Property Changes in the Proposed Successions Revision

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Among the numerous changes advocated by the proposed successions revision are several that affect fundamental property principles. The purpose of this essay is to review critically the important property concepts either targeted for reform or directly impacted by the revision. The writer has elected to concentrate upon the broader property issues raised by the revision, rather than to dissect the articles microscopically. It is hoped that those who read this essay will attribute to it the spirit in which it is offered; namely, as one academician's invitation for further discussion and collaboration in order to create the finest Civil Code possible.

Three fundamental property concepts will be discussed. The first topic is "seizin," a concept that is often misunderstood. The second topic is the transfer and tacking of possession. The third topic is the surviving spouse's usufruct, which was affected by that portion of the revision enacted in 1996.

I. SEIZIN

Seizin, a term used in both the common and the civil law, has had a fairly long history in each system. Although the meaning and importance of the concept has changed significantly over time in each system, this paper will focus only upon its place in Louisiana today, raising four basic questions. First, what exactly is seizin? Second, what is seizin's present significance in Louisiana successions law? Third, what role (if any) does seizin have in the revision? Fourth, what are the ramifications of the suppression of seizin, assuming its elimination by the revision? Each of these questions will be explored in the following sections.

A. What Exactly Is Seizin?

Under the current successions articles, designated classes of successors are automatically invested with seizin immediately at the moment of the predecess-
or's death.\textsuperscript{4} Exactly what these seized heirs are automatically vested with has been the subject of both dispute and misunderstanding. According to Planiol, even the celebrated French jurist Pothier was confused about seizin.\textsuperscript{4} In Louisiana, one vocal critic of seizin called it a concept whose "chief justification . . . is its pedagogical value in exercising the minds of law students in metaphysical gymnastics."\textsuperscript{6} Scholars cannot even seem to agree on how to spell the word.\textsuperscript{7}

The meaning of the word "seizin" can be determined by examining two sources—one historical and the other jurisprudential. The historical source is the fundamental change effected by the 1825 Civil Code. Prior to this Code, a juridical person (\textit{i.e.}, the succession) came into existence at the death of a natural person, and continued to exist until all of the debts of the decedent had been paid and the remaining property distributed to his successors. Under the pre-1825 regime, the decedent's patrimony\textsuperscript{8} was transmitted at his death to "the succession," and then subsequently transmitted to his successors.\textsuperscript{9}

This system was eliminated in the 1825 Code in favor of \textit{le mort seizit le vief}—"the dead give seizin to the living." Article 940 of the Code thus provides:

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4. The Code sets up three classes of heirs who can acquire seizin of the decedent's estate. The first class consists of forced heirs. If the decedent was survived by forced heirs, then those forced heirs are invested with seizin. Article 1607 provides:

When, at the decease of the testator, there are heirs to whom a certain proportion of the property is reserved by law, these heirs are seized of right, by his death, of all the effects of the succession, and the universal legatee is bound to demand of them the delivery of the effects included in the succession.

If there are no forced heirs, or if the forced heirs have all been disinherited, then the second class entitled to seizin is the universal legatee. La. Civ. Code arts. 1609-1610. If there are neither forced heirs nor universal legatees, then the decedent's legitimate heirs are invested with seizin. \textit{Id.} at art. 1613. The Code also implies that legatees under universal title can be seized. \textit{See id.} at art. 940.

In addition, whenever the succession is judicially administered, the succession representative is invested with seizin of the decedent's patrimony. La. Code Civ. P. art. 3211. The succession representative's seizin primes the right to seizin that the three classes of heirs would otherwise have.

5. Planiol, supra note 1, at 605 nn.14, 16.

6. Max Nathan, Jr., \textit{Common Disasters and Common Sense in Louisiana}, 41 Tul. L. Rev. 33, 38 (1966). The quotation from Mr. Nathan's article actually was referring to \textit{le mort seizit le vief}; however, it appears clear from the article as a whole that Mr. Nathan generally viewed seizin as synonymous with \textit{le mort seizit le vief}.

7. The Code uses "seizin," which is the spelling chosen by this writer. However, when the writer conducted separate Westlaw searches in the Louisiana cases database using four different spellings, "seizin" yielded 175 documents, "seisin" 154 documents, "seizen" 28 documents, and "seisen" 1 document.

8. For an overview of this civilian doctrine, see A.N. Yiannopoulos, Civil Law Property §§ 190-200, in 2 Louisiana Civil Law Treatise (3d ed. 1991).

9. The Digest of 1808 provided:

Until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect, the deceased who was the owner of the estate.

La. Digest of 1808, Book III, title 1, ch. 6, § 1, art. 74.
A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

Article 941 expands this concept in providing:

The right mentioned in the preceding article is acquired by the heir by the operation of law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

Thus children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they be merely seized of right and not in fact.

Under this regime, the decedent’s patrimony is transmitted to his seized heirs immediately at his death without the interposition of a juridical person. Being seized of the decedent’s patrimony, the seized heirs stand in his shoes. Article 945 explains:

The second effect of [seizin] is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in every thing, represents the deceased, and is of full right in his place as well for his rights as his obligations.

