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# Forum Juridicum: Probate Economy and Celerity in Louisiana

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## FORUM JURIDICUM

### PROBATE ECONOMY AND CELERITY IN LOUISIANA

Leon Sarpy\*

Within the past decade at least two caustic attacks have been launched by laymen<sup>1</sup> against the general probate administration prevalent in almost all of the United States, which for the most part dates back to Norman England.<sup>2</sup> These complaints are levelled at two principle aspects of probate practice, namely, excessive expenses and time-consuming "red tape." It is admitted by the legal profession that generally costs may run very close to ten percent in uncontested estates, and that a time period as much as two years is usually required to accomplish final liquidation. A survey of the situation with a view to remedial legislation is long overdue.

All criticisms on the subject have omitted any particular references to the Louisiana probate system which is of civil law origin, having been adopted in a large measure from the French Civil Code of 1804, and also from *Las Siete Partidas* of Spain.<sup>3</sup> It is submitted that Louisiana's traditional system in dealing with all estates, even those of moderate size, is the most functional and economical, and merits serious consideration for adoption by the other American states.

Actually Louisiana's probate system does not differ greatly in its essential features from the systems of common law origin in effect in the balance of the nation, insofar as the general procedural aspects are concerned, but varies significantly as to the substantive law of inheritance, with which this presentation will not be concerned. But it is submitted that Louisiana's procedural system is far more progressive from a logistics standpoint, for it accentuates celerity and economy.

The *raison d'être* of probate practice both at common law and in civil law is to realize adequate cash to pay all death taxes and creditors and to distribute the net residue to the heirs, all without undue delay.<sup>4</sup> As to the charge of undue delay, Louisiana pleads

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1. See BLOOM, *WHAT'S WRONG WITH LAWYERS* 214 (1968); N. DACEY, *HOW TO AVOID PROBATE* (1965).

2. Sheard, *Avoiding Probate of Decedents' Estates*, 36 *CIN. L. REV.* 70 (1967).

3. 1 H. McMAHON, *LOUISIANA PRACTICE* 2 (1939); McMahon, *Revision of Probate Procedure in Louisiana*, 1 *LA. B.J.*, no. 2, at 53, 55 (Oct. 1953).

4. *Danos v. Waterford Oil Co.*, 225 So. 2d 708, 712 (La. App. 1st Cir. 1969), citing 2 H. McMAHON, *LOUISIANA PRACTICE* 1616 (1939); see also *In Re Acken's Estate*, 144 *Iowa* 519, 123 *N.W.* 187 (1909).

innocent, for in the overwhelming number of cases there is no mandatory waiting period. As to fees and costs, Louisiana probably has the least expensive system in the nation.

In preparing a set of rules to govern the settlement of estates it behooves the lawmaker to inquire into the nature of the broad field of property usually left by decedents and to pattern the precepts accordingly. Consideration must necessarily be given to the type of situations which are in the majority, both as to the complexity as well as the total value of the average estate. This calls for a statistical survey, particularly among the great American middle class who admittedly constitute the backbone of our economy.

Traditional Anglo-Saxon precepts of mandatory qualification of executors and administrators with attendant unnecessary delays should yield to the basic economic needs of ninety-five percent of the people. It is understandable that an estate valued well into six figures may need a full scale administration. But this possibility is scant reason to impose a complex administration upon uncomplicated estates of lesser value. The existence of the traditional common law probate administration operates as a heavy burden on all but sizeable estates. Thus it is not to be wondered that complaints from the laity are so numerous.

Irrespective of the philosophical considerations, care must be given to the axiomatic fact that today's great middle class in America continues to expand, which trend will apparently continue for an indefinite period. The present levelling situation is unprecedented in the history of our nation, being an obvious product of the last half century by virtue of the ever expanding federal income and estate tax bites, particularly in the higher brackets.

According to the statistical studies by Professor Robert J. Lapman at the University of Wisconsin for the National Bureau of Economic Research and the Survey Research Center of the University of Michigan, less than five percent of American citizens own property worth \$100,000 and over,<sup>5</sup> and fifty percent of decedents have estates of less than \$1,800.<sup>6</sup> Hence, the overwhelming demand and need of ninety-five percent of the people is for a realistic probate system which permits settlement of estates with the least expensive celerity where at all possible.

