ENROLLED

Regular Session, 1997

HOUSE BILL NO. 1628

BY REPRESENTATIVES DIMOS AND MCMAINS AND SENATOR DARDENNE

(On Recommendation of the Louisiana State Law Institute)

AN ACT

To amend and reenact Chapters 4, 5, 6, and 13 of Title I of Book III of the Civil Code, heretofore comprised of Articles 934 through 1074 and Articles 1415 through 1466, to comprise Articles 934 through 968 and Articles 1415 through 1429, Chapter 6 of Title II of Book III of the Civil Code, heretofore comprised of Articles 1570 through 1723, to comprise Articles 1570 through 1616, Civil Code Article 3506(28), Code of Civil Procedure Articles 427, 2825, 2826, 2852, 2856, 2891, 2932, 2951(A)(1) and (B), 3001, 3004, 3031, 3228, 3301 through 3304, 3332, 3361, 3362, 3371, 3393, and 3394, R.S. 9:1521 and R.S. 9:2501; to enact R.S. 9:2440; to transfer and redesignate Civil Code Article 890.1 as R.S. 9:1400, and R.S. 9:1471 through 1474 as Code of Civil Procedure Articles 3295 through 3298 of Section 5 of Chapter 6 of Title III of Book VI; to redesignate Civil Code Article 1497 as Civil Code Article 1515; and to repeal Code of Civil Procedure Articles 2887, 2933, and 3155.1, and R.S. 9:2442 through 2445, all relative to the revision of the law of successions; to provide for intestate successions and the usufruct of the surviving spouse; to provide for commencement of successions, loss of succession rights, acceptance and renunciation of successions, and payment of the debts of an estate; to provide for testamentary dispositions; to provide for probate

procedure; to provide for public sale of succession property; to provide for transitional provisions; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapters 4, 5, 6, and 13 of Title I of Book III of the Civil Code, formerly comprising Civil Code Arts. 934 through 1074 and Arts. 1415 through 1466, are hereby amended and reenacted to comprise Arts. 934 through 968 and Arts. 1415 through 1429; Chapter 6 of Title II of Book III of the Civil Code, formerly comprising Civil Code Arts. 1570 through 1723, are hereby amended and reenacted to comprise Arts. 1570 through 1616, all to read as follows:

CHAPTER 4. COMMENCEMENT OF SUCCESSION

Art. 934. Commencement of Succession

Succession occurs at the death of a person.

Source: C.C. Art. 934 (1870).

Comments

(a) The word "death" as used in this Article is intended to include both physical death and death established by presumption under Article 54 of the Louisiana Civil Code. See also R.S. 9:1441-1443.

(b) This Article is not intended to affect the definition of death contained in Louisiana Revised Statutes 9:111.

(c) This revision does not reproduce the provisions of Civil Code Articles 1644 through 1647 (1870), which were the vestiges of a much larger section of the Civil Code that had been transplanted to the Code of Civil Procedure in 1960. No substantive change is intended by this omission, however. Almost the entirety of those articles was duplicative of the material now in the Code of Civil Procedure. See Code of Civil Procedure Articles 2811-2903. Those procedural provisions (and the deleted Civil Code provisions) provide, in essence, that, upon sufficient proof of death or of circumstances under which death is presumed, a document purporting to be a testament of the deceased may be presented to a court of competent jurisdiction, and shall be probated in accordance with the procedures stated in those Articles.

(d) Under Civil Code Articles 54 and 55 a testament may be probated without proof of death when the testator "has been an absent person for five years" and the declaration of death called for under that

circumstance has been rendered by a court of competent jurisdiction. See also C.C. Art. 30.

(e) With respect to the prescription of the right to present a testament for probate, see R.S. 9:5643.

Art. 935. Acquisition of Ownership; Seizin

Immediately at the death of the decedent, universal successors acquire ownership of the estate and particular successors acquire ownership of the things bequeathed to them.

Prior to the qualification of a succession representative only a universal successor may represent the decedent with respect to the heritable rights and obligations of the decedent.

Source: C.C. Arts. 940, 941, and 943 (1870).

Comments

(a) The first sentence of this article is consistent with *Baten v. Taylor*, 386 So.2d 333 (La. 1978), in which the Supreme Court noted that ownership was distinct from seizin, and that even particular legatees, who did not have seizin, had ownership from the date of the decedent's death. *See also Tulane University of Louisiana v. Board of Assessors*, 40 So. 445 (La. 1905). *See also La. Civil Code Article 477 on ownership, and La. Civil Code Article 448, et seq., concerning "things."*

(b) The Civil Code articles on seizin were taken from French doctrine and not from the Code Napoleon, and were repetitious and didactic. La. Civil Code Articles 940-945 (1870). In most respects, the theory of seizin is retained, but it is modernized as mentioned in comment (c), infra, and to take account of the authority of the succession representative in administered successions. Essentially, the succession representative has seizin. La. Code Civil Pro. Article 3211. While an estate is under administration, the universal successors may not exercise the rights of the deceased, such as the right to alienate or encumber the property of the deceased, without first terminating the administration. A successor may, however, alienate or encumber his own interest in the estate even while the estate is under administration. *See Succession of Cutrer v. Curtis*, 341 So.2d 1209 (La. App. 1st Cir. 1976).

(c) Under previous law, only universal successors had seizin, an attribute of which is possession, but under Article 936, possession is now transferred to particular legatees as well as universal successors.

(d) As under previous law, the decedent's possession is transmitted to the universal successors with all of its defects as well as its advantages. La. Civil Code Article 943 (1870). They may institute

all actions that the decedent could have brought unless the estate is under administration, in which case the succession representative is the proper party plaintiff or defendant and the successors need not be joined. La. Code Civil Proc. Articles 685, 734.

(e) Article 954 provides for the effect of acceptance or renunciation to be retroactive, making it unnecessary to retain Civil Code Articles 947-948 (1870). No change in the law is intended by their elimination.

(f) Civil Code Article 949 (1870) is obsolete because of the elimination of irregular successors and therefore has been deleted.

(g) Articles 936-938 (1870), which contained the commorientes presumptions, are repealed. Under this revision, when there is a common disaster involving two persons who were entitled to inherit from each other, and it cannot be proven which of the two decedents survived, by application of Civil Code Article 31 (1870), the estate of each decedent devolves as if that decedent survived the other decedent by application of Civil Code Article 31 (1870).

Art. 936. Continuation of the possession of decedent

The possession of the decedent is transferred to his successors, whether testate or intestate, and if testate, whether particular, general, or universal legatees.

A universal successor continues the possession of the decedent with all its advantages and defects, and with no alteration in the nature of the possession.

A particular successor may commence a new possession for purposes of acquisitive prescription.

Source: C.C. Art. 942-943.

Comments

(a) The transfer of possession that occurs under this Article is consistent with the provisions of Civil Code Article 3441. See Civil Code Article 3441 and the Comments thereunder; see also Civil Code Article 3442. The possession of the successor has the same attributes as the possession of the deceased.

(b) Civil Code Article 1607 (1870) distinguishes between forced heirs and universal legatees, and provides that as between the two, the forced heirs are the ones entitled to enjoy the possession of the decedent. The revision alters that distinction and recognizes that all successors have rights that vest at the moment of death of the decedent. C.C. Art. 935.

Art. 937. Transmission of rights of successor

The rights of a successor are transmitted to his own successors at his death, whether or not he accepted the rights, and whether or not he knew that the rights accrued to him.

Source: C.C. Art. 944 (1870).

Comment

This Article reproduces the substance of Article 944 of the Louisiana Civil Code of 1870. It does not change the law.

Art. 938. Exercise of succession rights

Prior to the qualification of a succession representative, a successor may exercise rights of ownership with respect to his interests in the estate. Upon qualification of a succession representative, the exercise of those rights is subject to the administration of the estate.

Source: New; see Articles 685 and 734 of the Code of Civil Procedure.

Comments

(a) This Article recognizes the ownership of estate property enjoyed by a successor prior to a formal judgment of possession, and affords a basis for his binding acts with respect to his own interest. A person dealing with a successor may acquire such title or interest as the successor has; in particular, the rights of creditors may supersede that of a purchaser from the successor if timely asserted. This principle is consistent with Civil Code Articles 2513 and 2650, which provide, in essence, that when a successor acts with respect to his right in an estate, he can do so with binding effect only as to his right as it may eventually be determined. He does not warrant title to a particular asset or portion of an asset, but only "his right as an heir." C.C. Art. 2650 (1870).

(b) There is a delicate balance between vesting rights in the successor on the one hand, and protecting the rights of creditors and correlating the rule with the role of the succession representative on the other hand, particularly when an administration is required. If the succession representative sells Blackacre in order to pay debts, the judgment of possession obviously could not put any successor in possession of Blackacre. By the same token, in a testate succession, if the testament leaves Blackacre to A, and the succession representative sells Blackacre, A's rights attach to the proceeds, and no other successor would be able to dispose of Blackacre either prior to qualification of a succession representative or during administration.

This revision preserves the important functional distinction that has been made in prior law with reference to acts prior to and acts subsequent to qualification of a succession representative.

(c) It is clear from provisions of the Code of Civil Procedure (Articles 426 and 427) that a successor who accepts his succession rights is also a proper party plaintiff or defendant.

(d) Under Article 3211 of the Code of Civil Procedure a succession representative is deemed to have possession of all property of the succession and is obligated to enforce all obligations in its favor. When such a representative has been qualified, the acts of a successor are clearly subordinate to the power and authority of the succession representative conferred by Code of Civil Procedure Article 3211 and the other articles of the Code of Civil Procedure with respect to the rights, duties and obligations of the succession representative.

(e) As to appointment of an attorney for absentee successors, see Article 3171 et seq. of the Code of Civil Procedure.

(f) A successor who acts with respect to his own interest during administration of the estate does not have to comply with the same procedural formalities that are required of a succession representative, such as, in the case of a sale of immovable property, the requirements of advertisement and court approval. His actions are, however, subject to the administrative powers of the succession representative.

(g) Upon qualification, a succession representative is the proper party to exercise rights of ownership in the assets of the deceased, to sue to enforce a right of the deceased, and to be sued to enforce an obligation of the deceased. See Articles 685, 734, and 3211 of the Code of Civil Procedure. Though the representative has the authority to act with court approval with respect to the assets of the deceased, a successor retains the right to act with respect to his own interest in an asset or in the entire estate, such as it ultimately may appear.

CHAPTER 5. LOSS OF SUCCESSION RIGHTS

Art. 939. Existence of successor

A successor must exist at the death of the decedent.

Source: C.C. Art. 953 (1870).

Comment

This article reproduces the substance of Article 953 of the Louisiana Civil Code of 1870. It does not change the law.

Art. 940. Same; unborn child

An unborn child conceived at the death of the decedent and thereafter born alive shall be considered to exist at the death of the decedent.

Source: C.C. Arts. 954-956 (1870).

Comment

This article reproduces the substance of the first paragraph of Article 954 of the Louisiana Civil Code of 1870. It is consistent with Civil Code Article 26 (1870). See also, Civil Code Article 1474 (1870), adopted in 1991.

Art. 941. Declaration of unworthiness

A successor shall be declared unworthy if he is convicted of a crime involving the intentional killing, or attempted killing, of the decedent or is judicially determined to have participated in the intentional, unjustified killing, or attempted killing, of the decedent. An action to declare a successor unworthy shall be brought in the succession proceedings of the decedent.

An executive pardon or pardon by operation of law does not affect the unworthiness of a successor.

Source: New; cf. C.C. Arts. 964-967 (1870).

Comments

(a) This article reproduces the substance of Articles 964 and 966 of the Civil Code of 1870, but it deletes the second and third provisions of Article 966, which are deleted as archaic. The article uses the term "unworthy," which is used in the source provisions. The functional aspect of the provisions is to divest a successor of rights for cause, and the articles of this chapter set out the grounds that establish such cause.

(b) The requirement that a court pronounce "unworthiness" found in Article 967 of the Civil Code of 1870 is reflected in the basic concept of this Article. Although French law is to the contrary, Louisiana has always required judicial pronouncement. This Article continues that requirement.

(c) Civil Code Article 965 (1870) has not been reproduced because its provisions appear to be unnecessary in light of the definitions of incapacity and the grounds for unworthiness provided in the revised Articles. It should be clear that a person who lacks capacity to be a successor has never been a successor, while the person who is declared unworthy clearly has the capacity to be a successor but loses that right and is judicially divested of the right to inherit because of certain conduct on his part.

(d) This Article restates the prior law as to the procedure for declaring a successor unworthy without substantive change, except in one major respect. Rather than envisioning a separate civil proceeding, the Article requires that the declaration be a part of the succession proceeding itself. Requiring that the action be a part of the succession proceeding is consistent with the reconciliation provisions in Article 943 and reflects the common understanding that such an action is not permitted during the lifetime of the ancestor because he might reconcile with the offending successor at any time up to the moment of his death. It is also consistent with the provisions of Article 81 of the Code of Civil Procedure.

(e) The articles on unworthiness do not apply to a judgment of possession that merely declines to recognize a person as a successor. In that instance, the person never was a successor. Unworthiness necessarily implies that the person divested is a successor and those rights are stripped from him. For example, if there were a challenge between an alleged heir who claimed to be in the fourth degree and another heir who claimed to be in the fifth degree, and the heir in the fifth degree prevailed because the heir claiming in the fourth degree could not prove his relationship, then the losing claimant would not be "unworthy" of succession rights: he was never an heir to start with, and the court simply declines to recognize him as a successor.

(f) This article intentionally uses the phrase "judicially determined" to continue the provisions of Civil Code Article 966 (1870) that if the successor is not convicted but is judicially determined to have participated in the intentional unjustified killing or attempted killing of a deceased, he should be declared unworthy. The determination may be made by the court having jurisdiction of the succession proceedings itself or by any other court of competent jurisdiction that makes the determination.

(g) Article 966(1) of the Louisiana Civil Code (1870) contains a provision that: "An executive pardon does not restore the right to succeed." The concept that an executive pardon does not exonerate unworthy behavior is retained, but its application has been expanded and at the same time made more precise. The new article refers not only to an executive pardon but any other pardon that arises by operation of law. The change is appropriate because under the Louisiana Constitution, an executive pardon is no longer the only way a felon can be pardoned. There are pardons for first time offenders that arise by operation of law. See, La. Const. Art. 4, Section 5(E). Furthermore, the brief statement that a pardon "does not restore the right to succeed" is too limited in its application, and is inadequate in dealing with the effects of a declaration of unworthiness. For example,

a declaration of unworthiness not only deprives the successor of the inheritance rights, either by testacy or intestacy, but also precludes the successor from serving as an executor, administrator, trustee or other fiduciary. See, C.C. Art. 945, infra. Unworthiness also requires the return of property over which the successor took possession. Id. Furthermore, the verb "restore" would be inaccurate in the case of a pardon granted before the successor has been judicially declared unworthy. Whether the pardon occurs before or after the judicial declaration of unworthiness is irrelevant. For that reason, the revision provides that the granting of a pardon does not "affect" the unworthiness, which means that it does not prevent or stop the rendering of a declaration, and it does not nullify the effects of a declaration that has already been rendered. The use of the mandatory "shall" in the first sentence of Article 941 means that when the conditions are met, the judge is obligated to declare a successor unworthy. A pardon does not preclude the rendering of such a declaration, nor does it in any way alter the effects of such a declaration if the declaration has already been rendered.

Art. 942. Persons who may bring action

An action to declare a successor unworthy may be brought only by a person who would succeed in place of or in concurrence with the successor to be declared unworthy, or by one who claims through such a person.

Source: New; cf. C.C. Arts. 967 and 974 (1870).

Comment

A person who successfully brings an action to declare a successor unworthy must be someone who is entitled to the share that would have fallen to the successor whose rights are divested. This Article includes the phrase "one who claims through such a person" specifically to cover the case of a right that is transmitted through a deceased successor pursuant to the rules of Civil Code Article 937, supra.

Art. 943. Reconciliation or forgiveness

A successor shall not be declared unworthy if he proves reconciliation with or forgiveness by the decedent.

Source: C.C. Art. 975 (1870).

Comment

This Article clarifies prior law. It does not preserve the presumption of forgiveness in Civil Code Article 975 (1870). The measure of sufficient conduct to conclude that reconciliation has

occurred or that forgiveness has occurred has been intentionally left to the courts. Obviously the decedent himself may remove the possibility of a declaration of unworthiness by the acts of reconciliation or forgiveness, although it should be noted that even a formal executive pardon does not have the same effect. See Civil Code Article 941.

Art. 944. Prescription

An action to declare a successor unworthy is subject to a liberative prescription of five years from the death of the decedent as to intestate successors and five years from the probate of the will as to testate successors.

Source: New.

Comments

(a) The prescriptive period for an action to declare an intestate successor unworthy under prior law is unclear. It may be that of a personal action not otherwise provided for in the Civil Code, subject to a ten-year prescriptive period under Civil Code Article 3499, or it may be subject to the thirty-year prescriptive period for actions for "recognition of a right of inheritance and recovery of the whole or a part of a succession" under Civil Code Article 3502. This Article establishes a period considerably shorter than either of those alternatives and is more in keeping with improved communications and modern succession procedure.

(b) As to interruption of the prescriptive period, see Civil Code Articles 3462 et seq.

(c) As regards the date of death of the decedent, see Civil Code Article 54 (presumed death after five years' absence) and La. R.S. 9:1441 through 9:1443 (presumption of death of military personnel).

(d) In connection with the subject matter of this article, see also Article 3497 of the Civil Code.

(e) Prescription under this article is not suspended in favor of minors during minority. See Louisiana Civil Code Article 3468.

Art. 945. Effects of declaration of unworthiness

A judicial declaration that a person is unworthy has the following consequences:

(1) The successor is deprived of his right to the succession to which he had been called.

(2) If the successor has possession of any property of the decedent, he must return it, along with all fruits and products he has derived from it. He must also account for an impairment in value caused by his encumbering it or failing to preserve it as a prudent administrator.

(3) If the successor no longer has possession because of a transfer or other loss of possession due to his fault, he must account for the value of the property at the time of the transfer or other loss of possession, along with all fruits and products he has derived from it.

He must also account for any impairment in value caused by his encumbering the property or failing to preserve it as a prudent administrator before he lost possession.

(4) If the successor has alienated, encumbered, or leased the property by onerous title, and there is no fraud on the part of the other party, the validity of the transaction is not affected by the declaration of unworthiness. But if he has donated the property and it remains in the hands of the donee or the donee's successors by gratuitous title, the donation may be annulled.

(5) The successor shall not serve as an executor, trustee, attorney or other fiduciary pursuant to a designation as such in the testament or any codicils thereto. Neither shall he serve as administrator, attorney, or other fiduciary in an intestate succession.

Source: C.C. Arts. 969, 970 and 971 (1870).

Comments

(a) This article sets forth comprehensively the various civil effects of a declaration of unworthiness. It begins with the principal effect, which is that the successor is deprived of the right to succeed, that is, that he is judicially divested of his right to inherit any of the property left by the decedent. The effect, spelled out in Section (1), is modeled on existing language of the Code to the effect that the successor is deprived "of the succession to which he is called." C.C.

Art. 966. The new language implements that same effect, in more modern terminology. Deprivation of the right to inherit property of the decedent follows whether the decedent has died testate or intestate. Accordingly, there are corresponding provisions elsewhere in the revisions specifically enunciating the rule that a declaration of unworthiness results in the lapse of a legacy to the successor. C.C. Art. 1589. And C.C. Art. 1500 of the Civil Code of 1870, as amended by Act 77 of the Special Session of 1996, provides that if the successor is a forced heir, he is deprived of his right to claim as a forced heir. See C.C. Art. 1500 (1870).

(b) Parts (2) and (3) of this Article restate with some changes the provisions of Articles 969, 970, and 971 of the Civil Code of 1870 relative to the consequences of a declaration of unworthiness with respect to property already in the possession of the later-divested heir and the validity of transfers or encumbrances that he may have made. If the declaration has preceded a judgment of possession in the succession proceedings, it is unlikely that these provisions would be needed. But in the unusual situation in which the action to declare a successor unworthy takes place after a judgment of possession had been rendered, they would be needed. The concept of the predecessor Articles is broadened to extend to all forms of transfer by the later-divested successor.