The second source providing insight into the meaning of the concept of seizin is the Louisiana Supreme Court decision in Baten v. Taylor.\textsuperscript{10} The testator in that case had written a will instituting his wife as universal legatee upon the condition that she survive him for thirty days. His sister attacked the will alleging \textit{inter alia} that the condition prevented the universal legatee from receiving seizin immediately at the testator’s death. Justice Dennis, in a characteristically scholarly opinion, found that the survivorship clause created no gap in seizin.

The court first classified the survivorship clause as a suspensive condition, which, while permissible, did prevent the wife as universal legatee from acquiring seizin at her husband’s death. Nonetheless, until fulfillment of the condition, the testator’s legitimate heir (his sister) was invested with seizin. The court then explained how the testator’s sister could be seized of her brother’s succession yet ultimately receive no ownership of his property:

Seizin is not ownership, however, but the legal investiture of one class of heirs with possession of the succession upon the death of the deceased, enabling the heirs who acquire seizin, from the instant of

\textsuperscript{10} 386 So. 2d 333 (La. 1979).
death, to bring all the actions which the deceased could have brought. . . . Whether an heir acquires seizin depends, therefore, not on his ownership of succession property, but on whether he is a member of the class of heirs entitled to seizin of a particular succession according to the codal order of priority.  

It is clear from these two sources that the transmission of a decedent’s patrimony occurs immediately at his death in favor of his seized heirs who then stand in his place. However, since seizin is not ownership, the seized heirs are the mere custodians of the decedent’s patrimony. Ownership devolves in accordance with the decedent’s will or the laws of intestacy subject of course to the superior rights of the decedent’s creditors.

B. What Is Seizin’s Present Significance in Louisiana Successions Law?

Perhaps the most important significance of seizin is its role in providing logic and consistency in the law of successions. The Civil Code’s property rules are very explicit: only persons can own property. Persons can be either natural or juridical. When the decedent dies, he loses his status as a person. Of course, since le mort seizit le vif, the successor’s ownership is retroactive to the instant of the decedent’s death. Nonetheless, the successor may never get ownership since his rights are subject to the claims of the decedent’s creditors. Furthermore, the successor has the option to renounce the succession, and has thirty years within which to choose. Moreover, the testator himself may impose suspensive conditions upon the legacy.

11. Id. at 339-40 (citations omitted).
12. In this sense the seized heirs can be compared to the trustee of a trust, who is invested with ownership of the trust property for the benefit of the beneficiaries. See Reynolds v. Reynolds, 388 So. 2d 1135 (La. 1981).
13. La. Civ. Code art. 479. Technically, the law of property refers to the objects of property rights as “things,” id. at art. 448, while the term “property” refers to the legal rights that persons have in those things. Yiannopoulos, supra note 8, § 1. However, the term “property” is sometimes used as a substitute for the word “thing.” See, e.g., La. Civ. Code art. 2335 (describing the types of “property” married persons can own).
14. Recognition of juridical person status can have severe consequences, as for example occurs when a usufruct is over a closely held business. If the business is a juridical person, either as a corporation or a partnership, then the property is classified as a non-consumable, La. Civ. Code art. 537, while a business conducted as a sole proprietorship is classified as a consumable. Id. at art. 536.
15. Denial of juridical person status can have serious consequences, as evidenced by St. Charles Land Trust v. St. Amant, 253 La. 243, 217 So. 2d 385 (1968), in which the Louisiana Supreme Court declined to characterize a trust as a juridical person. This resulted in the imposition of Louisiana’s estate taxes upon a non-resident beneficiary’s death, an outcome that would have been averted had the trust been classified as a juridical person.
16. Under sales law, ownership passes to the buyer when the sale is perfected, meaning the parties have agreed on the price and the thing. La. Civ. Code art. 2456. When the sale is subject to a
In the case of the legacy subject to a suspensive condition, the legatee’s ownership is clearly retroactive to the instant of death once the condition has been satisfied. But until that occurs, what is the status of the property? Since the decedent can no longer own any property, the doctrine of seizin provides the theoretical bridge to explain the status of the decedent’s patrimony until the successor’s rights have been determined.

The second role served by seizin is more practical. Until the successor’s rights have been determined, someone needs to act as the decedent’s representative, both for the purpose of asserting claims that the decedent may have against others, as well as for the purpose of defending claims asserted by the decedent’s creditors.

C. What Role (If Any) Does Seizin Have in the Revision?

There are two references to seizin in the comments accompanying the proposed articles, but there is no direct reference in the articles themselves. Seizin is first mentioned in a comment which accurately observes that ownership must be distinguished from seizin and possession. The article itself states that “[s]uccessors acquire ownership of the estate immediately on the death of the decedent.” The second reference, whose meaning is less clear than the first, follows proposed Article 936. The text of this article explains that the decedent’s possession is continued through his successors, while comment (c) states in pertinent part:

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, and in that limited sense, each of them has seizin. . . .

suspensive condition, ownership does not pass to the buyer until the condition is fulfilled, although the effects are retroactive. La. Civ. Code art. 1775. Thus the seller is considered to be the owner until the condition is fulfilled, but fulfillment of the condition results in the retroactive awarding of ownership to the buyer. This approach is unavailable in the successions context since the decedent has lost his legal personality.

