

Changes in the Law of Dispositions Mortis Causa From the Practitioner's Perspective

Lawrence L. Lewis III

Harry J. Philips Jr.

Repository Citation

Lawrence L. Lewis III and Harry J. Philips Jr., *Changes in the Law of Dispositions Mortis Causa From the Practitioner's Perspective*, 57 La. L. Rev. (1996)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol57/iss1/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Changes in the Law of Dispositions *Mortis Causa* From the Practitioner's Perspective

Lawrence L. Lewis, III
and Harry J. Philips, Jr.**

Senate Bill 1379 of the 1995 Regular Session of the Louisiana Legislature includes a number of changes to Chapter 6 of Title II, Book III of the Louisiana Civil Code, dealing with donations *mortis causa*.¹

The purpose of this article is to survey the changes in Louisiana substantive and procedural law on this subject from a practitioner's point of view. Each of the sections of Chapter 6 that are affected by this legislation are addressed and, where the authors feel appropriate, critiques or suggested changes are noted.

I. SECTION 1. TESTAMENTS GENERALLY

A donation *mortis causa* is defined as an act to take effect, when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable.² The proposed legislation provides that a "disposition *mortis causa*" may be made only in the form of a testament authorized by law.³ Presumably, a "disposition *mortis causa*" referenced in proposed Article 1570 is identical to a "donation *mortis causa*" defined in current Article 1469; however, if such is the case, it would be preferable to refer to a "donation *mortis causa*" in revised Article 1570. The revision comments also indicate that the proposed revision to Article 1570 simplifies, but does not change, the law.⁴

Present Article 1571 of the Civil Code, which defines the word "testament," is deleted.⁵ The comments to revised Article 1570 indicate that the definition of testament in present Article 1571 was thought unnecessary and repetitive since Article 1469 defines a donation *mortis causa*, and such donations may only be made by testament.⁶ The two definitions, however, are not identical. Article 1469 distinguishes a donation *mortis causa* from donations *inter vivos*, while Article 1571 provides how the donation *mortis causa* is executed.

Copyright 1996, by LOUISIANA LAW REVIEW.

* J.D., Louisiana State University Law School, 1970; L.L.M., Southern Methodist University, 1972; Board Certified Tax Attorney; Partner, Onebane, Bernard, Torian, Diaz, McNamara & Abell; Member, Louisiana State Bar Association.

** J.D., Louisiana State University Law School, 1983; Partner, Taylor, Porter, Brooks & Phillips, L.L.P.; Member, Louisiana State Bar Association.

1. S. 1379, 1995 Session, arts. 1570-1610 [hereinafter proposed La. Civ. Code arts.]. The bill is reproduced in the Appendix to this Symposium at 57 La. L. Rev. 201.

2. La. Civ. Code art. 1469.

3. Proposed La. Civ. Code art. 1570.

4. *Id.* at cmt. a.

5. La. Civ. Code art. 1571: "A testament is the act of last will clothed with certain solemnities, by which the testator disposes of his property, either universally or by universal title, or by particular title."

6. Proposed La. Civ. Code art. 1570 cmt. c.

Proposed Article 1571 continues and restates the prohibitions in current Articles 1572 and 1573, which prohibit joint or reciprocal testaments and testaments made by an agent or mandatary. The comments clarify that these prohibitions are not applicable to a situation where the testator is unable to sign the testament personally because of a mental or physical infirmity.⁷ Those situations are addressed in proposed Article 1579.

Proposed Article 1572 recognizes that testamentary dispositions may be committed to the choice of a third party in certain circumstances.⁸ It continues and expands the ability of a testator to delegate authority to an executor who may select assets to satisfy certain legacies. Under the proposed article, a testator may delegate authority to his executor to allocate specific assets to satisfy a legacy expressed in terms of a value or a quantum including a fractional share. This revision clarifies the present uncertainty whether "quantum" includes fractional shares, such as one-fourth or one-half of something, and removes the language in current Article 1573 that limits the ability to delegate such authority to instances where the designation of the quantum or value is made "either by formula or by a specific sum."⁹ The revision simplifies the language and provides the testator greater flexibility in allowing the executor to allocate assets to satisfy specific legacies.