(c) A successor may no longer have possession for a number of reasons. He may have alienated the property by onerous title. He may have sold or exchanged it for less than its fair market value. He may have entered into a giving in payment with respect to the property. It may have been destroyed in his hands, or may have been stolen from him. In all such instances, Parts (3) and (4) of this Article apply.

(d) Under this Article, loss of possession other than transfer includes destruction or theft.

(e) Under this Article, an alienation, encumbrance, or lease of the successor's interest in the property includes exchange.

(f) If those persons who seek a declaration of unworthiness are concerned about the conduct of the successor with reference to property during the pendency of the litigation, they may protect their interest in immovable property by filing a notice of lis pendens under Article 3751 et seq. of the Code of Civil Procedure and their interest in movable property by securing a writ of sequestration under Articles 3501 et seq. of the Code of Civil Procedure.

(g) Part 5 of this article prohibits the successor from serving in a fiduciary capacity, and the language in that regard is modeled closely on Article 1481 which imposes the same result when there has been fraud, duress, or undue influence in connection with a donation.

Art. 946. Devolution of succession rights of successor declared unworthy

If the decedent died intestate, when a successor is declared unworthy his succession rights devolve as if he had predeceased the decedent; but if the decedent died testate, then the succession rights devolve in accordance with the provisions for testamentary accretion.

When the succession rights devolve upon a child of the successor who is declared unworthy, the unworthy successor and the other parent of the child can not claim a legal usufruct upon the property inherited by their child.

Source: New. See C.C. Art. 973 (1870).

Comments

(a) This Article is new and definitely changes the law. In an intestate succession, the Article protects the innocent descendants of a successor whose rights are judicially divested for unworthiness. It changes the law by permitting the descendants of a person whose rights have been divested to inherit even when their degree of relationship would not otherwise permit them to do so. It establishes an exception to the normal rule of representation, which is that only deceased persons may be represented (see Civil Code Article 886 (1870)). It permits the children who could have represented the successor now judicially divested of his rights to succeed despite the cause for which their ancestor's rights are divested and despite his having survived the decedent. Civil Code Article 973 (1870) permits such children to take only in their own right. Thus they would be excluded by a first-degree descendant in the absence of this Article.

(b) An example of the application of this Article is as follows: The decedent is survived by two sons, A and B. A has participated in the intentional murder of the decedent, but A has a son, C, who is totally innocent and blameless in the affair. In the absence of the provisions contained in this Article, when A is declared unworthy, his one-half interest in the estate is inherited entirely and exclusively by his surviving brother, B, and the innocent grandchild C inherits nothing. Under the provisions of this Article, C would inherit ahead of A's co-heirs of the same degree.

(c) In a testate succession, the testament may provide for the devolution of the property by a vulgar substitution. Under the provisions of Article 1589, a declaration of unworthiness causes the legacy to lapse, and in that case the devolution of the property may be governed by the provisions of the testament.

(d) The second paragraph of this article preserves the provisions of Civil Code Article 973 (1870) that prohibit an unworthy parent from obtaining the usufruct of his child's inheritance. The paragraph clarifies another aspect of that problem and removes any question whether the other parent, who may be blameless, would have a usufruct over the inherited property under Civil Code Article 223 (1870), and expressly provides that the other parent does not have such a usufruct, either.

CHAPTER 6. ACCEPTANCE AND RENUNCIATION OF SUCCESSIONS

SECTION 1. GENERAL PRINCIPLES

Art. 947. Right of successor to accept or renounce

A successor is not obligated to accept rights to succeed. He may accept some of those rights and renounce others.

Source: C.C. Arts. 977, 1018 (1870); cf. C.C. Art. 986 (1870).

Comments

(a) This article is based on the provisions of Articles 977, 986, and 1018 of the Louisiana Civil Code (1870). It does not change the law. It enunciates the principle that a successor does not have to accept in toto, but may selectively accept part and renounce part. The ability to partially accept or renounce applies to both testate successions and intestate successions, and applies even to a particular legatee, who may accept all or part of the particular legacy to him. If he is the recipient of two particular legacies, he may accept one particular bequest and renounce another particular bequest. This principle was most likely intended by Act No. 249 of 1981, which amended Civil Code Article 986 (1870), but the specific language of Civil Code Article 986 (1870) is not so clear. The Article refers only to "he who has the power of accepting the entire succession ...." The new article clarifies the matter by using language that is sufficiently broad to cover all such instances.

(b) Obviously the rules in this Chapter governing acceptance apply to a partial acceptance as well as to a full acceptance.

Art. 948. Minor successor deemed to accept

A successor who is a minor is deemed to accept rights to succeed, but his legal representative may renounce on behalf of the minor when expressly authorized by the court.

Source: C.C. Arts. 977, para. 2; 1018.

Comments

(a) This Article reproduces the substance of the second paragraph of Civil Code Article 977 (1870) without changing the law, but it adds an important new right by authorizing a legal representative of a minor to renounce an inheritance when expressly authorized to do so by the court. Such a renunciation could be a matter of significant tax import under the federal tax rules regarding disclaimers. A minor's rights should not, however, be renounced except under scrutiny, and the provision is made that the minor's representative must have express authorization by the court.

(b) The word "deemed" is intentionally used as a term of art to establish a stronger rule than a mere rebuttable presumption. As such, it is conclusive and thus irrebuttable.

Art. 949. Death of decedent as prerequisite to acceptance or renunciation

A person may not accept or renounce rights to succeed before the death of the decedent.

Source: C.C. Arts. 978-979 (1870).

Comment

This Article reproduces the substance of Articles 978 and 979 of the Louisiana Civil Code (1870). It does not change the law. It states an important rule of public policy that until the person who is to be succeeded has died the presumptive successors cannot act with reference to his succession. See also Article 951 of the Civil Code regarding a premature acceptance.

Art. 950. Knowledge required of successor as prerequisite to acceptance or renunciation

An acceptance or renunciation is valid only if the successor knows of the death of the person to be succeeded and knows that he has rights as a successor. It is not necessary that he know the extent of those rights or the nature of his relationship to the decedent.

Source: C.C. Arts. 980, 983.

Comment

This Article reproduces the substance of Articles 980 and 983 of the Louisiana Civil Code (1870), but the language of the source Articles is awkward, and the revision intends to clarify these provisions. It clarifies the predicate needed to validate an acceptance

or renunciation. The predicate is made conjunctive so that the successor must (1) know of the death of the person to be succeeded, and (2) know that he has rights as a successor. If the successor merely knows of the death of a person but does not know of his own rights as a successor, an acceptance or renunciation would be premature. The second sentence clarifies that it is not necessary that the successor know the extent of the inheritance rights, or even that the successor know the exact nature of his relationship to the decedent, so long as he knows that the person has died and he knows that he has rights. Even if he believes the rights to be more extensive or less extensive than they actually are, it is the conjunction of the knowledge of death and the knowledge of rights that satisfies the predicate and validates an acceptance or renunciation.

Art. 951. Nullity of premature acceptance or renunciation

A premature acceptance or renunciation is absolutely null.

Source: C.C. Art. 984 (1870).

Comment

This Article reproduces the substance of Article 984 of the Louisiana Civil Code(1870). It does not change the law. There is no reason to preserve the archaic language of the source article. The use of the word "premature" ties in with the immediately preceding article, and refers to an acceptance that has been made either before the successor knows of the death of the person, or before he knows that he has rights as a successor, or before the person to be succeeded has in fact died. It is believed unnecessary to detail all of the different ways in which an acceptance or renunciation might be premature. It is also unnecessary to keep the prior language that the acceptance or rejection could produce no effect, or to keep language stating the obvious, that the heir could later validly accept or renounce.

Art. 952. Probate or annulment of testament after acceptance or renunciation of succession

An acceptance or renunciation of rights to succeed by intestacy is null if a testament is subsequently probated. An acceptance or renunciation of rights to succeed in a testate succession is null if the probate of the testament is subsequently annulled or the rights are altered, amended, or revoked by a subsequent testament or codicil.

Source: C.C. Arts. 981-982 (1870).

Comments

(a) This Article is intentionally divided into two parts, to cover separately the situations in testate and intestate successions. Where the successor believes that the rights to succeed that are involved arise by intestacy, the operative fact that would nullify his acceptance or renunciation is the probate of a will. Present law refers to "discovery" of a will, but this Article uses the concept of probate of a will, which assumes that the newly discovered will is valid. It would be inappropriate to nullify an acceptance or renunciation if an instrument that purported to be a will was discovered but was without effect. Of course, the testament must be a testament of the decedent whose estate is at issue.

(b) The second sentence of this Article covers the situation involved in a testate succession and consequently by definition there must be a testament that has been probated. The sentence refers to annulling the probate of that testament. The situation might arise either because a subsequent testament is discovered and it supersedes the one that was originally probated, or the probate of the testament may be nullified because of form, that is, lack of authenticity, or as the result of a challenge such as the testator's lack of capacity. In either event the critical point is that there is a definite change in circumstances from those under which the original acceptance or renunciation was made. Further, the probate may not be annulled, but the rights may be altered by the subsequent discovery of a codicil or of a testament that does not revoke the earlier testament and merely supersedes it in part.

(c) The source provisions, Civil Code Articles 981 and 982 (1870) apply only to intestate successors, but this Article intentionally covers both testate and intestate successions. As noted above, the language of the source provisions refers to "discovery" of a will, and this Article clarifies that the mere discovery of the will may not be sufficient to bring the provisions of the article into operation, because a will might be discovered that would not be a valid will. Whether the Article becomes operative because of the discovery of a valid will, where the decedent was believed to have died intestate, or because of the discovery of a second or subsequent testament, or because the originally probated will is annulled and an earlier will is revived or the estate then devolves by intestacy, in all of these situations the provisions that ultimately govern may be similar or even the same provisions that the successor accepted or renounced earlier. Even with intestacy, for example, the probate of a testament may be essentially meaningless, if the discovered testament simply disposes of the estate in accordance with the laws of intestacy. Nevertheless, it makes no difference to the applicability of this Article whether the resulting situation involves a disposition of all or part of the property of the estate in a manner that is different from the disposition originally accepted or renounced: the acceptance or renunciation is annulled, and the successor who accepted or renounced has the opportunity to reconsider whether he wishes to succeed to any portion of the estate.

Art. 953. Legacy subject to a suspensive condition

A legacy that is subject to a suspensive condition may be accepted or renounced either before or after the fulfillment of the condition.

Source: New. Cf. C.C. Art. 985 (1870).

Comments

(a) This Article is fundamentally new and changes the law. The Article reverses the rule of Civil Code Article 985 (1870) by permitting a legacy under a suspensive condition to be accepted or renounced prior to fulfillment of the condition, instead of prohibiting acceptance or renunciation during that period. There is no reason of public policy nor any pragmatic reason to prohibit such renunciation or acceptance of a legacy under a suspensive condition. Thus, it is appropriate to permit a legatee to accept such a legacy pending the fulfillment of the condition.

(b) This Article addresses only legacies on a suspensive condition, because it is unnecessary to address legacies that are subject to a resolutory condition. A legacy subject to a resolutory condition may be accepted like any other legacy, prior to fulfillment of the condition, and becomes nugatory once the condition has occurred. See Civil Code Articles 1767-1776, inclusive, regarding conditional obligations.

Art. 954. Retroactive effects of acceptance and renunciation

To the extent that he accepts rights to succeed, a successor is considered as having succeeded to those rights at the moment of death of the decedent. To the extent that a successor renounces rights to succeed, he is considered never to have had them.

Source: C.C. Arts. 946-48, 987 (1870).

Comments

(a) This Article is a corollary of the salutary rule of "Le Mort Saisit Le Vif," by which rights are always considered to flow and vest as of the moment of death. C.C. Art. 935. Obviously the treatment is theoretical and fictitious. Since an acceptance may be made months or years later, it is the fictitious relation-back to the moment of death that is important in terms of vesting of rights. The same rules apply for renunciation, so that if successor "A" renounces three months after the decedent has died, the renunciation relates back to the moment of death, and the acceptance by successor "B" also relates back to the moment of death. This relation-back has always been the law of

Louisiana, and Article 954 does not represent a substantive change in the law.

(b) This Article twice contains the phrase, "to the extent," which is intended to refer to the newly-clarified right of a successor to accept or renounce part of a succession. C.C. Art. 947. If the successor accepts part and renounces part, then "to the extent" that he has accepted part, that acceptance relates back to the moment of death, and "to the extent" that he has renounced part, that renunciation relates back to the moment of death. This approach is consistent with Articles 935 and 947, and the revision as a whole.

(c) This Article applies not only to the initial rights that flow from the decedent but also to rights that may come by virtue of accretion. An acceptance of part that accretes through renunciation of other successors will have the same retroactive effect and relate back to the moment of death.

Art. 955. Reserved

Art. 956. Claims of successor who is a creditor of the estate

A successor may assert a claim that he has as a creditor of the estate whether he accepts or renounces his succession rights.

Source: C.C. Art. 1059 (1870).

Comment

(a) This Article represents a clarification of the law, and may or may not represent a change. Civil Code Article 1059 (1870) refers to an heir preserving rights as a creditor when he renounces his rights as an heir, but that Article does not address the issue of the successor's rights when he accepts. Except to the extent that rights may be extinguished by confusion, a successor who is a creditor of the estate should have the right to pursue his claims as a creditor. See Civil Code Article 1903 (1870). The roles of successor and creditor may be different, and when they are, the successor is not precluded from asserting his right as a creditor.

(b) This article is not intended to supersede or mitigate the application of the concept of confusion set forth in La. Civil Code Articles 1903-1905 (1870). "When the qualities of obligee and obligor are united in the same person, the obligation is extinguished by confusion." Id. Art. 1903. This article does not preclude the application of confusion under Article 1903 in appropriate circumstances, that is, when and to the extent that it may apply in a given situation. For example, confusion would not occur when a successor/creditor is the creditor of an indebtedness secured by a mortgage on Arpent Noir, but he inherits Arpent Blanc as a particular legacy, although the debt would be extinguished if the testament made the legacy in satisfaction of the indebtedness or as a condition of the legacy. See, e.g., Article 1616, infra.

SECTION 2. ACCEPTANCE

Art. 957. Formal or informal acceptance

Acceptance may be either formal or informal. It is formal when the successor expressly accepts in writing or assumes the quality of successor in a judicial proceeding. It is informal when the successor does some act that clearly implies his intention to accept.

Source: C.C. Arts. 988-990 (1870).

Comments

(a) This Article reproduces the substance of Articles 988, 989, and 990 of the Louisiana Civil Code (1870). It does not change the law. There is a change of terminology, making acceptance either "formal" or "informal," instead of "tacit" or "express." The changes are not intended to change the law but merely to clarify it.

(b) Even in the absence of either formal or informal acceptance there is, nonetheless, a presumption that all successors accept their rights. See Article 962. That presumption will simplify matters in many areas, as, for example, prescription of the right to accept under former Civil Code Article 1030 (1870). The consequences of acceptance under this revision are consistent with the changes that were intended to be brought about by the adoption of R.S. 9:1421 in 1986. They do not carry with them the specter of unlimited personal liability that stalked successors who considered unconditional acceptance under prior law. Under this revision a successor cannot be personally liable for more than the value of property he actually receives, so the presumption of acceptance or indeed the act of acceptance does not carry dire or baleful consequences with it as before.

Art. 958. Informal acceptance; use or disposition of property

Acts of the successor concerning property that he does not know belongs to the estate do not imply an intention to accept.

Source: C.C. Arts. 991-992 (1870).

Comments

(a) This Article does not change the law but merely restates it in clearer fashion. If the successor disposes of property that does not actually belong to the estate, then he is not implying an intention to accept, and the Article does not apply. If he disposes of property that does belong to the estate, then the Article requires that he know that it belongs to the estate before the inference of an intention to accept may be made.

(b) Inasmuch as there is a presumption of acceptance under this revision, the importance of tacit as well as express acceptance is that such actions in effect ratify the presumption and preclude renunciation.

Art. 959. Informal acceptance; act of ownership

An act of ownership that can be done only as a successor implies acceptance, but an act that is merely administrative, custodial, or preservative does not imply acceptance.

Source: C.C. Arts. 994, 996-997 (1870); see also C.C. Arts. 995, 999, 1000, 1001, 1002 (1870).

Comments

(a) This Article is based on Articles 994-997, 999-1002 of the Louisiana Civil Code (1870). It does not change the law, but intentionally revises the language to clarify the provisions of prior law. Its new terminology is more consistent with modern usage and is clearer as to the kinds of acts that do not imply acceptance. For example, the use of the word "custodial" should help differentiate the kinds of acts that one may do as an owner as opposed to acts one may do as a custodian who holds property for someone else.

(b) Obviously if the successor disposes of property in a capacity different from that of successor, as, for example, if he is the executor or administrator of the estate, there should not be an implication of acceptance as a successor.

(c) Practical problems in this area involve situations such as those where the successor is sued and fails to defend himself, or takes care of the burial of the decedent, or pays funeral expenses. Clearly if the successor is sued in his capacity as a successor, he should respond by affirming or denying that capacity. That issue should be resolved based on the activity in the lawsuit itself. With regard to taking care of a burial or paying funeral expenses, these would appear to be nothing more than acts of piety or reverence that do not constitute acts of ownership with reference to property of the decedent. On the other hand, making a donation, a sale, or an assignment of rights that the successor receives, whether they are transferred to a stranger or to co-heirs, ought to be considered an acceptance. The courts are given latitude to determine under particular circumstances whether or not a given act constitutes "an act of ownership". See C.C. Arts 1000-1002 (1870).

Art. 960. Donative renunciation deemed acceptance

A renunciation shall be deemed to be an acceptance to the extent that it causes the renounced rights to devolve in a manner other than

that provided by law or by the testament if the decedent died testate.

Source: C.C. Art 1003 (1870).

Comment

This Article codifies the jurisprudence under prior law and further amplifies it by considering issues not addressed in the jurisprudence. In the case of Aurienne v. Mount Olivet, 153 La. 451, 96 So. 29 (1922), the Louisiana Supreme Court upheld a renunciation as a true renunciation and not a donation, when the renouncing successors renounced rights in such a way that they devolved in favor of the person who was legally entitled to succeed to them under succession law. In deciding the case, the court pointed to the principle that when a person renounces succession rights in favor of another person in a manner other than that provided by law, the renunciation is not a true renunciation, but in fact constitutes an acceptance of the rights coupled with a donation to the third person in whose favor the rights are renounced. For such an act to be a true renunciation, the successor must merely renounce, leaving the renounced rights to devolve on those who would be legally entitled to succeed to them under the provisions of the testament or under the succession law. One additional aspect of this problem is that to the extent that such a renunciation-qua-acceptance disposes of incorporeal rights, it constitutes a donation and therefore must be in authentic form. The unfortunate consequence if the "renunciation" were not in authentic form would be that the acceptance would be valid but the donation over to the third party would be invalid. Although a renunciation must be express and in writing, it is not required to be in notarial form. See La. Civil Code Article 963. The failure to make it in notarial form, therefore, could be a serious problem if it is a donative renunciation.

The renunciation-qua-acceptance should only be treated as an acceptance to the extent that the renunciation-over in favor of the third person is different from the manner in which the rights would devolve otherwise. If the successor renounces in favor of "A," but "A" would have received the property if the successor had merely renounced, then the renunciation should be treated as a renunciation and not as a renunciation-qua-acceptance.

Art. 961. Effect of acceptance

Acceptance obligates the successor to pay estate debts in accordance with the provisions of this Title and other applicable laws.

Source: C.C. Art. 1013 (1870); R.S. 9:1421.

Comments

(a) Although on its face this Article appears to state very little, in reality there is a great deal of substance implicit in it. The statement that the successor must pay debts "in accordance with the rules of this Title," brings into play other Articles of this revision that deal with payment of debts of the decedent and administrative expenses and the

limitation of liability that the revision provides. See Civil Code Articles 1415-29.

(b) Because this revision provides for a limitation of the liability of accepting successors for estate debts, R.S. 9:1421 (by which all successors are deemed to accept with benefit of inventory where an inventory or descriptive list has been executed) is no longer necessary and it is, therefore, repealed as part of this revision.