17. S. 1379, 1995 Session, art. 935 comment (a).
18. Id. at art. 935. While the proposed article and its accompanying comment are both accurate, it could be said that the attributed sources for this article are incorrect. The revision draft cites three articles as the source for the rule in proposed Article 935, viz., La. Civ. Code arts. 940, 941, and 943, yet these articles deal with seizin—not ownership. The retroactivity of ownership is provided for in Article 946, which states:

Though the succession be acquired by the heir from the moment of the death of the deceased, his right is in suspense, until he decide whether he accepts or rejects it. If the heir accept, he is considered as having succeeded from the moment of his death; if he rejects it, he is considered as never having received it.

19. S. 1379, 1995 Session, art. 936 comment (c). The bill is reproduced in the Appendix to this Symposium at 57 La. L. Rev. 201.
This comment is cryptic at best. Certainly it is true that a successor's ownership is retroactive to the moment of death, even though the successor's rights may not be recognized until a later point in time. However, retroactivity of the successor's ownership is not seizin, since seizin and ownership are distinct. Further, it makes no sense to say that all successors have seizin from the moment of the decedent's death.

Assume for example that the decedent has made a particular legacy of Blackacre to X. On the day prior to the decedent's death, a defective tree falls, severely damaging a neighbor's car. Under Article 2322, the owner of the tree is liable for the damage caused by its vice. Since the decedent was the owner of Blackacre and the trees thereon when the defective tree fell, the decedent would be liable to the neighbor for the resulting damage. Who now stands in the decedent's shoes for purposes of the neighbor's claim?

If X has seizin, as comment (c) to Article 936 implies that he does, then the neighbor ought to be able to sue X, but this would make no sense. Under obligations law, claims arising out of Blackacre do not bind X personally even if the obligation qualifies as a real obligation (although a real obligation would continue as a charge on X's ownership). The neighbor's claim would thus be a general charge on the decedent's patrimony, and, since X neither owns nor has any custodial power over other property of the decedent, it is illogical to invest seizin in X or in any particular legatee.

It is certainly possible that the above quoted and discussed comment is not intended to preserve seizin, and, even if it were, there is tremendous danger in relegating important concepts (like seizin) to a comment. Moreover, the conclusion is more likely that the proposed revision is simply eliminating seizin. It is likely this is intentional since Max Nathan, Jr., Reporter for the project, criticized the concept sharply in a 1966 law review article. The proposed elimination of seizin undoubtedly stems from the belief that the concept is unnecessary. This leads to the final question of this section, which follows.

D. Assuming That Seizin Has Been Eliminated by the Revision, What Are the Ramifications of Its Suppression?

Until the successor's rights have been determined, the decedent's patrimony must vest in a person, either natural or juridical. It is true of course that in many

20. Article 1764 of the Civil Code provides:
   A real obligation is transferred to the universal or particular successor who acquires the movable or immovable thing to which the obligation is attached, without a special provision to that effect.
   But a particular successor is not personally bound, unless he assumes the personal obligations of his transferor with respect to the thing, and he may liberate himself of the real obligation by abandoning the thing.

cases there will be an administration and that the succession representative will administer the decedent's estate. However, suppose the case where there are no debts, yet none of the successors has either accepted or renounced the succession. Who has the legal authority to assert rights on behalf of the decedent? Unless the decedent's legal personality is carried on by someone, confusion results.

It does not help to say that the ownership of the successors is retroactive. Although the situation is clear once the successor's rights have been determined, there needs to be someone designated as the custodian of the decedent's patrimony until that occurs. Without seizin, there is a void, both theoretically and practically.

Of course, there is the real possibility that the concept of seizin will subsist even if the revision does eliminate all references to it. We certainly have experienced the phenomenon of a term being suppressed yet continuing to exist in the jurisprudence. And, who can forget Article 3467, which states in its text that legislation alone can establish causes of suspension, yet suggests (correctly) in comment (d) that the jurisprudentially created doctrine of contra non valentem "continues to be relevant." If seizin is eliminated as a concept expressly acknowledged in the Code, then this writer predicts that it will continue to live on, not just in the ivory tower of legal academia where abusively logical law professors reside, but in the halls of justice, to be reflected in the jurisprudence.

II. THE TRANSFER AND TACKING OF POSSESSION

Proposed Article 936 provides:

The possession of the decedent is transferred to his successors, whether intestate or testate, and if testate, whether particular, general, or residuary. Intestate, general, and residuary successors continue the possession of the decedent with all its advantages and defects, and with no alteration in the nature of the possession. The possession of the decedent is tacked to the possession of all successors. A particular successor may commence a new possession for the purposes of acquisitive prescription.