The second paragraph of proposed Article 1572 is new and provides that in connection with charitable legacies, the testator may delegate authority to the executor to not only select assets but also to select the charitable legatee to receive the legacy and to impose conditions upon the charity in connection with the receipt of the legacy. The ability of the executor to select the legatees and to impose conditions upon the legatees is a radical departure from prior law and seemingly allows the executor to substitute his will for the testator's will. The ability to impose conditions on the receipt of charitable legacies may, indeed, allow an executor the ability to redirect assets by imposing conditions that will be impossible for the charity to fulfill, thereby allowing the legacy to fail and the property to go to an alternate legatee or to pass intestate. Although flexibility in estate planning is desirable, this type of flexibility may lead to abuse. Furthermore, the use of the term "philanthropic" may be overly broad. There is no objective standard to determine if an entity is organized for philanthropic purposes. The Internal Revenue Code provides an objective reference for

7. Proposed La. Civ. Code art. 1571 cmt. b.

8. Proposed La. Civ. Code art. 1572: "Testamentary dispositions committed to the choice of a third person are null, except as expressly provided by law. A testator may delegate to his executor the authority to allocate specific assets to satisfy a legacy expressed in terms of a value of a quantum, including a fractional share.

The testator may expressly delegate to his executor the authority to allocate a legacy for educational, charitable, religious or other philanthropic purposes, to one or more entities organized for any of those purposes. In addition, the testator may expressly delegate to his executor the authority to select in his discretion, the entities to receive the legacies and the authority to impose any conditions on them that are not contrary to law."

9. La. Civ. Code art. 1573.

religious, charitable, or educational organizations.¹⁰ If this authority is going to be granted to an executor, it would be preferable to restrict the exercise of such power to entities in existence at the time of the testator's death that qualify as Section 501(c)(3) organizations under the Internal Revenue Code. This approach of restricting the executor's ability to impose conditions on the legacy will diminish the potential for abuse under this provision.

Proposed Article 1573 restates the existing law that the formality to which a testament is subjected by law must be observed; otherwise, the testament is null.¹¹

II. SECTION 2. FORMS OF TESTAMENT

Current law provides for five forms of testaments: nuncupative by public act, nuncupative by private act, mystic, olographic, and statutory.¹² The proposed revision reduces the forms of testaments to two: olographic and notarial.¹³ The proposed revision abolishes the nuncupative will by public act, the nuncupative will by private act, and the mystic will. The abolition of these forms of testament is desirable for they have become archaic and are seldom, if ever, used in current practice. The validity of existing nuncupative and mystic wills is preserved.¹⁴

Neither proposed Article 1574 nor Article 1570 mention the revocable living trust which may be used as a will substitute to avoid probate. A settlor, through the use of a revocable trust, may provide for his property to pass to his beneficiaries upon his death. Such trusts often become irrevocable upon the death of the settlor. These revocable trusts which are used as will substitutes seem to fall within the definition of a donation *mortis causa* under Article 1469: an act to take effect, when the donor shall no longer exist, by which he disposes of the whole or part of his property, and which is revocable. The revocable trust is, by its very definition, revocable and usually disposes of the whole or part of the settlor's property upon the settlor's death. Are such revocable trusts classified as donations *mortis causa*? If such a trust is a donation *mortis causa*, then it may be made only in the form of a testament under proposed Article 1570 and must be either an olographic or notarial testament under proposed Article 1574. A revocable living trust is created during the life of the settlor and is considered by most practitioners to be an *inter vivos* trust which may only be created by authentic act or by act under private signature executed in the presence of two witnesses and duly acknowledged by the settlor or by the affidavit of one of the attesting witnesses.¹⁵ The form of an *inter vivos* trust

