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Private Law: Trusts and Estates

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TRUSTS AND ESTATES

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TRUSTS

Succession of Dunham[1] is surely one of the more important cases decided within the last ten years. The stakes were high, the issues complex, and the parties adversary at almost every point.

Ted F. Dunham died survived by his widow, Katharine, two sons of a prior marrage, and nine grandchildren. His will created eight trusts: one each for his two sons and for six of his grandchildren. His widow, Katharine, was named as executrix and she, one Alexander, a business associate, and a bank were named as co-trustees of each of the eight trusts. At issue were: the classification of shares in related close held corporations, the regularity of a stock redemption provoked by the executrix, satisfaction of the legitime of the two sons, removal of the executrix and individual trustees, and the value of certain succession property.

Classification of Stock

Some three years prior to his marriage to Katharine, decedent acquired 490 shares in a close held corporation evidenced by a stock certificate registered in the name of Katharine (then his secretary) and endorsed by her to his order. Although Katharine claimed the shares were issued to her as owner and endorsed by her only for the purpose of financing the acquisition transaction, the first circuit gave little weight to her testimony nor to stock records "prepared carelessly and perhaps in haste." Although the endorsement appeared as though someone had attempted to eradicate it, (which the widow testified she had done at her husband's direction) the court nevertheless found ownership to be in the endorsee decedent. The supreme court reversed on this issue finding a want of donative intent. According, the shares were Mr. Dunham's separate property.

An additional 1,000 shares of the same corporation were purchased by Dunham prior to his marriage to Katharine under an Oklahoma agreement styled "conditional sale." According to the document, title to the shares was to remain in the seller until final

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1. 393 So. 2d 438 (La. App. 1st Cir. 1980), *aff'd in part and rev'd in part*, No. 81-C-0140 slip op. (La. 1981).

payment was made—an event which did not occur until after decedent and Katharine were married. She claimed the shares were community property while the sons argued that they were separate. In characterizing the sales document, the first circuit (after some straining) held that the legal effects of the transaction were the same as though there had been an immediate sale followed by a pledge of the shares to secure the credit portion of the purchase price. The Supreme Court agreed but on the basis that all the parties assumed that Louisiana law controlled. (But even if they didn't, it would).

The shares of the corporation (discussed above) were subject to a redemption agreement between the company and the decedent which provided that the shares were redeemable at a price not less than book value nor greater than 105 percent thereof. The widow, as executrix, obtained court authority to redeem 394 shares for the stated purposes of securing funds to pay taxes and expenses of administration, and in order to secure the tax advantages under Section 303 of the Internal Revenue Code.[2] One of the sons unsuccessfully sought a preliminary injunction to prevent the sale which eventually took place after the injunction was denied and no suspensive appeal taken. The son took a devolutive appeal which was dismissed as moot inasmuch as the sale for $590,000 had already taken place.[3] However, the appellate court reserved the son's right to set the sale aside or sue the widow for breach of fiduciary duty.

In the present action, the trial court found that the actual redemption took place on the day before some $500,000 in corporate net income would have been credited to the book value which, in turn, would have substantially increased the redemption price. The first circuit found a breach of the executrix' fiduciary duty in her failure to secure an amended court order either setting aside the sale or increasing the price to reflect the increased book value. Such action, said the court, was a violation of the fiduciary duty to preserve succession property.[4] However, the court refused to find that she had violated the fiduciary duty not to sell succession property to herself, although as a result of the redemption her proportionate ownership of the corporation was increased. The court cited article 3195 of the Code of Civil Procedure which exempts from the

2. The court relied on *Barbet v. Langlois*, 5 La. Ann. 212 (1850), and *Due v. Due*, 342 So. 2d 161 (La. 1977), *discussed in* 3 G. LEVAN, LOUISIANA ESTATE PLANNER No. 1 at 50 (1976). Internal Revenue Code section 303 permits capital gains treatment of partial redemptions in certain circumstances which would otherwise be treated as dividends and taxed as ordinary income.

