Successions and Donations

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INTRODUCTION

Succession of Fakier ¹ is a rare decision by the Louisiana Supreme Court involving fundamental issues of forced heirship. The testatrix’s will left the disposable portion of her estate to her two daughters and restricted her other forced heirs, the grandchildren (the children of her predeceased son), to their legitime. She had previously donated inter vivos a diamond ring to one daughter and had named the daughters the beneficiaries of the proceeds of annuity contracts that she had purchased. The grandchildren sought collation of the ring and the annuities. Reversing the lower courts, the Louisiana Supreme Court held that the dispositions in the will were insufficient to declare an intention to make the inter vivos gift of the ring an extra portion. The court affirmed the lower courts’ ruling that the annuities were not subject to collation, but not, as the lower courts had reasoned, because of the dispositions in the will. Instead, the supreme court held that because the annuities had not been donated inter vivos they were not susceptible of collation.

The decision concerning the effect of the testamentary dispositions on the issue of collation is not compelled by the Louisiana Civil Code or compatible with earlier decisions of the court. It may cause the frustration of a testator’s intention unless in future cases the intention is expressed in particular words. For this reason alone the court’s pronouncement upon the substantive law merits the attention of the bar.

Of equal interest, however, was the court’s admission that the issue that prompted the grant of the writ—whether annuity proceeds are subject to fictitious collation and reduction—had not been raised below and thus could not be decided. While the supreme court perceived that the confusion over the issues presented stemmed from a failure to distinguish “actual collation” (hereinafter collation) from “fictitious

¹. 523 So. 2d 823 (La. 1988).
collation,"² the procedure typically used in practice for making claims of collation and reduction when a succession is under administration may have been partly at fault. The procedural issues will be discussed first, followed by a comment on the substantive law.

PROCEDURAL ISSUES: SUCCESSION ADMINISTRATION, COLLATION, AND THE LEGITIME

The succession administration in Fakier had scarcely begun. The executrix had probated the will, qualified as executrix, and filed a descriptive list of the property owned by the decedent at the time of her death. Before she could proceed further, one group of forced heirs, the children of a predeceased child (hereinafter the grandchildren), filed a “Motion to Traverse Detailed Descriptive List; To Require Collation of Gifts; And to Require Appraisal of Gifts” against the executrix.³ The grandchildren sought collation of a ring given inter vivos to one of the decedent’s daughters and collation of annuity policies of which the two daughters were beneficiaries. They also sought the inclusion of the annuity policies on the descriptive list.

The filing of the descriptive list appears to have been the procedural device used to trigger a conglomeration of claims. Whether this early step in the administration of a succession was intended to serve this function involves an examination of the role of the descriptive list in succession administration. Alternate means of raising issues of collation, fictitious collation, and reduction of excessive donations will be discussed. Finally, the issue of the susceptibility to appeal of judgments rendered in the early stage of the administration will be treated. None of the procedural issues was discussed by the court. This was, perhaps, an indication that the procedure used in Fakier is common practice to which no one objected. But if a different procedure can segregate the substantive issues such that a premature and possibly unnecessary presentation of a case to the supreme court can be avoided in the future, that procedure would be preferable to the one illustrated by Fakier.

The Purpose and Practice of Succession Administration

The Louisiana Code of Civil Procedure institutes a logical sequence of procedural steps, which the succession representative initiates, to

² The court borrowed this terminology from Succession of Gomez, 225 La. 1092, 78 So. 2d 411 (1955). “Actual collation” is the action a forced heir has against another forced heir to equalize donations given to the forced heirs by the decedent. “Fictitious collation” is part of the calculation of the disposable portion and legitime according to Louisiana Civil Code article 1505, wherein the value of inter vivos donations is added to the value of the property left at death, and the debts subtracted, to form the active mass.
³ 523 So. 2d at 826.
accomplish the administration of a succession. These steps permit a fiduciary to assume control of the decedent’s property for the purpose of paying the decedent’s debts and the charges of administration, fulfilling the inheritance and estate tax obligations, delivering particular legacies, and distributing the residue to the heirs or residuary legatees. This fiduciary is the succession representative. The succession representative is not in the same position as a liquidator of a partnership or corporation, since a succession is not a juridical entity. Thus the succession representative, instead of acting on behalf of some abstract legal entity, acts directly for the benefit of those parties who have an interest in the succession. From the standpoint of the creditors of the deceased and the particular legatees, the purpose of an administration is to assure payment of the decedent’s debts and particular legacies out of the decedent’s property before that property becomes mixed with the patrimonies of the heirs or residuary legatees and therefore becomes subject to the claims of their creditors. From the standpoint of the heirs and residuary legatees, the purpose of an administration is to implement their acceptance of the estate with benefit of inventory, which will limit their liability for the decedent’s debts to the value of the property they receive from the deceased. All of those to whom the succession representative owes a fiduciary duty—the creditors of the deceased, the heirs, and the legatees—may respond and object to the actions of the representative at each step of the administration.

4. See La. Civ. Code art. 827, official comment. For further authorities on this point and an example of the risks of muddling up this rudimentary concept, see infra note 44.
8. The fiduciary duty of the succession representative may also extend to the surviving spouse. A spouse’s death terminates the community regime, making the heir of the deceased spouse a co-owner in indivision of the community property with the surviving spouse. Whether the substantive and procedural law entitles the succession representative of the deceased spouse to administer both halves of the community property is a matter of debate. See Cavanaugh, Problems in the Law of Successions: Succession Representatives, Surviving Spouses, and Usufructuaries, 47 La. L. Rev. 21 (1986); Spaht, Developments in the Law, 1982-1983—Matrimonial Regimes, 44 La. L. Rev. 441 (1983). If so, then the surviving spouse becomes a party for whose benefit the administration is conducted and would have standing to object to proposed acts of administration.
Inaction, too, may be challenged when it is a breach of the succession representative's duty, such as the duty to close the succession as soon as possible. Finally, the Code provides various remedies for interested parties who are dissatisfied with the administration of the succession representative. The death of the decedent may raise some other issues that are germane to the final settlement of his affairs but that traditionally have not been regarded as part of the administration. The Louisiana Code of Civil Procedure has probably not changed this practice. For example, reduction of excessive donations, collation, and partition of the estate can be extremely important issues in a succession, but the Code does not treat these matters as issues of administration. The Code of Civil Procedure does not expressly incorporate collation and reduction into the procedure for administering a succession at all. Moreover, the articles in the Code of Civil Procedure relating to partition of successions are in a title separate from that relating to administration of successions. Article 3462, which states that the action for partition can be brought by the coheirs and legatees whenever they could have ended the administration, implicitly recognizes that partition is not an obligatory part of the administration. Thus, it is arguable