22. In the 1985 obligations revision, the term "potestative" was suppressed. Nonetheless, a Westlaw search found 16 cases since January 1, 1985 that have used the word. In all fairness to Professor Saul Litvinoff, Reporter for the Obligations project, there is certainly an important difference between the elimination of the word potestative in the obligations revision and the elimination of the concept seizin in the proposed successions revision. The concept that the word potestative represents was not eliminated, but the word itself suppressed because of numerous misunderstandings that had plagued the Louisiana courts. La. Civ. Code art. 1770 comment (e).

This article raises two important questions. First, what is existing law on the transfer and tacking of possession? Second, does proposed Article 936 change the law as its comment (b) states?

A. What Is Existing Law on the Transfer and Tacking of Possession?

As explained by Professor A.N. Yiannopoulos, the term possession refers to "the factual authority that a person exercises over a corporeal thing with the intent to own it or the corresponding authority by which a person exercises a real right with the intent to have it as his own."24 In Louisiana, rights resulting from possession fall into three categories. The first category, acquisition of the status of possessor, is the least protected under property law. One attains this status by complying with the dual requirements set forth in Article 3424, which provides: "To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing."25 The second category, acquisition of the right to possess, requires that the possessor continue his status as possessor for one year.26 The third category is the acquisition of ownership through acquisitive prescription.

The transfer of possession is expressly provided for in Article 3441, which states: "Possession is transferable by universal title or by particular title." While this article permits the transfer of possession for both types of successors, there is of course a fundamental difference. The successor by universal title "represents the person of the deceased, and succeeds to all his rights and charges,"27 while the successor by particular title "succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him."28 In other words, the universal successor stands in the shoes of the ancestor, and is substituted in his place for both rights and duties. By contrast, the particular successor acquires the ancestor's rights relative to the specific property that has been transferred. Universal succession occurs mortis causa, either through operation of law or in accordance with a will. Particular succession occurs either mortis causa (through particular legacy) or inter vivos (through onerous or gratuitous transfer).

24. Yiannopoulos, supra note 8, § 301, at 583.
25. One who has attained the status of possessor is entitled to the following protections under property law. First, the possessor is entitled to certain rights on account of fruits that he has gathered. La. Civ. Code art. 486. Second, the possessor has certain rights on account of improvements he has made upon the land of another. Id. at art. 496-97. Third, the possessor has certain rights for expenses he has incurred on account of the property of another. Id. at art. 527-28. The possessor can even retain the thing until reimbursed by its owner. Id. at art. 529. Fourth, the possessor of a corporeal movable is presumed to be its owner, id. at art. 530, while a possessor of an immovable is entitled to a higher burden of proof when sued in a petitionary action. Id. at art. 531.
26. Id. at art. 3422. A possessor with the legal right to possess is entitled to judicial protection of that possession through institution of a possessory action.
27. Id. at art. 3506(28).
28. Id.
Tacking of possession is described in Article 3442, which provides: "The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession." When tacking occurs, the possession of the ancestor is cumulated with the possession of the successor. Universal successors clearly have the right to add the period of their ancestor's possession onto their own, since they stand in the shoes of the decedent. Technically, this is not tacking but the universal successor's continuation of the possession begun by the ancestor.\(^\text{29}\)

By contrast, since the particular successor begins a new possession, tacking is the vehicle through which he can cumulate his ancestor's possession with his own. Under Louisiana jurisprudence, tacking requires a juridical link between the parties, meaning an act sufficient to transfer ownership (or possession).\(^\text{30}\)

**B. Does Proposed Article 936 Change the Law as Its Comment (b) States?**

The first sentence of proposed Article 936 says that the decedent's possession is transferred to his successors. This sentence is certainly accurate as applied to the universal successor, but is not accurate under present law as applied to the particular successor, who must demand delivery of his legacy from the person or persons with seizin.\(^\text{31}\) This is not valid basis for criticism of the article, however, since Article 3441 permits the transfer of possession, but does not provide for the transfer of possession at the possessor's death.

The second sentence of proposed Article 936 states that "[i]ntestate, general, and residuary successors" continue the decedent's possession. This sentence is accurate but unnecessary, and the phrase "[i]ntestate, general, and residuary successors" is a cumbersome method of describing the universal successor. The third sentence says that tacking applies to all successors. This sentence is inaccurate because universal successors merely continue the possession of their ancestor (as correctly stated in the second sentence of the proposed article).

The fourth sentence provides: "A particular successor may commence a new possession for purposes of acquisitive prescription." Comment (b) to proposed Article 936 states in pertinent part:

This Article changes the law with respect to particular legatees. Under prior law, the continuation of possession did not apply to particular legatees but only to universal legatees and legatees under universal title, who in the revision are called "residuary" and "general" legatees.

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29. Yiannopoulos, supra note 8, § 323, at 621.
This comment makes clear that the purpose of the proposed article is to change the law, and that the vehicle for this change is the permissive verb “may” in the fourth sentence.