In the five percent category of estates in excess of \$100,000, it may generally be conceded that in order to pay debts, legacies and taxes the appointment of an executor or administrator, although de-

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5. F. LUNDBERG, *THE RICH AND THE SUPER-RICH* 15 (1968).

6. *Id.* at 17.

sirable in some situations, need not be mandatory. However, in the other ninety-five percent of estates, if an executor or administrator can be by-passed without serious results, the law is duty bound to provide some propitious method of relief to that end with attendant reduction in fees. The Uniform Probate Code's redactors are eminently correct in their observation in this regard<sup>7</sup> but they restrict the option of the remedy to estates inconsequential in size. It is submitted that the traditional system in Louisiana which we shall discuss has successfully achieved that end for almost two centuries for all estates irrespective of size.

The legal profession is quite cognizant, as is reflected from the Uniform Probate Code, that reforms to curtail costs and time loss can, and must be, accomplished. Accordingly, in the Uniform Probate Code some commendable steps have been taken in that direction, with definite indication that the system is constantly being improved. But the celerity is rather inadequate and the expenses are not curtailed.

Perhaps the initial effort of recent years in America was reflected in the Model Probate Code drafted at the University of Michigan in cooperation with the American Bar Association's Section on Real Property and Trust Law and published in 1946.<sup>8</sup> This volume became principally a reference work and was drawn upon considerably in the drafting of the Louisiana Code of Civil Procedure of 1960, as well as the Uniform Probate Code.

The Commissioners on Uniform State Laws began their work almost a decade ago on the Uniform Probate Code. Working Draft Number 5 was submitted to the House of Delegates of the American Bar Association at Dallas, Texas, on August 13, 1969, and adopted by an overwhelming vote of that body.<sup>9</sup> The Commissioners are recommending adoption by the individual states.

Attempts to convince the state legislatures to adopt this Uniform Probate Code may encounter formidable problems because of the Code's broad objectives. This Code would have a far better chance of wide adoption if it were limited to procedural law. But it also seeks in effect to rewrite the substantive laws of intestacy and wills,<sup>10</sup> estates of person interposed,<sup>11</sup> non-probate transfers<sup>12</sup> and trust admin-

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7. UNIFORM PROBATE CODE art. III, General Comment at 75 (1969): (5) "Probate of a will by informal or formal proceedings may occur without any attendant requirement of appointment of a personal representative."

8. MODEL PROBATE CODE (1946).

9. FOREWORD TO UNIFORM PROBATE CODE (1969).

10. UNIFORM PROBATE CODE art. II (1969).

11. *Id.* art. V.

12. *Id.* art. VI.

istration.<sup>13</sup> A significant improvement will no doubt be realized by many adopting states over their present laws.

However, it appears that Louisiana may never adopt this Code for such would mean a complete emasculation of its substantive law on inheritance and wills, which has been followed for almost three hundred years. As to the possible adoption in Louisiana of the procedural aspects only, it is submitted that the present Louisiana probate practice is more progressive than the Uniform Probate Code.

#### CELERITY AND ECONOMY IN LOUISIANA'S CODE OF CIVIL PROCEDURE

Louisiana has had in operation for more than a decade its Code of Civil Procedure of 1960 which embraces probate practice.<sup>14</sup> This work was undertaken in 1950 by the Louisiana State Law Institute, the State's official law reform body, pursuant to a legislative mandate.<sup>15</sup> The leadership was assigned to the late Professor Henry George McMahon of Louisiana State University, who had done graduate work at Northwestern under the noted procedural expert, Professor Robert Wyness Millar.<sup>16</sup>

Louisiana's Code places much importance on curtailing mandatory time factors in the administration of estates and in so doing has reduced the entailed expenses to a degree heretofore unknown in American law. This Code's simplified solution lies basically in the option which enables the legatees and heirs to accept and receive the assets promptly upon paying inheritance taxes and assuming the decedent's debts, and in certain instances furnishing bond, all without the intervention of an executor or an administrator.<sup>17</sup> This technique is not novel, for it has existed in Louisiana for over two centuries, albeit in a rather informal manner, reflecting custom recognized in a long line of decisions, rather than in actual written law.<sup>18</sup> This election is known by the title "Unconditional Acceptance" and is intended for use where an estate is solvent and all heirs are of age and agree to assume the debts.<sup>19</sup> The result is the immediate delivery of

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13. *Id.* art. VII.

14. See LA. CODE CIV. P. arts. 2811-3462.

15. La. Acts 1948, No. 335.

16. Professor McMahon in the preface to the two-volume work on Louisiana Practice published in 1938, had credited Professor Millar with his "deep feeling of obligation." See 1 H. McMAHON, LOUISIANA PRACTICE vii (1939).

17. *Kelley v. Kelley*, 198 La. 338, 3 So. 2d 641 (1941); *Danos v. Waterford Oil Co.*, 225 So. 2d 708 n.4 (La. App. 1st Cir. 1969); Brown, *The New Look in Probate Procedure*, 9 LA. B.J. no. 1, at 35, 38 (May, 1961).

18. See LA. CODE CIV. P. art. 3001, comment (a).

19. LA. CODE CIV. P. art. 3001: "The heirs of an intestate shall be recognized by the court, and sent into possession of his property without an administration of the

the assets to the heirs and the consequent avoidance of an administration. In such a situation costs are lower, including attorneys' fees.<sup>20</sup> The court retains discretionary veto power,<sup>21</sup> and thus may provoke an administration.

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succession, on their *ex parte* petition, when all of the heirs are competent and accept the succession unconditionally, and the succession is relatively free of debt. A succession shall be deemed relatively free of debt when its only debts are succession charges, mortgages not in arrears, and debts which are small in comparison with the assets of the succession.

"The surviving spouse in community of an intestate 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 community is accepted, and the succession is relatively free of debt, as provided above."

20. Louisiana State Bar Association Attorney Handbook sets forth the minimum fees suggested for the settling of estates. "SUCCESSIONS: No minimum fee is fixed for 'small successions' as defined in Article 3421, Code of Civil Procedure. The minimum fees for other successions, with percentages based on the gross inventory or sworn value of the entire community estate, plus the decedent's separate estate shall be:

1. Up to but not in excess of \$100,000.00.
  - A. Placing in possession without administration, minimum fee—3% but not less than \$300.00.
  - B. With administration, minimum fee—5% but not less than \$450.00
2. Above \$100,000.00 but not in excess of \$250,000.00 an additional fee of 2.5% minimum on such amount.
3. Above \$250,000.00 an additional fee of 2% minimum on such amount.

"This schedule contemplates normal succession procedure, including the usual disposition of Louisiana Inheritance Tax.

"If there are difficult or unusual questions involved, an additional charge should be made commensurate with the additional services required. Litigation should be charged for in accordance with, but not less than the section on Preparation and Trial of Civil Cases.

"Where a Federal Estate Tax Return is required, a charge of not less than \$250.00 should be made for its preparation. Services in addition to preparation, such as conferences with the Internal Revenue Service, final settlement, etc., should be charged for in accordance with the section on Administrative Practice. Litigation should be charged for in accordance with the section on Preparation and Trial of Civil Cases.

"If the administration in Louisiana is ancillary to the main administration in another State, the circumstances may so decrease the work to be performed and the responsibilities assumed by the lawyer that the fee may be reduced to a time basis."

21. LA. CODE CIV. P. art. 3004: "The heirs of an intestate may be recognized by 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: (1) Those of the heirs who are competent, if all of these accept the succession unconditionally; (2) The legal representative of the incompetent heirs, if all of the heirs are incompetent and a legal representative has been appointed therefor; or (3) The surviving spouse in community of the deceased, if all of the heirs are incompetent and no legal representative has been appointed for some or all of them.