3. Succession of Dunham, 359 So. 2d 674 (La. App. 1st Cir. 1978).

4. LA. CODE CIV. P. arts. 3191 & 3221.

self-dealing-by-sale prohibition the surviving spouse, a partner with regard to partnership assets, and a co-owner as to property owned in indivision. The first circuit analogized Mrs. Dunham's position as a corporate shareholder to that of a partner or co-owner and thus the exception applied. The court rejected the argument that the article 3195 exception should apply only where the fiduciary was not benefited by the sale:

> [I]n all likelihood all sales that would be made to the persons excepted by Article 3195 *would* benefit the persons excepted, *or they would never take place.* The policy behind this codal article clearly contemplates benefit to the persons excepted.[5]

Alternatively, the sons argued that the widow had breached her fiduciary obligation by failing to "spin-off" the land owned by a real estate subsidiary by distribution to the shareholders of the parent company, thereby yielding a favorable tax result. In order to generate cash sufficient to finance the redemption, the executrix had caused the land to be sold to third persons. The court rejected this argument because stock ownership of the real estate subsidiary had been in continuous dispute. Moreover, there was neither evidence that the executrix had received such tax advice nor was such suggested by the sons' accountants until after the redemption was complete.[6] The supreme court affirmed the question of breach of fiduciary obligation, emphasizing her active role as a corporate director in the transaction.

In the earlier injunction proceeding, the first circuit had refused to set aside the redemption sale because the corporation was not a party to the proceeding, and further because no recission was sought. Since the purchase of succession assets (via redemption) by the executrix was not prohibited by article 3195 of the Code of Civil Procedure, the court found no authority to set the sale aside. The only recognized remedy for a breach of article 3221 (which requires the executor to preserve and protect succession property) was an action for damages. In other words, the executrix had the power to contract for sale (via redemption) to herself. The fact that she breached a fiduciary duty by failing to cause the corporation to pay a reasonable price was not grounds to set aside the sale. The sole remedy was in damages for the deficit:

> Here, even if we consider the redemption to constitute a sale by the executrix to herself through an intermediary. . . , *a question*

5. 393 So. 2d 438, 448 (La. App. 1st Cir. 1980) (emphasis added).

6. Moreover, said the court, the executrix as controlling shareholder of the parent company would have been required to control the subsidiary through the parent and the court was "unwilling to pierce two corporate veils." *Id.* at 449.

> *upon which we do not need to render a decision*, nevertheless, as we have seen, Mrs. Dunham falls within the stated exceptions and the sale cannot be set aside for that reason. Then we fall back upon Articles 3191 and 3221, which read together, provide but one remedy for mismanagement, damages. . . . In the present case, damages are not sought. There is no showing as to quantum. All that is sought is a judgment setting aside the sale. The codal authority does not afford that remedy. Hence, we must refuse to set aside the sale. We reserve appellant's right to proceed against Mrs. Dunham by separate action to obtain damages for her breach of fiduciary duty.[7]

Legitime

The testamentary trusts for the benefit of the two sons were confined to their forced portions, the disposable portion passing to the trusts for the grandchildren. The sons argued that the legitime trusts were insufficient in that they were subjected to maximum spendthrift restraints, and that the trust property was largely composed of close held corporate stock (of the parent company) which had paid no dividends in almost forty years. This, argued the sons, was in violation of article 12, section 5 of the Louisiana Constitution providing that "no law shall abolish forced heirship." The first circuit acknowledged that the legitime could be placed in trust without violating the constitution[8] and could be subjected to spendthrift restraints.[9] However, the court did not interpret the Constitution as permitting the legitime to be invested wholly in non-income producing property. The sons prayed that the trusts be either terminated or that the trustees be ordered to sell the stock and to invest the proceeds in income producing assets. The court responded:

> We note that the trusts are for the lives of the two forced heirs; there is no possibility of their ever receiving principal. An increment to principal is of no benefit to them. *To receive their legitime, they must receive income* as well as the hollow and meaningless shell of principal, and income from Anderson-Dunham must necessarily be in the form of dividends.[10]

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7. *Id.* at 450 (emphasis added).