10. I.R.C. § 501(c)(3) (1986).

11. La. Civ. Code art. 1595.

12. La. Civ. Code arts. 1574-1588 and La. R.S. 9:2442-2444 (1991).

13. Proposed La. Civ. Code art. 1574.

14. Proposed La. R.S. 9:2441, S. 1379, 1995 Session.

15. La. R.S. 9:1752 (1991).

does not comply with the forms for either the olographic or notarial testaments under proposed Articles 1575 through 1578. Thus, if a revocable trust is a donation *mortis causa* which must be in the form of a testament, such a trust would be a nullity as a will substitute unless in the form of an olographic or notarial testament. Since a revocable living trust is also an *inter vivos* trust, it cannot be in the form of an olographic testament, as an *inter vivos* trust is subject to its own rules of form.¹⁶ Consequently, a revocable living trust would have to be in the form of a notarial testament to insure its validity under the proposed Civil Code articles or these articles should be clarified to recognize that a donation *mortis causa* may be made in the form of a revocable trust not subject to the form requirements of donations *mortis causa*.

Proposed Article 1575 provides the rules relating to the form of an olographic testament.¹⁷ It continues the substance of current law that an olographic testament must be entirely written, dated, and signed in the handwriting of the testator in order to be valid.¹⁸ Any additions and deletions to an olographic testament may be given effect only if made by the hand of the testator.¹⁹

The notarial testament is the second form of testament recognized under the proposed revision. This form of testament is essentially identical to the current statutory will.²⁰

Proposed Article 1577 provides the general requirements of form for notarial testaments.²¹ These general requirements are identical to the present requirements of form for a statutory will.²² The testament must be in writing and shall be dated. If the testator knows how to sign his name and to read, and is

16. *Id.*

17. Proposed La. Civ. Code art. 1575:

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

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

18. La. Civ. Code art. 1588.

19. La. Civ. Code art. 1589 and proposed La. Civ. Code art. 1575.

20. Compare La. R.S. 9:2442-2444 (1991) and proposed La. Civ. Code arts. 1577-1580.

21. Proposed La. Civ. Code art. 1577:

The notarial testament shall be prepared in writing and shall be dated and executed in the following manner. If the testator knows how to sign his name and to read, and is physically able to do both, then:

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

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

22. La. R.S. 9:2442 (1991).

physically able to do both, then the following procedure must be followed: (1) in the presence of the notary and the two witnesses, the testator must declare or signify to them that the instrument is his testament and sign his name at the end and on each other separate page of the instrument, and (2) the notary and witnesses, in the presence of the testator and of each other, must sign the following declaration or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this ____ day of _____, _____."

Proposed Article 1578 provides for the execution of a notarial testament by a testator who is literate and sighted but is physically unable to sign.²³ In such a case, the testator must declare or signify to the notary and the witnesses that the instrument is his testament, that he is able to see and read but unable to sign because of physical infirmity, and shall affix his mark where his signature would otherwise be required. If he is unable to affix his mark; he may direct another person to assist him in affixing a mark or to sign his name in his place. The other person may be one of the witnesses or the notary. The notary and witnesses must sign the following declaration in the presence of the testator and of each other: "In our presence the testator has declared or signified that this is his testament, and that he is able to see and read and knows how to sign his name but is unable to do so because of a physical infirmity and in our presence he has affixed, or caused to be affixed, his mark or name at the end of the testament and on each other separate page and in the presence of the testator and each other, we have subscribed our names this ____ day of _____, _____."²⁴ Otherwise, the ordinary requirements for a notarial testament apply to the execution of a testament by a person physically unable to sign his name.

23. Proposed La. Civ. Code art. 1578:

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

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

(2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "In our presence the testator has declared or signified that this is his testament, and that he is able to see and read and knows how to sign his name but is unable to do so because of a physical infirmity; and in our presence he has affixed, or caused to be affixed, his mark or name at the end of the testament and on each other separate page, and in the presence of the testator and each other, we have subscribed our names this ____ day of _____, _____."