10. Removal of the succession representative is the most obvious remedy. La. Code Civ. P. art. 3182. Universal successors may even put an end to an incomplete administration in certain circumstances. Id. arts. 3362, 3372.
13. "The functions of an executor are at an end when he has discharged the debts and legacies and rendered his account.... The settlement of the community and the partition must be left to [the heirs]." K. Cross, Successions § 300, at 485 (1981). Huey v. Huey, Man. Urep. Cas. 264 (La. 1877-80).
14. La. Code Civ. P. art. 3462. The succession representative thus cannot prolong an administration in order to effect a partition if the heirs desire to do it themselves. See Succession of Roberts, 255 So. 2d 610 (La. App. 1st Cir. 1971), writ denied, 260 La. 582, 257 So. 2d 148 (1972) (administrator cannot sell succession immovable where there are no debts and heirs desire to and are entitled to be put in possession). However, should all the heirs desire the succession representative to liquidate the estate for the purpose of effecting a partition or implicitly consent to his doing so by not objecting, a sale made by the succession representative for that purpose is valid since Louisiana Code of Civil Procedure article 3261 empowers the succession representative to sell property to pay debts "or for any other purpose." See Succession of Lewis, 440 So. 2d 899 (La. App. 2d Cir. 1983), writ denied, 443 So. 2d 1119 (1984). Apparently a dissenting heir cannot prevent a sale "for any other purpose." Succession of Tagliafero, 490 So. 2d 538 (La. App. 4th Cir. 1986), aff'd, 500 So. 2d 393 (1987). Until rendition of a judgment of possession the action for partition is brought "in the succession proceedings," meaning the action is filed under the succession heading and tried by the court to which the succession is assigned. La. Code Civ. P. arts. 81(2), 3451. On the meaning of "in the succession proceedings," see Louisiana Code of Civil Procedure article 2931, official comment (b).
that the Code of Civil Procedure did not break with the tradition of treating these matters separately from the administration.

In practice, however, the parties usually consent, expressly or impliedly, to settle all three of these matters within the administration. Lawyers simply have adapted the various procedures that the Code institutes for the payment of debts, charges, and legacies in order that issues of collation, reduction, and partition may be raised and decided. In particular, the descriptive list has in practice become the all-purpose pleading for raising, challenging, and deciding a variety of issues. As will be seen, the descriptive list as instituted by the Code of Civil Procedure is not well-suited to this wide variety of tasks. It might be better to confine it to the purpose indicated by the Code of Civil Procedure and to use other procedural devices for raising other issues.

The Descriptive List

The filing of the descriptive list is usually an early step in the administration of a succession. The person seeking the office of succession representative is to file the descriptive list, according to the official comments of the Louisiana Code of Civil Procedure.15 This list merely replaces the public inventory,16 which, according to the Code of Civil Procedure, includes "each item of property belonging to the estate," "written evidences of indebtedness due the estate," and "property owned in whole or in part by third persons, or claimed by third persons as having been left [in the possession of the decedent] on loan, deposit, consignment, or otherwise."17 The Code of Civil Procedure makes the inventory or the descriptive list prima facie proof of the facts shown on it, but states that either can be corrected at any time by a motion tried contradictorily with the person at whose instance the inventory was taken and the notary public who made the inventory, or with the person who filed the descriptive list.18

At the start of an administration, evidence of several different facts must be provided for various purposes, and the inventory or descriptive list performs this evidentiary function.19 For example, the

16. Id. art. 3136.
17. Id. art. 3133. See Succession of Danese, 459 So. 2d 725 (La. App. 4th Cir. 1984) (movables found in possession of deceased must be included on descriptive list though claimed to have been donated inter vivos).
19. See Louisiana Code of Civil Procedure article 3333, official comment (b) to the effect that the account of the succession representative need not repeat in detail the property on hand at the beginning of the administration since this property is already listed on the inventory or detailed descriptive list.
A descriptive list gives the succession representative some means of apprising the creditors, heirs, and legatees of the property he believes the decedent owned and possessed, and over which he will assume administration. The inventory or descriptive list also serves to evidence property that is subject to the inheritance tax, and to reveal the property upon which the fixing of the security and the compensation of the succession representative will be based. As the inventory or detailed descriptive list provides only *prima facie*, not conclusive, proof of the facts shown in it, its filing by the succession representative does not dispose of any property included on or excluded from the list. The filing of the detailed descriptive list is no more than a preliminary step upon which the succession representative may base future action.

Prior to the Code of Civil Procedure, the jurisprudence recognized the inventory, for which the descriptive list is a substitute, as a mere preliminary device that served limited evidentiary purposes. Cases reflect that the practice at that time was not to challenge the inventory as an end in itself, but only in conjunction with some other action, such as the fixing of the amount of inheritance taxes or reduction of excessive donations. Unnecessary corrections of errors that made no practical difference to the administration were in this way avoided. Furthermore, the cases held that the decedent’s ownership of specific property could not be determined in summary proceedings by means of a motion challenging the correctness of the inventory; rather, the decedent’s ownership had to be established by an ordinary and direct action by or against the person claiming the property adversely to the decedent. A motion to force the succession representative (and the

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20. La. Code Civ. P. arts. 2951, 2952. Under the inheritance tax law *inter vivos* gifts deemed to have been made in contemplation of death and in avoidance of tax are subject to tax although such gifts are not property subject to the administration. Donations made within one year of death are required to be listed separately on the inventory or descriptive list. La. R.S. 47:2406 (1952). Now that the inheritance tax collector has an official tax return form, the statute should be amended to require disclosure of such donations on the tax return instead of the inventory or descriptive list. The inventory or descriptive list could then be limited to listing property that is subject to the administration.


22. Id. arts. 3135, 3137. Official comment (a) to article 3135 (1961) indicates that with respect to the inconclusiveness of the inventory, article 3135 is consistent with prior jurisprudence.


24. Succession of Vance, 183 La. 760, 164 So. 792 (1935). In an action to reduce excessive donations the facts shown on the inventory, i.e., the property owned at death and its value, are relevant to the calculation of the active mass.

25. Succession of McKinney, 5 La. Ann. 748 (1850) (creditor cannot have property
SUCCESSIONS AND DONATIONS

notary who made the inventory) to include or exclude property based upon the decedent's ownership or nonownership would have produced at most a notation on the inventory of the claim concerning the property; it did not determine ownership.

In resolving issues of ownership by means of procedures separate from those pertaining to the administration the old law kept certain problems from arising. First, when an action is brought against the succession representative to modify the descriptive list, the succession representative in his representative capacity has a conflict of interest when he claims ownership of the disputed property in his individual capacity. Under the old law ownership in that case would have had to be determined by suit against him individually, not by motion against him in his representative capacity. Second, when an heir claims ownership adversely to the decedent on the basis of a sale or donation inter vivos, the succession representative cannot represent that interest, because the heir's interest arises from some source other than heirship. For example, when an heir claims that a sale by the decedent to a coheir was an absolute simulation, and hence the property now in the possession of the coheir was actually owned by the decedent, the complaining heir cannot seek a return of that property by motion against the succession representative, for the latter has no authority to defend the position of the possessor-heir. The old law would have required a separate action against the possessor-heir. Third, the actions by which the decedent's ownership would normally be established were he alive (e.g., the action to declare a simulation, the possessory and petitory actions, and the equivalent actions for movables) would be tried by ordinary process. To treat these matters as if they were part of the administration subjects them to trial by summary process. Even if all parties in interest are represented and do not object to the use of summary process, the question would remain whether these ownership matters should take precedence on the court's docket ahead of

alienated by decedent brought into administration by rule against administrator to correct inventory; must bring revocatory action); Succession of Kranz, 115 La. 545, 39 So. 594 (1905) (heir's claim that sale of property by decedent to coheir was null cannot be made by rule to amend inventory).

26. Succession of Carcagno, 43 La. Ann. 1151, 10 So. 252 (1891). See also Succession of Amos, 422 So. 2d 605 (La. App. 3d Cir. 1982) where the court recognized that ownership of the funds represented by a certificate of deposit allegedly donated by the decedent could not be determined by motion against the succession representative to traverse the descriptive list, but, as the list is not conclusive of ownership, the court suggested the property should be noted on the list; cf. Succession of Wingertner, 133 La. 876, 53 So. 387 (1913). When the existence of the contested property is already known to the parties in interest, it would seem that little is accomplished by forcing the succession representative to make note of the existence of the claim on the detailed descriptive list.
other worthy litigation simply because they are associated with the administration of a succession. Under the old law these separated actions were not entitled to preferential procedure.

