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Private Law: Trusts and Estates

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TRUSTS AND ESTATES

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TRUSTEES

In *Bridwell v. Bridwell*,[1] Mr. Bridwell died (apparently intestate) leaving a surviving spouse in community and two children, Kenneth and Ginger. A judgment of possession recognized Mrs. Bridwell's half-interest in the community and the children's interest in their father's share, which was subject to their mother's usufruct under Civil Code article 916. The principal succession asset was a tract of land.

At the suggestion of an attorney, Ginger created a trust for her own benefit, naming her mother as trustee and conveying the interest in her father's succession, a one-fourth naked ownership in the land, to the trust. Two years later, Mrs. Bridwell, individually and as trustee, and joined by Kenneth (but not by Ginger), sold the land. The purchaser issued three checks in payment: one to Kenneth representing one-fourth of the price, one to Mrs. Bridwell, individually, for one-half, and a third check to Mrs. Bridwell, as trustee, representing the remaining one-fourth. After deduction of some of Ginger's expenses, the balance of the trust's share of the proceeds was deposited in a savings and loan account opened in Mrs. Bridwell's name as trustee. Over the next two years the balance was depleted down to a few dollars.

At Ginger's insistence, the court ordered Mrs. Bridwell to account for the sales proceeds she held as trustee.[2] In response, Mrs. Bridwell filed a letter from the savings and loan to the effect that she had on deposit some $43,750 currently earning interest at 7-1/2%. Ginger then petitioned not only for an accounting but also for termination of the trust or, alternatively, for removal of her mother as trustee. At the start of litigation, the trial court said that the sole issue was who was entitled to the *income* from the savings and loan deposit reported by Mrs. Bridwell. The court held that Mrs. Bridwell had renounced her usufruct over the trust's share of the proceeds and thus was not entitled to interest income from the savings account.

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1. 381 So. 2d 566 (La. App. 2d Cir. 1980).
2. *See* LA. R.S. 9:2088 (1950), 9:2221 (1950), & 9:2231 (1950).

Another trial occurred. The trial court not only ordered an additional accounting, but removed Mrs. Bridwell as trustee, named her successor, and ordered her to deliver over the trust property. Upon refusing to comply, she was jailed for contempt. This judicial action produced a prompt accounting. Mrs. Bridwell claimed that she never had renounced her usufruct over Ginger's share of the sales proceeds, that, as usufructuary, she was entitled to the greater share of the original savings and loan deposit, and that Ginger's trust never was entitled to more than the present value of Ginger's naked ownership as of the date of sale. Moreover, Mrs. Bridwell alleged that, as trustee, she had disbursed, on Ginger's behalf, an aggregate amount exceeding the value of Ginger's naked ownership interest in trust. The trial court found that Mrs. Bridwell had expended some funds on Ginger's behalf, but that the remainder belonged to the trust. Moreover, since the funds were earning 7-1/2% interest, the trust was entitled to interest on the amount owed at the earnings rate rather than at the legal rate of 7%.

In most respects, the second circuit sustained the trial court. As to the alleged renunciation of the usufruct, Civil Code article 624 was applicable: "In all cases the renunciation of the usufructuary *cannot be inferred* from circumstances; *it must be expressed.*"[3] The court noted that the 1976 revision[4] requires express *written* renunciation. In addressing the problem, the second circuit stated:

> Ordinarily, an express renunciation of a usufruct should be evidenced by words to that effect either written or spoken. . . . Although precise and ceremonial language need not be employed, unequivocal language understood by the owner is required. . . . In this case, however, the usufructuary is Mrs. Bridwell and the naked owner is Mrs. Bridwell *as trustee*, with her interest in each capacity being directly in conflict. *Necessarily then, the issue of whether she renounced her usufruct must be determined by her actions, and not by her words communicated from herself in one capacity to herself in another capacity.*
>
> We hold that by selling the property jointly in her individual capacity and as trustee, *by consenting to the payment of the entire proceeds attributable to the trust's one-fourth interest to the trustee of the trust, and by depositing the money to the account of the trustee*, Mrs. Bridwell expressly renounced her usufruct of the proceeds of the sale. There could hardly be a more express renunciation of the usufruct of money than by pay-

3. LA. CIV. CODE art. 624 (repealed 1977) (emphasis added).
4. 1976 La. Acts, No. 103, § 1.

ment and delivery of the money by the usufructuary to the naked owner. . . .

