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Successions and Donations

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Substitutions and Conditions

The third circuit court of appeal considered the validity of two testamentary dispositions[1]: the testator first disposed of the usufruct of the property to two persons jointly, and then bequeathed the "ownership" to the survivor. The opponent of the testamentary provisions argued that each disposition constituted a prohibited substitution,[2] or alternatively, a disposition subject to illegal or impossible conditions.[3] In *Launey v. Barrouse*,[4] the court concluded that the ownership of the property was subject to a suspensive condition[5] and therefore did not

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1. Launey v. Barrouse, 509 So. 2d 734 (La. App. 3d Cir. 1987).

The testament contained the following pertinent dispositive provisions:

> "2. I leave and bequeath unto Angela R. Launey and Lorraine S. Barrouse, share and share alike, the use of my home, together with all furniture anf (sic) fixtures located therein, which home is located on Sixth Street in Mamou, Louisiana, for the remainder of their natural life; and to the survivor of these two, Angela R. Launey or Lorraine S. Barrouse, I leave the house and lots, together with the furniture and fixtures located therein, and other improvements located thereon, with full title to the aforesaid property.
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> "3. I leave my store building and lots located on Sixth Street in Mamou, Louisiana, unto Angela R. Launey and Lorraine S. Barrouse for their use for the remainder of their natural life, provided that so long as Lorraine S. Barrouse lives, she shall be entitled to use the store building as a store and/or other businesses, upon payment of a rent of $12.50 per month to Angela R. Launey, and to the survivor of these two, Angela R. Launey or Lorraine S. Barrouse, I leave the said store building and lots."

Id. at 736.

2. La. Civ. Code art. 1520 (as amended by 1962 La. Acts No. 45, § 1) provides:

> Substitutions are and remain prohibited, except as permitted by the laws relating to trusts.
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> Every disposition not in trust by which the donee, the 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.

3. La. Civ. Code art. 1519 provides: "In all dispositions *inter vivos* and *mortis causa* impossible conditions, those which are contrary to the laws or to morals, are reputed not written."

4. 509 So. 2d 734.

5. La. Civ. Code art. 1767 (as amended by 1984 La. Acts No. 331, § 1) provides in part: "A conditional obligation is one dependent on an uncertain event.
"If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive."

vest until the happening of the condition;[6] thus, the dispositions were not prohibited substitutions. However, the court concluded that the condition of each legacy was "impossible," and thus to be "reputed not written."

Initially, the court had to determine the intention of the testator,[7] and, if possible, interpret the language so as to sustain the validity of the disposition.[8] The language employed in the first disputed disposition was:

> I leave and bequeath unto Angela R. Launey and Lorraine S. Barrouse, share and share alike, the use of my home . . . for the remainder of their natural life; and to the survivor of these two . . . I leave the house and lots, together with the furniture and fixures located therein, and other improvements located thereon, with full title to the aforesaid property.[9]

The use of the house equated to a usufruct, according to the court, which should probably be interpreted as being jointly owned.[10] The

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6. 509 So. 2d at 737-38:

> It is also apparent that, since by the terms of the disposition the testator bequeathed the property to only one of the parties, i.e., the survivor, there is no immediate vesting of ownership in either of the parties upon the death of the testator.
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> Therefore, we conclude that the testator, through dispositions 2 and 3, intended to bequeath the usufruct of the property described therein to Mrs. Launey and Mrs. Barrouse, that he further intended to bequeath the full ownership of the described property to the survivor of the two parties, and that the survivorship of one of the two parties is a suspensive condition which the legacies are subject to.

Under La. Civ. Code art. 1775 (as amended by 1984 La. Acts No. 331, § 1): "Fulfillment of a condition has effects that are retroactive to the inception of the obligation." The article continues: "Nevertheless, that fulfillment does not impair the validity of acts of administration duly performed by a party, nor affect the ownership of fruits produced while the condition was pending. Likewise, fulfillment of the condition does not impair the right acquired by third persons while the condition was pending."

7. La. Civ. Code art. 1712.

8. La. Civ. Code art. 1713.

9. 509 So. 2d at 736.

10. An analogous example is the usufruct accorded to both parents who survive a child where brothers and sisters or their descendants inherit the naked ownership. La. Civ. Code art. 891 (as amended by 1981 La. Acts No. 919, § 1) provides in pertinent part: "If both parents survive the deceased, the usufruct shall be joint and successive." The relevant comment to article 891 describes the joint usufruct as follows: "If both parents survive the deceased they receive this usufruct in indivision."