24. *Id.*

Proposed Article 1579 provides for notarial testaments where the testator is illiterate or physically unable to read.²⁵ The written testament must be read aloud in the presence of the testator, the notary, and the witnesses. The witnesses and the notary, if he is not the person who reads the testament aloud, must follow the reading on copies of the will. After the reading, the testator must declare or signify to the witnesses and the notary that he heard the reading and that the instrument is his testament. The testator must sign his name at the end of the testament and on each separate page of the instrument. The declaration must be in the following form or substantially similar: "This testament has been read aloud in our presence and in the presence of the testator, such reading having been followed on copies of the will by the witnesses [and the notary if he is not the person who reads it aloud], and in our presence the testator declared or signified that he heard the reading, and that the instrument is his testament, and that he signed his name at the end of the testament and on each other separate page, and in the presence of the testator and of each other, we have subscribed our names this ____ day of _____, 19____."²⁶ If the testator does not know how to sign his name or is unable to sign because of physical infirmity, he must so declare or signify and then affix his mark, or

25. Proposed La. Civ. Code art. 1579:

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

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

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

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

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

26. *Id.*

cause it to be affixed, where his signature would otherwise be required. If he is unable to affix his mark, he may direct another person to assist him in affixing a mark or to sign his name in his place. This other person may be one of the witnesses or the notary. In such instance, the required declaration must be modified to recite in addition that the testator declared or signified that he did not know how to sign his name or was unable to do so because of physical infirmity and that he affixed, or caused to be affixed, his mark or name at the end of the testament. The proposed revision codifies the result in *Succession of Harvey*,²⁷ that it is not necessary that the notary be the person who reads the will. However, the attestation clause must declare that the notary followed the reading of the will along with the witnesses if he is not the person who reads it aloud. Section 4 of proposed Article 1579 provides that a person who may execute a testament authorized by either Article 1577 or 1578 may also execute a testament authorized by proposed Article 1579. Consequently, where there is a doubt as to whether the testator is physically impaired or as to the extent of the testator's literacy, a will may be executed under these provisions even though the testator is literate or is physically capable of signing his name.

Proposed Article 1580 provides for the execution of a notarial testament in a braille form and substantially reproduces the substance of current law relative to statutory testaments in braille form.²⁸ It does not change the law.

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

The proposed revision provides that the following persons are incompetent to act as witnesses to testaments: (a) the insane, (b) the blind, (c) those under the age of fourteen, and (d) those unable to sign their names.²⁹ Additionally, a person who is competent although deaf or unable to read cannot be a witness to a notarial testament under proposed Article 1579, which requires that the testament be read aloud and that the witness follow the reading of the will or a copy of the will. The proposed revisions lower the age of competency for a witness from age sixteen to fourteen and abolish the disqualification as witnesses of "persons whom the criminal law declares incapable of exercising civil functions."³⁰ The revision comments indicate that the age of competency has been reduced to fourteen to make it consistent with traditional practice regarding witnesses to authentic acts under former Civil Code article 2234.³¹ The lowering of the age of competency of witnesses is of questionable desirability. Does an adolescent at age fourteen have the desired qualities of a witness—the powers of observation and recollection?

27. 573 So. 2d 1304 (La. App. 2d Cir. 1991).

28. La. R.S. 9:2444 (1991).

29. Proposed La. Civ. Code art. 1581.

30. La. Civ. Code art. 1591.

31. Proposed La. Civ. Code art. 1581 cmt. c.

Under current law, the fact that a witness or a notary is a legatee does not invalidate a testament.³² The proposed revision provides that the legacy to the witness shall be upheld if it is otherwise valid, but that the legacy to the notary shall be invalid.³³ The second sentence of proposed Article 1582 requires clarification, as it is somewhat ambiguous. The comments indicate that the proposed Article does not change the law and that the language of the Article inferentially approves the result in *Estate of Wartelle*,³⁴ which held that the signature of a third witness, who was a legatee in the testament, could be disregarded as unnecessary and that the legacy to the legatee witness should be upheld. This is apparently the meaning of the second sentence of the revised article. However, it is subject to misconstruction as currently drafted and clarification is needed. One approach would be to clearly state that a legacy to a witness to a will is invalid unless the appearance of the legatee as a witness to the will is unnecessary to sustain the validity of the will.