(c) See Article 1415, infra, for a definition of "estate debts," which includes both debts of the decedent and administrative expenses.

(d) The reference to "other applicable law" is intended to include such rules as those in the Estate Tax Apportionment Law. See La. R.S. 9:2431, et seq.

Art. 962. Presumption of acceptance

In the absence of a renunciation, a successor is presumed to accept succession rights. Nonetheless, for good cause the successor may be compelled to accept or renounce.

Source: New. Compare C.C. Art. 1030 (1870).

Comments

(a) It should be noted first that the concept of this Article is very close to that of Article 1014 (1870); namely that the person who is called to the succession, being seized thereof in right, is considered the heir as long as he does not renounce. Under this revision, where acceptance does not carry with it unlimited personal liability, all successors are presumed to accept. Nonetheless, a successor may renounce, and unless there is a formal or informal acceptance, which would preclude such renunciation, the successor will have the right to renounce even though he has been presumed to accept. This is a substantial change in the law, but it is consistent with the new rules regarding limited liability for accepting successors.

(b) The second sentence of this Article codifies a principle that has been unclear, but which many persons thought was implicit in the prior law, although a recent case has held to the contrary. See In Re Succession of Bradford, 567 So. 2d 751 (La. App. 2 Cir. 1990), holding that a court did not have authority to order one of four sisters to accept or renounce the succession, thereby preventing the signing of a Judgment of Possession placing all sisters into possession without administration. In the course of administration of a succession, the succession representative may need to compel a decision by a successor. If the succession representative wants to place the successors in possession of the assets of the estate, a mere presumption of acceptance is not sufficient. In that instance there would be good cause for the representative to compel a successor to either accept or renounce, and the second sentence of this Article would authorize such an action. The phrase "for good cause" should cover many kinds of

cases. The example given above of a succession representative who needs to terminate the administration and place the successors in possession would clearly be a good cause for compelling a response by a successor. On the other hand, the successor who has been asked to accept or renounce may have good cause for further delay, as for example if the extent of the assets and liabilities of the estate has not been determined. The "good cause" language would permit persons seeking to compel an election between acceptance and renunciation to do so in appropriate circumstances, but it should also protect the successor who reasonably needs a longer time in which to deliberate, and for that reason the permissive "may" is used in the sentence. This language is intended to grant a court discretion to allow the successor the time needed to deliberate in appropriate circumstances.

(c) Article 962 intentionally does not provide who has the right to compel the successor to accept or renounce. It is purposefully unrestricted in that regard so that any interested party, such as a succession representative, or another heir, or legatee, or even a creditor, will have the right to compel the successor to accept or renounce in appropriate circumstances. Obviously a court should not permit a person to maintain the action unless that person is an "interested party", and even then the interested party who seeks to compel the successor to accept or renounce should have "good cause" to do so.

SECTION 3. RENUNCIATION

Art. 963. Requirement of formality

Renunciation must be express and in writing.

Source: C.C. Arts. 1015 and 1017 (1870).

Comments

(a) This Article provides a simpler statement of the rules that are contained in Articles 1015 and 1017 of the Louisiana Civil Code of 1870. It changes the law by requiring only that a renunciation be in writing, rather than in authentic form, as was required by Article 1017 of the Civil Code of 1870. Informal renunciation is not permitted.

(b) The provisions of Article 1016 of the Louisiana Civil Code (1870) have not been reproduced, and to that extent, the new law does intend a change. Article 1016 (1870) provides that "a succession can neither be accepted nor rejected conditionally." With the changes in the law that affect the consequences of acceptance or renunciation as the revision does, there is no reason to prohibit conditional acceptances or conditional renunciations.

(c) The provisions of Article 1014 of the Louisiana Civil Code (1870) have been deleted as unnecessary, but the content of Civil Code Article 1014 (1870) is consistent with the approach of this revision to presume that successors accept the succession until they have formally renounced. See Article 962.

(d) The language of this Article is modeled on Civil Code Article 3038 (1870), pertaining to the formal requirements of suretyship.

Art. 964. Accretion upon renunciation in intestate successions

The rights of an intestate successor who renounces accrete to those persons who would have succeeded to them if the successor had predeceased the decedent.

Source: C.C. Art. 1022 (1870); cf. C.C. Arts. 1027, 1028 (1870).

Comments

(a) This Article represents a very substantial change in the law. Under Article 1022 of the Civil Code of 1870, the portion of an heir who renounces goes to his coheirs of the same degree, and if there are none, then it goes to those in the next degree. That approach often produced unfortunate results, and was considered to be inappropriate. The new approach is to treat renounced rights as if the successor who renounces had predeceased the decedent, which produces a result similar to representation of the successor by his descendants. More often than not, the intended result of such a renunciation is in fact for the successor's descendants to take by virtue of the renunciation.

(b) By way of illustration, if a decedent is survived by two children, "A" and "B," and "A" has a child "C," and "A" renounces, then under prior law (specifically Civil Code Article 1022 (1870)) the portion renounced goes to "A's" co-heir "B," who is a co-heir in the same degree. "A's" child "C" would inherit nothing. By contrast, under this Article, when "A" renounces, the rights accrete to those persons who would have represented "A" if he had predeceased the decedent, which means that "C" would inherit the full set of rights renounced by "A."

(c) Intestate successors to whom a portion accretes by renunciation share the accretion in the same proportion that they do the inheritance. That is the substance of Article 1027 of the Civil Code of 1870, but it is unnecessary to codify the principle in this revision. For example, if a decedent is survived by three children, "A," "B," and "C," and "B" renounces, but "B" has no descendants, then it is obvious that the share of "B" will be divided evenly between "A" and "C." If "C" subsequently renounces and has no descendants then his inheritance devolves on "A" and "B," equally. "B's" renunciation of his original inheritance would not preclude him from accepting what might come to him by accretion by virtue of "C's" renunciation. See Civil Code Article 966.

Art. 965. Accretion upon renunciation in testate successions

In the absence of a governing testamentary disposition, the rights of a testate successor who renounces accrete to those of his descendants by roots who were in existence at the time of the decedent's death, but if none exist, in accordance with the rules for lapsed legacies.

Source: New; cf. C.C. Arts. 1704, 1709 (1870).

Comments

(a) Accretion in a testate succession must be treated different from accretion in intestacy. In the first place, the testament itself may govern to whom the rights accrete in the event of a renunciation, and sophisticated lawyers commonly place such provisions in wills. If the testament specifies what happens in the event of renunciation, then the successor who renounces is bound by the provisions of the testament. If the successor wants to achieve a different result, he must accept the bequest and then make a donation to the person or persons whom he intends to favor.

(b) The special rules regarding lapsed legacies and particularly accretion among joint legatees are located in Title II, Chapter 6, Section 2: "Testamentary Dispositions." See, for example, Civil Code Article 1593.

Art. 966. Acceptance or renunciation of accretion

A person to whom succession rights accrete may accept or renounce all or part of the accretion. The acceptance or renunciation of the accretion need not be consistent with his acceptance or renunciation of other succession rights.

Source: C.C. Art. 1024 (1870); cf. C.C. Arts. 1025, 1026 (1870).

Comment

This Article represents a change in the law that existed before 1986 but conforms to the amendment of Civil Code Article 1024 made by Act 239 of 1986. The revision attempts to further clarify Article 1024, broadening its scope. Following the 1986 amendment, Article 1024 comprehended only the situation of accretion that may be renounced after one has accepted because, under prior law, specifically Civil Code Article 1026 (1870), accretion only operates in favor of heirs who have accepted. Thus, a successor must accept the initial inheritance, but he may thereafter renounce the accretion. The revision broadens the scope of choices by permitting an heir who has renounced the original inheritance to accept what may come to him by accretion, or conversely, to accept the initial inheritance and renounce the

accretion. A successor may accept both, or renounce both, or accept one and renounce the other. This flexibility is conveyed by the statement contained in this Article that acceptance or renunciation with reference to accretion "need not be consistent with" acceptance or renunciation of the original inheritance. The policy reasons that underlay requiring an initial acceptance no longer exist with the new revision.

SECTION 4. ACCEPTANCE OF SUCCESSION BY CREDITORS

Art. 967. Acceptance of succession by creditor

A creditor of a successor may, with judicial authorization, accept succession rights in the successor's name if the successor has renounced them in whole or in part to the prejudice of his creditor's rights. In such a case, the renunciation may be annulled in favor of the creditor to the extent of his claim against the successor, but it remains effective against the successor.

Source: C.C. Arts. 1021, 1071-1074 (1870).

Comment

(a) This Article clarifies the prior rules and uses simpler terminology. As in prior law, judicial authorization for an acceptance by a creditor in the name of a successor is required, and that principle is set forth in the Article. There is no need to set forth specific procedures for obtaining such judicial authorization, since that matter should be determined in the succession proceedings themselves, and the request for authorization obviously should be made in the succession proceedings. The consequences of a creditor's acceptance are definitely limited, because of the nature of this revision's provision for limited personal liability of successors. A creditor who accepts succession rights in the name of his debtor can only accept those rights under the same conditions as the successor himself. As a result, it is implicit that the acceptance does not render the creditor liable for debts or administrative expenses of the estate, except to the value of the effects of the estate that may be received by the creditor.

One problem that perhaps should be addressed is the ranking among the creditors. If there are three creditors but only one accepts, then that one may receive payment in full of his claim whereas the other two creditors receive nothing. Since no single rule could be designed to cover all instances, and the problem has not been a serious one for the last hundred and seventy years, it was concluded that the effects of such acceptances ought to be viewed on an ad hoc basis. The creditor who accepts may or may not actually receive the inheritance, and indeed the proper results may be instead that the inheritance is seized and sold at a public auction, with the proceeds then distributed by the Sheriff. If there are sufficient assets in the inheritance to pay all

creditors, then the questions of ranking and procedure are irrelevant. If there are not sufficient assets, then the court should be able to fashion an appropriate remedy under the general law.

(b) The requirement of judicial authorization is based on Articles 1071-1072 of the Louisiana Civil Code (1870) and is not a change in the law.

Art. 968. Reserved.

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CHAPTER 13. PAYMENT OF THE DEBTS

OF AN ESTATE

SECTION 1. GENERAL DISPOSITIONS INTRODUCTION

Art. 1415. Estate debts; administrative expenses

Estate debts are debts of the decedent and administration expenses. Debts of the decedent are obligations of the decedent or those that arise as a result of his death, such as the cost of his funeral and burial. Administration expenses are obligations incurred in the collection, preservation, management, and distribution of the estate of the decedent.

Source: New.

Comment

The basic function of this article is to define, and as such it makes three important categorical distinctions. First, it classifies "estate debts" as including not only debts of the decedent but also administration expenses. The broad inclusion of both categories of debts and expenses is very important in this revision. The second category, "debts of the decedent," would necessarily refer to obligations that were incurred by or for the decedent during his lifetime, but the article defines it also to encompass expenses that arise out of one's death such as funeral and burial expenses. The third category, "administration expenses", is broadly defined to include expenses that are incurred after death in preserving, safeguarding, and operating the property of the estate, such as repairs, costs of maintenance and upkeep, interest attributable to a debt, and custodial fees.

SECTION 2. RIGHTS OF CREDITORS

Art. 1416. Liability of universal successors to creditors for debts of estate

Universal successors are liable to the creditors of the estate for the payment of the estate debts in proportion to the part which each has in the succession, but each is liable only to the extent of the value of the property and its fruits and products received by him, valued as of the time of receipt.

A creditor has no action for payment of an estate debt against a universal successor who has not received property of the estate or its fruits and products.

Source: C.C. Arts. 1425, 1426, and 1427 (1870); See La. C.C.P. Art. 427.

Art. 1417. Reserved.

Art. 1418. Successors who are creditors, order of preference

Successors who are creditors of the estate are paid in the same order of preference as other creditors.

Source: New. See C.C. Arts. 1421 (1870); 2832, 2833

Comment

The principle enunciated by this article is straightforward and follows the general law of the State of Louisiana. If a creditor of the estate is secured, for example, by a mortgage on the land or by a Chapter 9 security interest in shares of stock, then the creditor will be paid in accordance with the preference and priority of his security right. If the creditor is unsecured, then in accordance with Article 3183 of the Louisiana Civil Code, the creditor must share pro rata with the other unsecured creditors. The important principle set forth in this Article is that the fact that the creditor is also a successor does not enhance or diminish the rights that he may have as a creditor. A different rule was adopted in the partnership law, providing that a partner who is an unsecured creditor of the partnership ranks behind unsecured creditors who are not partners. Louisiana Civil Code Article 2833 sets forth a comprehensive hierarchy for creditors of a partnership, but the same kinds of distinction are not made for creditors of an estate.

Art. 1419. Rights of pursuit of creditor

When there is an administration and a creditor asserts and establishes his claim after payment has been made to other creditors or distribution of the estate in whole or in part has been made to successors pursuant to a court order, the claim of the creditor must be satisfied in the following order: first, from the assets remaining under administration in the estate; next, from the successors to whom distribution has been made; and then from unsecured creditors who received payments, in proportion to the amounts received by them, but in this event the creditor may not recover more than his share.

Comments

(a) This article modernizes the provisions of Articles 1067 and 1068 of the Civil Code of 1870. It does not change the basic thrust of prior law where new creditors appear after distribution has been made. The article continues the rule that such a "new" creditor should first annul distributions that have been made to the successors, and only if there is still insufficient property to satisfy his claim would the creditor then pursue the other unsecured creditors who have been paid. That same scheme of priority applies under Articles 1067 and 1068 (1870).

(b) This article is worded so that it applies to administered estates only.

(c) There should be no doubt that the liability of unsecured creditors who have been paid to pay the new creditor is joint and not solidary. Because of the basic principle that unsecured creditors shall be paid ratably, a calculation would have to be made of the pro rata share of the new creditor, but a corollary of that determination is the determination of the ratable share of all of the other unsecured creditors. An unsecured creditor who has previously been paid more than his ratable share could be compelled to restore the differential, but an unsecured creditor who had been paid less than his ratable share would not be forced to pay at all.

(d) The article does not include the express protection of prior law for the succession representative who pays pursuant to law. The latter statement appears to be unnecessary: a creditor would have no right of action against a succession representative who has made payments pursuant to law, but he may have such a claim against a succession representative who fails to obtain authority to make payments. In any event, the claim will exist against the other creditors

who have been paid or the successors who have received distributions, but there would be no cause of action against an executor or administrator personally unless he failed to comply with lawful requirements.

SECTION 3. RESPONSIBILITY OF SUCCESSORS AMONG THEMSELVES

Art. 1420. Regulation of payment of debts by testament or by agreement among successors

The provisions of this Section pertaining to responsibility of the successors among themselves for estate debts do not prevent that responsibility from being otherwise regulated by the testament or by agreement of the successors. Nevertheless, the rights of creditors of the estate cannot be impaired by the testament or by agreement among the successors.

Source: C.C. Arts. 1415-1416 (1870).

Comment

This Article recognizes that the testator may, in the testament, make provisions for payment of debts, but also that the successors themselves may agree on apportionment of the payment of the debts. In doing so, the article takes cognizance of and states general principles of freedom of testation and freedom of contract. Nonetheless, neither the testator nor the successors have total freedom in that regard. The second sentence preserves the rule of Article 1416 of the Louisiana Civil Code of 1870 to the effect that neither a testator, nor the heirs, can alter rules regarding payment of debts in a way that affects the ability of creditors of the estate to be paid. But when there is no problem of public policy, the testator's wishes should control. For example, a testator who wants a legacy to be free of any obligation to bear its share of administrative expenses may so provide in his will, but that provision cannot override the mandatory rule that protects the rights of creditors.

Art. 1421. Estate debts, charged

Unless otherwise provided by the testament, by agreement of the successors, or by law, estate debts are charged against the property of the estate and its fruits and products in accordance with the following articles.

Source: New.

Comment

The preceding article acknowledges that the method of charging debts and allocating responsibility may be determined by the testator or the successors themselves, who may allocate responsibility for payment of estate debts by agreement. In the absence of any such testamentary or conventional allocation, estate debts are charged both to the property of the estate and to its fruits and products, and this article is essentially a preamble or threshold article that serves as a springboard for the rules that follow. The article itself does not set forth a new rule. Accepting the general principle that both the property of the estate and the fruits and products of the property are chargeable with responsibility to pay estate debts, it sets the stage for the articles that follow. Of the rules enunciated in the succeeding articles, some are new, and others are mere clarifications of prior law, or in other words, expressions of what is generally believed to be prior law.

Art. 1422. Debts attributable to identifiable or encumbered property

Estate debts that are attributable to identifiable property or to the production of its fruits or products are charged to that property and its fruits and products. Also, when the decedent has encumbered property to secure a debt, the debt is presumptively charged to that property and its fruits and products. The presumption may be rebutted, by a preponderance of the evidence that the secured debt is not attributable to the encumbered property.

Source: New.

Comments

(a) This article contains many important rules. The first sentence sets forth the principle that when an estate debt is attributable to identifiable property, or to the production of fruits or products of that property, the debt is charged to that property and its fruits and products. The simplest illustration would be a farm as to which expenses are incurred for fertilizer, pesticide or repairs to farm machinery. Those debts are administration expenses that would clearly be attributable to identifiable property, namely the farm, and to the production of fruits or products of the farm. If the farm is the object of a particular legacy, it would not customarily be charged with an estate debt, but under this article, those expenses would be allocable to the farm itself and not to other legacies. Similarly, repairs to a house would be attributable to that house. Owner's insurance with regard to rental property would be an estate debt attributable to identifiable property, namely the rental property itself, so that the insurance expense would be charged to that property and as an administration expense it would first be charged to the rents received.

(b) The second sentence of the article allocates primary responsibility for an encumbrance to the property that is encumbered. This rule is relatively simple in the case of an ordinary conventional mortgage, such as a homestead loan to purchase a home. The rule is less clear when a collateral mortgage or a mortgage to secure future advances is used by which the decedent has encumbered the property to raise funds that were or may be used for other purposes than the acquisition or preservation of that property. For example, a landowner grants a mortgage to secure future advances on Blackacre and uses it to secure a line of credit for a business that is unrelated to the property. For that reason, the article carefully states that a debt is "presumptively" charged to the encumbered property and its fruits and products. As a presumption only, the rule is not inflexible. Evidence may be introduced to overcome the presumption, and the debt may be charged differently. By way of illustration, if the decedent pledged shares of stock in a corporation to borrow money to purchase an automobile, then the debt may not be allocable to the stock, but it is presumed to be attributable to the stock which is the encumbered property, and the burden of proof is, of course, on the challenger, to show otherwise. To remove any doubt as to the standard of proof required to overcome the presumption, the article states that it must be overcome by a "preponderance of the evidence."

(c) Under prior law, the general rule in Louisiana was that a legacy of encumbered property carries the encumbrance with it to the legatee in the absence of a clear expression of intent to leave the property free and clear of the encumbrance. See Article 1638, Louisiana Civil Code (1870). There has been some interesting jurisprudence with reference to allocation of debts and whether or not a testator intends for the debt to be discharged by the executor. In Succession of Waterman, 298 So.2d 731 (La. 1974), the Louisiana Supreme Court held that the declaration by the testator that all of his "just debts" should be paid led to the conclusion that a particular legacy of Blackacre that was encumbered by a mortgage was to be delivered to the legatee free and clear of the encumbrance.

(d) The provisions of this article are, of course, exceptions to the rules set forth in the following articles with reference to charging debts ratably to the property that is the object of general and residuary legacies.

Art. 1423. Decedent's debts charged ratably

Debts of the decedent are charged ratably to property that is the object of general or universal legacies and to property that devolves by intestacy, valued as of the date of death. When such property does not suffice, the debts remaining are charged in the following order:

(1) Ratably to the fruits and products of property that is the object of general or universal legacies and of property that devolves by intestacy; and

(2) Ratably to the fruits and products of property that is the object of particular legacies, and then ratably to such property.

Source: New.

Comments

(a) This article sets forth the important general principle that "debts of the decedent" are charged ratably to general and universal legacies.