However, there is language in the testamentary disposition which raises the issue of the undivided character of the usufruct. The testator disposes of the use to the two legatees "share and share alike." A usufruct is susceptible to division and may be conferred on the two legatees in divided or undivided shares. La. Civ. Code art. 541 (as amended by

disposition of the ownership of the property to the survivor was "a conditional bequest of the full ownership of the described property to either Mrs. Launey or Mrs. Barrouse, but not to both."[11] Because the testator intended that ownership vest only upon the happening of the condition, the survival of one legatee, the court characterized the condition as suspensive.[12] The second disputed disposition had essentially the same features, but the use and conditional ownership concerned a store building and lots with certain specific modifications.[13] The residuary legatee was Mrs. Launey, the testator's sister.[14]

One of the apparent difficulties presented by the dispositions in the *Launey* case is identifying who was the naked owner of the properties subject to the joint usufructs granted to the two legatees. The Civil Code explicitly permits the disposition of the usufruct to one person

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1976 La. Acts No. 103, § 1). Comment (b) explains:

> When a usufruct is conferred jointly on two or more persons, it is frequently a matter of contractual or testamentary interpretation to determine whether the grant is in divided or undivided portions. The grant of a usufruct in divided portions involves the creation of as many distinct rights of enjoyment as there are portions. Thus, if a usufruct is conferred on a number of beneficiaries in divided portions, the termination of the interest of each beneficiary benefits the naked owner. . . . The grant of a usufruct in undivided portions, on the other hand, involves the creation of a single right, which is apportioned among the beneficiaries and persists until the termination of the last interest.

For purposes of testamentary accretion under La. Civ. Code art. 1707, the language "share and share alike" has been interpreted on occasion as destroying the conjointness of the legacy. For a discussion of this jurisprudence see Hopson v. Ratliff, 426 So. 2d 1377 (La. App. 3d Cir. 1983). There is an exception, however, in La. Civ. Code art. 1708 if the thing "not susceptible of being divided without deterioration, has been given by the same act to several persons, even separately."

By analogy to article 1708 and the nature of the items subject to the usufruct, the court would probably interpret the usufruct as joint.

11. 509 So. 2d at 737.

12. Id. "Therefore, this bequest is one subject to a suspensive condition." Id.

A suspensive condition, according to La. Civ. Code art. 1767 (as amended by 1984 La. Acts No. 331, § 1), is one that prevents the obligation from being enforced until the uncertain event occurs.

13. 509 So. 2d at 736.

> "3. I leave my store building and lots located on Sixth Street in Mamou, Louisiana, unto Angela R. Launey and Lorraine S. Barrouse for their use for the remainder of their natural life, provided that so long as Lorraine S. Barrouse lives, she shall be entitled to use the store building as a store and/or other businesses, upon payment of a rent of $12.50 per month to Angela R. Launey, and to the survivor of these two, Angela R. Launey or Lorraine S. Barrouse, I leave the said store building and lots."

Id.

14. Id. " 'The remainder of my cash, savings account and savings bonds and any other property not hereinabove donated, I leave to Angela R. Launey, in full ownership.' " Id.

and the naked ownership to another.[15] Furthermore, the Civil Code permits the disposition of the ownership of the deceased's property subject to a suspensive condition.[16] Since the suspensive condition is

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15. La. Civ. Code art. 1522 provides: "The same shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked ownership to another."

An example of a usufruct accorded to one person and the naked ownership to another at death is the legal or testamentary usufruct and the naked ownership referred to in La. Civ. Code art. 890 (as amended by 1982 La. Acts No. 445, § 1).

16. See, e.g., La. Civ. Code art. 1698 which provides: "Every testamentary disposition made on a condition depending on an uncertain event, so that in the intention of the testator the disposition shall take place only inasmuch as the event shall or shall not happen, is without effect, if the instituted heir or the legatee dies before the accomplishment of the condition." See also La. Civ. Code art. 1699. Furthermore, La. Civ. Code art. 1519 necessarily recognizes the right to impose conditions upon donations mortis causa since it places limitations upon the type of conditions that can be imposed.

La. Civ. Code art. 1521 (as amended by 1987 La. Acts No. 680, § 1) provides in part:

> A. The disposition, by which a third person is called to take a gift, the inheritance or the legacy, in case the donee, the heir, or the legatee does not take it, shall not be considered a substitution and shall be valid, provided:
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> * * *
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> (2) That, with regard to the taking of a disposition by any heir, legatee, or trust beneficiary, including the legitime of a forced heir, a testator may impose as a valid suspensive condition that the donee, heir, legatee, or trust beneficiary must survive the testator for a stipulated period, which period shall not exceed ninety days after the testator's death, in default of which a third person is called to take the gift, the inheritance, or the legacy; in such a case the right of the donee, heir, legatee, or trust beneficiary is in suspense until the survivorship vel non as required is determined. If the donee, heir, legatee, or trust beneficiary survives as required, he is considered as having succeeded to the deceased from the moment of his death, and if he does not survive as required, he is considered as never having received it, and the third person who is called to take the bequest in default of his survival is considered as having succeeded to the deceased from the moment of his death. A survivorship condition as to the legitime of a forced heir shall only be valid if the forced heir dies without descendants, or if he dies with decendants (sic) and neither the forced heir nor the descendants survive the stipulated time.