8. *Id.* at 450. The supreme court reserved to the sons an action in damages against the executrix, but carefully avoided any comment on the merits of the claim.

9. Succession of Earhart, 220 La. 817, 57 So. 2d 695 (1952).

10. Succession of Singlust, 169 So. 2d 10 (La. App. 2d Cir. 1964), *writ refused* 247 La. 262, 170 So. 2d 512 (1965). *Earhart* and *Singlust* were decided under the constitution of 1921, but the court found no significant change in the constitution of 1974. As a matter of fact, the new constitution expressly permits the forced portion to be placed in trust. LA. CONST. art. XII, § 5.

In support of its position, the court cited *Succession of Burgess*.[11] The first circuit read *Burgess* to say:

> that swampland in trust would not satisfy legitime requirements where a forced heir was principal and income beneficiary of a trust created for his life (subject, in that case, to the usufruct of the surviving spouse) if the swampland was unproductive. The court further stated that swampland should be sold if income from the swampland was found to be insufficient to satisfy the legitime, the measure of sufficiency being the present value of future income the forced heir could expect based on his life expectancy (with deduction for the surviving spouse's usufruct, a problem that does not concern us here).
>
> The principal is thus established by *Burgess* that if an income and principal interest representing the legitime is placed in trust, the trust property must be at least reasonably productive of income.
>
> The prudent man rule with respect to trust investments . . . also required that trust property must be productive to be retained. [R.S. 9:2127, Trust Code.]
>
> As property *not* constituting the legitime must be sold if it does not yield sufficient income, *still more* must property that constitutes the legitime be sold or otherwise disposed of if in time it is unproductive of income, for two reasons: (1) retaining the property in trust impinges upon the legitime, and (2) retaining the property in trust violates the prudent man rule with respect to investments.[12]

Supporting its refusal to terminate the trusts or order sale of the shares, the court concluded:

> We do not find that it violates the spirit of *Burgess* to decline to order an immediate sale of the . . . stock, or that the prudent man rule requires a sale without judicious hesitation to allow new trustees to exert their influence. . . . It is somewhat unlikely that if the . . . stock held in the trusts for the children is ordered sold, it will produce its true value. A minority interest in a closely held corporation does not generally sell for its true value.[13]

However, the court reserved the sons' rights to proceed in the trial court to force a sale "if within a reasonable time Anderson-Dunham has still failed to pay dividends commensurate with principal."

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11. 359 So. 2d 1006 (La. App. 4th Cir.) *writ denied*, 360 So. 2d 1179 (La. 1978).
12. 393 So. 2d at 451.
13. *Id.* at 452-53.

Removal of the Executrix

The trial court had refused to remove Mrs. Dunham as executrix because mere conflict of interest between the succession representative and heirs was insufficient ground for removal, citing *Succession of Kaffie*,[14] and *Succession of Favalora*.[15] In particular, the trial court relied on *Succession of Houssiere*,[16] which it interpreted as holding that a succession representative could not be removed for *anticipated* mismanagement. Apparently, the trial court did not find *prior* mismanagement. However, the first circuit did find *prior* mismanagement in the form of the stock redemption—a failure to preserve succession assets and thus a breach of the fiduciary obligation. The first circuit removed the executrix.[17] The Supreme Court affirmed.

Removal of Individual Trustees

The trial court removed the widow and Alexander as trustees of the legitime trusts, but refused to remove them as trustees for the grandchildren. The first circuit removed them both from all trusts. Noting only two prior cases dealing with the removal of the trustee[18] the first circuit held that *mere animosity* between trustee and beneficiary was insufficient ground for removal. However:

> In the present case, although animosity must be said to exist, much more than animosity exists. First we note that in traditional trust law animosity that colors the judgment of the trustee is grounds for removal. Restatement of Trusts, 2nd, Section 107, Comment C. Oppenheim and Ingram . . . Treatise on Trust . . . Section 136, indicate this view would be followed by Louisiana courts. It is shown that Mrs. Dunham and Mr. Alexander *conveniently delayed their acceptances of the trust* for the two sons *until such time as the stock redemption had taken place* . . . It was their duty either to have recused themselves as trustees, as it is obvious that they intended to accept the trusts as soon as the redemption had taken place, or to have accepted the trusts and actively opposed the sale in their capacities as trustees. They did neither. Rather than opposing the sale or recusing themselves, as would appear to have been the more

14. 273 So. 2d 318 (La. App. 3d Cir.) *writ refused*, 276 So. 2d 701 (La. 1973).