There is one intrinsic caveat in this method which the attending attorney should explain to the heirs; namely, should the estate prove insolvent the residuary heirs can be called upon to contribute their virile share<sup>22</sup> towards paying the creditors of the estate over and above what they received from the estate.<sup>23</sup> This means jointly and not severally.<sup>24</sup> But from a practical standpoint, the writer has observed that the overwhelming percentage of estates is solvent, and so the heirs unanimously decide on pursuing the simple placing in possession in order to realize their inheritance promptly. In most situations, due to the family's familiarity with the decedent's standard of living and the extent of his holdings, the risk is indeed minimal.

These savings in time and particularly expense are naturally of great concern to the heirs, for they desire dispatch with the least financial outlay as a matter of human nature. In the simple possession there is no executor's fee, and the attorneys' fee is generally reduced from five percent to three percent under the cited schedule of minimum fees suggested by the Louisiana State Bar Association.<sup>25</sup> If an executor is appointed, his fee is two and one-half percent of the total assets, set by the Code,<sup>26</sup> which when added to the five percent attorneys' fees, brings the total cost of administration fees to seven and one-half percent. Accordingly, when a family elects a simple possession, there is a saving in the lower brackets of as much as sixty percent over the cost of an administration, not an insignificant windfall over the situation in other states, wherein attorneys' fees alone begin at seven percent as we shall see, and executors' fees another two and one-half percent, thus bringing the total close to ten percent.

There is no ceiling restriction provided by law on the value of an estate in the use of the option of simple possession. However, practical considerations in large estates often prompt the full administra-

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

22. LA. CIV. CODE art. 1425: "But though the heirs and other universal successors, who have not made an inventory as is before prescribed, are bound for the payment of all the debts of the succession to which they are called, even when the debts exceed the value of the property left them, they are not bound, *in solido* and one for the other, for the payment of the debts."

23. LA. CODE CIV. P. art. 427: "An action to enforce an obligation, if the obligor is dead, may be brought against the heirs, universal legatees, or legatees under a universal title, 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."

24. *Jordan v. Smith*, 206 La. 766, 20 So. 2d 17 (1944).

25. See note 20 *supra*.

26. LA. CODE CIV. P. art. 3351.

tion. For example, if the estate totals \$1,000,000 or higher, consideration of federal estate tax brackets may well prompt the heirs to await the expiration of the optional six months valuation date for calculating federal estate taxes,<sup>27</sup> with possibly resulting lower estate taxes. In addition, keeping the estate open may well result in a longer period for income tax reporting at lower bracket rates, resulting in a saving over what the heirs would pay in income taxes had they gone into immediate simple possession and added the new income to their own. Such considerations are generally immaterial in estates under the federal estate exemption of \$60,000 because the comparative differences between estate taxes and income taxes are often nebulous.

Although the Uniform Probate Code makes no reference to the Louisiana law and has no such option as the simple possession, it does provide for pursuit against distributees after the estate is closed in section 3-104:

No action to enforce a claim against a decedent's estate or his successors may be revived or commenced before the appointment of a personal representative. After appointment of a personal representative and until the estate is closed, all proceedings and actions to enforce a claim against a decedent's estate shall follow the procedure prescribed by this Article. *After the estate is closed a creditor whose claim has not been barred may recover from the distributees as provided in Section 3-1004 or from a former personal representative individually liable as provided in Section 3-1005.* (Emphasis supplied.)

Hence, administrations are mandatory under the Uniform Probate Code, which simply does not afford the economy of the Louisiana law. The result is that normal probate costs outside of Louisiana will invariably continue to be higher. A recent survey by a layman discloses that normal attorneys' fees generally in effect begin at seven percent and graduate downward.<sup>28</sup> Hence, the cost of seven percent for attorneys' fees plus two and one-half percent for the executor gives a beginning cost of over two hundred percent in excess of Louisiana's minimum attorneys' fees in the simple possession (three percent) with no additional costs for fees of an executor or administrator.

It is therefore submitted that the situation under Louisiana's 1960 Code of Civil Procedure is the more economical and speedier,

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27. INT. REV. CODE OF 1954, § 2032; 1 CCH FED. EST. & GIFT TAX REP. ¶ 1220 (1973).