The 1987 amendment to article 1521 extends the length of the suspensive condition from thirty days to ninety days. The condition, referred to as the survivorship clause, and its length are related to the calculation of estate tax. See 26 U.S.C. § 2056 (1976) (marital deduction). In a comment on Baten v. Taylor, 386 So. 2d 333 (La. 1979), the author expresses apprehension concerning language in the supreme court opinion which indicated that the brevity of the condition may have affected the court's reasoning that there was no prohibited substitution: "There is language in the opinion which seems to indicate that had the condition been longer in duration, the court might have declared it resolutory and, therefore, a charge to preserve. If such an approach is taken by the court, then a longer condition, even though apparently suspensive, could result in finding a prohibited substitution." Note, Baten v. Taylor: Suvivorship Clauses Survive the Civil Law, 41 La. L. Rev. 262, 273 (1980) (footnotes deleted).

Furthermore, article 1521 expressly permits the condition to attach to the legitime of

retroactive to the date of the deceased's death,[17] it can be argued that who is entitled to the naked ownership of the property is legally immaterial since perfect ownership vests in the survivor of the two legatees upon the death of the other (the happening of the condition), retroactively to the date of death. The only other possible result would be to conclude that the naked ownership of the property, just as the seizin,[18] belongs to the universal legatee subject to an implied resolutory condition,[19] that being the survival of one of the two legatees. Without considering it necessary to identify the naked owner of the property at the moment of death, the court focused on the existence of provisional seizin in the universal legatee while the ultimate legatee's ownership was suspended.[20]

Relying on *Baten v. Taylor*,[21] where the issue concerned a gap in seizin and the duty to preserve imposed upon an heir who had not

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the forced heir, which under French law was considered impermissible if it prohibited alienation. (La. Civ. Code art. 1710). See Aubry & Rau, Droit Civil Francais § 692 at 299 (La. St. L. Inst. transl. 1969). In the 1987 amendment to La. Civ. Code art. 1521, a new sentence pertaining to the condition attached to the legitime was added: "A survivorship condition as to the legitime of a forced heir shall only be valid if the forced heir dies without descendants, or if he dies with decendants [sic] and neither the forced heir nor the descendants survive the stipulated time."

17. La. Civ. Code art. 1775 (as amended by 1984 La. Acts No. 331, § 1) provides:

> Fulfillment of a condition has effects that are retroactive to the inception of the obligation. Nevertheless, that fulfillment does not impair the validity of acts of administration duly performed by a party, nor affect the ownership of fruits produced while the condition was pending. Likewise, fulfillment of the condition does not impair the right acquired by third persons while the condition was pending.

See also La. Civ. Code art. 1521 (see text of article supra note 16) which provides for the same result.

18. La. Civ. Code arts. 940-46. See also discussion of the effect of La. Code Civ. P. art. 3211 upon hereditary seizin in Baten v. Taylor, 386 So. 2d 333 (La. 1979), and authorities cited therein.

19. La. Civ. Code art. 1767 (as amended by 1984 La. Acts No. 331, § 1) provides in pertinent part: "If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutory." Conditions may be implied "by the law, the nature of the contract, or the intent of the parties." La. Civ. Code art. 1768.

Resolutory conditions have the same retroactive effect as suspensive conditions. See La. Civ. Code art. 1775 (see text of article supra note 17).

20. 509 So. 2d 734, 740 (La. App. 3d Cir. 1987):

> Therefore, immediately upon the death of the testator, the universal legatee acquires seizin, since the testator did not leave any forced heirs. The universal legatee remains provisionally seized of the property, subject to the succession representative's rights and duties under the Code of Civil Procedure, until the legacy's suspensive condition is fulfilled, while the legatee's ownership rights under the will are suspended during this period.

Id.

21. 386 So. 2d 333 (La. 1979).

received *ownership* of the proeprty,[22] the court concluded "that since the testamentary dispositions of ownership of the property in this case are subject to suspensive conditions which have resulted in excessively long suspensive periods, the conditions are impossible under Article 1519."[23] The implication of the quoted language and the focus upon seizin in the universal legatee is that the survivor of the legatees become the owner of the property upon the happening of the condition retroactively to the date of death. Thus, the result is that the dispositions were of a joint usufruct to the two legatees, subject to the implied resolutory condition of death of one usufructuary[24] and of the ownership of the property subject to a complementary suspensive condition (which was the same as the resolutory condition), both retroactive to death. Rather than a double suspensive condition as in the *Baten* case or as contemplated under Civil Code article 1521,[25] the disposition in the *Launey* case was subject to complementary resolutory, suspensive conditions.[26]

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22. Although the Louisiana Supreme Court in its opinion in the *Baten* case relies upon the legislative history of La. Civ. Code art. 1520 (in particular the Louisiana Law Institute amendment to the article in 1962), which supports the necessity of three elements for the prohibited substitution, the supreme court discusses each separately in its opinion. 386 So. 2d 333. One implication of the discussion of each characteristic of a prohibited substitution separately is that any one of the three is enough. However, the correct view is that all three must be present to constitute a substitution that is invalid under La. Civ. Code art. 1520. For a discussion of the three elements, see infra text accompanying note 29.