Comment (b) does not expressly mention Bartlett v. Calhoun, but the intent behind the change in the law must be the overruling of Bartlett, a decision that created a major roadblock for particular successors seeking to tack possession for purposes of ten year acquisitive prescription. Article 3482, at issue in Bartlett, then provided:

It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription.

It is clear from Article 3482 that a possessor’s loss of good faith will not prevent him from attaining ownership through ten year acquisitive prescription, since the good faith requirement is satisfied for that possessor so long as his possession commences in good faith and continues for ten years.

Until 1982, the Louisiana courts allowed any particular successor whose transferor had commenced his own possession in good faith to tack that transferor’s possession, even where the transferee had never been in good faith. According to the seminal case of Devall v. Choppin and its progeny, the transferor’s good faith satisfies the requirement of good faith for ten year acquisitive prescription. Bartlett overruled this long line of cases and held that Article 3482 envisions a single possession, and is thus inapplicable to the particular successor, since he commences a new possession separate from his ancestor’s. Under Bartlett, the particular successor and the ancestor must both have begun their possession in good faith in order for the particular successor to tack for purposes of ten year acquisitive prescription.

Bartlett overruled 142 years of jurisprudence constante in the area of property, where rules tend to be more “crystalline” than “muddy.” Of course, in a civil law jurisdiction, where legislation is the source of law, Louisiana courts have the duty to disregard judicial opinions that are contra legem. If Devall had erroneously interpreted Article 3482, then the Bartlett court was correct in overruling it. While the writer agrees with those commentators who have already stated their disagreement with Bartlett, the present discussion is limited to the issue of whether that decision is affected by proposed Article 936.

The fourth sentence of proposed Article 936 is apparently intended to bypass Bartlett by allowing the particular successor to choose whether he wants to

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32. 412 So. 2d 597 (La. 1982).
33. 15 La. 566 (1840).
34. The reader is directed to a splendid law review article authored by Professor Carol Rose in which she examines the relative rigidity/flexibility of property law rules. Carol Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988).
continue the decedent's possession or whether he wants to commence a new possession. If he decides to continue the possession of the decedent, then there would exist only one possession which would satisfy Article 3482 and enable the possessor to claim ownership through ten year acquisitive prescription.

It must be remembered that Bartlett imposes no limitations upon tacking by particular successors in contexts other than ten year acquisitive prescription. Thus, for purposes of thirty year acquisitive prescription, where good faith is not an ingredient, particular successors can tack even though they technically begin a new possession. The following hypothetical is illustrative: Assume that Y, a good faith possessor, commences his possession of Greenacre in 1965. In 1973, Y conveys Greenacre to Z, who is in bad faith. Under Bartlett, Z, as a particular successor of Y, is precluded from tacking Y's possession since Z has begun a new possession. However, for purposes of thirty year acquisitive prescription, where good faith is not an ingredient, Z is permitted to tack Y's possession. Thus, despite the fact that Z's possession is considered a new possession, he has the right to tack Y's possession for purposes of thirty year acquisitive prescription. Of course, under the above facts, it is in Z's interest to do so, since he could acquire ownership of Greenacre in 1995 through thirty year acquisitive prescription.

The Code already allows the particular successor to choose whether to forego tacking in order to take advantage of the technical fact that his possession is a new possession, or whether to take advantage of tacking, thereby foregoing whatever advantage he might have otherwise obtained because his possession is a new possession. Bartlett denies the particular successor that choice if he is a particular successor who commenced his own possession in bad faith, and who relies upon tacking to acquire ownership through ten year acquisitive prescription.

The principal problem with the fourth sentence of the proposed article is that it misses the mark: it fails to focus upon tacking, which is the key concept. The fourth sentence of proposed Article 936 would be much clearer if it addressed the tacking issue head on, ideally through an affirmative statement that the particular successor need not be in good faith to tack for purposes of ten year acquisitive prescription.

To find that the fourth sentence has overruled Bartlett, one must first conclude that the fourth sentence is intended to overrule a famous Louisiana Supreme Court decision not cited in the comment, but referred to obliquely as "law." Referring to a judicial opinion as law seems uncivilian, since the very first article of the Civil Code declares that "[t]he sources of law are legislation and custom." Furthermore, even if one accepts the proposition that proposed Article 936 intends to overrule Bartlett, there remains the question of whether the fourth sentence will accomplish that result, since it does not refer specifically to tacking.