28. M. MAYER, THE LAWYERS 23 (1967) lists normal fees as follows: 7% on the first \$1,000; 5% on the next \$4,000; 4% on the next \$10,000; 3% on the next \$60,000; 2½% on the balance over \$75,000.



more desirable than that of any other state, and carries all of the requisite safeguards for creditors and heirs.

#### MANDATORY DELAYS UNDER THE UNIFORM PROBATE CODE

After many years of toil the Commissioners on Uniform State Laws have produced their scholarly and comprehensive Uniform Probate Code which should improve probate practice in states other than Louisiana, with its feature "Flexible System of Administering Decedents' Estates."<sup>29</sup> The Uniform Code's prefatory note declares

American probate procedures rest on the assumptions inherited from the English that wills must be proved after death in order to be effective, and that personal property of a decedent passes to a state appointed personal representative who is to collect it and use it to satisfy the decedent's creditors before distributing to successor.

and then continues:

It is a fact that all facets of administration are part of one continuous court proceeding of which the probate judge has ultimate control. Attorneys counselling executors must take each estate through essentially the same routine without regard for whether the parties are contentious or friendly, or whether the estate is worth \$15,000 or \$150,000. The necessity for the routine is hard to explain; and fees, possibly justified by the required work, are not understood nor accepted by clients.<sup>30</sup>

The Code therefore takes full cognizance of the need for reform in time consumption as well as economy in the work performed and hence contains a device labelled "Flexible System for Administering Decedents' Estates," to combat the traditional problem of inflexibility, the system "being designed to permit great variety in the way particular estates, including small estates, may be handled."<sup>31</sup>

The Uniform Probate Code denominates estates with total assets not exceeding \$5,000 as Small Estates.<sup>32</sup> Only in such small estates the Flexibility System here allows the personal representative to distribute the property immediately to successors, thus affording quick and inexpensive transfers.<sup>33</sup> This is precisely what Louisiana has tra-

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29. UNIFORM PROBATE CODE, Prefatory Note (1969).

30. *Id.* at xix.

31. *Id.*

32. UNIFORM PROBATE CODE § 3-1201 (1969).

33. *Id.* § 3-1203.

ditionally allowed in all estates by the unconditional acceptance discussed previously. Therefore, there is no policy against the unconditional acceptance by the codifiers of the Uniform Probate Code; rather the Code adopts the very principle of Louisiana's simple possession, albeit only in small estates.

The Uniform Code has thus afforded a much needed acceleration of administration in small estates. The reform, however, falls short of its mark in comparison with the technique of the unconditional possession of the Louisiana law which is not restricted to such small estates.

The Uniform Probate Code requires estates to remain open for at least one year,<sup>34</sup> save for small estates, yet in small estates the appointment of a personal representative remains mandatory. The Uniform Code, therefore, does not provide any significant economic measures to curtail expenses in probate practice, except to a limited degree in very small estates, for the fees of executors and administrators remain mandatory, thus preserving an archaic concept which has no logical basis in ninety-five percent of all probate situations.

The progressive provisions of the Uniform Probate Code in curtailing costs in small estates is indeed entitled to commendation. But far broader application is required. It is recommended to the Commissioners on Uniform State Laws that a study be made of the unconditional acceptance of Louisiana law with the view of extending to larger estates what they have already ordained with regard to estates not in excess of \$5,000.

#### RIGHTS OF CREDITORS IN SIMPLE POSSESSION AND THE DISPENSING WITH AN EXECUTOR OR ADMINISTRATOR

Creditors, having a priority over heirs, are admittedly entitled to the highest form of protection in their claim against the estate and its assets. However, when the creditors' claims are satisfied, or adequately provided for, logically they have no further interest in the estate, regardless of who might have paid them the sums due them.<sup>35</sup> Any device which facilitates prompt payment of debts is obviously to be welcomed by creditors, who by nature abhor the usual delays in the administration of estates almost to the same extent that they despise bankruptcy matters, for their claims are thereby frozen and removed from their working capital. And with the modern creditors' technique of adding by contract delinquent interest and penalties to ordinary debts, it also behooves the heirs to satisfy the creditors as

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34. *Id.* §§ 3-1001, 1003.