This conclusion is supported by Mrs. Bridwell's confession that she renounced the usufruct of the proceeds paid to her son even though there is no evidence of words, written or spoken, expressly renouncing the usufruct of that money. This conclusion is also consistent with Mrs. Bridwell's duties as trustee of The Ginger Bridwell Trust. *Any conclusion to the contrary would raise serious questions of a breach of duty owed by the trustee to the beneficiary of the trust in joining in a sale of the property, thereby converting a nonconsumable (land) which must be preserved (formerly a perfect usufruct) to a consumable (money) of which the usufructuary becomes the owner (formerly an imperfect usufruct), with power to dispose of the money to the detriment of the trust and its beneficiary.*

The usufruct of the funds having been renounced, and the funds having been delivered to the trustee, the trustee must account to the trust and its beneficiary for the funds and the income or profit the funds would have produced.[5]

Because Mrs. Bridwell was obligated to restore the money, the final issue was the rate of interest she should pay. The second circuit held that she was obligated to restore the 7-1/2% interest that would have been earned during her tenure as trustee because that amount represented lost trust income.[6] After her removal, however, she was only a debtor of the trust; thus she became liable only for legal interest at the rate of 7% from the date of her removal until the amount was paid.[7]

This decision treats a variety of important issues not previously addressed by a Louisiana court. The second circuit handled most points admirably. One might question the reduction of trustee liability for misappropriated funds after the removal of the trustee. During the period that a former trustee wrongfully withholds trust property, the trust suffers a continual loss of income which may well exceed the legal interest rate. By the court's reducing the obligation to restore interest to the legal rate, ex-trustees might be encouraged to "borrow" from their creditors by slow or contested payment, invest the wrongfully-retained funds at higher rates of interest, and pocket the difference. Certainly the law should not encourage an ex-fiduciary to "operate on the float." The Trust Code provides:

5. 381 So. 2d at 569-70 (citations omitted) (emphasis added).
6. *Id.* at 570.
7. LA. CIV. CODE art. 1935.

> If a trustee commits a breach of trust he shall be chargeable with:
> (1) A loss or depreciation in value of the trust estate resulting from a breach of trust;
> (2) A profit made by him through breach of trust; or
> (3) A profit that would have accrued to the trust estate if there had been no breach of trust.[8]

Applying any of these three standards, Mrs. Birdwell should be required to restore lost trust income because she breached the trust while serving as trustee. The fact that the breach was not remedied until after her discharge as trustee should make no difference.

The larger issue in this case deals with the predicament of a trustee who is also the usufructuary of trust property. The second circuit suggests that a breach of trust would occur when the trustee-usufructuary sells nonconsumable trust property. Under current law, the usufruct would attach to the proceeds.[9] The proceeds of the sale (presumably cash) become a consumable to which the usufruct attaches. When this transformation occurs, the trust property is converted into a non-interest-bearing, unsecured account receivable from the usufructuary-trustee. By this conversion, the beneficiary loses not only income earned on the proceeds, but also appreciation in value, and perhaps everything if the usufructuary's estate is unable to account. In other words, unless the usufructuary-trustee immediately reinvests the proceeds in nonconsumables, he would seem to commit a breach of the trust by self-dealing of the most serious sort.

Little consolation can be drawn from the 1976 amendments[10] that require renunciation of the usufruct to be in writing. The usufructuary-trustee who sells nonconsumables and fails to renounce probably has breached the trust. The usufructuary who does renounce in writing probably has made a gift. Even though article 616 now permits the naked owner to demand that the proceeds of sale be safely invested subject to the rights of the usufructuary, this provision does not solve the problem of lost income nor that of lost appreciation.