Finally, the Bartlett decision was concerned with particular successions in the general sense, and was not limited to mortis causa transmission. The underlying facts of that case involved a typical inter vivos particular success-
sion—a sale. Proposed Article 936 clearly is limited to mortis causa transfers. Even if the article is successful in overruling Bartlett, it applies only to mortis causa particular successors, who probably represent only a handful of possessors affected by the Bartlett decision. Most people attempting to prove ownership through ten year acquisitive prescription are buyers whose titles were defective, but who were aware of the risk of eviction and bought the property nonetheless. The combined weight of these factors convinces this writer that Bartlett needs to be addressed directly in the acquisitive prescription articles, not in the succession articles, where the focus is more limited.36

III. THE SURVIVING SPOUSE’S USUFRUCT

The third property concept affected by the revision is the surviving spouse’s usufruct, which, unlike the previous two topics, has actually been revised by Act 77 of the first extraordinary session of 1996. One stated goal in tinkering with the spousal usufruct was to segregate the spousal usufruct created through intestacy from those testamentary spousal usufruct provisions that have been permitted to burden the legitime.

Article 890, the source article which initially regulated only the intestate spousal usufruct,37 was amended several times before Act 77, with the overall purpose of each prior amendment to expand the rights of the surviving spouse at the expense of the forced heirs. The prior amendments allowed certain specified testamentary expansions of the spousal usufruct that was otherwise available where the decedent died intestate, owning community property, survived by descendants and a spouse. In such cases, the surviving spouse received a usufruct over the community property inherited by the descendants.

36. As a matter of full disclosure, the writer feels compelled to “confess” that she was affiliated with the enactment of an article that could be criticized for reasons similar to those she advances here against proposed Article 936. This confession concerns Article 2502, which defines a quitclaim deed and announces its legal effects. The article is placed in the eviction chapter of the sales title, as application of the warranty against eviction to quitclaims ought to be addressed there. However, the article goes beyond that topic, and purports to explain the application of the rules of acquisitive prescription to quitclaims.

It would have been more appropriate to have addressed the acquisitive prescription aspects of quitclaims in the articles dealing with acquisitive prescription. Thus, Article 2502 can be criticized for dealing with a topic it had no right to deal with. In addition, Article 2502 does not synchronize with Articles 3480-81, which deal with good faith for purposes of acquisitive prescription. Article 3480 defines good faith for purposes of acquisitive prescription as the honest and reasonable belief that a possessor is the owner of the property he is possessing. Article 3481 states that a possessor is presumed to be in good faith. Thus, the burden is placed on him who asserts the lack of good faith to disprove the presumption by showing either that the possessor actually knew he was not the owner, or that his belief, albeit honest, was not reasonable. Article 2502, dealing with quitclaims, states that the buyer’s acceptance of a quitclaim does not create a presumption of bad faith. Since there are no presumptions of bad faith in the acquisitive prescription articles, the reference in Article 2502 is out of sync.

37. The predecessor to Article 890 prior to 1981 was Article 916.
The usufruct created by Article 890, a legal usufruct because it is created by operation of law, has been legislatively declared to be a permissible burden upon the legitime.

Each prior amendment to Article 890 increased the decedent’s power to favor the surviving spouse over the forced heirs by allowing additional testamentary expansions of the intestate spousal usufruct. Each resulting testamentary expansion has been legislatively characterized as a legal usufruct permissibly burdening the legitime. Of course, the purpose of applying the concept “legal usufruct” to certain testamentary expansions of the intestate spousal usufruct is clear: to avert claims by forced heirs that the contested testamentary provision constituted an impingement upon the legitime.

One could certainly fault the legislature for calling these specified testamentary expansions of the intestate spousal usufruct “legal” usufructs. Such a characterization severely erodes the distinction between legal usufructs and conventional usufructs. Furthermore, characterizing testamentary expansions of the intestate spousal usufruct as legal usufructs is plainly disingenuous. For example, under Article 890, a usufruct over the decedent spouse’s separate property is a permissible testamentary expansion of the intestate spousal usufruct. It is characterized as a legal usufruct, even though it is available only through express testamentary disposition.

Another source of the erosion of the distinctions between legal and conventional usufructs is jurisprudential. When confronted with a testamentary disposition that bequeathed a usufruct to the surviving spouse identical to the legal usufruct, the Louisiana Supreme Court held in Succession of Chauvin that the resulting spousal usufruct was a mere confirmation of the legal usufruct, and thus legal, not conventional. As a result, the usufruct would terminate upon remarriage, and not at death.

The revision’s goal with respect to the spousal usufruct was to separate provisions on the intestate spousal usufruct from the testamentary expansions of that intestate spousal usufruct. This certainly has logical appeal to it. As the redactor of the revision has pointed out, Article 890 mixes rules of intestacy with rules applicable to wills, which is technically inappropriate since Article 890 is situated within the rules of intestacy. And so the revision makes changes to the spousal usufruct for the dual purposes of “stylistic purity and conceptual consistency.” The writer applauds the revision for attempting to untangle Article 890’s mélange of rules for intestacy and testacy. Those aspects of Article 890 applicable to testaments certainly should be severed from the purely “legal” usufruct recognized by the article.