(b) As a general rule, particular legacies are not charged with the responsibility of paying estate debts, whether the debts are debts of the decedent or administration expenses. There are exceptions to that rule, of course, under the provisions of Article 1422, where an estate debt is allocable to identifiable property or property that is encumbered. For that reason, the article states that the decedent's debts are charged ratably to all of the property that devolves as general legacies, universal legacies, or by intestacy. There is no preference between a general legacy and a universal legacy, because by definition a testament cannot contain both kinds of legacies. There is a preference between a particular legacy, on the one hand, and general and universal legacies on the other hand, as in prior law. See C.C. Article 1600, but note also C.C. Article 1422 regarding debts identified with property.

Art. 1424. Administration expenses, how charged

Administration expenses are charged ratably to the fruits and products of property that is the object of the general or universal legacies and property that devolves by intestacy. When the fruits and products do not suffice to discharge the administration expenses, the remaining expenses are charged first to the property itself, next to the fruits and products of property that is the object of particular legacies, and then to the property itself.

Source: New.

Comments

(a) Consistent with the provisions of Article 1423, which refers to debts of the decedent, this article sets forth the identical principle for

administration expenses, namely that they are not charged to particular legacies but ratably to the fruits and products of general or universal legacies and the property that passes by intestacy. The basic distinction between Articles 1423 and 1424 is that Article 1423 refers to "debts of the decedent" and Article 1424 refers to "administration expenses." Debts of the decedent are charged to the property of the estate, but administration expenses are charged to the fruits and products of the property. If the fruits and products are insufficient, then the administration expenses are charged to the property itself. The creditors are entitled, of course, to be paid out of either source, and if the property that is the object of general or universal legacies is not sufficient, either by virtue of its fruits and products or of the property itself, then the administration expenses are charged to the fruits and products of the particular legacies, and if that resource, too, is not sufficient, then they are charged to the property that is the object of the particular legacy itself. In all instances, where there are several items of property among which the charge may be allocated, the charge is made ratably.

(b) This article, in conjunction with Article 1423, attempts to set forth a priority, allocating the decedent's debts to property of the estate and administration expenses to revenues of the estate, then further breaking down those categories so that particular legacies do not bear any responsibility for these expenses unless they fall within one of the recognized exceptions, such as being encumbered to secure a debt or having a debt attributable to the object of the particular legacy as identifiable property.

(c) In most instances professional fees such as the fees of the attorney who handles the estate, or accounting fees, or the compensation paid to the executor are incurred in part for administration purposes and in part as a result of the death of the decedent, so that they should be allocated partially to principal and partially to income. No hard and fast rule can be developed, and Civil Code Article 1426 authorizes a succession representative or the heirs to allocate such fees between debts of the estate and administration expenses in accordance with what is reasonable and equitable in view of the interests of the various successors. See Civil Code Article 1426, second paragraph.

Art. 1425. Liability of successors for contribution or reimbursement

A successor who has not received property of the estate or its fruits and products, is not liable for contribution or reimbursement. A successor who has received property of the estate, or any of its fruits or products is not liable for contribution or reimbursement for an amount greater than the value of the property or fruits or products, received by him, valued as of the time of receipt.

Source: New.

Comment

This article is a necessary corollary to Article 1416, which announces a rule of limited liability for successors. As the Comments to that article reflect, successors are solidarily liable, but the solidary liability is limited to the value of property received by the successor, valued at the time of receipt. The instant article coordinates with that rule by insulating the successor from aggregate liability greater than that limitation whether it is to creditors or to other successors by way of contribution or reimbursement. See for example, the illustration of such a potential problem in Comment (f) to Article 1416. A successor who pays more than his proportionate share to a creditor (because of solidary liability) may have a right of contribution or reimbursement against other successors, but if so he cannot recover from another successor more than the value of the property that was received by that successor, and, as in the earlier article, the limitation utilizes the valuation as of the time of receipt of the property.

Art. 1426. Classification of receipts and expenditures in absence of controlling dispositions

In the absence of an express testamentary provision or applicable provision of law, receipts and expenditures are allocated in accordance with what is reasonable and equitable in view of the interests of the successors who are entitled to the fruits and products as well as the interests of the successors who are entitled to ownership of the property, and in view of the manner in which persons of ordinary prudence, discretion, and intelligence would act in the management of their own affairs.

The compensation of the succession representative and professional fees incurred after death, such as legal, accounting and appraisal fees, shall be allocated between debts of the decedent and administration expenses in accordance with the provisions of this Article.

Source: New; Cf. R.S. 9:2142, 2143.

Comment

(a) The concepts set forth in this article are not new. The article is modeled closely on the provisions of Louisiana Revised Statutes 9:2142 and 9:2143, which are located in the Trust Code. The

principles that it enunciates are general principles, and the Comments to the Trust Code articles should be equally applicable to this article. No hard and fast rule can serve to determine how each and every receipt or expenditure should be classified, and for that reason the article refers to "what is reasonable and equitable" and further references the interest of successors who are entitled to fruits and products (such as usufructuaries or income interests in trust) as well as those entitled to ownership of property (such as naked owners and principal beneficiaries in trust). The article also incorporates the well-known and universally accepted principle that the rules should be viewed the way that persons of "ordinary prudence, discretion and intelligence would act in the management of their own affairs."

(b) See Comment (c) to Article 1424.

Art. 1427. Reporting and deducting as authorized by tax law

Notwithstanding the provisions of this Chapter, for tax purposes the succession representative, or the successors if there is no representative, may report receipts and deduct expenditures as authorized by the tax law.

Source: New.

Comment

This article is intended to re-assure executors and administrators, as well as their tax advisors, that for tax purposes they are not required to slavishly adhere to the rules set forth in this revision if they produce adverse tax consequences. The articles are intended to furnish guidelines to assist succession representatives and their professional advisors, as well as the courts. As such, they provide rules where the law has previously been silent or may be unclear, but there is no intent to preclude or foreclose appropriate tax elections under state or federal income tax law or Louisiana inheritance or federal estate tax law. For example, many expenses are recognized by the federal government as deductible on either the estate tax return, Form 706, which would be more as a debt of the decedent, or on a fiduciary income tax return, which is more as an administration expense. The fact that an expense may be a "debt of the decedent" for Louisiana civil law purposes should not impair the ability of the succession representative to claim that expense as an administration expense if permitted by federal or state tax law. That being the case, the principle set forth in this article is intended to clarify that the succession representative may properly elect either deduction and make the decision based on what is perceived to be the best interest of the estate without any impediment as a result of these articles. The articles on payment of debts are intended to be helpful to serve as useful and practical guidelines, as well as rules of law. They do not compel adverse tax consequences.

Art. 1428. Rights and obligations of usufructuary not superseded

This Chapter does not supersede the provisions of this Code governing the rights and obligations of a usufructuary with respect to payment of estate debts.

Source: New.

Comment

This article precludes any claim that the new articles on payment of debts supersede the provisions of the Civil Code with regard to the rights and obligations of a usufructuary. Indeed, the primary function of this article is to clarify that the provisions of this section dealing with the payment of debts do not displace or over-ride the allocation of responsibility for the payment of those debts as between the usufructuary and the naked owner. Under the new scheme of limited liability of successors, estate debts are charged to property, and its fruits and products, and not to successors personally. Successors are personally liable to creditors, only to the extent that they take possession of property of the estate, or its fruits and products. The new scheme of limited liability of successors for estate debts, allocates responsibility for payment of a debt to property itself, and there is no intention to alter, modify, or tacitly repeal, any of the provisions in the law of usufruct with regard to the responsibility of the usufructuary for payment of debts. When an estate debt is allocated to Blackacre, then, as between the usufructuary, who has the usufruct of Blackacre, and the naked owner, who owns the naked ownership of Blackacre, the responsibility is determined by the provisions of the Civil Code that deal with the law of usufruct. The responsibility of the underlying property against which the debt is charged is governed by the section of the Code dealing with payment of the debts, but as between the usufructuary and the naked owner with regard to the payment of those debts, the allocation and placement of responsibility is determined by the section of the Civil Code on the law of usufruct. These new articles do not relieve a usufructuary of the responsibility properly placed upon usufructuaries under the provisions of the Civil Code elsewhere.

Art. 1429. Rights and obligations of income interest in trust not superseded

This Chapter does not supersede the provisions of the Trust Code governing the rights and obligations of an income interest in trust with respect to payment of estate debts.

Source: New.

Comment

The comments to Article 1428 apply with equal force to this article.

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TITLE II. DONATIONS

* * *

CHAPTER 6. DISPOSITIONS MORTIS CAUSA

SECTION 1. TESTAMENTS GENERALLY

Art. 1570. Testaments; form

A disposition mortis causa may be made only in the form of a testament authorized by law.

Source: C.C. Arts. 1570 and 1590 (1870).

Comments

(a) This Article is based on Article 1570 of the Civil Code of 1870. It simplifies, but does not change, the law.

(b) Dispositions mortis causa are defined in Civil Code Article 1469 of the Civil Code of 1870 as acts to take effect upon death by which the individual disposes of all or a part of his property, but which remain revocable during his lifetime. This Article specifies that dispositions mortis causa may not be made other than in one of the forms of testaments authorized by law, i.e., by statute or Civil Code Article. So long as the testament is in an approved form and demonstrates an intent to dispose of property, it is irrelevant that the testator may have intended it to be in a different form. See Article 1590 of the Civil Code of 1870. The language of this Article is broad enough to include the principle of Article 1590 of the Civil Code of 1870.

(c) No major changes are made in this Article from the provisions of prior law. It was thought unnecessary to continue the definition contained in Article 1571 of the Civil Code of 1870, describing a testament as "the act of last will clothed with certain solemnities, by which the testator disposes of his property, either universally or by universal title, or by particular title." Since the Code already contains a definition of donations mortis causa (C.C. Art. 1469 (1870)), and these donations may only be made by testament, there was no need to repeat the definition.

Art. 1571. Testaments with others or by others prohibited

A testament may not be executed by a mandatary for the testator. Nor may more than one person execute a testament in the same instrument.

Source: C.C. Art. 1572 (1870); cf. Art. 670, Spanish Civil Code.

Comments

(a) This Article restates the prohibitions contained in Article 1572 and the first sentence of Article 1573 of the Civil Code of 1870. It recognizes that a testament is a personal and individual act in which no other person can join.

(b) The prohibition set forth in this article does not apply to the situation where the testator is unable to sign the testament personally because of a mental or physical infirmity. See Article 1579. In one sense, Article 1579 may be viewed as expressly relaxing the rule of this article, but more properly, in the situation authorized by Article 1579 the testator is technically the person who "makes" the testament and the person who physically signs for him or makes his mark is nothing more than an extension of the hand of the testator.

Art. 1572. Testamentary dispositions committed to the choice of a third person

Testamentary dispositions committed to the choice of a third person are null, except as expressly provided by law. A testator may delegate to his executor the authority to allocate specific assets to satisfy a legacy expressed in terms of a value or a quantum, including a fractional share.

The testator may expressly delegate to his executor the authority to allocate a legacy to one or more entities or trustees of trusts organized for educational, charitable, religious, or other philanthropic purposes. The entities or trusts may be designated by the testator or, when authorized to do so, by the executor in his discretion. In addition, the testator may expressly delegate to his executor the authority to impose conditions on those legacies.

Source: C.C. Art. 1573 (1870); R.S. 9:2271; cf. Art. 670, Spanish Civil Code.

Comment

(a) The source of this Article is Article 1573 of the Civil Code of 1870, which originally provided that "the custom of willing by testament, by the intervention of a commissary or attorney in fact, is abolished." In 1982 the article was amended to grant a testator limited power to delegate authority to an executor to select assets to distribute in satisfaction of certain legacies. The 1982 amendment to Article 1573 has been preserved and significantly expanded to permit the delegation of authority to an executor to select assets to distribute in all instances where the legacy of the share of the estate is designated by quantum or value. The revision clarifies that "quantum" includes fractional shares, such as one-fourth or one-half of something, and intentionally removes the language in Article 1573 (1870) that limits the ability to delegate such authority to the instances where the designation of the quantum or value is made "either by formula or by a specific sum". This article permits delegation of authority in all instances where the legacy is a quantum or value, whether or not the bequest is by formula or by specific sum.

(b) The first paragraph of the article refers only to the delegation of authority to select assets and does not permit the delegation of authority to select legatees. The second paragraph of the article, however, goes much further in that regard, but applies only to charitable kinds of legacies. It not only permits a testator to leave a bequest to a specified charity and delegate authority to the executor to select assets to go to the charity, but under this paragraph the testator may even delegate authority to the executor to allocate among charities designated by the testator and, indeed, to grant authority to the executor to select the very charities themselves. The last sentence permits the executor to impose conditions on the legacies, as, for example, that funds be used for heart research, scholarships for indigent children, and so forth. Obviously, the ability "to impose conditions" does not authorize the executor to impose conditions that are contrary to law.

(c) Since a trust is not an entity, the article appropriately refers to "entities or trustees of trusts."

Art. 1573. Formalities

The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null.

Source: New; See C.C. Art. 1595 (1870).

Comment

This article is based on the provisions of Article 1595 of the Louisiana Civil Code of 1870. It does not change the law.

SECTION 2. FORMS OF TESTAMENTS

Art. 1574. Forms of testaments

There are two forms of testaments: olographic and notarial.

Source: New.

Comments

(a) This Article changes the law by suppressing the "public and private nuncupative" and "mystic" testaments found in the Civil Code of 1870. The so-called statutory testament is revised and retained by this Article, to be called the notarial testament. The olographic testament is retained without substantive change.

(b) There is no reason to retain the nuncupative wills or the mystic will. The notarial testament provided in the revision can be used in every instance in which those wills would be usable, and is much easier and simpler to obtain and execute. One distinction that arguably might justify keeping the private nuncupative testament is that it does not require a notary public. However, it is almost inconceivable that a lay person would know all of the formal requirements of the Louisiana Civil Code for such a will, when needed. Accordingly, this lack of a notary hardly seems a justification for retaining nuncupative wills. The sole justification of the mystic will is the secrecy that it affords the testator, but that secrecy may as easily be obtained by using an olographic testament. If a testator cannot write such a testament, the notarial testament under Article 1577 or Article 1578 should suffice because it is not necessary that the will be read aloud or that the witnesses read it.

(c) The enactment of this Article does not invalidate testaments that were valid when written. See R.S. 9:2445.

(d) Articles 1597 through 1604 of the Civil Code of 1870 have been suppressed in their entirety as obsolete and unnecessary. They provided special rules for time-limited testaments of military personnel and those at sea. The present law is adequate to provide for the needs of such persons, especially in light of the current military practice to provide for such matters as a part of regular induction procedures. A testament written for military personnel is valid in Louisiana if: (a) it is valid under Louisiana law; or (b) it is valid under the law of the state of making at the time of making or (c) it is valid under the law of the state in which the testator was domiciled at the time of making or at the time of death; or (d) with regard to immovables, it is valid under the law that would be applied by the courts of the state in which the immovables are situated. See Civil Code Article 3528. Moreover, an olographic testament valid under Louisiana law may be written anywhere.

(e) By definition, no oral testament could be valid, since it would not be in one of these forms. See also Articles 1575 and 1576 of the Civil Code of 1870.

(f) A notarial testament may be made in one of four ways. The notarial testament described in Article 1577 may be made only by a person who knows how to sign his name and how to read the testament as written, and is physically able to do both. If the testator lacks the physical ability to sign his name, the testament must be made in the manner described in Article 1578. If the testator's sight is impaired to the extent that he cannot read or if he is a person who does not know how to read, the testament must be made in the manner described in Article 1579. If the testator knows how to and is physically able to read braille, the testament may be made in the manner described in Article 1580. It is envisioned that most testators will use the basic notarial testament described in Article 1577.

Art. 1575. Olographic testament

An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. It is subject to no other requirement as to form.

Additions and deletions on the testament may be given effect only if made by the hand of the testator.

Source: C.C. Arts. 1588 and 1589 (1870).

Comments

(a) This Article combines the substance of Articles 1588 and 1589 of the Civil Code of 1870. It does not change the law.

(b) There is no intent to change the rationale of *Succession of Burke*, 365 So. 2d 858 (La. App. 4th Cir. 1978), in which the testament was written in the hand of the testator on a form with printed words intended for another form of testament. The court ignored all printed matter and upheld the olographic testament made up solely of the material in the testator's handwriting and in compliance with the predecessor of this Article.

(c) In *Succession of King*, 595 So.2d 805 (La. App. 2d Cir. 1992), it was held that in an olographic testament the signature should be at the end, and anything written after the signature would not be effective. This article is not intended to change the rule of *Succession of King*.

Art. 1576. Notarial testament

A notarial testament is one that is executed in accordance with the formalities of Articles 1577 through 1580.

Source: New.

Comment

(a) This Article is new. It does not change the law, however.

(b) A notarial testament may be made in one of four ways. The notarial testament described in Article 1577 may be made only by a person who knows how to sign his name and how to read the testament as written, and is physically able to do both. If the testator lacks the physical ability to sign his name, the testament must be made in the manner described in Article 1578. If the testator's sight is impaired to the extent that he cannot read or if he is a person who does not know how to read, the testament must be made in the manner described in Article 1579. If the testator knows how to and is physically able to read braille, the testament may be made in the manner described in Article 1580. It is envisioned that most testators will use the basic notarial testament described in Article 1577.

Art. 1577. Requirements of form

The notarial testament shall be prepared in writing and shall be dated and 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 the 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 other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this ____day of _____, ____."

Source: R.S. 9:2442.

Comments

(a) This article reproduces the substance of R.S. 9:2442. It does not change the law.

(b) The testator need not sign after both the dispositive or appointive provisions of this testament and the declaration, although the validity of the document is not affected by such a "double" signature. The testator is disposing of property, appointing an executor or making other directions in the body of the testament itself. He need only sign at the end of the dispositive, appointive or directive provisions. The witnesses and the notary are attesting to the observance of the formalities; they need only sign the declaration.

(c) The testator's indication that the instrument contains his last wishes may be given verbally or in any other manner that indicates his assent to its provisions.

(d) The instrument must be in writing. The form of the writing (typewritten, mimeographed or any other form) is immaterial. Moreover, there is no requirement that the testament be written in the English language, or even in Roman characters. So long as it is written in a language that the testator can read and understand, the protections to assure verity of the provisions are satisfied.

(e) The ability of the testator to verify that the contents of the written document express his last wishes for the disposition of his property is the mechanism to assure accuracy. Thus he must have the intellectual ability to read the will in the manner in which it is written, and must have the same ability to show his assent by signing his name.

(f) This Article does not require that the testator actually read the testament at the time of its execution. Clearly, he should not omit the reading if he is not wholly satisfied that the instrument reflects his wishes accurately. Louisiana courts have frequently observed that "... signatures to obligations are not mere ornaments. If a party can read, it behooves him to examine an instrument before signing it; ...." *Snell v. Union Sawmill Company*, 159 La. 604, 105 So. 728 (1925); *Boult v. Sarpy*, 30 La. Ann. 494 (1878).

(g) This Article requires that the testament be dated but intentionally does not specify where the date must appear, nor does it require that the dating be executed in the presence of the notary and witnesses or that the dating be made by the testator. It is common practice to have a typewritten will that is already dated, and that will should be upheld if it is valid in all other respects. The first paragraph of the Article states that "the ... testament shall be prepared in writing and shall be dated", and the subsequent language (with reference to execution) intentionally contains no language that refers to the dating having been executed in the presence of the witnesses or the notary. Nor is there any requirement that the testator be the one to date the testament. The critical function of the date is to establish a time frame so that, among other things, in the event of a conflict between two presumptively valid testaments, the later one prevails. A subsequent testament that contains a provision that revokes all prior testaments obviously revokes the earlier testament, and one primary function of the date is to establish which of the two testaments is the later one.

Art. 1578. Notarial testament; testator literate and sighted but physically unable to sign

When a testator knows how to sign his name and to read, and is physically able to read but unable to sign his name because of a physical infirmity, the procedure for execution of a notarial testament is as follows:

(1) In the presence of the notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament, that he is able to see and read but unable to sign because of a physical infirmity, and shall affix his mark where his signature would otherwise be required; and if he is unable to affix his mark he may direct another person to assist him in affixing a mark, or to sign his name in his place. The other person may be one of the witnesses or the notary.