Despite these sound justifications for the rules of the old procedural scheme regarding when the inventory could be corrected and what could be accomplished by the correction, the drafters of the Code of Civil Procedure indicated in their official comments that they intended something new. The Code provides that an interested person may at any time traverse the inventory or descriptive list by contradictory motion served on the person at whose instance the inventory was taken (and the notary who made the inventory) or the person who filed the descriptive list.27 The official comments indicate that the procedure of the traverse now permits correction of an erroneous inventory (or descriptive list) at a point earlier than the point at which the facts shown on the inventory become relevant to some action in the proceedings.28 Although the drafters did not make clear exactly what can be accomplished by such a correction, in practice it is assumed that the motion to traverse the inventory or descriptive list is the way to establish or challenge the decedent's ownership of property.

As was noted earlier, Louisiana Code of Civil Procedure articles 3135 and 3137 state that the defendant in the motion to traverse is the person at whose instance the inventory was made (and the notary), or the person who filed the descriptive list. In an administered succession this person is usually the succession representative, as was the case in Fakier. If the drafters intended that the traverse be used to establish or challenge the decedent's ownership of property, the Code's designation of the succession representative as the sole defendant causes the problems the old law avoided. Perhaps the drafters intended that the party claiming ownership adversely to the succession be named as a codefendant in the motion against the succession representative. If so, did they also intend that his ownership would then be determined by summary process for the ostensible purpose of correcting the inventory or detailed descriptive list? If his ownership is not determined, then the correction of the list accomplishes virtually nothing except apprising all interested parties of a potential action; the real issue, ownership, would still remain.

In some situations a traverse against the succession representative to determine the decedent's ownership of property does not do much violence to other principles of procedure. In 1965 the Louisiana Supreme Court indicated that when the inventory or the descriptive list

prepared by the succession representative is overinclusive, a person claiming ownership of the property included in the inventory or list may use the traverse to have the issue of ownership tried. In Succession of Smith, the court decided that the decedent's husband, who was neither heir, legatee, nor creditor, could prove his ownership of community property that the succession representative had inventoried as the decedent's separate property by motion against the succession representative to traverse the inventory.\(^\text{29}\) At least in that case the executor in his representative capacity had no conflict of interest. His position as defendant on the issue of the decedent's ownership was consistent with that of all those to whom he owed fiduciary duties: the heirs, legatees, and creditors of the decedent. Since their claims to the property were derived from the succession, the succession representative could represent them. By including the property in the list, the executor arguably made a claim to it on behalf of those claiming through the succession, and by doing so consented to the use of summary process by adverse claimants challenging this claim. Ordinary litigation pending on the trial court's docket may have been deferred by the summary proceeding, but that may not be a critical problem.

In Fakier, however, the descriptive list allegedly was underinclusive.\(^\text{30}\) The grandchildren's motion against the executrix to traverse the descriptive list sought, among other things, the inclusion of annuity contracts purchased by the decedent. As the grandchildren interpreted their motion to the Louisiana Supreme Court, their argument for inclusion was that the annuities were property owned by the decedent at her death.\(^\text{31}\) The executrix claimed that since the proceeds of the annuities were payable to beneficiaries other than the estate, namely, the executrix and her sister, the annuities or their proceeds did not constitute property owned by the decedent at her death.\(^\text{32}\) The alignment of the parties was different from that in Smith. There the party bringing the motion claimed ownership adversely to all those claiming through the decedent, and the succession representative, as the defendant in his representative capacity, was aligned with the interests of those other

\(^{29}\) 247 La. 921, 175 So. 2d 269 (1965). The court held that the surviving spouse is an "interested party" within the meaning of Louisiana Code of Civil Procedure article 3135. Note that in this case the decedent was the wife, and hence her succession representative had no authority to administer both halves of the community, as would have been customary at the time had the decedent been the husband.

\(^{30}\) The official comment to Louisiana Code of Civil Procedure article 3137 broadly indicates that incompleteness of the descriptive list can be challenged by traverse, without suggesting what is accomplished thereby.

\(^{31}\) Brief for the Plaintiffs-Appellants at 14-18, Succession of Fakier, 523 So. 2d 823 (La. 1988) (No. 87-C-1877).

\(^{32}\) Brief for Defendant-Appellee-Respondent at 12-13, Succession of Fakier, 523 So. 2d 823 (La. 1988).
In *Fakier* the party advancing the decedent's ownership was not the succession representative but a group of heirs. They sought to make the succession representative defend the position of those whose claim to ownership rested outside of the succession. The succession representative, however, has no authority to defend the ownership of those whose claim is not made by virtue of their heirship or of a legacy. The complaining heir must sue those persons in their individual capacities, for the succession representative cannot stand in judgment for them. Further, since their claim is not made by virtue of their heirship, there arguably is no basis for compelling them to try their claim by summary process if they object to doing so.\(^3\)

The Louisiana Code of Civil Procedure assigns the succession representative the duty to collect and preserve the decedent's property and accords him full procedural capacity to carry out that duty.\(^4\) The real complaint of the grandchildren in *Fakier* was that, with respect to the annuities, the executrix declined to do what they believed she should have done: treat the proceeds as succession property. The failure of the succession representative to do her duty, however, is not put at issue by the filing of the detailed descriptive list. It is put at issue by either the filing of the succession representative's account of her administration or by some act of administration that impliedly recognizes the exclusion of the proceeds from the succession. In *Fakier*, neither of those events had occurred at the time the grandchildren filed their traverse.\(^5\) Since the parties may correct the detailed de-

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33. See Succession of Graf, 125 La. 197, 51 So. 115 (1909) (administrator can represent heirs for appeal or judgment rendered against them).

34. But see Succession of Terral, 301 So. 2d 754 (La. App. 2d Cir. 1974), aff'd, 312 So. 2d 296 (1975), in which some of the forced heirs sued another forced heir who was also the administrator to declare a simulation or alternatively for collation of a disguised donation of property transferred *inter vivos* by the decedent to the defendant forced heir. The appellate court held that the direct action between the heirs could not proceed because of the absence of some indispensable plaintiff-heirs. However, the court allowed the plaintiffs to proceed on exactly the same issues against the defendant forced heir in his capacity as administrator for an amendment of the descriptive list. In affirming, the supreme court did not question the procedure by which the issue of simulation was determined.


36. The motion of the grandchildren requested actual remedies, not merely a declaration of rights. When actual relief, as opposed to a declaration of rights, is sought, the plaintiff may not circumvent the process of succession administration once it has begun. Browne v. Witten, 153 So. 2d 184 (La. App. 2d Cir.), writ denied, 244 La. 1002, 156 So. 2d 56 (1963) (once succession is under administration heirs may not sue to collect debt allegedly owed to decedent by executor and one of coheirs, but may instead later pursue remedies for maladministration).

The Code of Civil Procedure expressly permits heirs, legatees, and creditors, as well as succession representatives, to obtain a declaratory judgment concerning the construc-
scriptive list at any time, a failure by the grandchildren to challenge the omission until such time as it was relevant in the course of the administration could not have prejudiced them.

