sustained the respondent's Federal Rules of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted.