2020 Recent Developments
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Successions

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RECENT DEVELOPMENTS IN SUCCESSIONS & DONATIONS

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I. RECENT DEVELOPMENTS

A. Jurisprudence - Wills - Requirements of Form

La. C. C. Art. 1577 provides:

> The notarial testament shall be prepared in writing and dated and shall be executed in the following manner. If the testator knows how to sign his name and to read and is physically able to do both, then:
>
> (1) In the presence of a notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament and on each other separate page.
>
> (2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each separate page, and in the presence of the testator and each other we have hereunto subscribed our names this ____ day of _____, ____."

1. **Succession of Hanna,** 283 So. 3d 493 (La. 2019)

The attestation clause in this will provided:

> "SIGNED AND DECLARED by testator above named in our presence to be his last will and testament and in the presence of the testator and each other we have hereunto subscribed our name on the 18th day of October, 2012 at Jonesboro, Louisiana."

The attestation clause lacks a declaration by the notary and witnesses that the testator signed the will at its end and on each separate page. However, the testator did, in fact, sign at the end and on all pages of the will.

La. C. C. Article 1577 requires the notary and witnesses to attest to three (3) things, namely, (1) the testator signed the will at its end and on each separate page; (2) the testator declared in the presence of the notary and witnesses that the instrument was his will; and (3) in the presence of the testator and each other, they (notary and two (2) witnesses signed their names on a specified date.

The trial court granted summary judgment invalidating the will as materially deviating from the requirements of Article 1577 (2). The Second Circuit appellate court reversed finding the failure to include the phrase "at the end and on each separate page" a minor immaterial deviation where in fact the testator did sign his full signature at the end and on each separate page. **Succession of Hanna,** 52,664 (La. App. 2 Cir. 6/26/19), 277 So. 3d 438.

The Louisiana Supreme Court granted a writ and in a brief per curiam opinion citing **Successions of Toney,** 226 So. 3d 397 (La. 2017) held that the trial court correctly concluded that the attestation clause materially deviated from the requirements of Article 1577 (2) so as to render the testament invalid, reversed the Court of Appeal and reinstated the trial court judgment. Justice Weimer dissented voicing concerns of "form over substance" when the testator's intent is paramount and would have the Court docket the case for full consideration rather than per curiam disposition on the issue of "substantial" compliance with Article 1577 (2).

2. **Succession of Booth,** 19-104 (La. App. 3 Cir. 11/6/19), 285 So. 3d 1.

The separate husband and wife wills consisted of four (4) pages. The first page which was not signed revoked prior wills, had a family history declaration and did not contain any dispositive provisions. Page 2 with dispositive provisions was signed. Page 3, with attestation clause, was signed by the witnesses but not the testators. Page 4, also with attestation clause was signed by the notary public and the testators but not the witnesses. In this case, the husband and

wife testators failed to sign two (2) pages of their respective wills and the attestation clause lacked the language that the wills were signed in the presence of the notary and two witnesses on each separate page and at the end.

The District Court granted judgment validating the wills and the Third Circuit granted a supervisory writ staying the trial court judgment and reversed holding that the testaments were absolutely null due to defects in the attestation clause. The requirements of Article 1577 include the testator "shall sign his name at the end of the testament and on each other separate page". The general jurisprudential rule is that failure to sign the separate pages of the will renders it an absolutely nullity **except** in cases where the testator "substantially complied" with the statutory provisions but did not sign a page that lacked dispositive provisions. In this case, there was no indication from the attestation clause that the testators signed in the presence of the notary public and witnesses at the end and on each separate page. The attestation clause was not substantially similar to satisfy Article 1577 and therefore the wills were absolute nullities.

3. **Succession of Bruce,** 19-208 (La. App. 3 Cir. 1/8/20), 289 So. 3d 121, writ granted No. 2020-C-00239 (La. 6/22/20) argued 10/20/20

The decedent's last will and testament had an attestation clause which read:

> "Signed on each page and declared by Testator, PEGGY B. BRUCE, above named, in our presence, to be her Last Will and Testament, and in the presence of the Testatrix and each other, we have hereunto subscribed our names on this 21st day of November, 2016."

Issue: Whether an attestation clause lacking the language that the testator has signed "at the end" of the testament is substantially similar to the language dictated by Article 1577 (2)? Trial court here found the absence of the words "at the end" was material and granted judgment annulling the will.

Third Circuit Court of Appeal affirmed citing **Successions of Toney, supra,** ruling that the failure to include "at the end" is significant and material and cannot be considered substantially similar to Article 1577 (2).

A writ was granted (6/22/20) in the case and it was argued October 20, 2020.

4. Succession of Liner, 53,138 (La. App. 2 Cir. 11/20/19), 285 So. 3d 63.

The questioned attestation clause provided:

> "The foregoing instrument, consisting of eight (8) pages, and read aloud in the presence of the Testator and of each other, such reading having been followed on copies of the Will by Notary and witnesses, and the Testator declared that he had heard the reading of the Will by the Notary, and the Will was signed and declared by JAMES CONWAY LINER, III, Testator and above named, in our presence to be his Last Will and Testament, and in the presence of the Testator and each other we have hereunto subscribed our names on this 3rd day of June, 2015."