15. 169 So. 2d 197 (La. App. 4th Cir. 1964), *writ refused*, 247 La. 355, 171 So. 2d 476 (1965).

16. 247 La. 764, 174 So. 2d 521 (1965).

17. *See* LA. CODE CIV. P. art. 3182.

18. Holladay v. Fidelity Nat'l Bank, 312 So. 2d 883 (La. App. 1st Cir. 1975); Succession of Supple, 274 So. 2d 790 (La. App. 4th Cir. 1973).

> proper course, they did nothing, thereby permitting the succession and the trusts to sustain a substantial injury. This was a breach of their fiduciary duties as trustees, having been both a breach of the duty to act prudently in selling investments (R.S. 9:2127, Trust Code) and their duty to administer the trust solely in the interest of the beneficiaries (R.S. 9:2082, Trust Code) as the sale benefited Mrs. Dunham as a shareholder and strengthened Mr. Alexander's position as corporate president. Also, as trustees it was their *duty* to have caused the principal trust property, stock . . . *to be productive of income.* Income from the stock to the trusts would necessarily have had to have been in the form of dividends distributed by Anderson-Dunham. Trustees are under a duty to take reasonable steps to obtain possession of legacies. [R.S. 9:2091, Trust Code, Comment (c)]. It was the trustees' duty to have exerted pressure by threatening to *demand delivery of the legacy viz.* corporate stock in trusts, thereby influencing the corporation to distribute dividends, or to demand delivery of the stock from Mrs. Dunham in her capacity as executrix, so that the trustees could *vote the stock in such a manner that the corporation would declare dividends.* They did neither. Thus, they again breached their fiduciary duty. . . . The same injury that occurred to the children also occurred to the grandchildren. . . . The grandchildren also suffered from failure of the corporation to declare dividends.[19]

The supreme court affirmed, suggesting that the duty of the trustee was even more onerous than that of the executor.

Valuation of Special Bequests—Effect on Legitime

Finally, the sons presented a novel argument regarding the valuation of the decedent's half interest in his home, household effects, and an office building specially bequeathed to the trust for one of the grandchildren which was subject to the usufruct of his widow. The valuation given to these assets would have a direct bearing on the value of the active mass. The lower the valuation on these assets, the less the legitime; the greater the valuation, the greater the legitime. The sons argued for the higher value. The first circuit settled the matter on the basis of expert testimony presented by both sides. Whereas no new point of law was recognized or applied by the court, the circumstances point up a mathematical relationship that estate planners should keep in mind. A frequent Louisiana will format consists of special bequests (ordinarily home and household effects) followed by a fractional disposition of legitime by universal

19. 393 So. 2d at 453-54.

title to forced heirs, concluding with a disposition of the residue. Where such format is used, practitioners should remember that the values assigned to the property specially bequeathed will have a direct bearing on the value of the fractional bequest to forced heirs. Accordingly, where typically low values are sought, the forced heirs could be shortchanged. The supreme court did not comment on this issue.

In *Succession of Noe*,[20] Mrs. Noe died survived by three children, one of whom was Mrs. Laine. Her brother and sister received their forced portions outright. However, Mrs. Laine's portion was bequeathed in trust, naming her sister and sister's husband as trustees. The will divided the disposable portion among testamentary trusts for her grandchildren. The parents of the grandchildren were named as trustees of their respective trusts except that Mrs. Laine's brother and sister were named co-trustees of the trust for her daughter.

Several years later Mr. Noe died, his will reflecting a similar pattern of disposition. However, he left Mrs. Laine's forced portion to her outright and named her as sole trustee of the testamentary trust for her daughter created over part of the disposable portion.