40. The legal spousal usufruct of Article 890 expressly terminates upon remarriage, while conventional usufructs follow the general rule for a usufruct conferred on natural persons: such a usufruct ends at the death of the usufructuary. La. Civ. Code art. 607.
The revision has severed testamentary expansions of the intestate spousal usufruct from Article 890, while carefully preserving the status of these testamentary expansions of the intestate spousal usufruct as permissible burdens upon the legitime. The revision has successfully bifurcated the intestate spousal usufruct, a true legal usufruct, from those testamentary expansions of the intestate spousal usufruct, while making it clear that the enumerated testamentary expansions of the intestate spousal usufruct are permissible burdens upon the legitime.42

By moving these provisions into the donation title’s chapter on the disposable portion, and by stating expressly that these testamentary expansions are permissible burdens upon the legitime, the revision has eliminated the need to perpetuate the fiction that the amendments to Article 890 engaged in, viz., that testamentary expansions of the intestate spousal usufruct (albeit available only through a testamentary disposition) nonetheless result in a legal usufruct.

It is hoped that the revision intended to abandon this legal fiction, allowing us to achieve “conceptual consistency.” Unfortunately, it is not clear whether the revision has in fact eliminated this fiction, and thus, whether this goal has been attained. On the one hand, new Article 1499 does not call the usufruct described therein as a legal usufruct. In addition, the article is placed in a chapter defining the decedent’s testamentary freedom vis-a-vis the forced heirs. On the other hand, new Article 1514, which concerns security, is problematic. That article provides:

A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse. A forced heir may also request security to the extent that a surviving spouse’s usufruct over the legitime affects separate property.

According to comment (c), this provision merely reproduces the rules previously contained in the last paragraph of Article 890. At first blush, this comment seems accurate, but it must be recalled that Article 890, as periodically amended, characterized all permissible testamentary expansions of the intestate spousal usufruct as legal. Under the law of usufruct, legal usufructuaries do not

42. This is accomplished in Article 1499, adopted in the first extraordinary session of 1996. That article provides:

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period.

A usufruct over the legitime in favor of the surviving spouse is a permissible burden that does not impinge upon the legitime, whether it affects community property or separate property, whether it is for life or a shorter period, whether or not the forced heir is a descendant of the surviving spouse, and whether or not the usufructuary has the power to dispose of nonconsumables.
have to post security. Thus, any usufruct provided for in Article 890 would not require the usufructuary to post security. Exceptions were created to protect the forced heir whose legitime was subject to a usufruct over the decedent’s separate property, or to a usufruct in favor a stepparent. In these two cases, the forced heir was given the right to request security.

The two scenarios covered by this special rule are vastly different. A usufruct over the decedent’s separate property is available only through testamentary provision. Characterizing this usufruct as legal, as Article 890 did, was disingenuous, as stated previously. Of course, Article 1514 does not say that the usufruct over separate property is legal. To the contrary, its removal from Article 890 and its placement among the rules on testacy suggests very strongly that it is now viewed as a conventional usufruct, albeit a permissible burden upon the legitime.

Nonetheless, the presupposition of Article 1514 seems to be that the usufruct over separate property is legal, and that the usufructuary does not have to post security unless requested to do so by the forced heir. It is unlikely that the redactors fully considered this issue.

The second scenario embraced by Article 1514, the usufruct in favor of a stepparent of the forced heir, can arise either through intestacy or by testament. To the extent that this provision is intended to apply to “testamentary” usufructs to stepparents, the same criticism made above relative to the usufruct over separate property applies. To the extent that this provision is intended to apply to instances of intestacy, this provision is in the wrong place. It should have been left in Article 890, and its removal raises serious questions about its continued applicability in cases of intestacy.

This sloppiness detracts from the conceptual consistency espoused as a goal of the revision. It also hampers the revision’s pursuit of stylistic purity. This writer is of the view that the stylistic purity actually achieved through bifurcation of the testamentary spousal usufruct from the intestate spousal usufruct has been seriously undermined by Article 1514.

One potential difference between the security provisions of Article 890 and new Article 1514 lies in the amount of security that the heirs can obtain. Under old Article 890, the forced heir entitled to security could request security over all property to which the usufruct attached. Under new Article 1514, the forced heir’s right to obtain security in cases where the usufruct is over separate property seems to be limited to the amount of the legitime, and not to all property subject to the usufruct.

Another change sought by the revision is the overruling of Chauvin through the first paragraph of Article 1499, which provides:

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period.
Chauvin had held a testamentary provision bequeathing the surviving spouse a usufruct over community property to be a legal usufruct since it "merely confirmed" the usufruct otherwise available under Article 890. Thus, the usufruct would expire upon remarriage. The comments to Article 1499 state that Chauvin is legislatively overruled by the article. This comment is true so long as a testamentary provision "merely confirming" a legal usufruct is a "grant" of a usufruct under Article 1499. If it is, then the second sentence of the first paragraph applies, and the usufruct is for life. On the other hand, the mere confirmation of what would otherwise occur in the absence of a will might be something less than a grant, as that term is used in the article. If so, then the second sentence does not apply, and Chauvin may not be overruled, despite the comment.43

Article 1499 does add one item to its list of permissible testamentary expansions: the article makes clear that the testator can empower the surviving spouse to dispose of nonconsumables. Article 890 did not address this question, and there are no cases on point, but law professors have been raising the question in the classroom for years. Of course, by permitting the spouse to dispose of nonconsumables without impingement of the legitime, the article has arguably extended the usufructuary's power at the expense of the forced heir. This expansion is potentially significant, since a usufructuary empowered to sell nonconsumables would not be required to obtain the forced heir's permission to sell nonconsumables such as the house, the car, or the stock.