The attestation clause was signed by the witnesses, notary public and testator who also signed the bottom of every page of the will.

The issue here was whether the attestation clause substantially complies with the provisions of La. C. C. Art. 1579 (2) (**notarial testament; testator unable to read**). The complaint was that the clause language did not provide that the testator signed "at the end and on each separate page." The district court entered a judgment nullifying the will.

Civil Code Article 1579 provides the procedure for the execution of a notarial will for a testator unable to read requiring that the testament be read aloud in front of the parties, that the reading be followed on copies of the testament by the witnesses, and that in their presence the testator declare that he heard it read and that it is his will, and that he signed his name at the end and on each separate page. The language must be substantially similar to that set forth in Article 1579 (2).

The Second Circuit Court of Appeal found that the failure to include the language "at the end and on each separate page" was not a material defect because the will itself is clearly signed by the testator at the end and on each separate page and the notary and witnesses attested to all signatures. While the best practice is to use the sample attestation language provided in Civil Code Articles 1577 to 1580.1, the Court pointed out that the legislature has not mandated that this exact language be utilized. Trial court was reversed.

Aside: This decision is consistent with the Court's position in **Succession of Hanna, supra**, and other cases before the Louisiana Supreme Court's per curiam reversal. The Louisiana Courts of Appeal are apparently split on the issue. Hence the likelihood of writ granted in **Succession of Bruce, supra.**

5. Succession of Carter, 19-CA-545 (La. App. 5 Cir. 5/28/20), ___So. 3d ___, 2020WL2764372

Issue: Whether cursive initialing satisfies the statutory requirement that the testator sign a notarial will on each page and at the end. Here the district court denied the petition to annul the probated testament on these grounds.

Holding: Initialing a will on each page rather than signing it is a significant and material defect which does not substantially comply with formal requirements of Article 1577 which provides that a testator "shall sign his name" on each page. Shall being mandatory. Such a will is an absolute nullity under Civil Code Article 1573. The Court of Appeal reversed the district court citing **Successions of Toney, supra**, where the Louisiana Supreme Court nullified a will which was initialed rather than signed on the first two (2) pages and harbored a faulty attestation clause and as such, was not in substantial compliance with the language promoted by Article 1577.

B. Jurisprudence - Wills - Capacity - Corollary Issue

1. Succession of Armand, 19-751 (La. App. 3 Cir. 2/27/20), ___So. 3d ___, 2020WL944473

Rule 3.7 La. Rules of Professional Conduct provides:

> (a) A lawyer shall not act an advocate at a trial in which the lawyer is likely to be necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

Attorney A and Attorney B represent executor J. P. Gaspard. The decedent's will was probated on March 27, 2018. Attorney A drafted the document and was the acting Notary. Attorney B was a witness. Aggrieved "legatees" filed a petition to annul the probated testament on the grounds that the testatrix was legally blind at the time of execution of the will and the will did not comply with Civil Code Article 1579. During discovery, the executor denied the testatrix was legally blind and in his answers to interrogatories voiced his intention to call Attorney A and Attorney B as witnesses. The aggrieved "legatees" moved to disqualify the attorneys poised to testify on the primary issue in the case (i. e. capacity). The trial judge denied the motion.

On a supervisory writ application, the appeals court reverses. Disqualification of counsel is usually subject to the manifest error (clearly wrong) standard of review. However, when the district court makes an error of law, then the de novo standard of review applies. The district court erroneously applied the exceptions in the La. Rules of Professional Conduct. Rule 3.7 prohibits counsel from performing as an advocate at a trial in which the lawyer is likely to be a witness with exceptions, namely, allowing testimony relating the nature and value of legal services rendered and when disqualification would work substantial hardship on the client (Rule

3.7 (a) (2) and (3)). The court reasoned that the question as to the testatrix's capacity (i.e. legal blindness) is a material fact and the proffered testimony would be from a material witness. This is not testimony regarding the nature and value of legal services. Moreover, the executor has not shown "substantial hardship" which might result from disqualification. The district court was reversed and the motion to disqualify the attorneys was granted.

C. Jurisprudence - Wills - Revocation

La. C. C. Art. 1607 provides:

Revocation of an entire testament occurs when the testator does any of the following:

(1) Physically destroys the testament, or has it destroyed at his direction.
(2) So declares in one of the forms prescribed for testaments or in an authentic act.
(3) Identifies and clearly revokes the testament by a writing that is entirely written and signed by the testator in his own handwriting.

1. **Succession of Robin,** 286 So. 3d 396 (La. 2019)

The Louisiana Supreme Court granted a writ of review and reversed both the district court and court of appeal. (**Succession of Robin**, 2018-0538 (La. App. 4 Cir. 1/30/19) ___So. 3d ____, 2019WL385203) finding that the decedent's November 4, 2004 undated authentic act providing for "revocation of any and all prior wills or codicils" was effective in revoking decedent's 2004 testament. Further, extrinsic evidence on the date of execution was allowed.

D. Jurisprudence - Wills - Lapsed Legacy - Accretion; Authentication of Olographic Will

1. **Succession of Olsen,** 19-CA-348 (La. App. 5 Cir. 1/29/20), 290 So. 3d 727, writ denied 2020-C-00362 (La. 6/3/20), 2020WL3424584

Seventy three (73) year old L. L. Olsen, Jr. died childless on December 11, 2016. His wife (Jane Olsen) and sister Loydella Olsen Davenport, predeceased him and half-sister Lynn

Olsen Rizzo survived him only a matter of days. The decedent's December 5, 1994 notarial will left all his property to his wife, or if Jane predeceased him, to his sister Loydella O. Davenport. Since both wife and sister predeceased the decedent, there were no legatees under the will at his death. Sister Loydella's children, Phyllis and David, filed the petition to probate the 12/5/1994 notarial will and secured a January 18, 2017 order to probate the will, open the succession, and appoint them both co-independent administrators of the succession.

Whereupon, half sister Lyn Olsen Rizzo's two (2) children, Rebecca and Paul, filed a March 29, 2017 petition to annul the probated notarial will and probate a later olographic will dated November 25, 2016 which named an executor, left a number of special bequests and divided the rest equally among the four (4) nieces and nephews previously mentioned, namely, Phyllis, David, Rebecca and Paul. The latter olographic will appeared mysteriously at Rebecca and Paul's Attorney's office. Notably, two (2) of the legatees under the November 25, 2016 will attested by affidavit to the authenticity of the decedent's handwriting.

After a four (4) day bench trial over as many months involving much lay and expert testimony on the authenticity of the olographic will's handwriting, the trial judge ruled that Rebecca and Paul failed to meet their burden of proof necessary to probate the olographic will and that the succession rights pertinent to the 1994 notarial will are governed by the law in effect at the time of decedent's death (i.e. testamentary accretion) making Phyllis and David the decedent's sole heirs. Understandably, Rebecca and Paul appealed.

The Fifth Circuit affirmed the trial court's decision. The court recognized that all the witnesses testifying to the authenticity of the olographic testament would benefit from a positive finding in that regard noting that an interest in the estate is a factor affecting the credibility of the witnesses. Robert Foley, a renowned handwriting expert, testified that he did not believe that the

will was signed by the decedent. Further, the proponents (Rebecca and Paul) failed to call and expert witness to testify as to the authenticity of the handwriting. The appeals court found no manifest error in the trial court factual finding that the olographic will was not authentic.

La. C. C. Article 870 (B) provides that testate and intestate succession rights are governed by the law in effect on the date of the decedent's death. Pursuant to Civil Code Article 1589, a legacy lapses when the legatee predeceases the testator. Testamentary accretion takes place when a legacy lapses. (La. C. C. Art. 1590). At the time of decedent's death, La. C. C. Art. 1593 provided that if a legatee is a sibling of the testator and the legatee's interest in the legacy lapses, accretion takes place in the favor of the legatee's descendants by roots who were in existence at the time of the decedent's death. Accordingly, pursuant to the law in effect on the date of death, testamentary accretion makes Phyllis and David the sole heirs of the succession. The trial court judgment was affirmed in all respects.

E. Succession and Donations - Other Cases of Interest

1. **Transfer on Death (TOD) - non probate transfer - Succession of Schimek,** 2019-CA-1064 (La. App. 4 Cir. 6/10/20), ___So. 3d ____, 2020WL3071826

   Vanguard Transfer on Death (TOD) Plan in accordance with Pennsylvania law to pass ownership on individual nonretirement accounts without probate to designated beneficiaries after death. Choice of law question since both La. and Pa. have an interest in having their laws applied to the dispute. Here no conflict in contract law between the two (2) jurisdictions. The choice of law provision is valid unless statutory, jurisprudential law or strong public policy provision to the contrary. Louisiana allows for other types of non probate transfers (e.g. life insurance, pensions, retirement accounts, bank POD accounts). Pennsylvania choice of law provision valid.

2. **Forced Heir - Succession of Wilkins,** 2019-1060 (La. App. 1 Cir. 5/11/20) ___So. 3d___, 2020WL2315580

   Summary Judgment declaring Charles Wilkins, Jr. a forced heir due to bipolar disorder affirmed. See also Succession of Ardoin, 957 So. 2d 937 (La. App. 3

Cir. 5/30/07); Succession of Forman, 37 So. 3d 1081, (La. App. 3 Cir. 5/5/10).

3. **Sole Intestate Heir - Right of Action - Antoine v. East Baton Rouge Parish Council on Aging,** 2019-0109 (La. App. 1 Cir. 11/15/19), ___So 3d.___, 2019 WL6044634

   Daughter and sole intestate heir (not a legatee or a forced heir) has no right of action to bring claim; succession representative is the appropriate party to bring an action on behalf of the succession.

4. **Trial Court - Sua Sponte Signature Challenge - Succession of Barbee,** 2019 CA 0575 (La. App. 4 Cir. 11/27/19), 286 So. 3d. 461

   District Court was under mandatory obligation to probate the uncontested will and did not have standing to on its own contest the validity of testator's signature.