(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 is his testament, and that he is able to see and read and knows how to sign his name but is unable to do so because of a physical infirmity; and in our presence he has affixed, or caused to be affixed, his mark or name at the end of the testament and on each other separate page, and in the presence of the testator and each other, we have subscribed our names this _____day of ____, _____."

Source: R.S. 9:2442.

Comment

It is intended that the ordinary requirements for a notarial testament apply to the execution of a testament by a person physically unable to sign his name, except insofar as those requirements are modified by this Article. A person physically unable to make a mark could cause his mark to be affixed by directing someone else to assist

him so that the testator in fact affixes the mark. This article also authorizes the testator to direct another person to sign his name in his place. It is believed that with the presence of two witnesses and a notary public there is ample protection against abuse and there is no reason not to permit such liberality.

Art. 1579. Notarial testament; testator unable to read

When a testator does not know how to read, or is physically impaired to the extent that he cannot read, whether or not he is able to sign his name, the procedure for execution of a notarial testament is as follows:

(1) The written testament must be read aloud in the presence of the testator, the notary, and two competent witnesses. The witnesses, and the notary if he is not the person who reads the testament aloud, must follow the reading on copies of the testament. After the reading, the testator must declare or signify to them that he heard the reading, and that the instrument is his testament. If he knows how, and is able to do so, the testator must sign his name at the end of the testament and on each other separate page of the instrument.

(2) In the presence of the testator and each other, the notary and witnesses must sign the following declaration, or one substantially similar: "This testament has been read aloud in our presence and in the presence of the testator, such reading having been followed on copies of the testament by the witnesses [, and the notary if he is not the person who reads it aloud,] and in our presence the testator declared or signified that he heard the reading, and that the instrument is his testament, and that he signed his name at the end of the testament and on each other separate page; and in the presence of the testator and each other, we have subscribed our names this ____day of ____, _____."

(3) If the testator does not know how to sign his name or is unable to sign because of a physical infirmity, he must so declare or signify and then affix his mark, or cause it to be affixed, where his signature would otherwise be required; and if he is unable to affix his mark he may direct another person to assist him in affixing a mark or to sign his name in his place. The other person may be one of the witnesses or the notary. In this instance, the required declaration must be modified to recite in addition that the testator declared or signified that he did not know how to sign his name or was unable to do so because of a physical infirmity; and that he affixed, or caused to be affixed, his mark or name at the end of the testament and on each other separate page.

(4) A person who may execute a testament authorized by either Article 1577 or 1578 may also execute a testament authorized by this Article.

Source: R.S. 9:2443.

Comments

(a) For the protection of sight-impaired or illiterate testators, this article requires that the testament be read aloud in the presence of the testator and the witnesses. The article contemplates that the notary public will be the person to read the testament aloud in their presence, just as previous law has contained that requirement. Nevertheless, as indicated in the Comments below, on occasion the notary public may be unable to read it aloud, or if for any reason the notary chooses to have someone else read it aloud, then the article contemplates that the person who reads it aloud must do so not only in the presence of the testator and the witnesses but in the presence of the notary public. The article contains a form of declaration similar to the declaration that has been used previously, but because of the new provisions expressly authorizing someone other than the notary to read the testament aloud, the form of declaration contained in subsection (2) of the article indicates in bracketed language a suggested change to use when it is not the notary but another person who has read the testament aloud. Obviously, when the notary public <u>is</u> the person who reads the testament aloud, then the bracketed language shown in the form is not necessary and should not be used. The use of brackets in the form should not be misinterpreted. Occasionally brackets are used in the texts of articles that were originally written in French and translated to

English to indicate when there is a mistranslation of the original French. The use of the brackets in the form here is simply to indicate a choice of language to use when someone other than the notary public reads the testament aloud, and nothing more than that.

In *Succession of Harvey*, 573 So. 2d 1304 (La. App. 2d Cir. 1991), the attestation clause revealed that the notary did not actually read the testament aloud as required by R.S. 9:2443. Instead, the will was read by one of the witnesses while the testator, the notary, and the other two witnesses followed the reading on copies of the instrument. The notary testified that, on the day of execution, an allergy and asthma condition prevented him from reading the testament aloud. The Court held that there had been substantial compliance with the requirements of R.S. 9:2443 and upheld the validity of the will. According to the Court: "In the instant case, the testator did, in the presence of the notary and three witnesses, indicate that he had heard the reading and that the instrument represented his last will. The evidence clearly establishes that the notary accomplished the intended purpose of the reading of the testament, viz., to ensure that the person executing the document knows its contents. Hence, no error occurred." *Succession of Harvey*, supra, at 1309. This Article codifies the result reached by the Court in *Succession of Harvey*.

(b) In light of the fact that the person who executes a testament under this Article lacks the ability to verify its provisions for himself, the assurance of accuracy is achieved by the reading of the testament by the notary to the testator and the witnesses, while the latter follow the reading on copies of the testament. In this instance, the attestation by the witnesses is not only that the testator indicated that the instrument was his testament, but also that the witnesses assured themselves through the reading that the document that the testator signed was the same one that was read aloud.

(c) Section 4 permits this form of testament to be used whenever doubt exists whether a testator is unable to read because the disability, if any, is not so definitive as to be certain that he does <u>not</u> know how to read. There may be situations where doubt exists whether the testator is so physically impaired that he is unable to read, or there may be doubt as to the extent of his literacy. There is often no clear dividing line and it may be difficult to determine the testator's physical condition or literacy level with reasonable accuracy, much less with certainty. To avoid any problem whatsoever in that regard, Section 4 permits even a fully competent testator to execute a will under this section. The primary purpose of the kind of notarial testament authorized in this article is to provide safeguards to protect persons who are illiterate or otherwise unable to read, but it is not intended to disqualify competent testators. Since the procedure for execution of a testament under this article is more exacting and subject to greater formality than it is for a notarial testament executed pursuant to Article 1577 or 1578, any competent testator is permitted to execute a will under this article, not merely a person who is unable to read or who is so physically impaired that he is unable to read.

Art. 1580. Notarial testament in braille form

A testator who knows how to and is physically able to read braille, may execute a notarial testament according to the following procedure:

(1) In the presence of a notary and two competent witnesses, the testator must declare or signify that the testament, written in braille, is his testament, and must sign his name at the end of the testament and on each other separate page of the instrument.

(2) In the presence of the testator and each other, the notary and witnesses must sign the following declaration, or one substantially similar: "In our presence the testator has signed this testament at the end and on each other separate page and has declared or signified that it is his testament; and in the presence of the testator and each other we have hereunto subscribed our names this ____day of _____, _____."

(3) If the testator is unable to sign his name because of a physical infirmity, he must so declare or signify and then affix, or cause to be affixed, his mark where his signature would otherwise be required; and if he is unable to affix his mark he may direct another person to assist him in affixing a mark, or to sign his name in his place. The other person may be one of the witnesses or the notary. In this instance, the required declaration must be modified to recite in addition that the testator declared or signified that he was unable to sign his name because of a physical infirmity; and that he affixed, or caused to be affixed, his mark or name at the end of the testament and on each other separate page.

(4) The declaration in the notarial testament in braille form must be in writing, not in braille.

Source: R.S. 9:2444.

Comment

This Article reproduces the substance of R.S. 9:2444 relative to statutory testaments in braille form. It does not change the law.

SECTION 3. OF THE COMPETENCE OF WITNESSES AND OF CERTAIN DESIGNATIONS IN TESTAMENTS

Art. 1581. Persons incompetent to be witnesses

A person cannot be a witness to any testament if he is insane, blind, under the age of sixteen, or unable to sign his name. A person who is competent but deaf or unable to read cannot be a witness to a notarial testament under Article 1579.

Source: C.C. Art. 1591 (l870); R.S. 9:2442-9:2444.

Comments

(a) This Article combines the requirements for witnesses to the various testaments found in the Civil Code of 1870 and for the statutory (now the notarial) testament. It does not change the law, except as noted in comments (b) and (c) infra, and with the exception that it imposes a general requirement that a witness know how to read and to sign his name.

(b) The former disqualification in Article 1591 of the Civil Code of 1870 of "persons whom the criminal law declare incapable of exercising civil functions" has been suppressed, because it does not appear that there are any such persons under the present law.

(c) The age of competency has been reduced from sixteen to fourteen to make it consistent with the traditional practice regarding witnesses to authentic acts under former Civil Code Article 2234 (1870) (The successor provision, C.C. Art. 1833 (rev. 1984), does not contain an age requirement). The former exclusion of persons who were mute ("dumb" under Article 1591 of the Civil Code of 1870) has also been suppressed; the fact that a person cannot speak should not in and of itself disqualify him as a witness. That disqualification had in fact been deleted prior to this revision by Acts 1983, No. 198.

(d) The requirements stated in this Article are not in derogation of, but rather are supplementary to, the general competency requirements of R.S. 13:3665, and Article 691 of the Code of Evidence.

(e) A person who is not able to sign his name for any reason, whether due to physical inability or intellectual inability, does not qualify as a competent witness under this article. The article expressly does not make a distinction regarding the reason for inability to sign (as Article 1578 does, for example). For the same reason, a person who is unable to read, whether because of physical inability to read or

intellectual inability to read, does not qualify as a competent witness to a notarial testament under Article 1579, and the reason is obvious: The witness is required to follow the reading of the will on a copy as it is being read aloud by the notary.

Art. 1582. Effect of witness or notary as legatee

The fact that a witness or the notary is a legatee does not invalidate the testament. A legacy to a witness or the notary is invalid, but if the witness would be an heir in intestacy, the witness may receive the lesser of his intestate share or the legacy in the testament.

Source: C.C. Art. 1592 (1870).

Comment

(a) This article reproduces the substance of Article 1592 of the Louisiana Civil Code (1870). It does not change the law in upholding the testament, but it does change the law in permitting the witness to keep the legacy when he would have been an heir by intestacy if the decedent had died intestate.

(b) The second sentence of this Article represents a small change in Louisiana law. Historically, legatees were prohibited altogether from being witnesses to testaments, under penalty that the entire testament was invalid. The harshness of that result was mitigated in 1986 when Article 1592 (1870) was revised by Act No. 709 to permit the testament to be upheld and merely deprive the witness of the legacy. Even that solution, however, may be unnecessarily harsh in some instances, as, for example, when the witness is unaware that he is a legatee. Unless the testament is one that must be read aloud to the witnesses under Civil Code Article 1579, a witness may not know that he or she is a legatee. There is no requirement that the other notarial wills actually be read by the testator (who simply must be able to read), or by the witnesses, or by the notary (who may not have prepared the will). Nevertheless, in light of recent developments in the law of capacity and undue influence, it can be anticipated that there may be more will contests involving challenges to testamentary capacity or allegations of undue influence on the testator. As a result, it is as important as before to encourage the use of disinterested witnesses who can testify not only that the formalities for execution of the testament were satisfied, but who may also be able to furnish insights regarding capacity or undue influence issues when they arise. On the other hand, those issues are often more properly addressed to professionals, such as doctors and nurses, and in any event the potential interest of a witness may affect the credibility of the witness' testimony and the weight to be given the testimony. This article changes the law to permit a witness who is related to the testator to inherit at least as much as he or she would have been able to inherit under the laws of intestacy if the decedent had died intestate. The new rule does not protect a legatee/witness who is unrelated to the testator, but it mitigates somewhat the harshness of the existing rule, and it is in accord with the

prevailing rule in most of the United States. A practitioner who assists in the execution of a testament for his client should continue to make every effort to use disinterested witnesses who are fully capable in all respects.

The rule is not relaxed as to the notary public, who performs a more solemn function than the witnesses and is a public officer. The notary remains prohibited from taking under the testament.

Art. 1583. Certain designations not legacies

The designation of a succession representative or a trustee, or an attorney for either of them, is not a legacy.

Source: New. See R.S. 35:2(A).

Comment

This Article does not represent a change in the law, but it does codify what is believed to be the appropriate rule. It has long been recognized that the designation of a representative, whether the representative is an executor, a trustee, the attorney to handle the estate, or a tutor for a child, is not a bequest. See *Succession of Jenkins*, 481 So.2d 607 (La. 1986), holding that the designation of an attorney in a will is merely precatory and is not binding on the executor. See also Succession of Wallace, 574 So.2d 348 (La. 1991), holding the enactment of La. R.S. 9:2448, which provided that an executor of an estate may discharge the attorney designated in a testator's will "only for just cause" unconstitutional. There is some unfortunate language, however, in one reported case that indicates that the designation of the attorney might be construed to be a bequest. See *Roberts v. Christina*, 323 So. 2d 888 (4th Cir. 1976), writ denied 328 So. 2d 109 (La. 1976); see also *Succession of Boyenga*, 437 So. 2d 260, 263 (La. 1983) (Dixon, C.J., dissenting). Codification of the rule that designation of a representative is not a bequest clarifies the issue so there can be no problem in that regard.

SECTION 4. TESTAMENTARY DISPOSITIONS

Art. 1584. Kinds of testamentary dispositions

Testamentary dispositions are particular, general, or universal.

Source: New. See C.C. Art. 1605 (1870).

Comment

The three categories of legacies under prior law were universal legacies, legacies under universal title, and particular legacies. The names and characteristics of universal legacies and particular legacies are retained in this revision, but the name of the "legacy under universal title" has been changed to "general" legacy, and it has a modified new definition. See C.C. Art. 1586. The importance of the

three classifications is in allocating liability for the payment of estate debts, and in determining accretion rights among successors when a legacy lapses or is renounced. See, C.C. Arts. 1423 and 1424, infra, regarding payment of estate debts, and C.C. Arts. 1591 through 1595, infra, regarding accretion. And, of course, as before, particular legacies receive preference in being discharged before general or universal legacies. See C.C. Arts. 1600 and 1602, infra. This Article establishes kinds of testamentary dispositions that are not dissimilar to the universal legacy, legacy by universal title, and legacy by particular title found in the Civil Code of 1870. But their designations, and to some extent their substance, are altered somewhat in this revision.

Art. 1585. Universal legacy

A universal legacy is a disposition of all of the estate, or the balance of the estate that remains after particular legacies.

A universal legacy may be made jointly for the benefit of more than one legatee without changing its nature.

Source: New. See C.C. Art. 1606 (1870).

Comments

(a) The three categories of legacies under prior law were universal legacies, legacies under universal title, and particular legacies. The names and characteristics of universal legacies and particular legacies are retained in this revision, but the name of the "legacy under universal title" has been changed to "general" legacy, and it has a modified new definition. See C.C. Art. 1586. The importance of the three classifications is in allocating liability for the payment of estate debts, and in determining accretion rights among successors when a legacy lapses or is renounced. See C.C. Arts. 1423 and 1424, *infra*, regarding payment of estate debts, and C.C. Arts. 1591 and 1595, *infra*, regarding accretion. And, of course, as before, particular legacies receive preference in being discharged before general or universal legacies. See C.C. Arts. 1600 and 1602, *infra*.

(b) This Article retains the name of the "universal" legacy and codifies the principle that such a legacy need not be of the entire estate, so long as it is a legacy of the residuum of the estate remaining after particular dispositions. See generally 5 Planiol and Ripert, Traite pratique de droit civil francais, Nos. 611, 614, at 614, 644-646 (1933); Cross on Successions, Sec. 140, at 204; Projet Quebec Civil Code, Art. 261. It also codifies the prior jurisprudential rule that a legacy of the residuum following a particular legacy is a universal legacy. See *Willis v. McKeithen*, 184 So. 2d 748 (La. App. 2d Cir. 1966).

It must be noted that when the testament contains a general legacy, then by definition under this article there cannot also be a universal legacy. The two legacies are defined in such a way that they cannot exist in the same testament.

(c) The jurisprudence has recognized that leaving the entire estate or the residue of the estate to multiple legatees does not destroy the universality of the legacy, provided that the legatees are conjoint legatees. Thus, a legacy of the entire estate to A, B and C conjointly is a universal legacy, even though its practical effect is to leave one-third of the estate to A, one-third to B and one-third to C. By the nature of the legacy's being conjoint, if A predeceases B and C, A's share of the estate accretes to B and C. The new code article uses the word "joint" in referring to such legatees, which is consistent with prior jurisprudence and with the new terminology by which the former "conjoint" legacy is now called a "joint" legacy. C.C. Art. 1588.

Art. 1586. General legacy

A general legacy is a disposition by which the testator bequeaths a fraction or a certain proportion of the estate, or a fraction or certain proportion of the balance of the estate that remains after particular legacies. In addition, a disposition of property expressly described by the testator as all, or a fraction or a certain proportion of one of the following categories of property, is also a general legacy: separate or community property, movable or immovable property, or corporeal or incorporeal property. This list of categories is exclusive.

Source: New. See C.C. Art. 1612 (1870).

Comments

(a) The name "legacy under universal title" is the traditional name for fractional legacies in the civil law world, but because of the common use of the word "universal" in both the "legacy under universal title" and the "universal legacy," which are different kinds of legacies, the name was the source of some confusion. For that reason, Quebec recently changed the name of this classification to a "legacy under general title." The Louisiana revision follows the Quebec approach in part: it calls the legacy merely a "general" legacy rather than "legacy under general title," as Quebec does. It is hoped that the use of a new name for this category of legacy will call attention to the fact that there is a change in the law, albeit small. This Article reproduces the substance of Article 1612 of the Civil Code of 1870 concerning legacies by universal title. Functionally, a "general" legacy is similar in most respects to the old "legacy under universal title." As a practical matter, the classification may be important with respect to responsibility for payment of debts, since universal legacies and general legacies primarily bear that responsibility. See Article 1423, *infra*, but see, also, Article 1422, *infra*. The classification may also be important for purposes of accretion when a legacy lapses or is renounced. See Articles 1592 and 1595, *infra*. And, of course, it is important in determining priority for discharge of legacies when the estate is

insufficient to discharge all legacies. C.C. Articles 1600-1603, inclusive *infra*. The new rules for the "general" legacy depart slightly from prior law by expressly providing that a legacy made in terms of one of the enumerated property law classifications, such as "all of my community property to A," is a general legacy. Properly speaking, that kind of legacy is a general legacy, but in the jurisprudence the classification may have been unclear. This revision clarifies that principle.

(b) A legacy of "one-fourth of my property" is a general legacy because it disposes of a fraction of the estate, even though it does not use one of the enumerated categories, as does a legacy of one-fourth of "all my movables" or "all my immovables," or a legacy of "all my community property" or "all my separate property." The bequest of all or a fraction of the movables or all or a fraction of the immovables would be a disposition of a category of property. If the testator made a specific listing of assets and stated that he thought that the list would equal the portion he had in mind for the legatee, that would not be a general legacy as defined in this Article.

(c) A legacy of a usufruct over a specified portion of the testator's property is not a general legacy, either, nor would a bequest of the naked ownership of the same portion be a general legacy, unless it refers to one of the listed categories.

(d) A bequest of the entirety of an estate is a universal legacy even though in one sense it is the disposition of a specified portion of the estate. It is defined as a universal legacy under the preceding article. The practical effects of classification are essentially the same whether a legacy is a general legacy or a universal legacy, at least with reference to payment of debts and administration expenses, and with reference to determination of priority in discharging legacies.

(e) An executor may be given the power to select assets to satisfy a general legacy without changing the nature of the legacy. See Civil Code Articles 1302 and 1725 (1870) and Article 1571 of this revision. The fact that the executor may offer, and the legatee accept, a specific sum of money in lieu of the general legacy does not change the nature of the legacy itself.

(f) In order for a legacy of a category of property to be classified as a "general" legacy, it must be a legacy of only <u>one</u> of the categories of property enumerated in the Code article. The list of categories is exclusive. When the legacy is phrased in terms of overlapping categories of property, instead of only one category, the focus of the legacy is narrowed and by definition it is not a "general" legacy. Thus, a legacy of "all of my movables to X" is a general legacy, but a legacy of "all of my <u>corporeal</u> movables to X" is a particular legacy. It is narrower in scope, and by definition is a particular legacy under Article 1587. The test, of course, is the language or terminology used by the testator. Even though, as a practical matter, a legacy comprises, say, all of the testator's movables, unless the disposition is couched in those specific terms, that is, in <u>that</u> phraseology, it is not a "general" legacy. For example, if the testator leaves "all of my stocks and bonds to A," and he has no movable

property other than the stocks and bonds, the legacy is nevertheless a particular legacy, notwithstanding the fact that its practical effect is to be a legacy of "all" of his movable property. Similarly, if the testator leaves "Blackacre to A," and Blackacre is the only immovable property that he owns, then even though the incidental effect of the legacy is to be a legacy of "all of my immovable property," that is not the phraseology of the disposition and the disposition is not a "general" legacy. The terminology used by the testator, not the net effect or practical result of the disposition, determines the classification.