In *Succession of Batton v. Prince*,[11] Clarence Batton died survived by his wife and five children. His will left his wife 128 acres of land and a one-half interest in all of his separate property and confirmed

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8. LA. R.S. 9:2201 (1950).

9. LA. CIV. CODE art. 616, *as amended by* 1976 La. Acts, No. 103, § 1. *See* Succession of Gabriel, 344 So. 2d 24 (La. App. 4th Cir. 1977).

10. 1976 La. Acts, No. 103, § 1.

11. 384 So. 2d 506 (La. App. 2d Cir. 1980).

her usufruct over his interest in the former community. The balance went to five separate testamentary trusts, one for each child. Trust corpus consisted of some 500 acres of land, two-thirds of which was timber land, the balance being pasture land. Named as co-trustees were a son, Clarence, Jr., and the Homer National Bank. When the bank declined to serve as co-trustee, the widow and three children nominated Allen (the decedent's brother-in-law) to serve as successor trustee and filed a rule to show cause why he should not be appointed.

Two of the children objected on the grounds that Allen was a non-resident, that he was sixty-four years of age, that he lacked the appropriate educational and business background, and that his personal relationship with the other trustee was too close to permit him to exercise independent judgment. Moreover, they claimed that since their father had appointed a corporate trustee, the court likewise should name a corporate trustee as successor. Alternatively, the two children argued that they should be appointed as co-trustees of their respective trusts.

The will made no provision for the appointment of successor trustees.[12] In that situation the court having jurisdiction over the succession makes the appointment when the trust is testamentary.[13] The second circuit affirmed Allen's appointment, finding that his Arkansas residency did not disqualify him. He had promised to appoint an agent for service of process in Louisiana, but even if he failed to do so, the "long-arm statute" would be available.[14] As to his business experience, he had been employed by a pipeline transmission company for twenty-nine years; he had served as a terminal superintendent for three years, supervising twenty people and being responsible for valuable company property. The court stated:

> The cash deposits, savings bonds and shares of bank stock present in the trust corpus which are subject to a usufruct in favor of decedent's widow do not present such business complexities that a man of Allen's experience could not readily and intelligently administer these assets. . . . There is certainly nothing in the management of this land that a man of Allen's background cannot administer. Allen is extremely familiar with the land, since, as decedent's brother-in-law, he walked over the property "hundreds of times." He often discussed the raising of cattle and timber on the land with decedent. The evidence established that Allen has some business acumen as he has owned

12. LA. R.S. 9:1785 permits such designation in the trust instrument.
13. *See* LA. R.S. 9:1725(5) (1950), *as amended by* 1972 La. Acts, No. 656, § 1.
14. He need be only a United States citizen. LA. R.S. 9:1783 (1950).

> and sold several pieces of real property and the home he now owns is paid for. Although he lives in Arkansas, Allen's home is only ten miles from the Louisiana border and 35 miles from Homer, where the land is located. . . . Allen is well acquainted with all of the beneficiaries of the trust, one of whom is his co-trustee, and with the widow who owns an undivided interest in and has a usufruct over much of the property in the corpus of the trust. These are factors which will better equip Allen to administer the trust property and carry out the intentions of the settlor of the trust as reflected in the will.[15]

Nor did Allen's age, sixty-four, disqualify him as co-trustee. The court said: "We note that one of the principal candidates for the Republican nomination for President of the United States is substantially older than Allen."[16]

The court further rejected the appointment of the two children as additional co-trustees for their own trusts:

> If this contention of the opponents should prevail there would be four trustees, plus the decedent's surviving widow, making decisions with regard to the administration of much of the acreage included in the corpus of the trust. We find (and the trial court apparently so believed) that having only two co-trustees will facilitate the better administration of the trust estate.[17]

Even though the will dispensed the original trustees and all successors from posting bond, the two children urged the court to exercise its discretion to require bond pursuant to R.S. 9:2172. The second circuit declined:

> In his will the decendent exempted Clarence, Jr. and the Homer National Bank, and all their successors in office, from posting bond. In light of this exemption and the total lack of evidence of irresponsibility on the part of either Allen or Clarence, Jr., we cannot say the trial court abused its great discretion in not requiring Clarence, Jr. or Allen to provide a bond.[18]