5. **Filiation - Barron v. O'Rourke,** 19-412 (La. App. 3 Cir. 12/18/19), 287 So. 3d 817

   2016 Amendment to La. R.S. 9:406, changing prescription period (formerly two (2) years from acknowledgment) for the annulment of acknowledgment of paternity applies retroactively to claims that had already prescribed. Acknowledgment absent a biological relationship is an absolute nullity and not subject to prescription.

6. **Lifetime Usufruct - Prescription of Nonuse - 10 years - Succession of Johnson,** 2019-0786 (La. App. 1 Cir. 5/28/20), 2020WL2789562, Unpublished opinion

   Lifetime usufruct subject to 10 year period for prescription for non-use.

7. **Wrongful Death and Survival Actions - Trahan v. Leonard J. Chabert Medical Center,** 2019 CA 0561 (La. App. 1 Cir. 12/27/19), 292 So. 3d 919

   Succession representative does not have a cause of action when a member of a more favored class is still alive. Recall: spouse, child, parent surviving; then surviving brothers and sisters. La. C. C. Articles 2315.1, 2315.2.

8. **Donation Inter Vivos - Donative Intent - Succession of Fanz,** 2019 CA 0503 (La. App. 4 Cir. 1/29/20), ___So. 3d____, 2020WL476794

   Donation inter vivos from individual to his sole member LLC. Requirements of valid donation are divestiture and donative intent. If no donative intent and both donor and done only pretended to transfer property while intending the donor to retain ownership, then the donation is a simulation and is an absolute nullity.

9. **Wills - Lack of Capacity and Undue Influence - Succession of Fogg,** 2019 CA 0719 (La. App. 1 Cir. 2/21/20), ___So.3d___, 2020WL862201

The capacity required for a donation mortis causa is that a person be able to generally comprehend the nature and consequences of the disposition. La. C. C. Art. 1477. There is a presumption of capacity and the proponent challenging capacity must prove lack of capacity by clear and convincing evidence that the testator/donor lacked capacity at the time the testament was executed. La. C. C. Art. 1482 (A). This is a fact intensive inquiry with subjective and objective factors under consideration such a old age, delirium, sedation, etc. Available medical evidence/testimony may also prove helpful. A donation mortis causa is null on the grounds of undue influence if the influence of the donee or another person "so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor". La. C. C. Art. 1479. Undue influence must be proven by clear and convincing evidence.

10. **Donation - Revocation for Ingratitude - Pierce v. Pierce,** 2019 CA 0689 (La. App. 1 Cir. 2/21/20), ___So.3d___, 2020WL862474

    H & W married 1/10/94. Matrimonial domicile established on W's separate property and in 2002 W donated 1/2 interest to H. In a heated domestic proceeding on the last day of trial, W filed a second reconventional demand to revoke all donations to H on Article 1557 ingratitude grounds which provides that donations may be revoked for ingratitude of the donee who has been guilty of cruel treatment, crimes, or grievous injuries. However, an action must be brought within one (1) year from the day the donor knew or should have known of the act of ingratitude. La. C. C. Art. 1558. Trial Court found not properly plead (notice) on last day of trial and found not an abuse of discretion. Affirmed.

11. **Mandatory Joinder of Legatees - Succession of Pedescleaux,** 19 CA 250 (La. App. 5 Cir. 2/7/20), 290 So. 3d 749

    Joinder of all legatees required in suit to challenge the validity of will and declare property involved community.

12. **Removal of Succession Representative - Mismanagement - Succession of Madden,** 53,353 (La. App. 2 Cir. 3/4/20), 293 So. 3d 665

    Removal motion took three (3) years for a hearing due to pending motions to disqualify the lawyers involved. Succession proceedings at standstill until motions to disqualify resolved. Trial court relied on the succession accounting and attorney fees incurred ($196,000+) as evidence of executrix's "motivation and lack of prudence and judgment" together with as the appellate court found cable tv service for an unoccupied residence, a house sitter for a residence near to another family member's residence and the executrix's "inability to unravel the confusion regarding her mother's estate." Affirmed. **Note:** Not yet determined if attorney fee expenses were personal or succession related.

II. RECENT DEVELOPMENTS - LEGISLATION

A. Act 19 (2020) Louisiana Law Institute measure (effective August 1, 2020) relative to successions, to modernize terminology; to provide for the calculation of the legitime; to provide for the calculation of the active mass of a succession; to provide for independent administration; and to provide for the sealing of a detailed descriptive list in a succession without an administration.

B. Act 107 (2020) Successions; Independent Administration (effective June 9, 2020) La. C. C. P. Article 3396.1 amended to authorize the clerk of court (rather than the "court") to issue letters of independent administration or independent executorship.

C. Act 173 (2020) Small Successions (effective August 1, 2020) La. C. C. P. Article 3421 to authorize administration of certain testate successions without court approval.