The majority of the supreme court did not comment at all on the grandchildren's claim that the decedent owned the annuities at the time of her death. They may have assumed that, as suggested above, the issue could not be (and thus was not) raised by a traverse, or they may have implicitly held against the grandchildren on the merits of that claim. Either reason would support the affirmance of the appellate court's decree denying the relief sought by the grandchildren on the traverse. While procedure should not be rigid or hypertechnical, Fakier illustrates that the traverse of the descriptive list is an awkward procedural vehicle for challenging underinclusion of property by the succession representative.

Procedural Issues of Collation, Reduction, and Fictitious Collation

Just as the filing of the descriptive list should not permit the heirs or legatees to attack an as yet unfinished administration, so it should not permit them to submit claims for collation. In Fakier the grandchildren combined their motion to traverse the detailed descriptive list or validity of a testament, or any question arising in the administration of the estate. La. Code Civ. P. arts. 1872, 1874. As with a claim for actual relief, all interested persons must be made parties to a declaratory relief action. Id. art. 1880. When the declaratory judgment is sought by a party other than the succession representative, the question arises of whether such an action subverts the orderly process of administration if it is brought at a point at which the actual relief would be premature. What little jurisprudence there is indicates that a declaratory judgment is appropriate in these circumstances. Succession of Burgess, 323 So. 2d 914 (La. App. 4th Cir. 1975) (four months after judicial opening of succession forced heir sued executors and other interested parties for declaratory judgment concerning impingement of legitime); Guidry v. Hardy, 254 So. 2d 675 (La. App. 3d Cir. 1971), writ denied, 260 La. 454, 256 So. 2d 441 (1972) (heir sued other heir and surviving spouse for declaratory judgment that will was invalid and legitime impinged even though will not yet offered for probate). Since a suit for declaratory judgment involving factual issues is tried by ordinary process, Burgess, 323 So. 2d 914, it may unduly delay the administration, and the courts should use the discretion given them by the Code of Civil Procedure to dismiss the action when the plaintiff's eventual remedies are preferable to the delay. See Note, Declaratory Relief in Louisiana: The Potential for Procedural Misuse, 31 La. L. Rev. 549 (1971). When the party demanding the declaratory judgment is not exposed to any liability as a result of anticipated action or inaction, the protections afforded by the process of succession administration should be sufficient, and a preliminary declaration of rights would therefore be both unnecessary and inefficient.

37. Justice Watson, concurring and dissenting, expressed his disappointment at the majority's failure to address this claim. The majority decided only that the annuities had not been donated inter vivos. They did not expressly decide whether the annuities were property owned by the decedent at death even though beneficiaries were named.
with a claim for collation of a ring that the decedent had donated *inter vivos* to the executrix (the decedent's daughter) and the proceeds of annuity contracts in which the decedent had named the executrix and her sister as beneficiaries. Only the executrix was served. The supreme court, which reversed the lower courts by holding that the ring was collatable, did not comment on the procedure used by the grandchildren to assert the claim.

It is true that in practice issues of collation are normally resolved as part of the administration. Yet there are several objections that may be raised against permitting heirs to assert claims for collation against the succession representative alone and immediately after the filing of the descriptive list.

First, the Civil Code provides that collation can be claimed only by one forced heir against another. Thus, the claim should not be made by or against the succession representative in that capacity alone. Second, property donated *inter vivos*, such as the ring, does not belong on the descriptive list even if it is collatable. Since collation can inure only to the benefit of a forced heir, not to the benefit of the decedent’s creditors and legatees, the collated property is not available to the succession representative for the usual purposes of his administration. It is misleading to include such property on the detailed descriptive list with other property that is subject to the administration. Third, underlying several of the Civil Code provisions dealing with collation is the notion that collation is appropriate only when the heirs seek to partition the decedent’s property. Only then is the equalizing of the forced heirs’ shares necessitated. Once the heirs have divided the patrimony of the decedent among themselves, subsequent claims for collation should be precluded unless grounds exist for rescinding the partition. Thus, so far as the Louisiana Civil Code is concerned, unless the final account, the petition for discharge of the succession repre-
sentative, or the petition for possession incorporates a partition of the
decedent's property, the heirs need not present their claims for collation
during the administration at all. If and when the succession represen-
tative, an heir or legatee proposes a partition as part of the ad-
ministration, the issue of collation can be raised at that time.

In Fakier the grandchildren, upon realizing that their claim for
collation of the ring was premature, withdrew the claim at trial. Neither
side offered testimony on the issue. For some reason the grandchildren
did not regard their claim for collation of the annuities as likewise
premature. Both sides offered evidence on this issue, evidence that
included the testator's will. The trial court ruled that the ring was not
collatable, reasoning that the language in the will resolved the issue
of collation of the ring as well as the issue of collation of the annuities.
The supreme court, however, reversed the holding as to the ring, despite
the fact that the executrix had not had a chance to present testimony
on the issue. Had the claim for collation not been divided by the
reservation of the claim as to some property and the pursuit of it as
to other property in combination with a traverse as to that property,
there would have been less chance for misunderstanding by the court
and counsel of which issues were presented. Dividing the collation

44. Some unfortunate jurisprudence makes it risky to trust the Civil Code's linkage
of collation with partition. Doll v. Doll, 206 La. 550, 19 So. 2d 249 (1944), misun-
derstood Civil Code article 1242, which states that "collation is made only to the
succession of the donor" and held that once the succession has been closed and the
heirs sent into possession by a judgment of possession, there is no more "succession"
to which to collate; hence collation is thereafter precluded. See also Kinney v. Kinney,
150 So. 2d 671 (La. App. 3d Cir. 1963). The Doll court supposed the word "succession"
in article 1242 to mean a fictitious entity that no longer exists after a judgment of
possession is rendered. Though lawyers may speak informally and the Code of Civil
Procedure imprecisely of a succession as if it were an entity, in law it is no such thing,
at least not since the Code of 1825 rejected the Spanish concept of a succession in
favor of the French doctrine of *le mort saisit le vif*, wherein the heirs become the
owners of the decedent's property from the moment of death. Lazarus, The Work of
the Louisiana Appellate Courts for the 1971-1972 Term—Successions and Donations,
33 La. L. Rev. 199 (1973). See also La. Civ. Code art. 827, official comment. Thus,
the word "succession" in article 1242 refers to the decedent's property, not to an entity.
So long as the property remains an undivided mass, which it may even after a judgment
of possession, collation should not be foreclosed. The heirs, content to enjoy the
decedent's property as an undivided mass and not in individual shares, have had no
need of the object of collation, an equalization of each heir's divided share of the
decedent's property. See Succession of Smith, 514 So. 2d 606 (La. App. 4th Cir. 1987)
(neither express nor tacit acceptance bars heir from demanding collation).

45. Although the court noted at one place that the issue of collation of the ring
had been withdrawn, Fakier, 523 So. 2d at 827 n.1, it later used the lack of testimony
on this issue against the executrix. Id. at 833-34.

46. The court's reason for deciding the withdrawn issue on the merits without
remand was that neither party had objected to the trial and appellate courts' deciding
claim, which may have received implicit approval in Fakier, compounds the problem of an orderly resolution of auxiliary matters like collation and reduction within the process of succession administration as it presently exists in the Louisiana Code of Civil Procedure.