35. LA. CIV. CODE art. 2134.

soon as possible in order to save interest and costs, and to get possession of their shares of the estate.

In considering the most efficacious devices to pay creditors, a review of the statistics concerning the economic status of testators, ninety-five percent of whom leave less than \$100,000, should be considered.<sup>36</sup> So, although there is no centralized bureau to tell us what the average testator leaves, we do have some indications which are of interest.

In addition, the drafters of the Uniform Probate Code report that in the Cleveland area half of all estates are within \$8,000.<sup>37</sup> We have already seen that a non-legal authority informs us that only five percent of all testators leave over \$100,000, from which we conclude that if the ninety-five percent can be settled with less time and expense, the nation's heirs stand to benefit in the overwhelming number of cases.

From the observation previously referred to<sup>38</sup> that the appointment of a personal representative for the estate is traditional in the Anglo-Saxon probate law, and the admission by the Commissioners on Uniform State Laws that they be abolished in small estates,<sup>39</sup> it is submitted that the necessity for compulsory administrative routine, even in some large estates, is difficult to explain.<sup>40</sup> Further, to repeat, attorneys' fees and executors' commissions, possibly justified by the required work, are not understood or accepted by clients.<sup>41</sup> Hence, if the heirs are given the option in uncomplicated estates to assume all obligations and to receive immediate delivery of the property due them upon the attorney arranging for such a judgment, much of the criticism of excessive administration expenses would be effectively curtailed.

The question may be asked, how are creditors to be protected if the heirs do not pay them? The answer is that in Louisiana the creditors can within three months from the judgment of possession demand a bond from the heirs as security for the payment of their claims.<sup>42</sup> Furthermore, the creditors can provoke an administration if the heirs do not furnish such a bond.<sup>43</sup> Finally, the creditors can

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36. See note 5 *supra*.

37. UNIFORM PROBATE CODE, art. III, part 12, General Comment (1969).

38. See text accompanying notes 30, 31 *supra*.

39. *Id.*

40. See note 30 *supra*.

41. *Id.*

42. LA. CODE CIV. P. art. 3007. See note 47 *infra*.

43. *Id.* art. 3008: "If the security required by the court under Article 3007 is not furnished within the delay allowed, on ex parte motion of the creditor, the court shall

demand a separation of the property inherited from that of the heirs in case of insolvency of the succession.<sup>44</sup>

It is in this practical postulate that the simple placing in possession was established in the civil law and has continued with success for almost two centuries. Louisiana's long record speaks for itself. What has succeeded here can likewise succeed in other jurisdictions.

#### REFINEMENTS OF THE SIMPLE POSSESSION IN LOUISIANA

The Louisiana Code sets the philosophy that it is the duty of the succession representative to close the succession "as soon as advisable"<sup>45</sup> to achieve the result of economy in time and expenses.<sup>46</sup> The simple possession is allowed in both intestate and testate successions. As to the former, Louisiana Code of Civil Procedure provides:<sup>47</sup>

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

The surviving spouse in community of an intestate 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 any administration of the succession, when the community is accepted, and the succession is relatively free of debt, as provided above.

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render judgment annulling the judgment of possession, directing the cancellation of all inscriptions of the registry thereof, ordering an administration of the succession, and ordering the parties sent into possession to surrender to the administrator to be appointed thereafter all of the property of the deceased which they have received, and which they have not alienated.

"Conventional mortgages and other encumbrances placed by the heirs, legatees, or surviving spouse in community on property so surrendered, and recorded prior to the cancellation of the inscription of the registry of the judgment of possession, shall retain their initial force and effect despite the administration of the succession."

44. LA. CIV. CODE art. 1444; LA. R.S. 9:5011 (Supp. 1960).

45. LA. CODE CIV. P. art. 3197: "It shall be the duty of a succession representative to close the succession as soon as advisable."