D. Recap: Access to a decedent's accounts without need for Court documents:

(a) La. R.S. 9:1513 - "federally insured depository institution" - $20,000

(b) La. R.S. 9:1514 - "credit unions" - $10,000

(c) La. R.S. 6:315.1 -"depository financial institution" - $20,000

(d) Payable on Death (POD) provisions:

(i) La. R.S. 6:314 (banks)

(ii) La. R.S. 6:653.1 (credit unions)

(iii) La. R.S. 6:766.1 (savings and loans)

(iv) La. R.S. 6:1255 (Louisiana savings banks)

(e) Small Succession Affidavit Procedure (La. C.C.P. Art. 3431 et seq.)

(i) Intestate Louisiana domiciliary.

(ii) Intestate non-domiciliary or testate non-domiciliary whose testament has been probated by court order of another state.

(iii) **Affidavit procedure now applicable to testate domiciliary leaving no immovable property and probate of testament has same effect as if deceased died intestate.**

(iv) Decedent with gross estate of Louisiana property of $125,000 or less is small succession or who died at least 20 years before filing the affidavit is a small succession regardless of value of decedent's property.

(e) Transfer on Death (TOD) accounts.

E. Act 17 (2020) Louisiana Law Institute measure; Trust Administration (effective January 1, 2021) according to the preamble to provide with respect to allocation of income and principal; to provide for the appointment and allocation of various types of receipts and expenses; to provide for the obligation to pay money; to provide for charges against income and principal; to provide for transfers from income to principal for depreciation; to provide with respect to the payment of income taxes; to provide for underproductive property and related matters.

F. Act 18 (2020) Louisiana Law Institute measure; Out of state trust company; (effective August 1, 2020) confirms that out of state trust company may act as trustee from a trust office only if it (1) maintains a trust office or branch in the State of Louisiana, and (2) the state where the out of state trust company has its principal office allows a Louisiana institution to perform substantially similar business activities. La. R.S. 6:626(A)(1) & (2). Recall Act 334 (2019). Otherwise, the out of state trust company may establish a trust representative office for trust related business but may not enter into any trust agreements. This act further deletes the reference to "competent" beneficiaries in La. R.S. 9:2207 since "competent" in not defined in the Trust Code and in the Civil Code the term is "capacity". The Act further removes the limitation that prevents a beneficiary from agreeing to limit a trustee's liability for "improperly advancing money or conveying property" to a beneficiary of a spendthrift trust or a trust with restrictions on the beneficiary's right to alienate his or her interest. According to the Revision Comments, this has been a controversial provision since the 1964 adoption of the Trust Code and the modern trend is not to so limit a beneficiary's ability to relieve a trustee of liability.

ENROLLED

2020 Regular Session

ACT No. 19

HOUSE BILL NO. 125

BY REPRESENTATIVE GREGORY MILLER

(On Recommendation of the Louisiana State Law Institute)

AN ACT

To amend and reenact Civil Code Articles 897, 1495, and 1505(A) and (B) and Code of Civil Procedure Articles 2952 and 3396.18(A), to enact Civil Code Article 1495.1, and to repeal Part 1 of Chapter 4 of Title 9 of the Louisiana Revised Statutes of 1950, comprised of R.S. 9:2401, relative to successions; to modernize terminology; to provide for the calculation of the legitime; to provide for the calculation of the active mass of a succession; to provide for the independent administration of a succession; to provide for the sealing of a detailed descriptive list in a succession without administration; to repeal the Uniform Wills Law; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Articles 897, 1495, and 1505(A) and (B) are hereby amended and reenacted and Civil Code Article 1495.1 is hereby enacted to read as follows:

Art. 897. Ascendant's right to inherit immovables donated to descendant.

Ascendants, to the exclusion of all others, inherit the immovables given by them to their children or their descendants of a more remote degree who died without ~~posterity~~ descendants, when these objects are found in the succession.

If these objects have been alienated, and the price is yet due in whole or in part, the ascendants have the right to receive the price. They also succeed to the right of reversion on the happening of any event which the child or descendant may have inserted as a condition in his favor in disposing of those objects.

Revision Comments - 2020

The term "posterity" as used in the first paragraph of Article 897 has been replaced with the term "descendants," as "posterity" is no longer defined in the Civil Code. Under the Civil Code of 1870, the term "posterity" was defined to mean "all the descendants in the direct line." Article 3556(24) (1870). It was deleted in 1999.

* * *

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

Art. 1495. Amount of forced portion and disposable portion

Donations *inter vivos* and *mortis causa* may not exceed three-fourths of the property of the donor if he leaves, at his death, one forced heir, and one-half if he leaves, at his death, two or more forced heirs. The portion reserved for the forced heirs is called the forced portion and the remainder is called the disposable portion.

~~Nevertheless, if the fraction that would otherwise be used to calculate the legitime is greater than the fraction of the decedent's estate to which the forced heir would succeed by intestacy, then the legitime shall be calculated by using the fraction of an intestate successor.~~

Art. 1495.1. Calculation of the legitime

To determine the legitime of a forced heir when all forced heirs are of the first degree, the division of the forced portion is made by heads.

When representation occurs for purposes of forced heirship, the division is made by roots among those qualifying as forced heirs or being represented. Within each root, any subdivision is also made by roots in each branch, with those qualifying as forced heirs by representation taking by heads.