Art. 1587. Particular legacy

A legacy that is neither general nor universal is a particular legacy.

Source: New. See C.C. Art. 1625 (1870).

Comments

(a) This article reproduces the substance of Article 1625 of the Civil Code of 1870 concerning legacies by particular title. In one sense, however it defines the particular legacy in the negative by providing that it is any disposition that is not either of the other two types of legacies.

(b) The disposition of ownership of a specified asset to multiple legatees by fractions ("one-half of the Jones Road farm to A and one half to B") is a particular legacy, because it is a disposition of a certain object. That classification is not altered by the fact that the testator assigns a fractional interest in the thing to each legatee. A disposition of a right or interest in a certain object or a sum of money, such as the bequest of a usufruct of a sum of money or the usufruct of a specified asset, or the bequest of the naked ownership of that same asset, should also be classified as a particular legacy.

(c) A legacy of "all of my corporeal movables" is a particular legacy. See C.C. Art. 1586, Comment (f).

Art. 1588. Joint or separate legacy

A legacy to more than one person is either joint or separate. It is separate when the testator assigns shares and joint when he does not. Nevertheless, the testator may make a legacy joint or separate by expressly designating it as such.

Source: C.C. Arts. 1707 and 1708 (1870).

Comments

(a) This Article adopts a change in terminology from "conjoint" to "joint"; it does not change the law, however. The consequences of

lapse of a joint legacy under the revision are intended to be the same as the consequences of lapse of a conjoint legacy under Article 1707 of the Civil Code of 1870, except with regard to certain modifications to prefer descendants of children and siblings of the testator. See Article 1593.

(b) This Article does not in and of itself overrule the opinion in *Succession of Lambert*, 210 La. 636, 28 So. 2d 1 (1946), and the cases following it, holding that conjointness was destroyed if the testator used a phrase such as "share and share alike" or "to be equally divided between them," which did no more than re-state the legal consequences of his disposition. Under this revision, if the testator assigns shares the legacy is presumed to be "separate," as opposed to joint, so that the same result will be reached as under the Lambert decision, but the testator may nonetheless make the bequest joint in nature by using appropriate language to do so, and the mere use of the phrase "share and share alike" should not preclude that result. Some of the harshness of the Lambert rule is eliminated by this provision and by the coordinating provisions of Article 1593.

(c) The term "joint legacy" has been used to replace the term "conjoint legacy" in order to highlight the fact that new rules have been adopted. It was feared that, because of the familiarity of counsel with the term "conjoint," retaining it might lead lawyers or judges into error. The term "joint legacy" has no relationship to the term "joint obligation" used in Civil Code Articles 1786 et seq.

Art. 1589. Lapse of legacies

A legacy lapses when:

(1) The legatee predeceases the testator.

(2) The legatee is incapable of receiving at the death of the testator.

(3) The legacy is subject to a suspensive condition, and the condition can no longer be fulfilled or the legatee dies before fulfillment of the condition.

(4) The legatee is declared unworthy.

(5) The legacy is renounced, but only to the extent of the renunciation.

(6) The legacy is declared invalid.

(7) The legacy is declared null, as for example, for fraud, duress, or undue influence.

Source: New. See C.C. Arts. 1697-1699, 1703 (1870).

Comments

(a) This Article reproduces the substance of Articles 1697 through 1699 and 1703 of the Louisiana Civil Code of 1870. It does not change the law.

(b) This Article announces the principle that legacies are without effect in designated instances. The subsequent disposition of such legacies is governed by the following Articles.

(c) Incapacity of a legatee is governed by the articles on capacity of successors of the Louisiana Civil Code. See Louisiana Civil Code Articles 1470-83 (Rev. 1991).

(d) In general when the validity of a legacy depends upon the fulfillment of a condition or the completion of an uncertain term, the legacy lapses when that term or condition becomes impossible of fulfillment. Thus if the testator says, "I leave $10,000 to X if she has married Y at my death," the legacy lapses if the marriage has not taken place by the time of the testator's death. Properly viewed, the preceding bequest establishes a condition only to determine a status as of the time of the decedent's death, and in that sense it is neither suspensive nor resolutory. At the moment of the testator's death, a factual determination is made, namely whether X has married Y. A true suspensive condition would be better illustrated by the following example, in which the testator says, "I leave $10,000 to Cindy if the war ends within six months after my death." In that event, Cindy's bequest is suspensive, because "the obligation may not be enforced until the uncertain event occurs...." La. Civ. Code Art. 1767 (rev. 1984). If the war does not end within six months after the testator's death, then the condition is not met and Cindy does not take. When the condition is merely one that suspends the execution of a legacy, the legacy is valid. Thus if the testator says, "I leave $10,000 to X, to be paid him upon his 21st birthday," and X dies at age 19, the $10,000 belongs to X's heirs. See *Leonora, f.w.c. v. Scott*, 10 La. Ann. 651 (1855). Such a legacy is actually subject to a certain term, not a condition.

(e) Subpart (3) of this Article preserves the probable meaning of Article 2030 of the Civil Code of 1870, repealed by Act 331 of 1984, that the successors of a legatee had no right to a conditional legacy if the legatee died before the condition was fulfilled. Thus if a legacy is conditioned with language such as "to X, if my ship arrives in New Orleans within six months of my death," the legacy lapses if X dies before the ship arrives, i.e. before the event occurs. It also lapses if the ship sinks, since the condition can then no longer be fulfilled.

Art. 1590. Testamentary accretion

Testamentary accretion takes place when a legacy lapses.

Accretion takes place according to the testament, or, in the absence of a governing testamentary provision, according to the following Articles.

Source: New. Cf. C.C. Arts. 1706-1708 (1870).

Comments

(a) In this Article the term "accretion" has been expanded to include the disposition of all lapsed legacies, not just joint legacies. *Succession of Dugart*, 30 La. Ann. 268 (1878), is overruled on this point, as are Articles 1706-1708 of the Civil Code of 1870, to the extent that they mandate the Dugart interpretation.

(b) Although this Article refers to "a lapsed legacy", it should be obvious that the provision includes the lapsed share of a legatee under a joint legacy as well as a lapsed legacy where the legatee is the sole recipient of the bequest. Thus, a legacy of Blackacre "to A," when A predeceases the testator, would be a lapsed legacy, and a legacy of Blackacre "to A and B" jointly, where A predeceases the testator, would also be a lapsed legacy insofar as the undivided one-half interest in Blackacre that was left to A is concerned. In one sense it is only the legatee's share that lapses in the latter case, but in either event the predecease of the legatee causes a lapsed legacy. The second paragraph of this Article then refers the matter to the testament itself, because the testator may have covered the possibility of a lapsed legacy. In the event that the testament does not provide for that contingency, however, the provisions of the following articles would become effective.

Art. 1591. Accretion of particular and general legacies

When a particular or a general legacy lapses, accretion takes place in favor of the successor who, under the testament, would have received the thing if the legacy had not been made.

Source: C.C. Art. 1704 (1870).

Comment

This Article clarifies the rule of Article 1704 of the Civil Code of 1870. It does not change the law, but it is important to note the special treatment given a general legacy that is phrased as a "residue" or "balance," under C.C. Art. 1595, infra.

Art. 1592. Accretion among joint legatees

When a legacy to a joint legatee lapses, accretion takes place ratably in favor of the other joint legatees, except as provided in the following Article.

Source: C.C. Art. 1707 (1870).

Comments

(a) Upon death of one of the legatees under a joint legacy, the legacy lapses as provided for in Article 1588. This Article states the consequences that follow, but it does not change the law. It merely restates the provision of the first paragraph of Article 1707 of the Civil Code of 1870 without substantive change. Article 1707 does not specifically define the term, but Article 1588 provides such a definition and is in turn applied in this Article and the following Articles.

(b) The definitions of "joint legacy" and "testamentary accretion" are contained, respectively, in Articles 1588 and 1590 of this revision. With the addition of those definitions, and the exception made in the succeeding Article for certain preferred joint legatees, this Article re-states the provisions of Article 1707 of the Civil Code of 1870 without change.

(c) If the testator wishes to do so, he may specifically provide that the rule of testamentary accretion that would otherwise govern his disposition does not apply. For example, if he has given an item to A and B but does not wish A to receive B's part if B predeceases the testator, he may use a vulgar substitution. In this instance, he might provide "... to A and B, but if B should predecease me, his part to go to C."

Art. 1593. Exception to rule of testamentary accretion

If a legatee, joint or otherwise, is a child or sibling of the testator, or a descendant of a child or sibling of the testator, then to the extent that the legatee's interest in the legacy lapses other than by renunciation, accretion takes place in favor of his descendants by roots who were in existence at the time of the decedent's death. The provisions of this Article shall not apply to a legacy that is declared invalid or is declared null for fraud, duress, or undue influence. When

a legacy lapses because of renunciation the accretion is governed by Article 965.

Source: New.

Comments

(a) This Article changes the law by establishing a preferred group of legatees as to whom the law implies a vulgar substitution in favor of the descendants of such a legatee when his interest in the legacy lapses.

(b) This Article further changes the law by applying to joint (formerly "conjoint") legatees. If one of the joint legatees is within the preferred group of legatees (children or siblings of the testator, or their descendants), and predeceases the testator with descendants, those descendants succeed to the rights of the deceased legatee per stirpes. If, on the other hand, one of the joint legatees is outside the preferred group of legatees and predeceases the testator, the remaining joint legatees succeed to his share under the preceding Article.

(c) If the joint legacy is universal, the rights to which the preferred successors succeed include not only ownership of the share of property which would have belonged to the predeceased legatee, but also his right to take other legacies that have lapsed or are otherwise without effect under Article 1590.

(d) This Article establishes a species of anti-lapse statute for Louisiana, similar but not identical to Section 2-602 of the Uniform Probate Code.

(e) If a joint legatee within the preferred group predeceases the testator and dies without descendants, the general rule of testamentary accretion applies, rather than the exception in this article.

(f) The phrase "declared invalid" refers to the situation where the legacy is substantively invalid, as in the case of a prohibited substitution. The phrase does not refer to the legatee's being judicially divested of his rights, as for example by a declaration of unworthiness.

(g) The lapsed legacy can not accrete to a descendant by roots who is not in existence at the time of the decedent's death, that is, one who is conceived after the date of the decedent's death. For example, if the successor renounces his legacy, which causes it to lapse, and a descendant of the successor is conceived a year later, the after-conceived descendant has no rights under this article. The time as of which the descendants by roots of the successor are to be identified is the moment of death of the decedent involved. This rule is consistent with Civil Code Article 935, under which the date of the decedent's death is the operative date, also.

(h) The exception made in this article for lapses that occur by reason of renunciation is intended to reconcile the provisions of this article with Article 965 and to avoid any inconsistency between the two

articles. Article 965, which applies only to renunciation in a testate succession, contains a broader scope of protection for descendants than this article contains. This Article only protects descendants of children and siblings of the testator, whereas Article 965 applies to all legatees, even those who are not related by consanguinity to the testator. Clearly, if a lapse occurs by renunciation, and the renouncing legatee is a child or sibling of the testator, both articles would reach the same result.

Art. 1594. Reserved

Art. 1595. Accretion to universal legatee

All legacies that lapse, and are not disposed of under the preceding Articles, accrete ratably to the universal legatees.

When a general legacy is phrased as a residue or balance of the estate without specifying that the residue or balance is the remaining fraction or a certain portion of the estate after the other general legacies, even though that is its effect, it shall be treated as a universal legacy for purposes of accretion under this article.

Source: New. See C.C. Art. 1606 (1870).

Comments

(a) This Article establishes a broad anti-lapse provision, preferring universal legatees and certain general legatees over devolution by intestacy.

(b) This Article retains the general substance of the former article dealing with universal legacies and codifies the jurisprudential principle recognizing the most important consequence of such a legacy: the right of the legatee to take lapsed legacies and others that are of no effect. See *Succession of Burnside*, 35 La. Ann. 705 (1883); *City of New Orleans v. Hardie*, 43 La. Ann. 251, 9 So. 12 (1891); *Willis v. McKeithen*, 184 So. 2d 748 (La. App. 2d Cir. 1966).

(c) The concept of Article 1704 of the Civil Code of 1870 has been clarified in this revision, with express provision for the lapse of a particular legacy being made in Article 1591 of this revision, and in the catch-all provision provided in this Article. In fact, the substance of both of these Articles is a matter of testamentary choice, because the testator himself can provide specifically what will happen in the event of lapse of a legacy. In the absence of such a testamentary provision, these Articles set forth a rational scheme that should be easy to understand.

(d) If a universal legatee is not within the preferred group of legatees under the provisions of Article 1593, then his predecease gives

to his co-universal legatees both the right to his portion of the universal legacy itself and the right to take lapsed legacies, which is inherent in the universal nature of the legacy.

(e) If a general legacy lapses and there is no "vulgar substitution" that provides for another legatee to take the legacy, then in the absence of the second paragraph in this article, the accretion would be to the intestate successors. See C.C. Art. 1591, supra. The purpose of the second paragraph is to modify the application of that rule in certain instances. By the nature of their definitions a testament cannot contain both a general legacy and a universal legacy. If there is a general legacy of "all of my movables to A," and no vulgar substitution to provide for an alternative legatee if A predeceases the testator, then if A dies before the testator, the legacy of all the movables lapses and will fall by intestacy because the accretion of a lapsed general legacy could not flow to a universal legacy. The application of the second paragraph can be best illustrated in the following examples: Suppose the testament leaves "10% of the estate" to A, and "90% of the estate" to B. The two legacies are both general legacies, and if either legacy lapses, it does not accrete to the other legatee, but passes by intestacy. On the other hand, suppose that the legacies are "10% to A" and "the balance of my estate" to B. In that situation if A predeceases the testator, the legacy does accrete to B, under the second paragraph. The legacy to B is by definition a general legacy, not a universal legacy, but for purposes of accretion under this article, a policy decision has been made to provide for accretion to a general legacy as if the general legacy were a universal legacy when it is couched or phrased in terms of a "residue" or "balance." Several reasons support that policy decision. Essentially, the rule is based on practice and experience; and an effort to effectuate the testator's intent. The Redactors believe that when a testator has taken the time and effort to execute a testament, it is more likely than not that the testator would prefer that the estate devolve according to the testament rather than the rules of intestacy. Also, the view of experienced practitioners is that a testator who uses words such as "residue," "rest," "balance," or similar expressions, generally believes that if anyone else does not take under the will, the legatee of the "rest," "residue," or "remainder" of the estate should take it. The same implication would not prevail if the testator has more definitively assigned portions, as in saying "I leave 10% of my estate to A, and 90% of my estate to B." The variance from that expression coupled with use of the words "rest," "residue," or "remainder" implies an intent, or indeed an indirect kind of vulgar substitution, by which the legatee of the "residue" should take the share of the legatee whose legacy has lapsed. As a policy matter, it is thought that the testator would more likely than not want any lapsed legacies to go to a designated legatee of the "residue" of his estate rather than to his heirs by intestacy. For that reason, instead of making this a presumption or rule of evidence, the rule is elevated to code status and made a principle of law. As a special rule, it is an exception to the general rules regarding accretion.

Another example of a general legacy that qualifies under the second paragraph of this article is: "I leave all of my community property to Mary. I leave the balance of my estate to Fran." Since the legacy to Mary is a general legacy, the legacy to Fran is technically a

general legacy, also, because it is a legacy of a fraction or certain proportion of the estate. The legacy to Fran is tantamount to being a legacy of "all of my separate property," which would also be a general legacy. Under the second paragraph of this article, if Mary predeceases the testator, the legacy to Mary accretes to Fran as if the legacy to Fran were a residuary legacy.

Another example of the operation of the second paragraph is as follows: "I leave all of my immovable property to Cindy, and I leave the balance of my estate to Max." The bequest to Max is a general legacy, but under the second paragraph, if Cindy predeceases the testator, the accretion is to Max as if the legacy to him were a residuary legacy.

The policy decision of the second paragraph as stated above is to favor testacy over intestacy, and to presume that by leaving the "balance" of the estate rather than expressly stating "all of my separate property" or "all of my movables," the testator has indirectly manifested an intent to favor his testamentary selection of a legatee rather than have any of his property pass by intestacy.

Art. 1596. Accretion to intestate successors

Any portion of the estate not disposed of under the foregoing rules devolves by intestacy.

Source: C.C. Art. 1709 (1870).

Comment

This Article reproduces the substance and clarifies the provisions of Article 1709 of the Civil Code of 1870. It does not change the law.

Art. 1597. Loss, extinction, or destruction of property given

A legacy is extinguished to the extent that property forming all or part of the legacy is lost, extinguished, or destroyed before the death of the testator. However, the legatee is entitled to any part of the property that remains and to any uncollected insurance proceeds attributable to the loss, extinction, or destruction, and to the testator's right of action against any person liable for the loss, extinction, or destruction.

Source: New. See C.C. Arts. 615 and 617 and C.C. Art. 1643 (1870).

Comments

(a) While most of this Article is new, the new provisions are in keeping with the principles of Civil Code Article 617 relative to usufruct over property that is lost, extinguished or destroyed, but as to which insurance proceeds are due. The first clause of the second sentence of the Article, on partial destruction, reproduces the provision on partial destruction found in Article 1643 of the Civil Code of 1870.

(b) This new Article does not adopt the principle of Civil Code Article 615 relative to usufruct over property that is converted to money or other property (for example, by expropriation or corporate liquidation) without an act of the usufructuary, or that otherwise changes form where the change is not brought about by an act of the usufructuary. Under usufruct law, in such cases the usufruct does not terminate but attaches to the money or other property. Under this Article the effects of changes brought about by changes of form or conversions into money or other property without an act of the testator, or the sale or donation of the property, are governed by the rules on revocation of legacies.

(c) This Article recognizes the two concepts of total destruction and partial destruction, as to which there are close but not identical counterparts in the Louisiana law of lease. It does not treat the area of damage, where there may be an injury to property that is not so severe as to constitute a partial destruction.

(d) Since this Article by its nature applies only to events that occur prior to the date of the testator's death, and not to events occurring thereafter, one should be careful not to confuse the effects of this Article with the results that occur if there is damage, partial destruction, or total destruction after the testator's death. In those instances, entirely different issues arise, which may be governed by other principles of law, such as the duty of a succession representative to preserve and maintain property of the estate, and the duty to insure property pending the administration of the estate.

Art. 1598. Right of legatees to fruits and products

All legacies, whether particular, general, or universal, include the fruits and products attributable to the object of the legacy from the date of death, but the right of any legatee to distribution under this Article is subject to administration of the succession.

Nevertheless, the legatee of a specified amount of money is entitled to interest on it, at a reasonable rate, beginning one year after the testator's death, but the executor may, by contradictory proceedings with the legatee and upon good cause shown, obtain an extension of

time for such interest to begin to accrue and for such other modification with regard to payment of interest as the court deems appropriate. If, however, the legacy is subject to a usufruct for life of a surviving spouse or is held in trust subject to an income interest for life, to or for the benefit of a surviving spouse, the spouse shall be entitled to interest on the money from the date of death at a reasonable rate.

Source: New. See C.C. Arts. 1608, 1614, 1626-1630, 1631 and 1632 (1870).

Comments

(a) This Article combines the provisions of a number of articles of the Civil Code of 1870, retaining some principles and revising others.

(b) The concept that a legatee is the owner of his legacy from the moment of death, regardless of the nature of the legacy, and his ultimate right to the fruits of the legacy, have been retained.