TESTAMENTARY CAPACITY

Before the onset of his illness, Mr. Wright had executed a will leaving the bulk of his property to his wife. However, on the day before he died in the hospital, he executed a will leaving the bulk of

15. 384 So. 2d at 508.
16. *Id.* at 509.
17. *Id.*
18. *Id.*

his property to the child of a prior marriage. In *Succession of Wright*,[19] his wife attacked the hospital will, alleging that it was defective as to form, and further, that her husband lacked testamentary capacity. The fourth circuit chose not to discuss the formalities, but dealt solely with the question of capacity.

Within the sixteen months prior to his death, Mr. Wright had been hospitalized seven times in connection with lung cancer, twice undergoing surgery. The attending physician testified that he was in severe pain and required a great deal of sedation during the last few days of his life. Though Mr. Wright was rational when awake, he obviously was so close to death that his doctor saw no reason to wake him. His hospital record reflected that he was comatose, although he woke intermittently to ask for sedation. According to the doctor, "decedent's preoccupation with pain was such that he could not have made a new will without it being recommended by someone else."[20] According to a clinical pharmacologist, "the nature and extent of the potent narcotics required to sedate decedent were such that his ability to judge, think and discern would be affected.... [I]t was indeed possible for a person under the influence of these drugs to answer a question and 'not know exactly what he is answering.'"[21] The shift nurse testified, "[H]e wasn't really lucid" and that he "became worse day by day," responding only to inquiries concerning pain.[22] She did not think that Mr. Wright was capable of understanding or making a will.

At the time the will was executed, Mrs. Wright was absent from the room. Her absence was unexplained; she had left the hospital shortly before the notary and witnesses arrived. The testator, his son, the son's wife, and three witnesses were present at the hospital. All testified that the decedent acknowledged the others' presence and greeted them. According to one witness, Mr. Wright nodded to indicate his understanding as the notary read some passages from the will. His daughter-in-law "held" his hand while Mr. Wright placed an "X" on the will; he was too weak to sign his name. The daughter-in-law denied guiding the testator's hand, claiming that she merely "placed her hand over the knuckle."[23] Another witness added that after the will was read, the decedent asked his son, "[I]s this what we want, Billy?"[24] The notary testified that she had tried to

19. 376 So. 2d 589 (La. App. 4th Cir. 1979).
20. *Id.* at 591.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

draw his will the day before (but the decedent was sleeping, apparently sedated) and that she prepared the will in accordance with the son's instructions; the son stated to her that he was relaying his father's wishes. Mr. Wright seemed totally alert to the notary. The trial court based its finding of incapacity upon the testimony of the physicians and nurses. The fourth circuit found no reason to upset it.

In *Succession of Zinsel*,[25] a statutory will was upheld because the court found that the decedent had placed his signature, not merely his mark, on the will. His mark would have required three witnesses. In *Wright*, the decedent admittedly was unable to affix his signature; three witnesses were present. Moreover, there was the delicate question of whether his hand was "guided." In *Zinsel*, the attending physician testified that the decedent, though in pain and recently sedated, was capable of understanding. Contrary medical testimony was introduced in *Wright*. Perhaps the most distinguishing fact in *Wright* was the testator's question as to whether or not the will contained what his *son* wanted. This fact was, perhaps, reason enough for the court to bypass the formalities and to deal directly with the issue of capacity.

The effects of great pain and heavy sedation will continue to play a part in questions of testamentary capacity. Though Louisiana does not permit wills to be set aside because of "undue influence" on the testator,[26] these types of circumstances tend to blur the distinction between "undue influence" and testamentary capacity.