While both successions were still under administration, Mrs. Laine sued to have her brother removed as co-trustee of her trust and her daughter's trust, and to have herself substituted for him in both instances. Her petition recited a "complete lack of harmony" between Mrs. Noe and Mrs. Laine's husband at the time her will was executed, but that Mrs. Laine had subsequently divorced her husband and had had no contact with him for a number of years. She noted that the later will of her father, executed after the divorce, had left her her forced share outright and had named her as trustee of her daughter's trust. She further alleged personal alienation between herself and her brother (named co-trustee of both trusts), that they had not communicated in years except through attorneys, and thus would not be in a position to cooperate in the administration of the various trusts. She further alleged that her brother's fractional ownership in the assets of both successions and the interests of his children would make it impossible for him to discharge his fiduciary obligation as trustee of the trusts for Mrs. Laine and her daughter.

Mrs. Laine claimed that the substitution of trustees was authorized by Louisiana Revised Statutes 9:2026 (Trust Code), permitting the court to modify a trust due to circumstances unknown

20. 398 So. 2d 1173 (La. App. 2d Cir. 1981).

or not anticipated by the settlor which, if unchanged, would defeat or substantially impair the purposes of the trust. Additionally, she cited Louisiana Revised Statutes 9:1789, permitting removal of the trustee by the court "for sufficient cause shown." According to Mrs. Laine, the critical "change of circumstances" was her divorce from her husband. As "cause" for removal of her brother, she alleged an irreconcilable conflict of interest.

The second circuit affirmed the trial court's dismissal of her suit on exception of no cause of action. Citing copious authority collected in an excellent footnote, the court stated that her petition failed to contain *factual* allegations of impairment or interference with the proper administration of the trusts. Co-ownership with an allegedly hostile trustee was not necessarily an irreconcilable conflict of interest. Moreover:

> Mere hostility is not grounds for removal of a trustee, it is only where such hostility interferes with the proper administration of the trust that it constitutes reason for removal.[21]

WILLS

In *Succession of Goode*,[22] the olographic will provided in part:

> All oil and gas *royalty interest payments* owned by me shall be paid to Pauline Egbert Parker for as long as she might live. After her death, the amount of any *payments* shall be equally divided between my nieces and nephews and Linda Cosby Paine.

Opponents of the will challenged the bequest as a prohibited substitution alleging invalidity not only of the above disposition but the entire will. The second circuit agreed that the disposition was a prohibited substitution, and thus invalid, but that this had no effect on the remainder of the will.[23]

The court looked to the recent decision of the supreme court in *Baten v. Taylor*[24] for guidance in identifying a prohibited substitution. In *Baten v. Taylor*, the supreme court adopted the analysis advanced by the Report of the Trust Code Committee, namely that in order to be a prohibited substitution: (1) there must be a double disposition in full ownership, (2) a charge upon the institute to preserve and transmit the property to the substitute, (3) resulting in

21. *Id.* at 1178.

22. 395 So. 2d 875 (La. App. 2d Cir.), *writ granted*, 401 So. 2d 359 (La. 1981).

23. Succession of Walters, 261 La. 59, 259 So. 2d 12 (1972).

24. 386 So. 2d 333 (La. 1979), *discussed in* 7 G. LEVAN, LOUISIANA ESTATE PLANNER No. 2 at 178 (1980).

a successive order burdening the institute to transfer the property to the substitute. Proponents of the will argued that there was no double disposition of full ownership, but rather a mere disposition of successive usufructs, the naked ownership passing by intestacy. Apparently, this argument concentrated on the use of the word *payments* in both dispositions. Thus, it was argued that the bequest was not of the royalties themselves, but only of the use of the money generated.[25]

The court struggled to find assurance that less than full ownership was contemplated, searching in vain for such words as "use" or "use and benefit" which would suggest usufruct:

> The quoted language clearly indicates an intent on the part of the testator to bequeath in *full ownership* royalty interests owned by him rather than *payments* from royalty interests owned by him.[26]