The supreme court declined to consider whether the annuity proceeds were subject to fictitious collation or reduction, determining that this issue had not been raised by the pleadings. In present practice, issues of fictitious collation and reduction are settled during the administration. Past practice treated these matters separately from the administration recognizing that the claim for reduction lay with the forced heir, and until he exercised it, the legacies were valid and to be given effect by the executor. On the assumption that present practice will continue, how and when should these issues be raised? Should they be raised by motion against the succession representative in response to the filing of the descriptive list? The succession representative is inadequate as sole defendant since his loyalty is due equally to the attacking forced heir and to the legatee whose legacies are attacked. The descriptive list is not a declaration by the succession representative concerning the legitime. Rather, it is only *prima facie* evidence of the assets of the estate that the succession representative administers for the purpose of paying debts, charges, taxes, and legacies. This estate is very different from the active mass upon which the legitime is calculated. *Inter vivos* gifts, for example, are not among the assets of the estate, though their value is included in the active mass. To place property on the descriptive list because it is subject to fictitious collation, unless it was also owned by the decedent at his death, would confuse two different masses of property, each with different claimants. Furthermore, at the early point of the filing of the issue. It would have been procedurally awkward for the executrix to object, because the rulings on the merits were in her favor. Yet she was penalized for not having done so. This author questions whether the executrix in her individual capacity and the other daughter, who were not parties, are bound by this judgment. See supra text accompanying note 40.

47. La. Civ. Code art. 1502, 1504. In Succession of Ball, 42 La. Ann. 204, 208, 7 So. 567, 568 (1890), the court stated:

> The right of reduction appertains exclusively to the forced heirs, and the action therefor can be brought only by them, or their heirs or assignees. It did not lie in the mouth of the executors, as such, to raise such questions. As to them the legacy was valid until attacked and reduced by the forced heirs.

See also Cox v. Von Ahlefeldt, 105 La. 543, 556-60, 563, 30 So. 175, 181-82, 214 (1900).

48. If fictitious collation or reduction becomes necessary, the property listed on the inventory or descriptive list as owned by the decedent at his death will be relevant because this property is part of the active mass. At that time the completeness of the list and the valuations of the property can be challenged. See Succession of Vance, 183 La. 760, 164 So. 792 (1935).
the descriptive list the decedent’s debts may not yet have been ascertained, making calculation of the legitime impossible. Instead, the issue of reduction of *mortis causa* donations could await the point at which the succession representative either proposes to deliver legacies and put residuary legatees into possession or resists the legatees’ demands for delivery or possession.

Depending upon the terms of the will, it may be necessary for the succession representative to calculate the legitime and disposable portion even though reduction is neither contemplated by the forced heirs nor possible. For example, this calculation is required when the decedent leaves the “disposable portion” to a legatee by testament, as was the case in *Succession of Gomez (Gomez II)* and *Fakier*. When, as in *Gomez II*, the succession representative proposes to deliver the legacy of the “disposable portion” in cash, as opposed to putting the legatees into possession as owners in indivision, it becomes necessary to determine the dollar value of the “disposable portion.” *Gomez II* held that when a testator uses a term such as “disposable portion,” the court must assume that the testator intended the term to have the meaning the law attributes to it. Applying this principle to the case before it, the court concluded that the term “disposable portion” meant that part of the testator’s estate that he was free to alienate.

*Gomez II* also made it clear that article 1505 provides the one and only way to calculate the disposable portion (and its complement, the legitime), whether for the purpose of reducing excessive donations or simply ascertaining the dollar value of a legacy of the disposable portion. The article 1505 calculation, of course, requires the fictitious collation of the value of *inter vivos* gifts. Had the succession representative in *Fakier* proposed to deliver the legacy of the disposable portion in cash, fictitious collation would have been appropriate even if reduction had not or could not have been claimed. Since the proceedings had not reached that point, the court was correct in declining to rule on whether the death proceeds of annuity policies were exempt from the fictitious collation of article 1505.

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52. Id. at 1102-06, 78 So. 2d at 414-15.
53. Id. at 1108-10, 78 So. 2d at 416-17.
54. The plaintiff-forced heirs in *Fakier* could have asked for a declaratory judgment as to whether the legacy of the disposable portion should be construed to include in the active mass the proceeds of the annuities. The construction of wills is a proper subject for a declaratory action. La. Code Civ. P. arts. 1872, 1874. See supra note 36. The supreme court hinted that, in light of the broadly stated motion filed by the plaintiff-forced heirs, had the parties presented evidence on this issue, the court would have been willing to rule on it.
Several courts apparently have accepted the practice by succession representatives of including items on the descriptive list that are allegedly subject to collation or reduction, even though those items are not part of the estate for the traditional purposes of the administration. In light of this practice, one may infer that the supreme court in *Fakier* assumed that ruling on the claim of collation was tantamount to ruling on whether the ring and the annuities belonged on the descriptive list, for the court said nothing specific about the traverse. This writer believes it would be better practice in an administered succession to restrict the use of the descriptive list to evidencing property that is available for fulfilling the traditional purposes of the administration. Then the danger of confusion, evident in *Fakier*, regarding what issues are raised and decided by a traverse to the descriptive list and who are the proper parties would be minimized. The administration could proceed in logical fashion without getting sidetracked onto matters that are auxiliary to the administration and arise, if at all, at the end of it.

*Appeal of Judgments or Orders in a Succession Administration*

The *Fakier* case reached the Louisiana Supreme Court even though, by that time, the administration had progressed no further than the filing of the detailed descriptive list. The case probably will return there unless the important issue the court declined to consider is settled. This prospect suggests that the courts' handling of the case be examined closely to determine whether considerations of judicial economy have been ignored for no overriding reason.

Appeals from orders or judgments in a succession proceeding are governed by the rules applicable to appeals from ordinary proceedings, with some exceptions not pertinent here. In ordinary proceedings a party may appeal from a final judgment, or from an interlocutory judgment that may cause irreparable injury. The Code of Civil Procedure indicates that a judgment of confirmation, appointment, or


57. La. Code Civ. P. art. 2974. The article makes exceptions for orders and judgments of confirmation, appointment, or removal of the succession representative and the granting of an interim allowance, which are executed provisionally despite the appeal. Also, only a suspensive appeal can be taken from a judgment homologating a tableau of distribution. Id. art. 3308.

58. Id. art. 1841 defines the interlocutory judgment as one "that does not determine the merits but only preliminary matters in the course of action. . . ."

59. Id. art. 2083.
removal of the succession representative; the granting of an interim allowance; a judgment homologating the tableau of distribution; and a judgment homologating the final account of the succession representative are appealable. As for the other orders and judgments that may be rendered during the administration, the Code does not specify which determine preliminary matters and which determine the merits.

As noted above, prior to the enactment of the Louisiana Code of Civil Procedure the inventory was considered preliminary and inconclusive. Any appeal was taken from the action undertaken by the succession representative to which the inventory contents were relevant, not from an action to correct the inventory. The Code of Civil Procedure, however, introduced a procedure for traversing the inventory or detailed descriptive list and provided that "[t]he descriptive list . . . shall be accepted as prima facie proof of all matters shown therein, unless amended or traversed successfully." In light of these changes in the law, it would appear that a ruling on a point raised through a traverse to the inventory or descriptive list is conclusive or final. Nevertheless, the matter decided in the traverse, though decided on its merits, is still preliminary with respect to the administration since, at least at that point, the succession representative will not have proposed any acts of administration affecting the property.