Can chronic alcoholism deprive one of testamentary capacity? This possibility arose in *Succession of Collins v. Hebert*.[27] An autopsy revealed that the decedent (who died at age forty-three) had suffered physical deterioration as a result of excessive alcoholic intake and associated poor nutritional habits. Many of Mr. Collins' vital organs had become impaired. Microscopic studies revealed that a significant percentage of his brain cells had been damaged or scarred. His will had been executed some eight months prior to his death. A domestic servant testified that the decedent had been intoxicated almost constantly during his last years, being reduced to a state of almost total helplessness. Close friends testified as to Mr. Collins' increasing financial irresponsibility. A close friend, an attorney, had refused to prepare his will and an act of donation about a year before his death, due to the testator's intoxicated condition.

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25. 360 So. 2d 587 (La. App. 4th Cir. 1978).
26. LA. CIV. CODE art. 1492.
27. 377 So. 2d 516 (La. App. 3d Cir. 1979).

Proponents of the will presented a different picture tending to show that Mr. Collins was "usually sober in the mornings"[28] and drove a car safely and without apparent difficulty. The witnesses and notary on his contested will testified that Mr. Collins appeared fully alert at the will ceremony and seemed to be aware of what he was doing. They observed no odor of alcohol, slurred speech, or unsteady gait.

A neuropathologist who examined the decedent's brain post-mortem claimed that due to the number of damaged or destroyed brain cells, the decendent could not have understood the nature of his actions when he purported to draw his will eight months prior to death. There was countervailing medical testimony by a neurologist who testified that no medical authority nor recognized medical literature supported the theory that accurate conclusions concerning behavior or mental ability could be drawn from post-mortem studies of the brain. His testimony was punctuated by the examples of two famous politicians whose autopsies revealed pathological changes of the type found in decedent's brain, "yet they had functioned well and had had normal intellectual capabilities prior to their deaths."[29]

The third circuit held that the presumption of testamentary capacity had not been overcome. Judge (now Justice) Watson concurred reluctantly, but doubted that a man who consumed eighty bottles of liquor per month, who spent weeks in hospitals for alcholics, whose close attorney-friend refused to write him a will, who gave new automobiles to young friends for no apparent reason, and who was found by autopsy to have destroyed 50% to 90% of his brain cells by drinking, was of "sound mind."[30]

In *Succession of Arnold*,[31] the testatrix's statutory will was questioned because of her alleged inability to read.[32] Since testimentary capacity is always presumed, the burden of proof is on the opponent of the will. The second circuit characterized this burden as "similar to that required in *criminal* cases, namely, *any reasonable doubt* must be resolved in favor of the validity of the will."[33] Testimony offered by the opponents of the will tended to show that the testatrix "did have at least some reading capabilities."[34] She kept a check

28. *Id.* at 518.
29. *Id.*
30. *Id.* at 519-20.
31. 375 So. 2d 157 (La. App. 2d Cir. 1979).
32. LA. R.S. 9:2442(b) (as it appeared prior to 1974 La. Acts, No. 246, § 1 & 1976 La. Acts, No. 333, § 1); LA. R.S. 9:2443 (as it appeared prior to 1979 La. Acts, No. 241, § 1).
33. 375 So. 2d at 158 (emphasis added).
34. *Id.*

book and an address and telephone book, had a driver's license, and made out-of-town trips "with no apparent confusion."[35] She apparently read newspaper advertisements and once recognized her name in a judicial advertisement naming her as administratrix of the succession of a relative.

Given the evidence, the court did not find the opponents to have shown

> beyond a reasonable doubt that the testatrix was unable to read. Had defendants' burden of proof been merely a *preponderance* of the evidence, the result might be different since much of the testimony offered on behalf of plaintiff came from interested witnesses. However, we find the evidence creates a reasonable doubt as to whether the testatrix was able to read, and having to resolve this doubt in plaintiff's favor, we find the will to be valid.[36]

LIFE SUPPORT SYSTEM

The following case was decided by the fourth circuit in 1979, but remains unreported at the family's request. A child was born afflicted with arthogreyposis, a birth disorder in which the joints are stiff and muscles contracted or atrophied, complicated by atrophy of the respiratory muscles. Spontaneous breathing was impossible. A respirator had "breathed for" the child since birth. There was no hope of cure. While the child was kept alive by artificial means, extensive treatment, involving injections, constant intubation, and repeated administration of intravenous fluid and medications, was required to sustain life.