23. 509 So. 2d at 741.

24. Presumably, the provisions of La. Civ. Code art. 1775 (see supra note 17) protect the usufructuaries' rights to the fruits since article 1775 provides in part: "Nevertheless, that fulfillment (of a condition with a retroactive effect) does not . . . affect the ownership of fruits produced while the condition was pending."

25. See text of article supra note 16.

26. In Planiol, Traite Elementaire de Droit Civil No. 3295 at p. 601 (La. St. L. Inst. transl. 1959) (footnotes omitted), the type of double conditional bequest used by the testator in the *Launey* case was described as follows:

> Quite early practice made an effort to replace the prohibited substitution by a double conditional disposition. By leaving a bequest to Primus on a resolutory condition (for instance, if he should die without children), and to Secundus on a suspensive condition, that means if the first resolutory condition should materialize, the combined disposition came very close to the prohibited case of Art. 896. The courts have continued for a long time to set aside such conditional bequests as containing a prohibited substitution. But today their validity is recognized.

It is as if the testator or his attorney in the *Launey* case also read the footnote on the same page of Planiol's treatise:

> An effort was made to show that a double conditional bequest is valid when the two legatees are called to take on complementary suspensive conditions, mutually contingent [i.e., La. Civ. Code art. 1521 A. (2)]; and that it represents

Understanding the legal effects of the dispositions in the *Launey* case is imperative. It is a preliminary step in analyzing whether or not the disposition is a prohibited substitution[27] or a disposition subject to an impossible condition or a condition that is against public policy.[28] In the *Baten* case the Louisiana Supreme Court detailed the history of Civil Code article 1520 and concluded that the characteristics of a prohibited substitution are:

> (1) a double . . . disposition in full ownership, of the same thing to persons called to receive it, one after the other; (2) (c)harge to preserve and transmit, imposed on the first beneficiary for the benefit of the second beneficiary; (3) (e)stablishment of a successive order that causes the substituted property to leave the inheritance of the burdened beneficiary and enter into the patrimony of the substituted beneficiary.[29]

By virtue of the retroactivity of both the resolutory and the suspensive conditions, there was only one disposition of the property in full ownership—to the survivor.[30] Inexplicably, the court opines "(a) more dif-

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a prohibited substitution if the first beneficiary obtains his bequest on a resolutory condition. . . . *But as soon as he is left a usufruct*, the whole question becomes a matter of words. If a determined fact, considered as a resolutory condition, is supposed to void the bequest, it is simply necessary to express the opposite fact as a suspensive condition, and the combined disposition will be validated.

Id. at n.47 (emphasis added).

27. La. Civ. Code art. 1520 (see text of article supra note 2).

For an excellent discussion of the history of the article and prohibited substitutions, see Baten v. Taylor, 386 So. 2d 333 (La. 1979); Tucker, Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantical Reappraisal, 24 La. L. Rev. 439 (1964).

28. La. Civ. Code art. 1519 provides: "In all dispositions *inter vivos* or *mortis causa* impossible conditions, those which are contrary to the laws or to morals, are reputed not written."

29. Baten v. Taylor, 386 So. 2d at 336, quoting from the Louisiana State Law Institute report to the Legislature accompanying the Louisiana Trust Code in 1964.

The Louisiana Supreme Court continued by stating:

> We are convinced that the Law Institute's interpretation of Article 1520 is correct. As its report indicates, the Article implies the foregoing definition of a prohibited substitution, and the term is used in this sense in French doctrine and jurisprudence. . . . Moreover, the report of the Law Institute is entitled to great weight as reflecting legislative intent in this instance. . . . The Legislature evidently endorsed the Law Institute's definition of a prohibited substitution by adopting the amendments and enacting the new trust code on the basis of its report.

Id. at 337.

30. 509 So. 2d 734, 739 (La. App. 3d Cir. 1987):

> First, there is no double disposition of full ownership to persons called to receive it one after another. By the terms of the dispositions only the survivor of Mrs. Launey and Mrs. Barrouse is called to receive the property in full ownership. Pending the happening of the condition neither party has a vested interest in

ficult issue concerns whether the dispositions contain charges to preserve."[31] To constitute a prohibited substitution, the disposition must contain *all three* elements; it is insufficient if the disposition contain only the charge to preserve. However, much of the court's discussion of the charge to preserve is relevant to the inquiry of whether the disposition is subject to a condition that is against public policy and thus "reputed not written."[32]

Ownership of the properties, residential[33] and business,[34] was subject to the condition that one of two persons survive. In fact, at the time of the litigation in the *Launey* case, almost seven years had passed without the condition having occurred. Until the condition occurred no one owned the property: the two legatees enjoyed the usufruct and the universal legatee had seizin. Even though the two legatees of the ownership subject to the suspensive condition that one survive have a right which forms part of each legatee's patrimony[35] and potentially they may

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the property, other than the usufruct bequeathed to both of them. Since only one of the parties receives full ownership of the property, which only occurs when the condition is fulfilled, there is no double disposition of the property.