Beyond the question of whether the usufructuary's powers have been expanded, there exists the matter of the usufructuary's duty to the naked owner at termination of the usufruct where the usufructuary has been empowered to alienate nonconsumables. The usufruct articles do not provide a rule for this scenario. There are two different rules that might apply. But before presenting these rules, it might be helpful to present a general overview of the usufructuary's duties toward the naked owner at termination of the usufruct.

If the usufruct is over a nonconsumable, then the usufructuary cannot alienate or encumber the thing but must return it to the naked owner at the end of the usufruct. Notice that for a nonconsumable, the naked owner bears the risk that the thing will decline in value, but he also receives the benefit if it increases in value. This is to be contrasted with the situation of the naked owner where the usufruct is over a consumable. Here the usufructuary has the right at termination to pay to the naked owner the value the thing had at commencement, or to replace the thing with items of comparable quantity and quality. Thus, the naked owner bears the risk that the thing will decline in value, but does not receive the benefit if it increases in value. That benefit is conferred upon the usufructuary, who will pay the item's value at commencement if items of that type have increased in value, or will purchase comparable items if its value has declined.

43. For an example of a Louisiana Supreme Court decision disregarding a comment as contradictory of the article, see Ramirez v. Fair Grounds Corp., 575 So. 2d 811 (La. 1991).
The first rule ("Rule One") that could be applied where the usufructuary has been empowered to sell nonconsumables is the rule generally applicable to consumables: the usufructuary must either replace the things with items of the same quantity and quality, or pay the value of the things at commencement of the usufruct.\(^4^4\) The second rule ("Rule Two") applies where the usufruct is over a nonconsumable and the usufructuary has not been empowered to sell the thing. If the thing is a corporeal movable of the type that gradually wears out through use, then the usufructuary is empowered to sell it and to deliver at termination the value at the time of the disposition.\(^4^5\) Under Rule Two, the usufructuary is not required to sell the thing, but has the right to do so.

Of course, the significance of applying Rule One versus Rule Two depends upon whether the nonconsumable increases or decreases in value. If the property increases in value, the usufructuary is favored under Rule One, since he only has to pay the value at commencement which is less than either the value at the time of the disposition or at termination. The usufructuary is worse off under Rule Two since he must pay the value at the time of disposition, which is more than he owes under Rule One. On the other hand the naked owner under Rule Two is not as bad off as he would be under Rule One.

If the thing decreases in value, as movables sometimes do, the usufructuary who is empowered to dispose of the thing is still better off under Rule One. Even if he has sold the thing, he has the right to replace it with comparable things, which he can now buy for a price lower than that which he received in the sale. As far as the naked owner is concerned, he is better off under Rule Two, since he will receive the value at the time of sale, which is greater than its value at termination.

Regardless of whether Rule One or Rule Two is found to apply (and the writer believes Rule Two is the more appropriate), the expansion of Article 1499 to permit the usufructuary to dispose of nonconsumables clearly holds the potential for adverse effects upon the naked owner. It would have been preferable if this new expansion had been added to Article 1514's list of situations where the naked owner can request security to protect himself.

IV. CONCLUSIONS

The proposed successions revision directly impacts property law in three fundamental areas. First, seizin, a conceptual device fundamental in the transmission of the decedent's patrimony, is slated for elimination. This will result in a theoretical and practical hiatus, and will likely prompt the judiciary to resurrect the concept from their old West paperback Codes.

Second, core principles on the transfer and tacking of possession have been injected into the area of successions law dealing with intestacy. While the

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\(^4^4\) La. Civ. Code art. 537.
\(^4^5\) Id. art. 568.
revision appropriately states general principles on the transfer of possession upon the possessor’s death, the revisions does not stop there. Significant reform of acquisitive prescription concepts have been attempted, but may not have been successful, and, even if successful, should have been placed with the acquisitive prescription articles and broadened to include inter vivos transfers.

Third, Article 890, dealing with the spousal usufruct, has been streamlined so that it deals only with the true legal usufruct resulting from intestacy. The testamentary expansions of the intestate spousal usufruct, added piecemeal to Article 890, have been moved into a more appropriate location. Unfortunately, the revision, while recognizing the fundamental differences between the testamentary spousal usufruct and the intestate spousal usufruct, was not entirely successful in dismantling the legal fiction that certain testamentary spousal usufructs are nonetheless legal usufructs.

In conclusion, it is this writer’s sincere desire that additional discussion and collaboration be generated by this article so that our revised Code can serve us as well and as long as its predecessor.