The child's parents and the hospital medical staff concluded that the child's best interest mandated her removal from the life support system; their attorneys verbally requested such permission from the juvenile court. Instead, the juvenile court ordered temporary continuation of the life support system and fixed a hearing to determine whether further continuation should be ordered. A court-appointed attorney excepted to the juvenile court's jurisdiction.

Medical evidence at the hearing established:

> that there is no treatment which will cure or improve the disease; that the ventilator serves only to maintain life by suspending the onset of death until the disease or some complication kills the child; that the child's outside life expectancy is

35. *Id.*

36. *Id.* at 158 (emphasis added).

> one year; that the machine's pounding away at the lungs, the tube's constant presence in the throat, and the repeated injections are actually doing harm to the child's body. While the doctors conceded there was brain wave activity, their recommendation was "to discontinue the procedures" because "the child is not gaining anything by what we are doing."[37]

Supervisory writs were taken to the fourth circuit. Among other relief, the petition asked for a declaratory judgment regarding the civil and criminal liability of the parents and the hospital staff as a result of the removal of the life support system.

In a *per curiam* opinion (with separate concurrences by each judge) the fourth circuit held that the juvenile court lacked jurisdiction and thus that the order requiring continuation of the life support system was held to be issued improperly.[38]

In his concurring opinion, Judge (now Justice) Lemmon acknowledged the exclusive original jurisdiction of the juvenile court when a child is alleged to be in need of care,[39] specifically if his welfare is threatened by a parent's refusal to supply him with medical care.[40] Though the juvenile court could order invasion of the minor's body to improve or restore his health, discontinuation of life support was neither treatment nor restoration. Alternatively, even if the juvenile court had jurisdiction to order the cessation of life support, it had no jurisdiction to determine the civil or criminal liability of the hospital or the doctors: "Since there is no compelling state interest in ordering treatment which is not beneficial to restoring health, the question of whether the life of the minor should be maintained by artificial means *is a matter of private concern* . . . ."[41]

Judge Lemmon continued, saying that he found no duty on the part of the parents or the physicians to prolong the life of a terminally-ill child through extraordinary medical procedures. Had the life support system been discontinued, he would vote, upon appropriate evidence, that there was no civil or criminal liability. As to these matters, the district court was the proper forum in which to bring a request for declaratory judgment. Judge Lemmon stipulated:

> Whether a district court with criminal jurisdiction can rule on the criminal liability of the parent or physician, in an action which the district attorney and/or attorney general are made

37. In the Interest (name withheld), No. 10,899, slip op. at 2 (La. App. 4th Cir. 1979).
38. *Id.* at 3.
39. No. 10,899 (Lemmon, J., concurring). *See* LA. CODE JUVENILE P. art. 15(c).
40. *Id.*
41. *Id.* (Emphasis added).

> parties, is a separate question on which I (as a judge without criminal jurisdiction) will not comment. However, it seems highly unlikely that a state would prosecute a person who honestly and in good faith seeks and obtains a judicial declaration of the legality of his act in advance of the occurrence particularly in view of the recognized fact that in terminal patient care of an adult with capacity to decide, life support systems are often abandoned without publicity after a private decision reached by the doctor, patient and his family.[42]

Judge Boutall opined that the juvenile court had jurisdiction since the issue concerned a child whose parent could be said to have neglected or refused, when able to do so, to provide proper or necessary medical, surgical, or other care necessary for the child's well-being.[43] However, under the particular procedural posture of this case, he thought the juvenile court appropriately had dismissed it, and he did not comment on the larger questions.