For the same reason, the dispositions here do not establish a successive order whereby the property can leave the inheritance of one beneficiary and enter into the patrimony of a substituted beneficiary. Under the terms of the dispositions, the survivor of the two parties receives the property directly from the testator when the condition of her survivorship is fulfilled.

31. Id.

32. La. Civ. Code art. 1519. See, e.g., Succession of Feitel, 176 La. 543, 146 So. 145 (1933); Succession of Rogers, 138 So. 2d 251 (La. App. 4th Cir. 1962).

33. For the language of the disposition, see dispositive provision number 2, supra note 1.

34. For the language of the disposition, see dispositive provision number 3 supra note 1.

35. Under La. Civ. Code art. 1771 (as amended by 1984 La. Acts No. 331, § 1), "The obligee of a conditional obligation, pending fulfillment of the condition, may take all lawful measures to preserve his right."

See also comment (c) to La. Civ. Code art. 1767 (as amended by 1984 La. Acts No. 331, § 1) which provides in part:

> The French text provided that the right acquired by a legatee under a conditional bequest does not pass to the heirs of the legatee upon his death if the condition is then unfulfilled and is an act personal to the legatee, which is consistent with general principles. A contrario then, the right does pass to the heirs of the legatee when the condition is an act which is not personal to the legatee. This is consistent with C.C. Arts. 1698 and 1699 (1870).

Cf. La. Civ. Code arts. 1698-99.

In Due v. Due, 342 So. 2d 161 (La. 1977), the Louisiana Supreme Court characterized an attorney's contingent fee contract as an obligation in the attorney's favor subject to a suspensive condition. The conditional obligation was further described as a patrimonial asset:

> As noted at Planiol, Civil Law Treatise, Volume 1, sec. 319, p. 216 (LSLI translation, 1950): "The owner or creditor . . . is not therefore, properly speak-

jointly dispose of their rights conveyed by the testament,[36] it is doubtful that there would be interest in the purchase of such an asset. As a consequence, "[t]he result is that the property is *effectively* removed from commerce during the suspensive period, and the seized heir is bound to preserve the property for an indefinite period of time and then to deliver it to the legatee (survivor)."[37]

Because the property was "effectively removed from commerce," the court found that the condition was against public policy. "The resulting disincentives to improving the property and the effective removal of the property from commerce are against public policy since the maximum utilization of property is deemed to be in the public's best interest."[38]

As additional support, the court relied upon the *Baten* case and "the legislature's codification"[39] of the double suspensive condition by amendment to article 1521.[40] The short suspensive condition of thirty days, according to the court, "will have little, if any, effect on the

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ing, either an owner or a creditor as long as the condition is still pending. The simple possibility of the realization of the condition, nevertheless, constitutes a chance which is already considered an asset or liability."

Id. at 164.

36. As each legatee has a valuable right described in supra note 35, subject to the contingency that she survive, there theoretically exists the possiblity of a sale of the rights under the legacies jointly to a third person. Future things may be the subject of contracts. La. Civ. Code art. 1976 (as amended by 1984 La. Acts No. 331, § 1). Under La. Civ. Code art. 2451: "It also happens sometimes that an uncertain hope is sold; as the fisher sells a haul of his net before he throws it; and, although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught." Cf. La. Civ. Code art. 2450. For a discussion of the application of both articles, see Losecco v. Gregory, 108 La. 648, 32 So. 985 (1901).

37. 509 So. 2d 734, 741 (La. App. 3d Cir. 1987) (emphasis added.)

38. Id.

39. Id.

40. At the time of the decision in the *Baten* case and the *Launey* case, La. Civ. Code art. 1521 A. (2) read as follows:

> That, with regard to the taking of a disposition by any heir, legatee, or trust beneficiary, including the legitime of a forced heir, a testator may impose as a valid suspensive condition that the donee, heir, legatee, or trust beneficiary must survive the testator for a stipulated period, which period shall not exceed thirty days after the testator's death, in default of which a third person is called to take the gift, the inheritance, or the legacy; in such a case the right of the donee, heir, legatee, or trust beneficiary is in suspense until the survivorship *vel non* as required is determined. If the donee, heir, legatee, or trust beneficiary survives as required, he is considered as having succeeded to the deceased from the moment of his death, and if he does not survive as required, he is considered as never having received it, and the third person who is called to take the bequest in default of his survival is considered as having succeeded to the deceased from the moment of his death.