Proposed Article 1583 provides that the designation of a succession representative or a trustee, or an attorney for either of them, is not a legacy.³⁵ The comments indicate that this is not a change in the law and only clarifies and codifies what is the "appropriate rule."³⁶ The larger issue which the revision does not address is whether or not such designations are binding upon the heirs and legatees. The jurisprudence has indicated that the designation of an attorney in a will is merely precatory and is not binding on the executor.³⁷ The designation of an executor or a trustee is, however, normally binding and enforceable, although not a bequest, unless the executor fails to qualify or is removed for cause.

IV. SECTION 5. PROBATE OF TESTAMENTS

The proposed revisions to Section 2 reduce the recognized forms of testaments to only two, olographic and notarial. The notarial testament replaces, for all intents and purposes, all of the forms of testaments, other than olographic, that were set out in Articles 1574 through 1595 of existing law. Articles 1644 through 1680 of the Civil Code provided for procedures for opening successions and proving testaments. These articles also contained certain provisions with regard to executors. In practice, however, the precise rules for admitting testaments to probate, appointing executors, and generally executing wills are governed by the Louisiana Code of Civil Procedure.

32. La. Civ. Code art. 1582.

33. Proposed La. Civ. Code art. 1582.

34. 428 So. 2d 1300 (La. App. 3d Cir. 1992), *cert. denied sub nom. Succession of Wartelle*, 433 So. 2d 151 (1993).

35. Proposed La. Civ. Code art. 1583:

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

36. Proposed La. Civ. Code art. 1583 cmt.

37. *Succession of Jenkins*, 481 So. 2d 607 (La. 1986).

The proposed revision contains only one article addressing the probate of testaments. Article 1605 provides that "a testament has no effect unless it is probated in accordance with the procedures and requisites of the Code of Civil Procedure."³⁸ From a practitioner's standpoint, this provision brings the Louisiana Civil Code into alignment with the Code of Civil Procedure. Moreover, in the event that a comprehensive revision of the Code of Civil Procedure provisions regarding administration of successions is undertaken in the future, there will be no need for a concomitant revision of this section of the Civil Code.

V. SECTION 6. REVOCATION OF TESTAMENTS AND LEGACIES

The revision of Section 6 reduces the Civil Code articles addressing the revocation of testaments and legacies from twenty-two³⁹ to five.⁴⁰ In consolidating the provisions of Section 6, the revision simplifies the revocation of testaments and legacies, continuing the Civil Code theory of expressing general statements of law. The revision does, however, raise a few areas of potential concern to practitioners, while, to its credit, removing some antiquated provisions.

Article 1606 confirms the right of revocation expressed in Article 1690 of the current Code, including a prohibition on renunciation of the right to revoke a will at any time.⁴¹

Revised Article 1607 removes the current classifications of revocation (i.e., express or tacit, general or particular) from the law.⁴² Clearly, a testator should be able to include in his new testament a revocation of all previously executed testaments. This does not change long standing Louisiana law.⁴³ The existing law does not expressly provide for revocation of testament by physical destruction, as is provided in proposed Article 1607. However, physical destruction has long been recognized as a tacit revocation derived from an act

38. Proposed La. Civ. Code art. 1605:

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

39. La. Civ. Code arts. 1690-1711.

40. Proposed La. Civ. Code art. 1606-1610.

41. Proposed La. Civ. Code art. 1606:

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

42. Proposed La. Civ. Code art. 1607:

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

- (1) Physically destroys the testament, or has it destroyed at his direction.
- (2) So declares in one of the forms prescribed for testaments.
- (3) Clearly revokes the testament in a signed writing.