One solution may be to treat the ruling on the traverse as interlocutory and determine its appealability according to whether the order or judgment causes irreparable injury. Where, as in Smith, the party claiming adversely to the decedent's ownership was neither heir, creditor, nor legatee, he does not have standing to object to the succession representative's acts of administration or the final account, since he is not one to whom the succession representative owes any duties. Thus, if the court, ruling on the traverse, determines that the property identified by the traversing party did belong to the decedent, that party can be irreparably injured if the succession representative then proceeds to sell the property or distribute it to insolvent heirs. By contrast, an heir who loses the traverse would have standing to object to future

60. Id. arts. 2974, 3308, and 3337. Under the Louisiana Code of Civil Procedure, a judgment homologating the tableau of distribution may be appealed only suspensively, and the Code expressly states that a judgment homologating the final account has the same effect as a final judgment. Id. arts. 3308, 3337.

61. The jurisprudence considers an order permitting the sale of succession property to be appealable. Succession of Spann, 407 So. 2d 441 (La. App. 3d Cir. 1981), writ denied, 412 So. 2d 84 (1982); Succession of Voland, 296 So. 2d 406 (La. App. 4th Cir.), writ denied, 300 So. 2d 184 (1974).


63. See Molero v. Bass, 190 So. 2d 141 (La. App. 4th Cir. 1966), writ refused, 250 La. 2, 193 So. 2d 523 (1967) (order reopening a succession, normally interlocutory, appealable because of irreparable injury).
acts of administration with respect to the property and could take his appeal if and when those acts are proposed.

A second solution is suggested by the Louisiana fourth circuit's holding in Lee v. Lee. The court held that in a judicial partition of the community property the parties should not be allowed to take separate appeals from each ruling by the trial judge on the classification of individual items of property as separate or community. Since the purpose of the proceeding is the complete settlement of a patrimony, the appeal of any of the rulings should lie only after the court has rendered judgment homologating the entire partition. Thus, the wife, who had failed to appeal a judgment excluding the husband's military pension from the inventory of the community property, was not barred by res judicata from raising the issue later upon appeal of the judgment homologating the partition. While acknowledging that appellate courts have occasionally permitted piecemeal appeals in community property partitions, the court stated that the jurisprudence had never required such appeals. Thus, a party who declines to take a piecemeal appeal is not prejudiced and may still have his appeal in the end.

A succession administration is similar to the traditional judicial partition of the community property. Both the administration and the partition aim at the settling of a patrimony by a fiduciary (a notary public in the case of the traditional community property partition) appointed for that purpose. Both procedures permit interested parties to challenge the fiduciary's proposed action and allow the court to resolve the challenges and approve the overall plan of action. The judgment classifying property as community or separate corresponds to the ruling on a traverse determining the decedent's ownership of property. Thus, the losing party should be able to appeal from the ruling on the traverse immediately, subject to the discretion of the court or, without suffering prejudice, to postpone his appeal until the

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64. 375 So. 2d 769 (La. App. 4th Cir. 1979).
65. Id. at 772. The court held that the ruling was not a final judgment on the merits of the partition as a whole, nor could it be considered a partial final judgment since Louisiana Code of Civil Procedure article 1915 states that partial final judgments are only appropriate in specific situations not including this one. (This author believes there was a typographical error in the opinion at page 772, which says "We accordingly conclude that the judgment . . . was a partial final judgment that was not appealable under C.C.P. art. 1915 and thus did not acquire the authority of the thing adjudged when it was not appealed." To be consistent with the court's explanation of article 1915 it should read "We accordingly conclude that the judgment . . . was not a partial final judgment that was appealable under C.C.P. art. 1915 . . . .")
66. In 1982 Louisiana Revised Statutes 9:2801 (1983 & Supp. 1988) was enacted to provide a streamlined procedure for partitioning the community property, omitting the role of the notary. The traditional procedure in the Louisiana Code of Civil Procedure is still available.
issue decided becomes relevant to a proposed final disposition of the
property or of the estate as a whole.

**Substantive Law Issues: Collation and Related Matters**

*Collation: Declaration Creating an Extra Portion*

In *Fakier*, the testatrix, by statutory testament, provided for the
payment of certain particular legacies and then left "the entirety of
the disposable portion of [her] estate which remain[ed] after the com-
putation of the forced portion" to her two daughters.\(^6^7\) Thus, the will
specifically stated that the daughters were to receive the disposable
portion in addition to their respective forced portions. The will also
contained an extensive expression of the testatrix's reasons for disposing
of her property in favor of her two daughters and for limiting the
other forced heirs, the grandchildren, to their legitime. She stated that
she and her late husband desired that their three children share equally
the estate amassed between their parents, that when her husband's
estate was settled, the daughters retained significantly less than an
equal share by cooperating in certain transfers to enable their brother
to continue the family business, and that to even things up it was
necessary "to provide my two daughters with as much property, of
whatever nature, movable and immovable, community and separate,
including all rights and credits that I may own at the time of my
death, to the fullest extent and as may be authorized by law.'\(^6^8\)

During her life the testatrix had given a ring allegedly worth $10,000
to one of the daughters, and the grandchildren demanded collation of
the ring.\(^6^9\) Both lower courts ruled that the provision of the testatrix's

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\(^6^7\) *Fakier*, 523 So. 2d at 826.

\(^6^8\) Id. at 826. It is irrelevant to the issue of dispensation from collation that the
testator may have been wrong as a matter of law or fact as to whether any equalizing
was necessary. If the disposition shows an intent to favor a forced heir, the donor's
motive will not be questioned. *Darby v. Darby*, 118 La. 328, 42 So. 953 (1907).

\(^6^9\) The grandchildren withdrew at trial the issue of collation of the ring as pre-
mature. Thus, no testimony was offered concerning the circumstances under which the
ring was given, though the will was admitted in evidence in connection with the annuities.
Despite the fact that collation issue involving the ring had been withdrawn, the trial
court ruled on the basis of the will that the ring was not collatable. The appellate
court affirmed. The supreme court reversed and held the ring collatable on grounds
that the will was insufficient to waive collation of the ring. The court did not remand
for the taking of testimony that might have been relevant to a dispensation from
collation of the ring. Since the court did not rule that according to Civil Code article
1232 such testimony was legally irrelevant to a dispensation from collation, it should
have allowed the donee of the ring an opportunity to introduce such testimony.

As to whether a claim of collation was properly raised by a motion against only the
executrix see supra text accompanying notes 34-38.
will, which left the daughters the maximum amount allowed by law, that is, the disposable portion in addition to their legitimes, had relieved the daughters of the obligation of collating. The Louisiana Supreme Court reversed on the ground that the disposition in favor of the daughters of the disposable portion in addition to their legitimes did not constitute a declaration that inter vivos donations to the daughters were given as an extra portion. The court stated, "[T]here is no document, be it the will or otherwise, which refers at all to the gift of the ring, or which generically exempts from collation inter vivos donations . . . ."71

A parent or other ascendant is at liberty to favor a forced heir by relieving him of the obligation to collate (that is, to share equally with the other forced heirs) the donations he has received. The favored forced heir therefore would be entitled to a larger share of the property that the parent donated inter vivos and mortis causa than the other forced heirs. This dispensation from collation can be accomplished by means of the parent's expression of his intention that the donation be an advantage or extra portion.72 Because the law favors equality among the forced heirs, it prescribes certain formalities for expressing this intention.73 Provided the formalities are observed, the intention need not be manifested by any particular words, such as "advantage" or "extra portion"; all that is necessary is that the intention be manifested "in an unequivocal manner." 74

In Fakier that the decedent's will comported with the formalities required for dispensing with collation of inter vivos gifts was not contested.75 The only question was whether the testatrix had sufficiently