ability to alienate the immovable property."[41] The suspensive condition attached to the ownership of property at death, the court reasoned, and the term may not exceed thirty days, "at least in the case of survivorship clauses."[42] The conclusion of the court was "that since the testamentary dispositions of ownership of the property in this case are subject to suspensive conditions which have resulted in excessively long suspensive periods, the conditions are impossible under Article 1519."[43] The suspensive conditions were "reputed not written," thus, the legacies lapsed[44] and the universal legatee inherited the property.[45]

The third circuit court of appeal was correct in rejecting the argument that the legacies in *Launey* were prohibited substitutions. The restriction imposed upon the testator in article 1520 should be narrowly construed so as to apply only in instances where all three elements of the prohibited substitution are present. In neither the *Baten* case nor the *Launey* case was the legacy a prohibited substitution. Even if a legacy subject to a condition is not a prohibited substitution, the possibility exists that the condition is impossible or against public order under article 1519. There are two advantages to examining the suspect legacies under article 1519: (1) the flexibility the court has in deciding whether or not the condition

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41. 509 So. 2d at 741.

42. Id.

> We also note that in upholding the thirty-day survivorship clause in *Baten*, the court did not resolve the question of what maximum suspensive period a testator may stipulate for the survival of his legatee. The legislature, however, has provided an answer to this question in La. C.C. Article 1521 wherein it provides that the suspensive period a beneficiary may be required to survive the testator "shall not exceed thirty days after the testator's death." Therefore, there is express legislative disapproval of suspensive periods exceeding thirty days, at least in the case of survivorship clauses.

Id.

Consider the 1987 amendment to La. Civ. Code art. 1521, the text of which appears supra note 16, which legislatively approves of a ninety-day suspensive period.

43. 509 So. 2d at 741.

44. Because the suspensive condition attached to the legacy was "reputed not written" and it was the testator's intent that the ownership devolve to one but not both of the legatees, the result was a lapsed legacy analogous to the result described in La. Civ. Code art. 1698 which provides:

> Every testamentary disposition made on a condition depending on an uncertain event, so that in the intention of the testator the disposition shall take place only inasmuch as the event shall or shall not happen, is without effect, if the instituted heir or the legatee dies before the accomplishment of the condition.

45. Since there was a universal legatee to whom the testator had disposed of the whole of the property he left at death (La. Civ. Code art. 1606), she was entitled to the properties. La. Civ. Code art. 1709 only applies when a portion of the succession remains undisposed of.

"The dispositions having lapsed, the property falls to the residuary legatee, who in this case is Mrs. Launey." 509 So. 2d at 741.

is against public policy by weighing the intention of the testator against the interest of the public, and (2) the invalidity affects only the condition, not the legacy.[46] With the increased popularity of survivorship clauses and the legislature's extension of the length of the suspensive condition to ninety days,[47] it is likely that with increasing frequency the judiciary will have to scrutinize conditions imposed by the testator.

The issue in the ordinary case will be whether the condition is unlawful or contrary to the public interest, rather than impossible, as the court describes the condition in *Launey*.[48] A condition such as that

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46. See cases cited supra note 32.

In Lazarus, Spaht and Samuel, Successions and Donations: Cases and Reading Material at 333 (1984), Professor Carlos Lazarus observes:

> Literally applied, Article 1519 (C.N. Art. 900) would require a result different from that intended by the disposer, for it commands that the donation shall be executed free of the condition imposed. . . . The French jurisprudence under Article 900 of the Code Napoleon is to the effect that where the condition is the essential element of the disposition, the donation falls if the condition is illegal. It is said that in such cases the condition is the impulsive and determinant cause of the disposition the nullity of which results in the nullity of acts under gratuitous as well as under onerous title. See XI Aubry et Rau, Droit Civil (1956) § 692, pp. 134 et seq.
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> This doctrine, although recognized, adopted and applied by the Louisiana Supreme Court at an early date, seems to have been totally ignored in recent decisions in which the question has arisen, with the result that Article 1519 has been literally applied without regard to the intention of the disposer.

47. See text of La. Civ. Code art. 1521 A. (2) (as amended by 1987 La. Acts No. 680, § 1) supra note 16. See also discussion of article 1521 in Note, Baten v. Taylor: Suvivorship Clauses Survive the Civil Law, 41 La. L. Rev. 262 (1980).

48. In addition to La. Civ. Code art. 1519, see also La. Civ. Code art. 1769 (as amended by 1984 La. Acts No. 331, § 1). In comment (b) to article 1769 the following observation appears:

> This Article formulates a rule that governs obligations in general. The general rule yields to exceptions expressly provided by the law, as in the case of an unlawful or impossible condition attached to a donation inter vivos or mortis causa. C.C. Art. 1519 (1870). See also French Civil Code Article 900; and 7 Planiol et Ripert, Traite pratique de droit civil francais 375 (2nd ed. Esmein 1954).