Nevertheless, if the fraction that would otherwise be used to calculate the legitime is greater than the fraction of the decedent's estate to which the forced heir would succeed by intestacy, then the legitime shall be calculated by using the fraction of an intestate successor.

Revision Comments - 2020

(a) This Article provides a definitive statement as to how to calculate an individual forced heir's legitime. In that vein, it should be read in conjunction with Article 1495, which provides the method of calculation of the forced portion, i.e., the amount to which all forced heirs are collectively entitled.

(b) The first paragraph of this Article is applicable when all forced heirs are forced heirs of the first degree. When one or more forced heirs is a forced heir by representation, the second paragraph specifies the method by which the legitime is calculated. Both the first and the second paragraphs of this Article are subject to the limitation provided in the third paragraph.

(c) The second paragraph of this Article closes a gap that has long existed in Louisiana law, namely, how to calculate the legitime of a forced heir grandchild. Under this Article, the forced portion is initially calculated by assessing the number of descendants who are forced heirs in their own right or who are forced heirs by virtue of being represented by their descendants. The legitime is then calculated by roots and within each root by heads, but only among those who qualify as forced

heirs by representation. Descendants of those who are treated as forced heirs under this Article but do not themselves qualify as forced heirs by representation are not considered for purposes of calculation of the legitime. By way of example, A may have two predeceased children B and C, neither of whom qualified as a forced heir in his own right. B has a child D, who is a forced heir by representation, and C has three children, E, F, and G, but only E and F qualify as forced heirs by representation. Under this example, the calculation of the forced portion would be made at the generational level of B and C because B and C are both represented by forced heirs although neither B nor C is a forced heir in his own right. Consequently, the forced portion would be ½. B's root (or his 1/4 share) would be distributed to D, his child who is a forced heir by representation. C's root (or his 1/4 share) would be divided equally between E and F, but not G, as E and F are the only forced heirs by representation in C's root.

(d) The third paragraph of this Article specifies the limitation commonly known as the Greenlaw rule, which has been moved from Article 1495 to this Article. This revision has not disturbed its applicability in the ordinary case where the legitime share of a forced heir of the first degree is reduced to an intestate share. Rather, this Article clarifies that the Greenlaw rule is also applicable to the share of a forced heir by representation and may, in some instances, serve to reduce the legitime fraction of a forced heir by representation to that of an intestate successor. Whenever the Greenlaw rule applies, the reduction in the fraction used to calculate the legitime of a forced heir correspondingly reduces the overall forced portion to which all of the forced heirs are collectively entitled.

* * *

Art. 1505. Calculation of disposable portion on mass of succession

A. To determine the reduction to which the donations, either *inter vivos* or *mortis causa*, are subject, an aggregate is formed of all property belonging to the donor or testator at the time of his death; the sums due by the estate are deducted from this aggregate amount; to that is fictitiously added the property disposed of by donation *inter vivos* within three years of the date of the donor's death, according to its value at the time of the donation.

B. The ~~sums due by the estate are deducted from this aggregate amount, and the~~ disposable quantum is ~~calculated~~ determined on the ~~balance~~ above calculation, taking into consideration the number of forced heirs.

* * *

Revision Comments - 2020

This revision corrects a mistake that has long existed in Louisiana law regarding the calculation of the mass of the succession for purposes of forced heirship. Paragraph A of the prior version of Article 1505 declared that in ascertaining the reduction to which donations are subject, an aggregate is formed of all of the decedent's property and certain donations inter vivos are fictitiously added. Paragraph B then provided that the "sums due by the estate" were to be subtracted from the aggregate amount formed in Paragraph A. This language was derived from Article 922 of the French Civil Code, which has been characterized as "not clearly

express[ing] the intention of the legislation." Aubry & Rau, Droit Civil Français: Testamentary Successions and Gratuitous Dispositions § 684 n.15. Specifically, the order of calculation suggested by the prior version of Article 1505 proved problematic in instances in which the value of the property left at death is less than the debts. In such a case, the value of debts must be subtracted prior to adding fictitiously certain donations inter vivos. After all, "the sum [that] the donees are permitted to keep can [not] be affected by the payment of the debts[] because creditors cannot profit by the reduction ..." Id. See also Philippe Malaurie et Claude Brenner, Droit des Successions et des Libéralités 431 (8th ed. 2018). The current revision makes clear that the proper method of computing the succession mass is to deduct the debts of the succession from the aggregate of the extant property. Only after the "net estate" is calculated does one "fictitiously add[] the property disposed of by donation inter vivos within three years of the date of the donor's death, according to its value at the time of the donation." Article 1505(A). In light of the above, it should also be clear that when the decedent's estate is insolvent and the amount of debts exceeds the assets, the "net estate" is considered to be zero, and the succession mass for forced heirship purposes is based solely upon the donations inter vivos that are fictitiously added back. See Malaurie et Brenner, supra, at 431.