43. La. Civ. Code art. 1692 expressly provides for revocation of a testamentary disposition, but requires that such revocation be in "one of the forms prescribed for testaments, and clothed with the same formalities."

of the testator which supposes a change in the testator's intent.⁴⁴ In fact, the courts have viewed physical destruction as the most effective means of revoking a will, leaving little doubt about the testator's intent.⁴⁵ A potentially troubling provision in proposed Article 1607(1) would permit revocation of an entire testament when the testator has the document destroyed at his direction. While, obviously, there are elements of proof attendant to any claim that the testator physically destroyed his will, additional problems of proof arise when the claim is that the will was revoked because the testator directed another to physically destroy the document. Tacit revocation under existing jurisprudence seems to require the physical destruction of the document by the testator himself. Empowering a testator to delegate the physical destruction of his will to another seems contrary to the general principle that testamentary dispositions cannot be delegated to a third person. From a practitioner's standpoint, if a goal of the revision is to add certainty to the law, it would seem that the better rule would not authorize the testator to direct another to physically destroy the testament, but rather require the testator to destroy the testament himself.⁴⁶

Proposed Article 1607 would also permit revocation when the testator "clearly revokes the testament in a signed writing."⁴⁷ This provision represents a marked departure from existing Louisiana law in that it permits revocation to be accomplished by a writing that may not be in the form of a testament.⁴⁸ The comments to Article 1607 suggest that this new ground for revocation is designed to permit a court to conclude that a testament has been revoked when the testator's intent is clear, but the revocation is not in one of the forms of testaments recognized by Louisiana law.⁴⁹ A "signed writing" is not defined, but would presumably include a typewritten statement signed by the testator, or a handwritten document that might otherwise be an olographic will but for the absence of a date.

The requirement that a written revocation be in one of the forms recognized for valid testaments provided a degree of certainty as to the testator's intent and was consistent with requirements for changing bequests (i.e., a recognized testamentary form was essential). The proposed provision diminishes the degree of certainty in written revocations by inserting a potential problem such as verification of handwriting. This seems to be inconsistent with the approach taken in the revisions to the Code of Civil Procedure,⁵⁰ which make notarial and

44. La. Civ. Code art. 1691; *Smith v. Shaw*, 221 La. 896, 60 So. 2d 865 (1952) and cases cited therein.

45. *In re Succession of Jones*, 356 So. 2d 80 (La. App. 1st Cir.), *writ denied*, 357 So. 2d 1168 (1978).

46. This change would not deprive even a physically handicapped testator from effecting a renunciation, since there are clearly other forms of renunciations available, such as revocation in a subsequent notarial will or other "signed writing."

47. Proposed La. Civ. Code art. 1607(3).

48. La. Civ. Code arts. 1691 and 1692.

49. Proposed La. Civ. Code art. 1607.

50. For a discussion of La. Code Civ. P. art. 2891, see *infra* text accompanying note 59.

statutory testaments and nuncupative testaments by public act self-proving. If these forms of testaments are now self-proving, the revocation of a testament or of a legacy in one of these forms would also appear to be self-proving.

Requiring that a date be stated in the signed writing may also be helpful in interpretation of the testator's intent and in deciding such matters as whether a testator had sufficient capacity at the time the revocation was signed.

Article 1608 addresses revocation of legacies or other provisions⁵¹ less than the entire testament.⁵² This article also deletes the distinctions between express and tacit revocations of legacies and continues long standing Louisiana law that a legacy can be revoked by executing another testament or a codicil, in one of the forms prescribed for testaments,⁵³ or alienation of the thing bequeathed.⁵⁴

Proposed Article 1608 contains a provision that would permit the revocation of a legacy or other provision by a signed writing on the testament itself. Presumably this would accommodate a "line through" provision, accompanied by the testator's signature, as well as an express statement revoking a bequest or other provision. This provision presents the same potential problems as the companion provision for revocation of entire testaments in proposed Article 1607.⁵⁵

Proposed Article 1608 adds a new provision to the law that would invalidate a testamentary disposition to a spouse from whom the testator is divorced subsequent to the date of the execution of the testament. Although the article is not clear on this point, presumably, this provision would require a judgment of divorce to be final at the time of the death of the testator and would invalidate a testamentary provision made at any time prior to the date on which the divorce judgment was final. The assumptions underlying this provision are probably accurate. A testator who subsequently obtains a divorce probably does not want a legacy to a former spouse to be carried out, but may inadvertently neglect to revoke that legacy after the divorce. The article would require an affirmative act of the testator, either by express provision in a will that predates the divorce that any legacy to a spouse

51. Other provisions would include classification of executors, trustees under a testamentary trust or appointments of testamentary tutors.