La. Civ. Code art. 2033, before its repeal by 1984 La. Acts No. 331, read as follows: "Physical and moral impossibilities only are intended by the preceding articles. If the condition be only relatively impossible, that is to say, impracticable by the obligor, only from the want of skill, strength or means, but practicable by another, it is not an impossible condition." Comment (d) to La. Civ. Code art. 1769 (as amended by 1984 La. Acts No. 331, § 1) describes the reason for the repeal of article 2033: "Civil Code Article 2033 (1870) has been eliminated because it reflects a wrong approach; that is, it regards a condition as a performance that can be enforced."

In Aubry & Rau, Droit Civil Francais § 302 at 63 (La. St. L. Inst. transl. 1965) (footnotes omitted), impossible conditions are described as follows:

> Conditions legally impossible are those which relate to a fact the accomplishment of which is hindered by a permanent legal obstacle, i.e., one which could be

in the *Launey* case, the occurrence of which is uncertain, should be examined as of the date of death of the testator, rather than at the time of the litigation. If the condition is dependent upon death, life expectancy tables could be utilized.[49] Once the estimated length of the suspensive condition is established, the next inquiry should focus upon whether a condition such as that in *Launey* is a non-alienability clause. As observed earlier in this article, the condition which suspended ownership did not preclude in absolute terms the alienability of the property. The two potential legatees theoretically could have disposed of their respective interests to a third party.[50] However, it is unlikely, as a practical matter, that a third party would find such an acquisition attractive pending occurrence of the condition, due to the inability to alienate the *property* and the cost of purchasing the interests of the *two* legatees. Furthermore, even though the right acquired by the legatees

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set aside only by amending legislation.

Physically impossible are not only the conditions whose fulfillment is absolutely impossible according to the laws of nature, but also the conditions whose accomplishment involves, in ordinary circumstances and with respect to the means of action contemplated, insurmountable difficulties as well as those whose realization presupposes the existence of a person or of a situation which did not exist at the time of contracting or of the testator's death.

An example of an impossible condition was that in Parker v. Parker, 377 F. Supp. 455, 458 n.2 (W.D. La. 1974):

> The penalty clause in this will stating that a sale in violation of its terms shall terminate title in the violator and vest it in "the other devisees" is such an "impossible condition" since a sale by definition transfers title to vendee; hence, a devisee violating the will would no longer have title in the property sold that could be terminated and vested "in the other devisee."

49. Consider, for example, the life expectancy tables for calculation of the value of a legacy of an annuity or usufruct under La. R.S. 47:2405 (West Supp. 1987).

The approach suggested for calculation of the length of the suspensive condition is similar to calculation of the value of a charge imposed upon a donation for purposes of determining its predominant cause under La. Civ. Code art. 1526. For an interesting discussion of the problem, see Averette v. Jordan, 457 So. 2d 691 (La. App. 2d Cir. 1984), where the court recognizes the practical value of an after-the-fact calculation of the actual services rendered.

50. See supra notes 35-36 and accompanying text.

The court recognized the lack of marketability by their observation: "The resulting disincentives to improving the property and the effective removal of the property from commerce are against public policy since the maximum utilization of property is deemed to be in the public's best interest." 509 So. 2d 734, 741 (La. App. 3d Cir. 1987).

Parker v. Parker, 377 F. Supp. 455 (W.D. La. 1974), was another interesting case involving a condition that no property owned in indivision by the testator with his brother was to be sold or mortgaged without being first offered to the other co-owners. However, the federal district court granted the defendants' motion for summary judgment: "Mere reading of the will clause quoted impels us to grant summary judgment in favor of defendants without even considering the obvious objections with respect to its nullity under Louisiana law." Id. at 457-58.

pending the happening of the condition is a part of each legatee's patrimony, it is even less likely that a market would exist for one legatee's interest.[51]

The condition of non-alienability in the *Launey* case results from its suspensive character and practical market considerations.[52] Obviously, the time limitation during which there can be no alienation is extremely important in determining if "the principle of free circulation of property and the prohibition against the creation of incapacities other than those established by law"[53] have been violated. In *Succession of Feitel*,[54] the testator had bequeathed property to a legatee under the condition that it was not to be sold or mortgaged for ten years after his death. According to the court the condition was illegal and void. In the *Launey* case, as the court observed, the property had effectively been inalienable for a seven-year period, which was too long. Yet, at the other end of the spectrum in an analogous situation, a testator may condition a legacy to two or more persons upon their inability to divide or partition the property for a period not to exceed five years or subject to a condition certain.[55] At the expiration of five years, the judge may order partition "if it is proved to him that the coheirs can not agree among themselves, or differ as to the administration of the common effects."[56] The quoted

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51. See discussion supra note 36.