Judge Scott concluded that neither the juvenile court nor the court of appeal could adjudicate the questions of civil or criminal liability. In any event, the state would require representation.[44]

This case appears to be the first one in Louisiana involving the legal consequences of discontinuing life support. The leading case is, of course, *Matter of Quinlan*.[45] In that case, the parents of Karen Quinlan, the treating physician, the hospital, the local district attorney, and the New Jersey attorney general all were represented. The New Jersey Supreme Court held that the decision was to be made by the parents, with the concurrence of the treating physician and the hospital administration, but only after consultation with two other physicians who were not treating the patient.[46] Following this procedure, both civil and criminal liability would be avoided. Moreover, the New Jersey Supreme Court made it clear that, thereafter, the courts of that state were not going to decide such matters. On the other hand, the Supreme Court of Massachusetts has held, in effect, that Massachusetts courts maintain ultimate jurisdiction in each case to decide whether or not life support systems should be continued.[47] This result has been much criticized.

In *Hardee v. Kilpatrick Life Insurance Company*,[48] the insured

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42. *Id.* at 3.
43. LA. CODE JUVENILE P. arts. 13-14; LA. R.S. 13:1570 (Supp. 1978).
44. No. 10,899 at 2 (Schott, J. concurring).
45. 355 A.2d 647 (N.J. 1976).
46. *Id.* at 671.
47. Superintendant of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).
48. 373 So. 2d 982 (La. App. 3d Cir. 1979).
49. *Id.* at 984.

had suffered a head injury and apparently was kept "alive" by a life support system for 107 days. The death certificate did not reflect the possibility of an earlier "brain death." The life support system was removed on the date of death, as reflected by the death certificate. This removal occurred more than ninety days after the accident. The issue was whether or not accidental death coverage existed under the typical policy provision requiring "death" to occur within ninety days of the accident. The case was lost by the plaintiff on a motion for summary judgment by the insurer; the evidence in the record was insufficient to establish "brain death" prior to the date of death as reflected by the death certificate.[49] This result raises an interesting question, particularly in light of Louisiana R.S. 9:111, which purports to define "death."[50]

THE MARITAL PORTION

Sixteen months prior to his death, Fredrick Ziifle married a woman twenty-six years his junior. They later separated on two occasions and, at his death, were separated with no apparent reconciliation. His net estate was approximately $450,000; her assets were worth approximately $75,000. She claimed the marital fourth pursuant to Civil Code article 2382.

In *Succession of Ziifle*[51] the fourth circuit denied her claim on the basis that the evidence failed to show that her husband's death deprived her "of a standard of living similar in style, comfort and elegance to that existent during the marriage."[52] Quoting from *Succession of Lichtentag*[53] the court stated: "The right conferred by the article (2382) is in nature of a charity or bounty in favor of the surviving consort left in penurious circumstances . . . . The fourth is given in honor of the past marriage, that the survivor be retained in the previous accustomed rank and condition."[54]

Counsel for Mrs. Ziifle argued that entitlement to the marital

50. LA. R.S. 9:111 (Supp. 1976) provides in pertinent part:
A person will be considered dead if in the announced opinion of a physician, duly licensed in the state of Louisiana based on ordinary standards of approved medical practice, the person has experienced an irreversible cessation of spontaneous respiratory and circulatory functions. In the event that artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, duly licensed in the state of Louisiana based on ordinary standards of approved medical practice, the person has experienced an irreversible total cessation of brain function. Death will have occured at the time when the relevant functions ceased.

51. 378 So. 2d 500 (La. App. 4th Cir. 1980).

52. *Id.* at 501.

53. 363 So. 2d 706 (La. 1978).

54. 378 So. 2d at 501.

fourth should depend upon the *ratio* between the decedent's estate and the survivor's assets. In the instant case, the ratio was six-to-one; in prior cases the smallest ratio that a court had recognized was five-to-one. On this argument the fourth circuit concluded:

> Apparently overlooked in this energetic contention by appellant's counsel is the still existent requirement that the claiming spouse's lifestyle need also to have changed as a result of decedent's demise.
>
> Even so, it was difficult to ascribe absolute validity to the ratio theory which, by its own terms, becomes patently ridiculous when carried to an extreme.
>
> Yet we find no need to explore these provocative possibilities (*i.e.*, is a widow in necessitous circumstances when she has only five million dollars because her deceased husband left an estate of twenty-five million dollars) in view of our conclusion that the record, in fact, supports those critical factual determinations which form the overall basis for the trial court's judgment.[55]

55. *Id.*