Furthermore, the court found the requisite duty to preserve the interests in full ownership and to transfer them to the substitute beneficiaries. In its view, a double disposition in full ownership, if valid, necessarily obligates the institute to preserve the property for the benefit of the substitute. In supporting its holding, the court relied almost entirely on older decisions of the supreme court which narrowly construed the prohibited substitution.[27] It did not refer to Justice Dennis' discussion in *Baten v. Taylor* to the effect that in light of that decision, the older cases needed reappraisal.[28]

The civil law permitted various substitutions for centuries. The vulgar substitution is still permitted out of trust,[29] and at least three would-be substitutions are permitted in trust.[30] The redactors of the Code Napoleon were determined to prohibit those kinds of substitutions which had propped up the French aristocracy prior to the French Revolution and which had permitted the perpetuation of feudalism. Though feudalism has never been a real problem in Louisiana, the same prohibitions were adopted in article 1520 of the Civil Code. Both in France and in Louisiana, these prohibitions created

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25. *See* LA. CIV. CODE arts. 546, 1520 & 1522.

26. 395 So. 2d at 877.

27. Succession of Simms, 250 La. 177, 195 So. 2d 114 (1966); Succession of Thilborger, 234 La. 810, 101 So. 2d 678 (1958); Succession of Heft, 163 La. 467, 112 So. 301 (1927).

28. 386 So. 2d at 338.

29. LA. CIV. CODE art. 1521.

30. Class trusts, LA. R.S. 9:1906 (Supp. 1964); Conditional substitution trusts, LA. R.S. 9:1973 (Supp. 1974); Invasions of Trust Principal, LA. R.S. 9.2068 (Supp. 1964 & Supp. 1968, 1972 & 1974).

traps for the unwary. In Louisiana, the prohibition became a weapon against the importation of the trust. As a result of cases decided within the twelve years preceding *Creighton v. Succession of Gredler*,[31] and culminating with that case, some lawyers detected what appeared to be hostility to the trust among some of the justices. This hostility, real or apparent, was a major impetus towards the enactment of the Trust Code.

To read all of the Louisiana decisions involving prohibited substitutions is an ordeal not recommended. To try to reconcile them is folly. In many of these cases, it becomes apparent that the testator's intentions were vague. The layman seems to intend something like: "When I die I want *A* to have it, and when *A* dies, I want *B* to have it." No detailed thought is given to such practical consequences as what *A* can do with the property during his lifetime. If a testator were asked to write a scenario describing the relative rights and duties of *A* and *B* during *A*'s lifetime, the result would probably look more like usufruct and naked ownership than the "successive disposition in full ownership" which is prohibited by article 1520.

Undoubtedly due to the prohibited substitution, the civil law has not developed a list of correlative rights and duties between successive owners where each has full ownership. The common law has the same problem defining a similar relationship in the context of the reciprocal will. At common law, *A* and *B* can write wills reciprocally leaving their property to each other, binding the survivor to leave his property (including that inherited from the first to die) according to a prearranged plan. The common law courts have struggled mightily in trying to decide what the survivor can do with his own property and with the inherited property after the death of the first of the reciprocal testators. Analogies to life tenancy (usufruct) and trusts are sometimes used, but almost always unsatisfactorily.

If courts are bound to follow the testator's intention, they should try to apply the nearest *permissible* legal institution if no violence is done to the testator's intent. The nearest permissible arrangement to the disposition in *Goode* seems to be usufruct and naked ownership. We tempt no known feudal demon by doing so. The phrase "oil and gas royalty interest *payments*" could easily be construed as a usufruct of oil and gas royalties, without doing violence to the testator's intention. As a matter of fact violence might be done by not doing so.

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31. 256 La. 156, 235 So. 2d 411 (1970).

RENUNCIATION OF SUCCESSIONS

In *Succession of Williams*,[32] Stella Williams died intestate survived by a daughter and a son. Desiring his interest in his mother's succession to pass directly to his two children, the son proposed to renounce his mother's succession. In connection with the sale of the decedent's house, a petition for possession was prepared reciting that the daughter and the son's two children accepted the succession unconditionally. (The son was not a petitioner.) A deed to the prospective purchaser was prepared whereby the son and daughter conveyed the interests they had earlier inherited from their father (decedent's husband), and the daughter and the son's *children* conveyed the interests they had inherited from the decedent. Shortly before these documents were signed by the daughter, her brother had executed a formal renunciation of his interest in his mother's succession.