Section 2. Code of Civil Procedure Articles 2952 and 3396.18(A) are hereby amended and reenacted to read as follows:

Art. 2952. Descriptive list of property, if no inventory

A. If no inventory of the property left by the deceased has been taken, any heir, legatee, or other interested party shall file in the succession proceeding a detailed~~,~~ descriptive list, sworn to and subscribed by him, of all items of property composing the succe`ssion of the deceased, stating the actual cash value of each item at the time of the death of the deceased.

B. The detailed descriptive list shall be sealed upon the request of an heir or legatee.

C. If the detailed descriptive list is sealed, a copy shall be provided to the decedent's universal successors and surviving spouse. Upon motion of any successor, surviving spouse, or creditor of the estate, the court may furnish relevant information contained in the detailed descriptive list regarding assets and liabilities of the estate.

Comments - 2020

This revision extends the procedure adopted in 2017 in the context of independent administration to successions in which an heir is sent into possession without an administration of the succession. For the reasons explained in the Comments to Article 3396.18, the detailed descriptive list may be filed under seal.

* * *

Art. 3396.18. Inventory or sworn descriptive list

A. Before the succession can be closed, a judgment of possession rendered, and the independent administrator discharged, there ~~must~~ shall be filed an inventory or sworn detailed descriptive list of assets and liabilities of the estate verified by the independent administrator.

* * *

Comments - 2020

This revision clarifies the law by definitively stating that the rendition of a judgment of possession is still necessary even when a succession is independently administered. The 2017 amendments did not intend to repeal the requirement of a judgment of possession, even though independent administrators have "all the rights, powers, authorities, privileges, and duties of a succession representative provided in Chapters 4 through 12" of Title II of Book VI of the Louisiana Code of Civil Procedure. See Article 3395.15. Nothing in this Article affects the rendition of a partial judgment of possession pursuant to Articles 3362 or 3372.

Section 3. Part 1 of Chapter 4 of Title 9 of the Louisiana Revised Statutes of 1950 is hereby repealed in its entirety.

_____
SPEAKER OF THE HOUSE OF REPRESENTATIVES

_____
PRESIDENT OF THE SENATE

_____
GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

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ENROLLED

2020 Regular Session

ACT No. 107

HOUSE BILL NO. 499

BY REPRESENTATIVE SEABAUGH

AN ACT

To amend and reenact Code of Civil Procedure Article 3396.1, relative to the issuance of letters of independent administration or executorship; to authorize the clerk of court to issue letters of independent administration or executorship; to provide an effective date; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Code of Civil Procedure Article 3396.1 is hereby amended and reenacted to read as follows:

Art. 3396.1. Scope

Upon qualification of a succession representative and compliance with the provisions of this Chapter, the ~~court~~ clerk shall issue ~~Letters of Independent Administration or Letters of Independent Executorship~~ letters of independent administration or letters of independent executorship, as appropriate, certifying that the independent administrator has been duly qualified.

Section 2. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

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ENROLLED

2020 Regular Session

ACT No. 173

HOUSE BILL NO. 142

BY REPRESENTATIVES ROBBY CARTER, BAGLEY, GARY CARTER, WILFORD CARTER, CORMIER, COX, CREWS, GREEN, HARRIS, LACOMBE, LARVADAIN, MARCELLE, MARINO, MOORE, NEWELL, PIERRE, SEABAUGH, AND STAGNI

AN ACT

To amend and reenact Code of Civil Procedure Articles 3421, 3431(A), and 3432.1(A)(8), relative to successions; to provide relative to the definition of small succession; to authorize the administration of certain testate successions without court approval; to provide for certain required information; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Code of Civil Procedure Articles 3421, 3431(A), and 3432.1(A)(8) are hereby amended and reenacted to read as follows:

Art. 3421. Small successions defined

A. A small succession, within the meaning of this Title, is the succession or the ancillary succession of a person who at any time has died and the decedent's property in Louisiana has a gross value of one hundred twenty-five thousand dollars or less valued as of the date of death or, if the date of death occurred at least twenty years prior to the date of filing of a small succession affidavit as authorized in this Title, leaving property in Louisiana of any value.

B. A small succession shall also include a succession of a person who has died testate, leaving no immovable property, and probate of the testament of the deceased would have the same effect as if the deceased had died intestate.

* * *

Art. 3431. Small successions; judicial opening unnecessary

A. It shall not be necessary to open judicially the small succession of a person domiciled in Louisiana who died intestate or testate as provided by Article

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3421(B), or domiciled outside of Louisiana who died intestate or whose testament has been probated by court order of another state, and whose sole heirs are the following:

(1) His descendants.

(2) His ascendants.

(3) His brothers or sisters, or descendants thereof.

(4) His surviving spouse.

(5) His legatees under a testament ~~probated by court order of another state~~.

* * *

Art. 3432.1. Affidavit for small succession for a person ~~domiciled outside of Louisiana~~ who died testate; contents

A. When it is not necessary under the provisions of Article 3431 to open judicially a small succession, at least two persons, including the surviving spouse, if any, and one or more competent legatees of the deceased, may execute one or more multiple originals of an affidavit, duly sworn before any officer or person authorized to administer oaths in the place where the affidavit is executed, setting forth all of the following:

* * *

(8) An attachment consisting of certified copies of the testament and, if the testament has been probated by court order of another state, the probate order of ~~another~~ the other state.