> The stipulation of non-alienability may be express or implied. It may be absolute in the sense that the alienation is completely forbidden; or it may simply provide for the validity of the alienation on condition of investing or reinvesting the proceeds. It may call for an obligation to capitalize the revenues derived from the property given; and again these revenues may be declared to be non-transferable and not subject to seizure, being intended for the maintenance and education of the beneficiary.
>
> The scope or extent of the inalienability of the property given is determined by the terms of the donation or testament or by the interpretation of these terms.

Aubry & Rau, Droit Civil Français § 692 at 300 (La. St. L. Inst. transl. 1969) (footnotes omitted).

53. Id. at 298.

54. 176 La. 543, 146 So. 145 (1933).

55. La. Civ. Code art. 1300 provides:

> But a donor or testator can order that the effects given or bequeathed by him, be not divided for a certain time, or until the happening of a certain condition.
>
> But if the time fixed exceed five years, or if the condition do not happen within that term, from the day of the donation or of the opening of the succession, the judge, at the expiration of this term of five years, may order the partition, if it is proved to him that the coheirs can not agree among themselves, or differ as to the administration of the common effects.

56. Id.

The condition that no partition shall be made of inherited property, according to La. Civ. Code art. 1301, could extend beyond five years if those inheriting were minor children

phrase assumes the possibility that the co-owned property may have been *practically* inalienable for the five-year period.[57] Furthermore, relying upon the legislature's most recent expression, a condition suspending ownership for a ninety-day period would not be contrary to the public interest.

The public interest in non-alienability of property may be in the process of change.[58] Furthermore, the historical reasons underlying French Civil Code article 900,[59] the source of Louisiana Civil Code article 1519, may no longer be as compelling as they once were.[60] In *Succession of*

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or grandchildren. The length of the prohibition against partition would be then co-extensive with "their minority."

But see the application of La. Civ. Code art. 1301 to a forced heir's legitime in Succession of Turnell, 34 La. Ann. 1218 (1880). See also La. Civ. Code art. 1710.

57. An absolute prohibition that potentially would produce the practical result of non-alienability is addressed by the provisions of La. Civ. Code art. 1299 which provides:

> "A . . . testator can not order that the effects given or bequeathed by him to two or more persons in common, shall never be divided, and such a prohibition would be considered as if it were not made."

See Succession of Rogers, 138 So. 2d 251 (La. App. 4th Cir. 1962).

58. See, e.g., 1987 La. Acts Nos. 476 and 477, § 1.

Act No. 476 enacts La. R.S. 9:1112 to permit co-owners of immovable property to agree in writing not to alienate, encumber, or lease the property for a specified period of time. Act No. 477 enacts La. R.S. 9:1702 to permit such agreements as to *any* co-owned property.

59. French Civil Code art. 900 provides: "In all dispositions *inter vivos* or testamentary, impossible conditions, those which are contrary to the laws or to morals, are reputed not written." 1972 Compiled Edition of the Civil Codes of Louisiana—Article 1519 at 868.

60. Aubry & Rau, Droit Civil Français § 692 at 286 n.2 (La. St. L. Inst. transl. 1969).

> The origin of Art. 900 . . ., which is applicable to all liberalities, is traceable to the laws of the revolutionary period which were prompted by the apprehension that donors and testators would perpetuate the practices of the old regime in contravention of the new order under the guise of imposing conditions on their liberalities. . . . Cf. the discourse of Barrere delivered before the *Assemblee Constituante* , reproduced by Merlin, Questions de droit, Book 2, p. 487, Vo. Condition, § 1: "We must confine within just limitations the prejudices and the despotism of some citizens who, being unable to conform to the principles of political equality and religious tolerance, proscribe in advance by acts protected by law the tenure of public office, the marriage of their children to women referred to by them as commoners, or to persons who practice another religious cult or who have other political opinions. . . . Otherwise, the laws of nature and of the Constitution will be violated with impunity; the odium of the Revolution will be concealed under the guise of respect for the will of the dying, or of respect for the generosity of donors; marriages will be hindered, morals will be altered. . . . The intolerant aristocrat and the enemy of the principles of our Constitution will continue to rule from their graves."

Id.

Feitel[61] the court described the reasons for the restriction upon conditions attached to gratuities by the donor in the following manner:

> The law will not carry into effect the "wishes and conceits of the dead" concerning the property they leave to another in full ownership, to the disturbance of the rules of public order and policy which regulate the living. Men instinctively desire to accumulate and own property. When acquired they hold to it tenaciously and abandon it with reluctance. So great is their propensity to hold dominion over that which they have acquired, what is theirs, that some of them, on the brink of the grave, attempt to continue their control over it after they are dead. But under our law and jurisprudence this cannot be done.[62]

Men remain the same. The question is whether the law still views their motivations as undesirable.

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61. 176 La. 543, 146 So. 145 (1933).
62. Id. at 551, 146 So. at 147.