Prior to the closing, the daughter's husband, an attorney, expressed some concern about title problems which might arise from the manner in which the transaction was cast, but nothing was mentioned to the vendee or the latter's attorney at the closing. The next day, the daughter's husband advised the closing attorney that his wife would not accept the proceeds of the sale.

The pivotal question was the effect of the son's renunciation and of the daughter's acceptance. Article 1022 of the Civil Code clearly provided that upon the son's renunciation, his sister would become her mother's sole heir.[33] Moreover, article 1024 of the Civil Code prevented the daughter from accepting her portion and refusing that which fell to her by virtue of her brother's renunciation.[34] The son's children could not represent him because he was still living.[35]

The son and his children argued that, as heirs of the decedent, they were all entitled to distribute her estate in the manner they chose, citing Article 2291 of the Civil Code dealing with judicial confessions. However, the second circuit here limited its effects to judicial confessions of *facts*, rather than judicial confessions of *law*. According to the court:

This was not merely an error or misapplication of the law by virtue

32. 405 So.2d 336 (La. App. 2d Cir. 1981).

33. "The portion of the heir renouncing the succession, goes to his co-heirs of the same degree. . . ." LA. CIV. CODE art. 1022.

34. "He in whose favor the right of accretion exists, cannot refuse the portion of the heir who has renounced, and keep that part which has fallen to him in his own right, because he is bound to accept or renounce for the whole." LA. CIV. CODE art. 1024.

35. LA. CIV. CODE art. 899.

> of which an estate was distributed in a manner other than that provided by law, but an attempt to proceed in a manner expressly prohibited by law, i.e. by [the daughter] to accept only a portion of the succession and by the [son's] children to represent a live parent.[36]

According to the court, in order to accomplish what the parties desired, it would have been necessary for the son to renounce, for the daughter to accept the entire succession and then to donate a half interest to her brother's children. Since the son did not appear as a party to the joint petition, his renunciation could not be construed as an acceptance followed by a donation to his children. Accordingly, the second circuit set the judgment of possession aside as a nullity. Moreover, the second circuit found that the daughter was equitably estopped to accept the succession of her mother as sole heir, even after her brother's renunciation. Had she undertaken to do so, he would have revoked his prior renunciation as is permitted by article 1031 of the Civil Code.[37] On rehearing, however, the second circuit reversed and reinstated the judgment of the trial court. While it was "apparent that the manner in which the estate was distributed violated C.C. Arts. 1024 and 899 . . .," said the court, "we believe that this constituted an *error of law . . . under which a judicial confession cannot be revoked.*"[38]

ILLEGITIMATE INHERITANCE

In *Succession of Ross*[39] the decedent was married twice but had no children from either marriage. Upon his death in 1971 (apparently intestate) his widow was placed in possession of all his property under a judgment of possession also rendered during 1971.

Alleged illegimate children of the decedent sued to set aside the judgment of possession relying on *Succession of Brown*[40] and *Trimble v. Gordon.*[41] For the purposes of intestacy, article 919 would have subordinated acknowledged natural children to the surviving spouse, whereas legitimates would have taken in preference to the spouse. Article 919 was declared unconstitutional by the Louisiana Supreme

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36. Succession of Williams, 405 So. 2d 336 (La. App. 2d Cir. 1981).

37. "So long as the prescription of the right of accepting is not acquired against the heirs who have renounced, they have the faculty still to accept the succession, if it has not been accepted by other heirs. . . ." LA. CIV. CODE art. 1031.

38. Succession of Williams, No. 14,548, slip op. at 2 (La. App. 2d Civ. Nov. 2, 1981).

39. 397 So. 2d 830 (La. App. 4th Cir. 1981).

40. 338 So. 2d 1151 (La. 1980); *See* 6 LEVANN, LOUISIANA ESTATE PLANNER No. 4 at 148 (1980). *See generally* Trimble v. Gordon, 430 U.S. 762 (1977); 4 G. LEVAN, LOUISIANA ESTATE PLANNER No. 2 at 76 (1977).