70. 523 So. 2d at 825.
71. Id. at 832. The court also reminded us that manual gifts are not per se exempt from collation, as some language of the court of appeal implied; rather, only customary parental gifts are exempt under Louisiana Civil Code article 1245. The court determined that the ring was not such a customary gift. 523 So. 2d at 833.
73. Id. art. 1232.
74. Id. art. 1233: "The declaration that the gift or legacy is intended as an advantage or extra portion, may be made in other equivalent terms, provided they indicate, in an unequivocal manner, that such was the will of the donor." Civil Code article 1501 requires that in order to favor a child with the disposable portion the parent must expressly declare that this disposition is intended to be over and above the legitimate portion. The testatrix's will in Fakier clearly complied with article 1501.
75. The formalities for declaring an inter vivos donation an extra portion apparently were conceded to be present in the decedent's statutory will. Louisiana Civil Code article 1232, as it read at the time of the decedent's death, required an act passed before a notary and two witnesses if the declaration of extra portion was not contained in the instrument of donation itself. A statutory will is executed before a notary and two witnesses even though it is not exactly an act passed before them in the usual
manifested her intention to bestow such gifts as an advantage or extra portion. The testatrix expressed in her will in an unequivocal manner her desire to favor her daughters to the greatest extent that the law allowed. To that end she left her daughters the disposable portion of her estate plus their respective forced portions and she left the grandchildren their forced portions only. The author respectfully submits that, contrary to the supreme court's statement that the will did not refer generically to inter vivos donations, the terms "disposable portion" and "forced portion," which the testatrix used, included the category of inter vivos donations.

_Gomez II_ decided that Louisiana law knows only one disposable portion and one legitime or forced portion: that described in Louisiana Civil Code article 1505. The disposable portion and legitime are complements of each other. Together they represent the total of all property the decedent donated inter vivos and owned at death (minus the decedent's debts). All inter vivos donations except those exempted by special legislation are included in the total, known as the "active mass," whether they be subject to collation or not. Importantly, _Gomez II_ stated that the definition of the legitime and disposable portion ordained by article 1505 is applicable in all contexts, whether in the determination of an action to reduce excessive donations or in the interpretation of a testamentary bequest. Hence, as far as the rule announced in _Gomez II_ is concerned, that the grandchildren in _Fakier_ were claiming collation rather than reduction of excessive donations, should have been of no moment. To decide the issue of collation, the court must consult the will, for a dispensation from collation of inter vivos gifts may be made in that instrument. In _Fakier_ the testatrix used "disposable portion" in her will; the court must assume that she intended the legal term to have the meaning the law attributes to it.

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76. 226 La. 1092, 78 So. 2d 411 (1955). The precise issue in _Fakier_ was not raised by the facts of _Gomez II_. In _Gomez II_, the legacy of the disposable portion was made to non-forced heirs (grandchildren whose parent was still alive). Since they were not forced heirs, the legatees of the disposable portion in _Gomez II_ had no obligation to share equally any inter vivos gifts they or their parent might have been given. In _Fakier_ the legatees of the disposable portion were forced heirs against whom a claim for collation of the inter vivos gifts could be brought.


79. _Gomez II_, 226 La. at 1103, 78 So. 2d at 415.
Therefore, the holding of *Gomez II* regarding the meaning of "disposable portion" should have governed.

Once it is accepted that the testatrix, by using the terms "disposable portion" and "forced portion," referred to the legal definition that includes *inter vivos* gifts, one must decide what she intended to say about them. This must be determined from a reading of the will as a whole and from its entire plan of disposition, not just by looking for phrases that are the equivalent of "extra portion," or "*inter vivos* donations." The testatrix limited the grandchildren to their forced portion by giving all of the property of which the law allowed her to dispose to the daughters in addition to their legitimes. This disposition necessarily excluded collation of *inter vivos* gifts by the daughters. Otherwise, the grandchildren would have received more than their forced portion. To put it another way, collation by the daughter of the ring would have resulted in the daughters' receiving less than the entire disposable portion. Since the value of the *inter vivos* donations is included in the calculation by which the disposable portion and legitime are determined, the only result consistent with the plan of disposition in the will would have been to treat the ring as an extra portion exempt from collation.

Heretofore the jurisprudence has resolved the question of collation consistently with the decedent's overall plan of disposition. For example, in *Heirs of Barrow v. Barrow*, the testator made particular legacies to certain forced heirs "to equalize them with all my other...

80. 10 Aubry & Rau, supra note 78, § 632, at 394-95: "One must consider as sufficiently expressed any dispensation from collation which necessarily flows from the context or from the dispositions *inter vivos* or testamentary of the deceased taken as a whole. . . . It should likewise be admitted that the dispensation from collation is validly manifested, when it necessarily results from the nature or the kind of the disposition. This occurred . . . in the case of a universal legacy or of a legacy of the disposable portion. . . ."

81. A simplified example will illustrate the inconsistency between collation of an *inter vivos* gift and the terms of a will such as the one in *Fakier*: There are two forced heirs, A and B. The will leaves A his share of the legitime and gives B his share of the legitime plus the disposable portion. This means A gets 1/4 of the active mass, and B gets 3/4 of the active mass. The active mass consists of *inter vivos* gifts [x] plus the net property at death [y]. Thus, A's portion could be mathematically expressed by the formula 1/4 (x + y), and B's portion by 3/4 (x + y). In addition, A claims collation of x, which was given to B, or 1/2x. A's total claim amounts to 3/4x + 1/4y, in contravention of the will which gave him only 1/4x + 1/4y. See *Succession of Riggio*, 468 So. 2d 1279 (La. App. 1st Cir.), writ denied, 472 So. 2d 33 (1985) (where will leaves all of disposable portion to third person, will shows intention that funds previously given to forced heir were advance on his legitime), illustrating that the issue of whether an *inter vivos* gift is an extra portion, and hence not imputed to the legitime, must be determined consistently with the will when the will uses the term "disposable portion."
children.

After the testator’s death, several of these forced heirs claimed collation of advantages that had previously been given to another forced heir. The court held that the language in the will foreclosed the possibility of collation, thus recognizing that to allow collation would have frustrated the intention of the testator in making the legacies. That intention was that the legacies be considered the equivalent of the donations or advantages bestowed on the other forced heir. To allow the legatees to obtain a larger share of the estate by forcing the favored heir to collate his gifts would have destroyed the intended equality.

Although in Barrow the heirs favored in the will were claiming collation of a previous advantage, whereas in Fakier the heirs disfavored in the will were making the claim, the outcome should have been no different: the plan of disposition in the will, when it is unequivocal and pertinent to the issue of equality among the forced heirs, controls collation of previous advantages even though the words “extra portions” and “inter vivos gifts” do not appear in the text of that will.

Had the testatrix in Fakier left “one-half” of her estate to her daughters instead of “the disposable portion,” the supreme court might have been correct in concluding that the will did not address inter vivos gifts. “One-half” of the estate could easily mean one-half of only the property left at death. In that case there would have been no unequivocal manifestation of an intention to bestow an advantage that included inter vivos gifts. But the term “disposable portion” by definition includes inter vivos gifts, and the intention manifested by its use is, as a result of the decision in Gomez II, unequivocal.