(c) Though legatees are entitled to the natural and civil fruits of their legacies, the practicalities of succession administration require some modifications of that right. To the extent that a particular asset given is actually producing revenues and these can be identified and segregated, there is no reason to deny them to the legatee when his legacy is eventually delivered. For legacies of cash, however, there is no requirement that the succession representative undertake an investment program to produce interest, particularly since the cash may not be readily available at death. A one-year period is granted to the succession representative to arrange for payment of the cash legacy, and thereafter interest would be due. Such a waiting period is fairly common in other states. See Section 3-904 of the Uniform Probate Code (one year from appointment of succession representative). The article uses the term "reasonable" to refer to the rate of interest to permit the court to fix the rate realistically and at an amount that may be different from the legal rate of interest.

(d) For general and universal legatees, such fruits as are actually produced and are attributable to the assets encompassed by their legacies are due to them in their respective proportions. In addition, any expenses directly attributable to those assets are their responsibility.

(e) Within the principles of this Article, legatees retain the right under Article 3191 of the Code of Civil Procedure to assert a breach of the fiduciary duty of the succession representative.

(f) This Article provides a rule in the absence of a provision by the testator. A testator may specifically provide that no interest is due on a particular legacy regardless of the elapsed time period since his death, or that interest shall begin to accrue earlier than one year.

(g) If there is an administration, there is no right to distribution prior to the completion of the administration of the succession. Consistent with the principles of Article 3372 of the Code of Civil Procedure, a legatee may proceed contradictorily with the executor to seek possession of all or part of his legacy.

(h) The Civil Code of 1870 had no provision as to the right of a legatee by universal title (now a general legatee) to the fruits of his legacy from the day of death, but the French have apparently accorded him that right. See Planiol, Vol. 3, No. 2775.

(i) The demand for delivery of the legacy with its role in the determination of the beginning point for accounting for the fruits of the legacy has been suppressed as unnecessary in light of modern succession procedure and the change of the substantive rule effected by this Article.

(j) Mineral substances extracted from the ground and the proceeds of mineral rights are not fruits, because their production results in depletion of the property. Revision Comments to Article 551 (Comment (c)). By virtue of other provisions of law, or by virtue of the testamentary provisions, such mineral rights may belong to the usufructuary, but in any event, although they would not be considered as natural or civil fruits, they are "products" within the purview of this Article.

(k) The last sentence of this Article intentionally refers to a legacy of money that is "subject to a usufruct" of a surviving spouse or that is "held in trust and subject to an income interest" for the benefit of the surviving spouse. It would be inappropriate to state merely that the legacy is a usufruct for life. The legacy is both a naked ownership interest of a sum of money and a usufruct for life. Similarly, the legacy in trust is not only of an income interest; it is an amount or sum of cash that is held in trust subject to an income interest for life. The first operative fact of the last sentence is that the legacy is one of cash, whether in trust or subject to a usufruct, so that the usufructuary has received a legacy of a usufruct of cash or the income beneficiary has received a legacy of an income interest in trust of cash. It should be noted, too, that the usufructuary or the income beneficiary must be a surviving spouse to be entitled to interest on the money from the date of death at a reasonable rate. One of the principal reasons for such a provision is to preserve the ability to obtain federal tax treatment of either interest as a possible "qualifying terminable interest," which, under applicable federal tax regulations, requires that the usufructuary receive the income from the date of death of the decedent. See Internal Revenue Code, 26 U.S.C. § 2702, Federal Tax Regulations, C.F.R. 25.2519-1.

Art. 1599. Payment of legacies, preference of payment

If the testator has not expressly declared a preference in the payment of legacies, the preference shall be governed by the following Articles.

Source: New.

Comment

This article is new. It does not change the law, however. It codifies a principle implicit under prior law.

Art. 1600. Particular legacies; preference of payment

A particular legacy must be discharged in preference to all others.

Source: C.C. Art. 1634 (1870).

Comment

This Article reproduces the substance of Article 1634 of the Louisiana Civil Code (1870).

Art. 1601. Preference of payment among particular legacies

If the property remaining after payment of the debts and satisfaction of the legitime proves insufficient to discharge all particular legacies, the legacies of specific things must be discharged first and then the legacies of groups and collections of things. Any remaining property must be applied toward the discharge of legacies of money, to be divided among the legatees of money in proportion to the amounts of their legacies. When a legacy of money is expressly declared to be in recompense for services, it shall be paid in preference to all other legacies of money.

Source: C.C. Art. 1635 (1870).

Comment

This Article reproduces the substance of Article 1635 of the Louisiana Civil Code of 1870. It does not change the law. The phrase "property remaining after payment of the debts" is used in preference to the term "the effects" used in the predecessor Article in order to make it clear that payment of debts must precede payment of legacies.

The provision of the source Article giving preference to a legacy that is expressly declared to be in recompense for services has been retained, using the identical language. No change in the law is intended.

Art. 1602. Discharge of an unsatisfied particular legacy

Intestate successors and general and universal legatees are personally bound to discharge an unpaid particular legacy, each in proportion to the part of the estate that he receives.

Source: C.C. Art. 1633 (1870).

Comments

(a) This Article reproduces the substance of Article 1633 of the Louisiana Civil Code of 1870. It does not change the law. It reflects changes in terminology with respect to the former categories of "legatees by universal title" and "legatees by particular title."

(b) The second paragraph of the predecessor Article concerning the liability of the heirs "by mortgage for the whole, to the amount of the value of the immovable property of the succession withheld by them" is not retained in this Article because the concept is adequately covered in the separation of patrimony statutes, R.S. 9:5011, et seq.

(c) The word "heirs" in the predecessor Article is replaced in this Article by a reference to those persons whose legacies or inheritance by intestacy have responsibility for the debts of the deceased.

(d) The substance of the revised Article is consistent with the jurisprudential view of the predecessor Article over the years. *Jones v. Mason*, 124 So. 2d 795 (La. App. 2d Cir. 1960) (action for payment of legacy after heirs are sent into possession is against heirs, not discharged administrator); *Baron v. Vaum*, 44 La. Ann. 295, 10 So. 766 (1892); *Succession of Dupuy*, 33 La. Ann. 277 (1881); *Anderson's Executors v. Anderson's Heirs*, 10 La. 29 (1836). See also C.C. Art. 1381 (1870) (reappearance of left-out heir after partition is cause for re-opening and re-distribution).

(e) It should be obvious that this Article applies only where successors have been put in possession, and can apply only to unpaid

cash legacies. If the bequest consists of a specific thing (or "certain object" as it is called in existing law), then either the object exists and is owned by the testator at the time of his death or it does not. If he does not own the thing (for example, if he has sold or donated it during his lifetime), then the legacy lapses and there is no need to assign responsibility to any other successors to discharge that legacy. On the other hand, if the property is found in the estate, then it belongs to the particular legatee. See Article 935. If the succession is under administration, the succession representative will be obligated to deliver the thing to the particular legatee. If it has been distributed to someone erroneously, as for example in the situation where A is placed in possession and a subsequent will or codicil is found leaving the property to B, once it is determined that the subsequent codicil is valid and prevails, the particular legatee under it (here, B) will be able to obtain possession from A of the property in accordance with other rules of the general law. There is no need to provide for successors who have been put in possession when a particular legacy other than cash remains undischarged. It should, however, be noted that when no one has been put in possession, there are internal rules that determine which general and universal legatees bear the brunt of discharging particular legacies. By way of example, if the testator leaves 100 shares of General Motors stock to A, which is a particular legacy, and he leaves "all of my movables" to B, and "all of my immovables to C," then obviously it is B whose legacy is diminished or impaired by the bequest of stock to A, since the stock of General Motors is movable property and diminishes what B will receive. It does not affect C and would not have to be discharged by C. Thus, the responsibility of successors among themselves for the discharge of legacies is governed by rules of preference, but those rules are different from the principle enunciated in this Article.

(f) In many parts of the state it is common practice not to have an administration of an estate, especially when the heirs wish to avoid the time and expense of such an administration. They may be sent into possession without an administration, but when they do, they are required to discharge all of the legacies that have priority over their own. This Article emphasizes the importance of the concept of the duty to discharge a preferred legacy. Nonetheless, so long as the legatee who is obligated to discharge another legacy does not take possession of property of the estate, he has no personal liability for failure to do so. See C.C. Art 1604, *infra*.

Art. 1603. Reserved.

Art. 1604. Discharge of legacies, limitation of liability

In all the foregoing instances, a successor who is obligated to discharge a legacy is personally liable for his failure to do so only to the extent of the value of the property of the estate that he receives, valued as of the time of receipt. He is not personally liable to other successors by way of contribution or reimbursement for any greater amount.

Comment

(a) This revision continues the historic civil law approach to the duty of successors to "discharge" legacies. When an estate is under administration, the succession representative has possession of the property of the estate and is obviously the person obligated to see that all debts are paid and all legacies discharged. See Art. 3211 of the Code of Civil Procedure. But not all estates are administered, and even in an estate that has been administered, there may be no compelling reason to withhold placing a general legatee or a universal legatee in possession of his legacy. When a general legatee or a universal legatee takes possession of property of the estate, his obligation to "discharge" the particular legacies becomes more significant. Although the obligation is a personal obligation in the sense that it is imposed on the legatee himself, in a practical sense it is primarily an obligation imposed upon the property of the estate, and no one should be confused by the *in rem* nature of the obligation. If a general legatee or a universal legatee never takes possession of any property of the estate, he incurs no personal liability and therefore has essentially no "duty" to see that the particular legacy is discharged. Thus, it is in actuality the property of the estate that is used, so to speak, to discharge the particular legacy. In the scheme of the Code, particular legacies have preference over general and universal legacies. C.C. Art. 1600. This Article, and the Articles that precede it as well as those that follow it, help implement that scheme. See Comments to C. C. Art. 1602, *supra*.

(b) Article 3031 of the Code of Civil Procedure is being amended as part of this revision to permit general and universal legatees to be sent into possession of their legacies without requiring that particular legatees join in the petition for possession. The general and universal legatees who utilize this change in the procedural law and receive property of the estate are personally obligated to discharge those legacies, and if they fail to do so, they are exposed to personal liability. Consistent with the rules adopted elsewhere in this revision that limit the liability of successors to creditors of the estate, this article provides for a ceiling on the extent of that liability, which is fixed at the value of the property received by the legatees, valued at the time of receipt.

(c) This Article logically follows the provisions of the immediately preceding Articles, and the comments to C.C. Art. 1602 apply with equal force here. This Article, however, also enunciates the limitation on personal liability that is incurred by a general or universal legatee who takes possession of property and then fails to discharge the legacies that he is obligated to discharge. Since there may be more than one general or universal legatee, it is possible that a particular legacy may be discharged by only one of those legatees, but since those legatees are obligated to discharge it on a pro rata basis, the legatee who discharges the particular legacy may be entitled to contribution or in certain instances reimbursement from the other legatees. For example, a general legatee who satisfies a particular legacy may be entitled to reimbursement from the intestate successor or other general legatee who should have satisfied it in its entirety. Whether the claim

is for contribution or reimbursement, under any circumstances the legatee who owes the contribution or reimbursement cannot be personally liable for an amount greater than the value of the property that he has received from the estate.

(d) This Article is consistent with the principle expressed in Article 1425 as a corollary of Article 1416 concerning limitation of the liability of successors for estate debts. According to the principle of Article 1425, a successor cannot be held liable for contribution or reimbursement for an amount greater than the value of the property received by him.

SECTION 5. PROBATE OF TESTAMENTS

Art. 1605. Probate of testament

A testament has no effect unless it is probated in accordance with the procedures and requisites of the Code of Civil Procedure.

Source: C.C. Art. 1644; see also Arts. 1645, 1646, 1647.

Comments

(a) Articles 1644 through 1647 of the Civil Code of 1870 concern the procedure for probate of testaments following adequate proof of death. To the extent that their substance is already contained in Articles 2851 et seq. of the Code of Civil Procedure, they do not need to be revised or reenacted. There is, moreover, ample substantive law adopted in the revision in the area of "opening of succession" with appropriate comments. See Chapter 5, First Part, "Commencement of Succession," supra.

(b) When a valid testament is probated, it is effective as of the date of the testator's death. See Article 935.

(c) The relevant prescriptive period for probating a testament is 5 years from the date of judicial opening of the succession of the decedent. See R.S. 9:5643.

(d) Articles 1645-1647 of the Civil Code of 1870 have been suppressed as unnecessary in light of the detailed regulation of this area provided in the Code of Civil Procedure.

SECTION 6. REVOCATION OF TESTAMENTS AND LEGACIES

Art. 1606. Testator's right of revocation

A testator may revoke his testament at any time. The right of revocation may not be renounced.

Source: C.C. Art. 1690 (1870).

Comment

This Article reproduces the substance of Article 1690 of the Civil Code of 1870. It does not change the law.

Art. 1607. Revocation of entire testament by testator

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.

Source: New; See C.C. Arts. 1691-92, 1694 (1870).

Comment

This Article supplements the provisions of its predecessor articles by adding new methods of revoking a testament, but otherwise it restates the provisions without substantive change, except for the deletion of the unnecessary division into "express" and "tacit" revocations. Paragraph (1) continues the supposition that physical destruction of the entire instrument indicates that a revocation was intended. Paragraph (2) provides for revocation by subsequent will, but it expands the ability to revoke by adding the use of an authentic act to do so. The more significant new specific ground for revocation of an entire testament is in paragraph (3) which authorizes revocation by a signed writing that identifies and clearly revokes the testament. This new ground is added to permit a finding of revocation when the testator's intent has been made clear in a writing that he has written by hand and signed but which may not be dated. By definition such a signed but undated writing is not in the form of a testament. Nevertheless, such a clear intent to revoke should be honored. As a matter of policy, the formality required to dispose of property is greater than the formality needed to revoke a prior disposition. For example, if there were a contest between two undated testaments, it would be impossible to determine which of them prevailed. But when revocation is involved, the undated writing must of necessity be subsequent to the testament it seeks to revoke, and dating is therefore less significant than a clear identification of the testament to be revoked and a clear manifestation of the intention to revoke. See Comments to Article 1610, infra. To the extent that the rationale of *Succession of Melancon*, 330 So. 2d 679 (La. App. 3rd Cir. 1976), would deny that a revocation

would occur by a signed and handwritten notation to that effect that did not have a date, that decision is overruled.

Art. 1608. Revocation of a legacy or other testamentary provision

Revocation of a legacy or other testamentary provision occurs when the testator:

(1) So declares in one of the forms prescribed for testaments.

(2) Makes a subsequent incompatible testamentary disposition or provision.

(3) Makes a subsequent inter vivos disposition of the thing that is the object of the legacy and does not reacquire it.

(4) Clearly revokes the provision or legacy by a signed writing on the testament itself.

(5) Is divorced from the legatee after the testament is executed and at the time of his death, unless the testator provides to the contrary. Testamentary designations or appointments of a spouse are revoked under the same circumstances.

Source: C.C. Arts. 1691, 1693, 1695-1696 (1870).

Comments

(a) This Article combines and restates the provisions of the predecessor Articles of the Civil Code of 1870 with some substantive change, including the deletion of the unnecessary division into "express" and "tacit" revocations.

(b) The statement in Article 1691 of the Civil Code of 1870 that a revocation results from "some act which supposes a change of will" has not been retained as written, because it was too vague and general and its acceptance by the judiciary was inconsistent. In *Succession of Muh*, 35 La. Ann. 394 (1883), the court used the phrase to find revocation of an entire testament by the obliteration of the testator's signature on the document. But in *Succession of Melancon*, 330 So. 2d 679 (La. App. 3d Cir. 1976), the lining out of certain legacies accompanied by the notation in the hand of the testator that the legacy was revoked, and his signature beneath that, was held insufficient to constitute a tacit revocation. It was "some act which supposes a change of will," but the court held that since it was not dated, it was not in one of the forms prescribed for testaments. The text of this Article, like Article 1607, is intended to overrule Melancon and to specify the grounds upon which revocation may be found.

(c) The former ground of revocation that applied when an inconsistent disposition of the thing was made by sale or donation, even if null, has not been continued. If the sale, donation or other disposition is valid, the transferee rather than the testator is the owner of the property, and the legacy cannot be given effect. As a technical matter, the disposition is null, and revocation is not the correct approach nor an appropriate legal issue.

(d) The provisions of this and the preceding Article make it unnecessary to continue the provisions of the Civil Code of 1870 relative to general and particular revocations.

(e) This Article is broader than the predecessor Articles because it includes revocation of "other testamentary provisions." A testament customarily includes many important provisions in addition to legacies, such as those designating representatives like executors, tutors, and trustees. Furthermore, the will may provide for short-term survivorship, which is a "testamentary provision" but not a legacy. A codicil may revoke the designation of an executor but not necessarily dispose of property. The new language addresses revocations of such provisions and thus modernizes the traditional rule.

(f) An important new provision in item (5) of this Article covers the situation of divorce that is not otherwise covered by the testament itself. The new rule recognizes that when a testator becomes divorced from a spouse, more often than not, he does not want bequests to that spouse to be maintained, and would very likely not want that spouse to serve as the executor or trustee. The new rule is consistent with Louisiana domestic relations law by providing that the divorce must have occurred after the testament was executed, and that there must have been no reconciliation. Furthermore, the testator may provide to the contrary, so that even though the parties may be divorced, the testator may make a bequest to the spouse, or if he wants that spouse to serve in a representative capacity he may so provide. Most states have adopted similar provisions, and this provision fills a gap in the prior law.

(g) As provided in Article 1609, in order to produce effects under this article, the revocations involved in Sections 1-4 must be effective at the time of the testator's death.

Art. 1609. Revocation of juridical act prior to testator's death

The revocation of a testament, legacy, or other testamentary provision that is made in any manner other than physical destruction of the testament, subsequent inter vivos disposition or divorce is not effective if the revocation itself is revoked prior to the testator's death.

Source: New.

Comment

This Article recognizes the fundamental rule that all testaments are ambulatory. The purpose of the article is to assure that the rule that testaments are ambulatory will also apply to undated but signed writings, since the new law permits an undated but signed writing to revoke a testament or legacy or other testamentary provision. See Arts. 1607 and 1608.

Art. 1610. Other modifications

Any other modification of a testament must be in one of the forms prescribed for testaments.

Source: New.

Comment

Although this Article is new, it must be read in conjunction with Article 1608. A distinction must be made between the revocation of a legacy or a testamentary provision, and the implementation of a new legacy or a new testamentary provision. The rules are relaxed to permit the revocation of a legacy or a testamentary provision by a signed writing that is not dated but which clearly revokes the will, the provision, or the legacy. Where a replacement provision is called for, whether it is a new legacy or a new designation, the formalities should be more stringent. For that reason, this Article continues in place the rule that any modification or amendment other than revocation of a testamentary provision must be in one of the forms prescribed for testaments. For example, if a document containing such a modification were written and signed by the testator it would also have to be dated in order to be in the form prescribed for an olographic testament. The difference between these rules can be shown by the following illustration: suppose that a testator executes a will naming A as the executor. Subsequently, he writes on the testament: "I hereby revoke the designation of A as executor, and I name and appoint B as the executor of my estate." The writing is not dated although it is written by the hand of the testator and is signed by him. Under Article 1608(4), the revocation will be effective and A will not be permitted to serve as executor under the testament. The appointment of B, however, will not be effective, because the "signed writing on the testament" is not in proper form for a testament, which requires that it not only be in writing and signed by the testator, but also that it be dated.

SECTION 7. RULES FOR THE INTERPRETATION OF LEGACIES

Art. 1611. Intent of testator controls

The intent of the testator controls the interpretation of his testament. If the language of the testament is clear, its letter is not to be disregarded under the pretext of pursuing its spirit. The following

rules for interpretation apply only when the testator's intent cannot be ascertained from the language of the testament. In applying these rules, the court may be aided by any competent evidence.

Source: C.C. Arts. 9 (rev. 1987), 1712 and 1715 (1870); see Uniform Probate Code, §2-603.

Comments

(a) This Article reproduces the substance Articles 1712 and 1715 of the Louisiana Civil Code (1870). It does not change the law. It emphasizes the strong rule, long recognized in the jurisprudence, that the intent of the testator is the single most important guideline in the interpretation of a testament. It clarifies the role of the other Articles of this section as supplementary in instances of ambiguity or vagueness.