41. 430 U.S. 762 (1977).

Court in *Succession of Brown* as violating both the Louisiana Constitution and the United States Constitution. *Succession of Ross* squarely presented the question of retroactivity, not addressed in *Brown*. The fourth circuit held that *Brown* should not be applied retroactively, but only prospectively from September 3, 1980, the date of the decision.

The majority relied on the recent Louisiana Supreme Court decision in *Lovell v. Lovell*.[42] *Lovell* involved the constitutionality of article 160 of the Civil Code imposing an alimony obligation on the husband but not on the wife. (Article 160 was amended in 1979 to make that statute gender-neutral.) The supreme court was asked to apply that holding retroactively. The fourth circuit relied on the following language from *Lovell*:

> In determining whether or not our decision should be given retroactive effect, three factors should be considered: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation; and (3) the inequity imposed by retroactive application must be weighed.[43]

The fourth circuit concluded that *Succession of Brown* certainly established a new principle of law, that substantial inequity would result if all prior judgments of possession relying on article 919 of the Civil Code were declared invalid, and that there was ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.[44]

Judge Redmann dissented:

> To the arguments that judges' rules outrank the United States Constitution, and that judges who cannot escape declaring a statute unconstitutional may nevertheless escape the unwelcome effect of the unconstitutionality (or may punish the litigant who forced its declaration) by making up a rule that the unconstitutionality is 'prospective,' the answer is that the supremacy

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42. 378 So. 2d 418 (La. 1979).

43. *Id.* at 421.

44. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Cipriano v. City of Houma, 395 U.S. 701 (1969).

clause, U.S. Constitution Article 6, Clause 2, grants no such supremacy to judges' rules.[45]

The majority opinion appears sound insofar as prospective application is concerned. The question is: prospective from what date? Three dates suggest themselves: the date of the decision in *Brown*, September 3, 1980, the date of the decision in *Trimble v. Gordon*, April 26, 1977, or January 1, 1975, the effective date of the Louisiana Constitution of 1974. Although the Louisiana Supreme Court in *Brown* relied on Article 12, section 5 of the 1974 constitution prohibiting discrimination on the basis of *birth*, it was not at all clear in 1974 that this provision would be applied to inheritance by illegitimates.[46] On the contrary, the Louisiana system of disfavoring illegitimates had been upheld in 1971 by the United States Supreme Court in *Labine v. Vincent*.[47] To use 1975 as the point of demarcation would generate some of the inequities noted by the supreme court in *Lovell. Trimble v. Gordon* certainly sent a signal, but that case involved Illinois law, did not overrule *Labine v. Vincent*, and in footnote 17 suggested that there might be a distinction which could preserve the viability of the Louisiana system. There were early warnings of the *Brown* decision in *Succession of Robbins*[48] and *Succession of Thompson*,[49] both of which held codal prohibitions against testamentary bequests to illegimate children as violations of both the Federal and State Constitutions. Only in *Brown*, however, did the Louisiana Supreme Court apply the state and federal constitutions to irregular intestate succession. For these reasons, I think the September 3, 1980 date should be accepted.[50]

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45. 397 So. 2d 830, 832 (La. App. 4th Cir. 1981) (Redmann, J., dissenting).

46. But consider the following language from the *Brown* opinion: "The members of the constitutional convention intended this article to include within its scope unreasonable discrimination based upon illegitimacy, *Succession of Thompson*, 367 So. 2d 798 (La. 1979)." 388 So. 2d 1151, 1154 (La. 1980).

47. 401 U.S. 532 (1971).

48. 349 So. 2d 276 (La. 1977).

49. *See* cases cited in note 40, *supra*.

50. The Louisiana Supreme Court will probably take up the matter before long. A district court in DeSoto Parish apparently has applied *Succession of Brown retroactively*. IMC Exploration Co. v. Henderson, No. 37, 807, 11th Judicial District Court, DeSoto Parish, Louisiana, currently on appeal to the second circuit.