* * *

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

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ENROLLED

2020 Regular Session

ACT No. 17

HOUSE BILL NO. 123

BY REPRESENTATIVE GREGORY MILLER

(On Recommendation of the Louisiana State Law Institute)

Provides relative to the allocation of receipts and expense to income and principal

AN ACT

To amend and reenact R.S. 9:2141 through 2144, 2145(1), 2146, 2147 through 2154, and 2156(A), (C), and (E), to enact R.S. 9:2151.1, 2151.2, 2156.1, 2156.2, and Subpart F of Part V of Chapter 1 of Code Title II of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:2164, and to repeal R.S. 9:2155 and 2157, relative to the administration of trusts; to provide with respect to allocation to income and principal; to provide for the apportionment and allocation of various types of receipts and expenses; to provide for the obligation to pay money; to provide for charges against income and principal; to provide for transfers from income to principal for depreciation; to provide with respect to the payment of income taxes; to provide for underproductive property; to provide for an effective date and applicability; to provide for redesignation; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 9:2141 through 2144, 2145(1), 2146, 2147 through 2154, and 2156(A), (C), and (E) are hereby amended and reenacted, and R.S. 9:2151.1, 2151.2, 2156.1, 2156.2, and Subpart F of Part V of Chapter 1 of Code Title II of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, comprised of R.S. 9:2164, are hereby enacted to read as follows:

§2141. General rule

A trust shall be administered with due regard to the respective interests of the beneficiaries in the allocation of receipts and ~~expenditures~~ expenses.

§2142. Allocation to beneficiaries of income and principal

A trust receipt ~~shall be credited, or an expenditure charged,~~ or expense shall be allocated to income or principal or partly to each:

(1) In accordance with the terms of the trust instrument, including any provision giving the trustee discretion, notwithstanding contrary provisions of this Subpart~~; or~~.

(2) In accordance with the provisions of this Subpart, in the absence of contrary provisions of the trust instrument~~; or~~.

(3) If no rule is provided in the trust instrument or this Subpart, ~~entirely to principal~~ in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

Revision Comments - 2020

Prior law provided that a receipt or expense shall be allocated entirely to principal if no provision in the trust instrument or other provision in this Subpart provided otherwise. This revision changes the default rule in an attempt to be fair to both beneficiaries of income and beneficiaries of principal. It is consistent with other provisions in this revision. See, e.g., R.S. 9:2148, 2151, 2152(A)(4), 2153(A), and 2154(A).

§2143. Allocation to beneficiaries of usufruct and naked ownership

A trust is administered with due regard to the respective interests of beneficiaries of usufruct and naked ownership in the allocation of receipts and ~~expenditures if a receipt is credited or an expenditure is charged~~ expenses to the beneficiary of usufruct or the beneficiary of naked ownership or partly to each:

(1) In accordance with the terms of the trust instrument and the law regulating usufruct, notwithstanding contrary provisions of this Subpart~~;~~.

(2) In accordance with the provisions of this Subpart, in the absence of applicable law regulating usufruct and if the trust instrument contains no provisions to the contrary~~;~~.

(3) If neither of the preceding rules applies, in accordance with what is reasonable and equitable in view of the interests of those who are beneficiaries of usufruct as well as those who are beneficiaries of naked ownership~~, and in view of~~

~~the manner in which men of ordinary prudence, discretion, and intelligence would act in the management of their own affairs.~~

Revision Comments - 2020

This revision modifies the law in part by making minor semantic clarifications and by deleting the "prudent man" rule that existed under prior law because persons of "ordinary prudence, discretion, and intelligence" do not generally consider the interests of successor beneficiaries in managing their own affairs. See, e.g., UPIA (1997) §103, Comment. Trustees, however, should consider the interests of all beneficiaries in discharging their fiduciary obligations.

§2144. Income and principal distinguished

Receipts paid or delivered in return for the use of ~~money or~~ property forming a part of principal are income, unless this ~~Sub-part~~ Subpart expressly provides to the contrary.

Receipts paid or delivered ~~as the~~ in consideration for the sale or other transfer of property forming a part of principal or as the replacement of property forming a part of principal are principal unless this ~~Sub-part~~ Subpart expressly provides to the contrary.

§2145. When right to income arises

The right of an income beneficiary to income from property in trust arises at the time prescribed in the trust instrument, or, if no time is prescribed and the person receiving the right to income is the first income beneficiary to receive a right to income from the property, then:

(1) At the time the property becomes subject to the trust, with respect to property transferred by inter vivos disposition~~;~~.

* * *

§2146. Apportionment of receipts when right to income arises

A. In the administration of property transferred in trust:

(1) Receipts due but not paid when the right of the first income beneficiary to receive income from the property arises shall be treated as accruing when due~~;~~.

(2) Receipts in the form of periodic payments, other than ~~corporate distributions to stockholders~~ receipts on account of an interest in a juridical person or from a plan subject to R.S. 9:2151.2, not due when the right of the first income