(b) Although the intent of the testator controls the effects of his dispositions, it obviously can do so only to the extent that the dispositions are permissible under Louisiana law. The testator's intent to write a prohibited disposition cannot override substantive law that prevents it.

(c) When the identity of a legatee is ambiguous, the court should give effect to the testator's probable intent by awarding the legacy to the person who had the closer friendship with the deceased. Any competent evidence that could resolve the uncertainty, however, should of course be considered. See *Succession of Baskin*, 349 So. 2d 931 (La. App. 1st Cir. 1977), cert. den. 350 So. 2d 1211 (La. 1977) (reference to legatee who had pre-deceased the testatrix shown not to be reference to adopted son of same name); *Succession of Rome*, 169 So. 2d 665 (La. App. 1st Cir. 1964), cert. den. 171 So. 2d 478 (La. 1965) (reference to "Helen" shown to be reference to claimant by testimony of friends of testatrix, and by fact that no other relative or friend bore that name); *Succession of Tilton*, 133 La. 435, 63 So. 99 (1913) (legacy to "home for insane" shown by extrinsic evidence to be specific state hospital in which testatrix had particular interest and which she believed to be only such hospital in state).

Art. 1612. Preference for interpretation that gives effect

A disposition should be interpreted in a sense in which it can have effect, rather than in one in which it can have none.

Source: C.C. Art. 1713 (1870).

Comment

This Article reproduces the substance Article 1713 of the Louisiana Civil Code (1870). It does not change the law. The Article is consistent with the customary position taken elsewhere in the Civil Code. See C.C. Art. 2049 (rev. 1984) (agreement to be interpreted with a meaning that renders it effective and not with one that renders it ineffective). This Article also comports with the general jurisprudential

rule for interpretation of statutes. Conley v. City of Shreveport, 216 La. 78, 43 So. 2d 223 (1950); Macon v. Costa, 420 So. 2d 480 (La. App. 4th Cir. 1982).

Art. 1613. Mistake in identification of object bequeathed

If the identification of an object given is unclear or erroneous, the disposition is nonetheless effective if it can be ascertained what object the testator intended to give. If it cannot be ascertained whether a greater or lesser quantity was intended, it must be decided for the lesser.

Source: C.C. Arts. 1716, 1717 (1870).

Comments

(a) This Article combines and restates the provisions of Civil Code Articles 1716 and 1717 (1870). It does not change the law.

(b) That the testator may have erroneously named the object given and thus himself created the ambiguity is of no moment, so long as the evidence establishes what the object must have been.

(c) If the ambiguity is over the precise amount of the legacy, this article expresses the rule in obscuris, quod minimum est sequimur often followed in the decisions. See Robouam's Heirs v. Robouam's Executor, 12 La. 73 (1838) (two testaments: first with legacy of $500 to each of two brothers, with statement that in event of predecease of either, his $500 should go to the other; second with same legacies but no statement about predecease; only $500 legacies upheld, not $1,000 cumulated from two testaments); *Succession of Bobb*, 41 La. Ann. 247, 5 So. 757 (1889) (disposition might have made legatees beneficiaries of residuum of entire estate, or only of fund derived from sale of specific asset; latter interpretation preferred).

Art. 1614. Interpretation as to after-acquired property

Absent a clear expression of a contrary intention, testamentary dispositions shall be interpreted to refer to the property that the testator owns at his death.

Source: C.C. Arts. 1720, 1721 and 1722 (1870).

Comment

This Article combines and restates the provisions of Articles 1720, 1721, and 1722 of the Civil Code of 1870, and it significantly changes their substance. The former rule provided that a disposition

that is silent as to time, or one that is written in the present or past tense, applies only to property owned at the time of execution of the testament. The new Article takes the opposite approach and provides that a disposition includes all the property of which the testator dies possessed unless the contrary clearly appears from the instrument, which is believed to be more realistic and more likely to reflect the testator's true intent. It is also more expressive of the rule actually followed by the Louisiana courts, which have generally ignored the provisions of Articles 1720, 1721, and 1722 of the Civil Code of 1870. See, e.g., *Succession of Burnside*, 35 La. Ann. 708 (1833), and authorities therein cited. But see *Succession of Van* Baast, 140 So. 2d 506 (La. App. 1st Cir. 1962). In *Succession of Quintero*, 209 La. 279, 24 So. 2d 589 (La. 1946) the testament disposed of 20 shares of a corporation (by specific number) which the testatrix owned at the time of execution of the testament, but the court also included in the disposition an additional 20 shares resulting from a 100% stock dividend that accrued between the time of execution of the testament and the time of the testatrix's death.

Art. 1615. Contradictory provisions

When a testament contains contradictory provisions, the one written last prevails. Nonetheless, when the testament contains a legacy of a collection or a group of objects and also a legacy of some or all of the same objects, the legacy of some or all of the objects prevails.

Source: C.C. Arts. 1719 and 1723 (1870).

Comments

(a) This Article reproduces and combines the provisions of Civil Code Articles 1719 and 1723. It does not change the law.

(b) The second sentence of this Article clarifies that there is no contradiction between particular legacies and a general legacy of the same kind. The article follows the rule of choosing the specific over the general. Thus, if the testator leaves "all the books in my collection" to A, but he leaves "the Iliad and the Odyssey" to B, the particular legacy to B prevails and he is entitled to the latter two works.

Art. 1616. Legacy to creditor

A legacy to a creditor is not applied toward satisfaction of the debt unless the testator clearly so indicates.

Source: C.C. Art. 1641 (1870).

Comment

This Article reproduces the substance of Article 1641 of the Louisiana Civil Code (1870). It does not change the law. Obviously the testator may overcome the presumption, by "clearly so indicating," which is illustrated in cases such as *Succession of Jackson*, 47 La. Ann. 1089, 17 So. 598 (1895). There is no need to retain the second part of Article 1641 (1870) regarding wages to a servant, which is an archaic provision in today's society.

Section 2. Civil Code Art. 3506(28) is hereby amended and reenacted to read as follows:

Art. 3506. General definitions of terms

Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:

* * *

28. Successor.--Successor is, generally speaking, the person who takes the place of another.

There are in law two sorts of successors: the universal successor, such as the heir, the universal legatee, and the general legatee; and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee.

The universal successor represents the person of the deceased, and succeeds to all his rights and charges.

The particular successor succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him.

Section 3. Code of Civil Procedure Arts. 427, 2825, 2826, 2852, 2856, 2891, 2932, 2951(A)(1) and (B), 3001, 3004, 3031, 3228, 3301 through 3304, 3332, 3361, 3362, 3371, 3393, and 3394 are hereby amended and reenacted to read as follows:

Art. 427. Action against obligor's heirs or legatees

An action to enforce an obligation, if the obligor is dead, may be brought against the heirs, universal legatees, or general legatees, who have accepted his succession, except as otherwise provided by law. The liability of these heirs and legatees is determined by the provisions of the Civil Code.

* * *

Art. 2825. Costs

In all succession proceedings conducted ex parte, the court costs are to be paid as administration expenses. In all contradictory succession proceedings, the court costs are to be paid by the party cast, unless the court directs otherwise.

Art. 2826. Definition of certain terms used in Book VI

Except where the context clearly indicates otherwise, as used in the Articles of this Book:

(1) "Residuary legatee" includes a recipient of a universal legacy or a general legacy, and also includes a residuary heir.

(2) "Residuary heir" is a successor who inherits the residue of a testamentary succession in default of a valid disposition thereof by the testator.

(3) "Succession representative" includes an administrator, provisional administrator, administrator of a vacant succession, executor, and dative testamentary executor.

* * *

Art. 2852. Documents submitted with petition for probate

The petitioner shall submit with his petition evidence of the death of the decedent, and of all other facts necessary to establish the jurisdiction of the court.

If the testament is one other than a statutory testament, a notarial testament, or a nuncupative testament by public act, and is in the possession of the petitioner, he shall present it to the court, and pray that it be probated and executed.

* * *

Art. 2856. Probate hearing; probate forthwith if witness present

When a testament that is required to be probated has been produced, the court shall order it presented for probate on a date and hour assigned. If all necessary witnesses are present in court at the time the testament is produced, the court may order it presented for probate forthwith.

* * *

Art. 2891. Notarial testament, nuncupative testament by public act, and statutory testament executed without probate

A notarial testament, a nuncupative testament by public act, and a statutory testament do not need to be proved. Upon production of the testament, the court shall order it filed and executed and this order shall have the effect of probate.

* * *

Art. 2932. Burden of proof in action to annul

The plaintiff in an action to annul a probated testament has the burden of proving the invalidity thereof, unless the action was instituted within three months of the date the testament was probated. In the latter event, the defendants have the burden of proving the authenticity of the testament, and its compliance with all of the formal requirements of the law.

In an action to annul a notarial testament, a nuncupative testament by public act, or a statutory testament, however, the plaintiff always has the burden of proving the invalidity of the testament.

* * *

Art. 2951. No judgment of possession or delivery of possession or legacy or inheritance until return and inventory or list filed and inheritance taxes paid; exception

A.(1) No judgment of possession shall be rendered, no inheritance or legacy shall be delivered, and no succession representative shall be discharged unless satisfactory proof has been submitted to the court that an inheritance tax return, where required, a copy of the petition for possession, the formal inventory or the sworn descriptive list, the affidavit of death and heirship, a copy of the federal estate tax return, when required, and a copy of the testament, if any, have been duly filed with the collector of revenue and that no inheritance taxes are due by the heirs and legatees, or that all taxes shown by the return to be due have been paid, except as otherwise provided herein.

* * *

B. In special cases, when the judge is satisfied that inheritance taxes have been paid on a legacy or on a part of an inheritance and the court is satisfied that inheritance taxes on the remaining legacy, legacies, or inheritance to be received by the heir or legatee will be paid, the court may in its discretion, enter an order permitting particular legacies to be delivered or possession of a part of an inheritance or legacy delivered or paid, and they may be paid or the possession thereof delivered under such order without liability on the part of the judge. The rate of payment of the inheritance tax on the legacy or

inheritance delivered in this manner shall be at the highest rate of taxation applicable to such heir or legatee. Upon closing of the succession, the heir or legatee is entitled to a credit on inheritance taxes due in the event the tax initially paid on the legacy or other inheritance delivered exceeds the tax computed on said legacy or inheritance in accordance with the rate of taxation upon final settlement of the estate.

* * *

Art. 3001. Sending into possession without administration when all heirs are competent and accept

The heirs of an intestate decedent shall be recognized by the court, and sent into possession of his property without an administration of the succession, on the ex parte petition of all of the heirs, when all of them are competent and accept the succession, and the succession is relatively free of debt. A succession shall be deemed relatively free of debt when its only debts are administration expenses, mortgages not in arrears, and debts of the decedent that are small in comparison with the assets of the succession.

The surviving spouse in community of an intestate decedent shall be recognized by the court on ex parte petition as entitled to the possession of an undivided half of the community, and of the other undivided half to the extent that he has the usufruct thereof, without an administration of the succession, when the succession is relatively free of debt, as provided above.

* * *

Art. 3004. Discretionary power to send heirs and surviving spouse into possession

The heirs of an intestate decedent may be recognized by the court, and sent into possession of his property without an

administration of his succession when none of the creditors of the succession has demanded its administration, on the ex parte petition of any of the following:

(1) Those of the heirs who are competent, if all of them accept the succession.

(2) The legal representative of the incompetent heirs, if all of the heirs are incompetent and a legal representative has been appointed therefor.

(3) The surviving spouse in community of the decedent, if all of the heirs are incompetent and no legal representative has been appointed for some or all of them.

In such cases, the surviving spouse in community of the decedent may be recognized by the court as entitled to the possession of the community property, as provided in Article 3001.

* * *

Art. 3031. Sending legatees into possession without administration

When a testament has been probated or given the effect of probate, and subject to the provisions of Article 3033, the court may send all of the legatees into possession of their respective legacies without an administration of the succession, on the ex parte petition of all of the general and universal legatees, if each of them is either competent or is acting through a qualified legal representative, and each of them accepts the succession, and none of the creditors of the succession has demanded its administration.

In such cases, the surviving spouse in community of the testator may be recognized by the court as entitled to the possession of the community property, as provided in Article 3001.

* * *

Art. 3228. Loans to succession representative for specific purposes; authority to encumber succession property as security therefor

When it appears to the best interest of the succession, and after compliance with Article 3229, the court may authorize a succession representative to borrow money for the purposes of preserving the property or the orderly administration of the estate, of paying estate debts and inheritance taxes, and for expenditures in the regular course of business conducted in accordance with Article 3224. As security for such loans the court may authorize the succession representative to encumber succession property upon such terms and conditions as it may direct.

* * *

CHAPTER 7. PAYMENT OF ESTATE DEBTS

Art. 3301. Payment of estate debts; court order

A succession representative may pay an estate debt only with the authorization of the court, except as provided by Articles 3224 and 3302.

Art. 3302. Time of payment of estate debts; urgent estate debts

Upon the expiration of three months from the death of the decedent, the succession representative shall proceed to pay the estate debts as provided in this Chapter.

At any time and without publication the court may authorize the payment of estate debts the payment of which should not be delayed.

Art. 3303. Petition for authority; tableau of distribution

A. When a succession representative desires to pay estate debts, he shall file a petition for authority and shall include in or annex to the petition a tableau of distribution listing those estate debts to be paid.

A court order shall not be required for the publication of the notice of filing of a tableau of distribution.

B. If the funds in his hands are insufficient to pay all the estate debts in full, the tableau of distribution shall show the total funds available and shall list the proposed payments according to the rank of the privileges and mortgages of the creditors.

Art. 3304. Notice of filing of petition; publication

Notice of the filing of a petition for authority to pay an estate debt shall be published once in the parish where the succession proceeding is pending in the manner provided by law. The notice shall state that the petition can be homologated after the expiration of seven days from the date of publication and that any opposition to the petition must be filed prior to homologation.

* * *

Art. 3332. Final account

A succession representative may file a final account of his administration at any time after homologation of the final tableau of distribution and the payment of all estate debts and legacies as set forth in the tableau.

The court shall order the filing of a final account upon the application of an heir or residuary legatee who has been sent into possession or upon the rendition of a judgment ordering the removal of a succession representative.

* * *

Art. 3361. After homologation of final tableau of distribution

At any time after the homologation of the final tableau of distribution, an heir of an intestate succession may file a petition to be sent into possession alleging the facts showing that he is an heir. Upon

the filing of such a petition, the court shall order the administrator to show cause why the petitioner should not be sent into possession.

Art. 3362. Prior to homologation of final tableau of distribution

At any time prior to the homologation of the final tableau of distribution, a majority of the heirs of an intestate decedent whose succession is under administration may be sent into possession of all or part of the property of the succession upon their filing a petition for possession as provided in Articles 3001 through 3008 excluding any provisions of Article 3004 to the contrary, except that the proceeding shall be contradictory with the administrator. Upon the filing of such a petition the court shall order the administrator to show cause why the petitioners should not be sent into possession, and shall order that the petitioners be sent into possession unless the administrator or any heir shows that irreparable injury would result, and upon a showing that adequate assets will be retained in the succession to pay all claims, charges, debts, and obligations of the succession. If a majority of the heirs are sent into possession of a part of the property, the administrator shall continue to administer the remainder.

* * *

Art. 3371. After homologation of final tableau of distribution

At any time after the homologation of the final tableau of distribution, a legatee or an heir may file a petition to be sent into possession, alleging the facts showing that he is a legatee or an heir. Upon the filing of such a petition, the court shall order the executor to show cause why the petitioner should not be sent into possession.

Evidence of the allegations in the petition for possession showing that the petitioner is a legatee or an heir shall be submitted to

the court as provided by Articles 2821 through 2823.

* * *

Art. 3393. Reopening of succession

A. After a succession representative has been discharged, if other property of the succession is discovered or for any other proper cause, upon the petition of any interested person, the court, without notice or upon such notice as it may direct, may order that the succession be reopened. The court may reappoint the succession representative or appoint another succession representative. The procedure provided by this Code for an original administration shall apply to the administration of a reopened succession in so far as applicable.

B. After formal or informal acceptance by the heirs or legatees or rendition of a judgment of possession by a court of competent jurisdiction, if other property is discovered, or for any other proper cause, upon the petition of any interested person, the court, without notice or upon such notice as it may direct, may order that the succession be opened or reopened, as the case may be, regardless of whether or not, theretofore, any succession proceedings had been filed in court. The court may appoint or reappoint the succession representative, if any, or may appoint another, or new, succession representative. The procedure provided by this Code, for an original administration, shall apply to the administration of successions formally or informally accepted by heirs or legatees and in successions where a judgment of possession has been rendered, in so far as same is applicable.

C. The reopening of a succession shall in no way adversely affect or cause loss to any bank, savings and loan association or other

person, firm or corporation, who has in good faith acted in accordance with any order or judgment of a court of competent jurisdiction in any previous succession proceedings.

Art. 3394. Refusal or inability to accept funds; deposit in bank

When an heir, legatee, or creditor is unwilling or unable to accept and receipt for the amount due him, on contradictory motion against the heir, legatee, or creditor the court may order that the succession representative deposit in a state or national bank or in the registry of the court to the credit of the person entitled thereto the amount due him.

A receipt showing the deposit shall be sufficient in the discharge of the succession representative to the same extent as though distribution to the person entitled thereto had been made.

Section 4. R.S. 9:1521 is hereby amended and reenacted and R.S. 9:2440 is hereby enacted to read as follows:

§1521. Public sale of succession property for purposes other than payment of estate debts or legacies

The property of a succession, movable, immovable, or both, may be sold at public auction for any purpose. There shall be no priority in the order of sale as between movable and immovable property when succession property is sold for any purpose other than the payment of estate debts or legacies.

An administrator or executor desiring to sell succession property at public auction for any purpose other than the payment of estate debts or legacies shall petition the court for authority therefor, describing the property and setting forth the reasons for the sale. When it considers the sale to be in the best interest of the succession, heirs, and

succession creditors the court shall render an order authorizing the sale of the property at public auction.

Except as otherwise provided in this Section, the property shall be sold in the manner provided for the sale of succession property at public auction to pay estate debts or legacies.

* * *

§2440. Continued validity of previously executed testaments

A testament executed prior to January 1, 1998, and valid under the law and jurisprudence prior to that date, when executed, is not invalidated by the passage of Acts 1997, No_____.

Section 5. R.S. 9:2501 is hereby amended and reenacted to read as follows:

§2501. Construction of testaments executed prior to January 1, 1996

If a person dies testate after the effective date of this act, and the testament is executed before January 1, 1996, then the testator's intent shall be ascertained according to the following rules:

(1) That the testament shall be governed by the law in effect at the time of the testator's death in any of the following instances:

(a) When the testament manifests an intent to disinherit a forced heir or to restrict a forced heir to the legitime under the law in effect at the time of the testator's death.

(b) When the testament leaves to the forced heir an amount less than the legitime under the law in effect at the time the testament is executed.

(c) When the testament omits a forced heir and the language of the testament indicates an intent to restrict the forced heir to an amount less than the legitime under the law in effect at the time the testament is executed.

(2) That in all other instances the testament shall be governed by the law in effect at the time the testament was executed.

(3) That the term forced heir, as used above, shall mean a presumptive forced heir under the law in effect at the time the testament was executed.

Section 6. Civil Code Art. 890.1 is hereby transferred and redesignated as R.S. 9:1400.

Section 7. R.S. 9:1471 through 1474 are hereby transferred to and redesignated as Code of Civil Procedure Arts. 3295 through 3298 of Section 5 of Chapter 6 of Title III of Book VI.

Section 8. Code of Civil Procedure Arts. 2887, 2933, and 3155.1, and R.S. 9:2442 through 2445 are hereby repealed in their entirety.

Section 9. The headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.

Section 10. The provisions of Section 5 of 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 in 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.

Section 11. The provisions of Sections 1 through 4 and 6 through 11 of this Act shall become effective on July 1, 1999.

Section 12. In accordance with Joint Rule No. 10 of the Joint Rules of the Senate and the House of Representatives, the Louisiana State Law Institute

is hereby urged and directed to include comments consistent with the provisions of this Act.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____