46. McMahon, *The Revision of Probate Procedure in Louisiana*, 1 LA. B.J., no. 2, at 53 (Oct. 1953).

47. LA. CODE CIV. P. art. 3001.

and as to the latter, the Code continues:<sup>48</sup>

When a testament has been probated, and subject to the provisions of Article 3033, the court may send the legatees into possession of their respective legacies without an administration of the succession, on their *ex parte* petition, when all of the legatees are either competent or are acting through their qualified legal representatives, all competent residuary legatees accept the succession unconditionally, 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.

And even if an administration has been provoked, nonetheless the heirs may at any time wrest possession summarily from the administrator under the following provision:<sup>49</sup>

At any time prior to the homologation of the final tableau of distribution, the heirs of an intestate whose succession is under administration may be sent into possession of all or part of the property of the succession upon filing a petition for possession as provided in Articles 3001 through 3008, 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 heirs should not be sent into possession. If the heirs are sent into possession of a part of the property, the administrator shall continue to administer the remainder.

and also from the executor<sup>50</sup>

At any time prior to the homologation of the final tableau of distribution, the legatees in a testate succession may be sent into possession of all or part of their respective legacies upon filing a petition for possession as provided in Articles 3031 through 3035, except that the proceedings shall be contradictory with the executor. Upon the filing of such a petition, the court shall order the executor to show cause why the legatees should not be sent into possession. If the legatees are sent into possession of a part of their respective legacies, the executor shall continue to administer the remainder.

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48. *Id.* art. 3031.

49. *Id.* art. 3362.

50. *Id.* art. 3372.

Obviously if the creditors are paid promptly or satisfied by any other arrangements, they cause no problem to the heirs. But if the creditors are fearful that they might lose their redress against the succession property, their remedies are explicit. The three months allowed creditors from the judgment of possession to petition the court for adequate security<sup>51</sup> is the only mandatory delay set forth in the Code on the administration of successions. The judge may determine the proper amount of security, and, if not posted within the delay set, the court may amend the judgment of possession and appoint an executor or administrator, whereupon the administration would proceed as ordinarily.<sup>52</sup> The articles are the first codification in Louisiana on the subject,<sup>53</sup> but these precepts have been recognized by the Louisiana supreme court since prior to the turn of the century.<sup>54</sup> The complete absence of reported cases where creditors have actually asked for the appointment of executors and administrators is a strong indication that creditors have encountered few problems in collecting their claims.

A cursory review by this writer of the probate docket in the Civil District Court for the Parish of Orleans, Louisiana, discloses that ninety percent of succession proceedings are settled by the unconditional acceptance.

Very recently the Louisiana Court of Appeal for the First Circuit commented on the effect of the simple placing in possession in this language:

The law of this state, favorably commented upon by respected authority, is that successions are administered as a convenient and efficient means of satisfying the debts of the decedent and effecting a proper distribution of the residue of the estate among the heirs. As aptly observed by the late noted Professor McMahan in his excellent work entitled '2 McMahan, Louisiana Practice', at page 1616:

'The sole raison d'être of executors and administrators is to settle successions (estates of deceased persons) by the payment of all debts and the subsequent delivery of the residuum to the heirs.'

It follows that once the debts of the succession are paid and all property disposed of, the function of the administrator ceases,

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51. *Id.* art. 3007.

52. *Id.* art. 3008.

53. *Id.* art. 3001 comment (a).

54. Succession of Hart, 52 La. Ann. 364, 27 So. 69 (1899); Succession of Bray, 50 La. Ann. 1209, 24 So. 601 (1898).

as does the succession entity itself. Since there is then no longer a need for its continuance, the being of the succession entity terminates.

When there is no need for administration of an estate and the assets pass into the hands of the heirs, the succession ends upon their unqualified acceptance, tacit or express, or on their being recognized as owners and sent into possession by judgment of a proper court. In this regard, we find the following in *Kelley v. Kelley*, *supra*:

'When an heir accepts a succession and takes possession of its effects unconditionally, he becomes the owner of the property and the succession, as such, ceases to exist. The recourse of the creditors is against him. If there is more than one heir, the creditor's action lies against each of his virile share.' (Citations omitted.)