Collation of Annuity Proceeds

In Fakier the testatrix named her two daughters as the beneficiaries of several annuities that she had purchased during her life. The grandchildren claimed collation of those annuities. The lower courts rejected

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82. 38 La. Ann. 645, 647 (1886).
83. It has been held irrelevant that the testator may have been wrong in fact or law as to whether the donations or advantages to his children really were equal. See cases cited supra note 68.
84. Cf. Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929) (Testatrix left all property to one daughter. Other daughter sought collation of this legacy. Held: exemption from collation is necessarily inferred when challenged legacy is universal or residual.). This case illustrates in the context of collation of a legacy that the issue of extra portion is determined by inference from the whole plan of disposition.
85. See Gomez II, 226 La. 1092, 1101, 78 So. 2d 411, 414.
86. See Succession Duvio, 449 So. 2d 147 (La. App. 4th Cir.), writ denied, 450 So. 2d 968 (1984) (“all of the property which I may die possessed” not an unequivocal dispensation of collation of inter vivos gifts).
the grandchildren's claim for the same reason that they rejected the claim for collation of the ring: the will showed an intent to favor the daughters to the fullest extent allowed by law. The supreme court affirmed the holding with respect to the annuities, but on the ground that collation applies only to *inter vivos* donations and the annuities had not been transferred by that means.

The point of contention was not really whether the decedent had transferred the annuity contracts themselves. She clearly had not. The issue concerned the effect of naming a beneficiary of an annuity the proceeds of which are payable after the annuitant's death. It is not clear in the case whether the court viewed the naming of the beneficiary of an annuity contract as (1) a transfer by *mortis causa*, rather than *inter vivos*, donation, (2) an onerous transfer, or (3) no transfer at all. The court's citation of *Jordan v. Filmore* for the proposition that collation is required only for *inter vivos* donations suggests that the court embraces the first view. *Jordan* rejected a claim for collation of a *mortis causa* donation (a universal legacy). Therefore, in citing

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88. This pronouncement is questionable in light of Civil Code article 1248 which states: "The advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation." This article has been interpreted to require collation of advantages that were not transfers of property. Succession of Pierson, 339 So. 2d 1337 (La. App. 3d Cir. 1976), writ denied, 342 So. 2d 216 (1977) (child's rent-free habitation of parent's property held collatable advantage). *Pierson* pointed out the difference between Louisiana and French law on this point. Thus according to *Pierson's* interpretation of article 1248, the issue should not have been whether there was a donation *inter vivos*, but whether there was an advantage bestowed.

89. *Fakier*, 523 So. 2d at 834.

90. There are two problems with the citation of *Jordan* for the proposition that only *inter vivos* donations are subject to collation. One is that the Civil Code clearly intends collation to apply to legacies as well as *inter vivos* donations, and anything said to the contrary in *Jordan* ought to be disregarded as unreliable *dicta*. La. Civ. Code arts. 1228, 1232, 1233, 1237, 1238, 1239, 1248. Second, the actual holding of *Jordan* was not that all legacies are exempt automatically from collation, but that the universal legacy to the forced heir in *Jordan* was an extra portion because the disposition itself necessarily implied an unequivocal intent to favor the legatee-forced heir. It is the real holding in *Jordan*, not the unreliable *dicta*, that is relevant to *Fakier*. *Jordan* supports the argument that the intention to create an extra portion must be sought in the will as a whole, in the overall plan of disposition, not just in references to the gift or legacy in question, or to the genus of gifts or legacies. Thus whether the annuities be *inter vivos* donations or whether they be regarded as *mortis causa* donations, the *Fakier* will's overall plan of disposition, as explained above, indicates that the annuities need not be shared equally with the grandchildren. The author does concede that, however ill-founded the view, the unreliable *dicta* in *Jordan* continues to be cited by lawyers and courts as if it were the correct rule on collation of legacies. See *In re Kendrick*, 361 So. 2d 309 (La. App. 1st Cir.), writ denied, 362 So. 2d 1119 (1978).
Jordan the court might have been assimilating the naming of the beneficiary of an annuity to the naming of a legatee.

The second view is eliminated by the court's insistence that it pretermitted consideration of the issue of fictitious collation of the annuities. If the court thought that the naming of the beneficiary of an annuity constituted a transfer, but not a donative one, the issue of fictitious collation would be decided as well, since fictitious collation applies only to donative transfers.91

The third view, that there is no transfer at all, is at odds with the supreme court's decision in T.L. James & Co. v. Montgomery.92 In that case, the court considered the similar issue of whether the death benefits of a retirement plan payable to a named beneficiary are subject to a forced heir's demand for reduction. On first hearing the court held that the naming of the beneficiary was an attempted mortis causa donation that failed to comport with the required formalities. Hence the beneficiary designation was invalid and, because there had been no valid transfer, the benefits belonged to the estate.93 On rehearing the court held that the contractual designation of the beneficiary validly transferred ownership of the proceeds to the beneficiary, but those proceeds, because transferred gratuitously, were subject to the forced heir's claim for his legitime.94 The statutes used in T.L. James to support the validity of the contractual designation of the beneficiary of a retirement plan are not identical to the statutes that govern annuities. It is unlikely, however, that the supreme court in Fakier intended to cast doubt on the validity of the contractual designation of the beneficiary of an annuity; rather, the court simply was leaving open the question of whether the proceeds, even though owned by the beneficiary, are includable in the active mass for the purpose of calculating the legitime and of seeking reduction of excessive donations.95

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91. La. Civ. Code art. 1505: "To determine the reduction to which donations, either inter vivos or mortis causa, are liable. . . ." (emphasis added). Property transferred onerously is not within the scope of article 1505. See also id. arts. 1513, 1514.
92. 332 So. 2d 834 (La. 1976).
93. Id. at 846-47.
94. Id. at 855-56 (on rehearing). The forced heir's right to claim his legitime from the death benefits of a retirement plan was cancelled legislatively by the 1981 amendment to Louisiana Civil Code article 1505 creating section D of that article.
95. If the proceeds are considered owned by the beneficiary but subject to reduction, they are included in the active mass under article 1505, but do not belong on the detailed descriptive list, which serves another purpose. See discussion supra at notes 47-50.
Annuity Proceeds, Fictitious Collation, and Reduction—The Undecided Issue

Extensive comment on the issue of whether the annuity proceeds are includable in the active mass for the purpose of calculating the legitime and for reduction should await a future decision. Those opposing inclusion will make an analogy to the treatment of life insurance proceeds payable to a named beneficiary. There may be facts in Fakier that make the analogy appealing, but the argument is not an easy one. The statute pertaining to annuities is different from that pertaining to life insurance. The supreme court showed reluctance in T.L. James & Co. to extend the rules applicable to life insurance by analogy, where doing so would encroach upon a forced heir’s legitime. Especially now, when the legislature wisely is protecting forced heirship against attempts to abolish it, the courts should be reluctant to erode this institution.

97. 332 So. 2d at 852.
98. In the 1988 regular legislative session two bills were introduced proposing an amendment to the state constitution to remove the constitutional protection for forced heirship. Senate Bill 6 failed on the floor of the Senate to get the two-thirds majority necessary for a constitutional amendment. House Bill 18 was heard in the House Committee on Civil Law and Procedure and was deferred by a vote of 10-3. In the 1987 regular session the legislature amended Louisiana Revised Statutes 9:2449 concerning death benefits of an individual retirement account to eliminate language that previously exempted benefits payable to a beneficiary from the claims of “heirs” of the decedent. The statute now is aimed solely at protecting the account holder in paying the named beneficiary, not in protecting the beneficiary from the claims of forced heirs.