Also settled is the issue that once all the heirs of a succession have accepted unconditionally by taking possession of the property, selling a portion thereof and partitioning other parts among themselves, and having committed acts of ownership and heirship indicating acceptance pure and simple, the succession ceases to exist. This rule was expressly recognized and applied in *Builard v. Davis*, 185 La. 255, 169 So. 78, from which we cite as follows:

'In the case of *Brashear v. Conner*, 29 La. Ann. 347, 349, the court held, as is well expressed in the syllabus, that:

'Where the heirs are all of age, and present, and represented, and have accepted the succession purely and simply, and there are no debts due by the succession, there is no necessity for the appointment of an administrator.

'In the course of the opinion, this court said:

'There was really no succession to open after the proceeding to annul and set aside the will and the judgment annulling it; for as we have already seen that proceeding was instituted and conducted by Mrs. Conner in her quality of heir, and in it she alleged that the sole heirs are John J. Osborne, who has sold and transferred all his rights in said estate to his sister, Mrs. Brashear, who is the remaining heir, and who appeared in that proceeding as well as the present litigation, and is alleged to be in possession of the property. From that time there was no succession to administer, and the heirs who accepted purely and simply represented the deceased both as to his rights and his obligations. The heir who accepts is considered as having succeeded to the deceased from the

moment of his death. R.C.C., article 947. He is of full right in place of deceased, as well for his rights as obligations. R.C.C. 945. All that remained was to partition the property between the heirs. Under such circumstances the property is vested in the heirs, and not in the succession.' (Citations omitted.)

Obviously the above rules are subject to application of pertinent prescriptive rules established by the statutory law of our state governing time limitations for the acceptance or rejection of successions. We do not, however, have reason to concern ourselves with such issues inasmuch as we find these successions were duly accepted by all the heirs concerned.<sup>55</sup>

The simple possession is thus deeply engrained in Louisiana's probate procedure, and has worked with marked success to the advantage of the creditors, heirs and legatees in the prompt termination of estates. It might be appropriately added that where an administration is provoked where a simple placing in possession would suffice, the courts will deny a higher attorney's fee than would be allowed for a simple placing in possession.<sup>56</sup>

#### CONCLUSION

Critics of probate practice are inclined to the erroneous conclusion that estate settling is a pro forma routine matter. Nothing can be further from reality. The probate attorney must gather all of the pertinent facts and study them in light of the law governing the validity of wills, rules of descent and distribution, trusts, and estate and even income taxes, due to both the federal and state governments. Thereafter the rights of the heirs are considered in light of the applicable law. He must then formulate his plan of procedure. When he has decided on his recommendations, he must then proceed to ultimate settlement. If there is to be a personal representative, he must qualify him, cause posting of a bond where required, file petitions for authority and present accountings to the probate court as provided, to name only a few of the principal steps. All require knowledge and training in the administration of estates.

The probate attorney must confer with the personal representative concerning the necessity of selling property to realize money to pay debts, legacies and taxes, which often requires sagacious business acumen. In case of litigation the attorney must resort to his trial

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55. *Danos v. Waterford Oil Co.*, 225 So. 2d 708, 713 (La. App. 1st Cir. 1969).

56. *Succession of Lodato*, 250 So. 2d 792 (La. App. 4th Cir. 1971).



capacity and ability. In short, the attorney for the estate must discharge multifarious duties which a layman simply cannot perform on a do-it-yourself basis.

The most efficacious manner of curtailing estate taxes is for the testator to resort to a reduction of his estate before death by careful estate planning, effecting reasonable gifts to his family and others from time to time, so as to take full advantage of legally avoiding the federal gift tax law.<sup>57</sup> Such a program if followed over a period of years can achieve significant results. It is here that early estate planning can legitimately reduce taxes and in many situations avoid them altogether.

For its own good it behooves the legal profession to take cognizance of the current widespread dissatisfaction among the laity of procrastination and exaggerated expenses in settling estates. The proper remedy is to curtail time loss and administrative expenses as Louisiana has traditionally accomplished. If the profession does not take realistic steps in these directions, there may well arise a public clamor for an administrative bureau to take over, much in the order of the compensation laws, with resultant political domination and perhaps even greater overall expenditures.

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57. 26 U.S.C. § 2501 (1970).