52. Proposed La. Civ. Code art. 1608:

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

- (1) So declares in one of the forms prescribed for testaments.
- (2) Makes a subsequent incompatible testamentary disposition or provision.
- (3) Makes a subsequent inter vivos disposition of the thing that is the object of the legacy and does not reacquire it.
- (4) Clearly revokes the provision or legacy by a signed writing on the testament itself.
- (5) Is divorced from the legatee, after the testament is executed and at the time of his death, unless the testator provides to the contrary. Testamentary designations or appointments of a spouse are revoked under the same circumstances.

53. La. Civ. Code arts. 1693, 1694.

54. La. Civ. Code arts. 1695, 1696, 1700.

55. See *supra* text accompanying notes 42-50.

would be effective even if the marriage terminates or, if such language is not included in a previously executed testament, a codicil or a subsequently executed will making a disposition to a former spouse.

Proposed Article 1609 would effectively reinstate a "revoked" testament or legacy if the act of revocation is itself revoked prior to the testator's death, but only if revocation of the testament occurs in a manner other than physical destruction of the document, a subsequent *inter vivos* disposition of the object of the legacy, or divorce.⁵⁶ For example, a testator who revokes a testament by executing a signed writing, but who does not physically destroy the "revoked testament," would, by revocation of the signed writing, revive the previously "revoked testament."

Finally, Article 1610 requires that "any other modification of a testament must be in one of the forms prescribed by testaments."⁵⁷ In the comments accompanying this article, the drafters suggest that the article is necessary to make it clear that a "signed writing" sufficient to *revoke* a will, legacy, or other testamentary disposition would not suffice to *make* a testamentary disposition.⁵⁸ In other words, the signed writing can revoke a legacy, but through the revocation a testator cannot bequeath the same property to another legatee without the "signed writing" being in one of the forms required for a testament. The necessity for this article would be alleviated if a testator did not have the ability to revoke a testament, legacy, or other provision by means of a signed writing and if all revocations (other than physical destruction of the document) were required to be in one of the forms recognized for testaments.

VI. REVISIONS TO LOUISIANA CODE OF CIVIL PROCEDURE

Senate Bill 1379 does not purport to rewrite the Louisiana Code of Civil Procedure articles regarding successions. The bill does, however, make changes with regard to the probate of some testaments.

For example, Code of Civil Procedure article 2852 is amended to provide that only testaments *other than* a statutory testament, a notarial testament, or a nuncupative testament by public act must be submitted for probate. Article 2891 makes notarial testaments, statutory testaments, and nuncupative testaments by public act self-proving and permits the court to sign an *ex parte* order directing that the original of such testaments be filed and executed. Such an order has the "effect of probate."

56. Proposed La. Civ. Code art. 1609:

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

57. Proposed La. Civ. Code art. 1610:

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

58. Proposed La. Civ. Code art. 1610, cmt.

This change in Article 2891 is particularly significant for practitioners in that it removes the requirement found in Article 2887 that a statutory will must be proved by the testimony (usually through affidavits) of the notary and one of the subscribing witnesses, or of both witnesses, that the testament was signed by the testator.⁵⁹

The self-proving nature of these three kinds of wills is consistent with the principle found elsewhere in the Civil Code that an authentic act is self-proving.

The amendments to the Code of Civil Procedure make it clear, in Article 2932, that the burden of proving the invalidity of a notarial testament, a nuncupative testament by public act, or a statutory testament is always on the plaintiff. As to these three kinds of testaments, this is a significant change in the law. The burden of proof does not shift from plaintiff to defendant based upon how much time has elapsed between the order admitting the will to probate and the filing of the action to attack the will's validity. As to the other forms of testaments now in existence, there is no change in the law.

While a comprehensive review and revision of Book 6 of the Code of Civil Procedure dealing with probate is probably desirable, the Senate Bill does not attempt such at this time. The changes in the Code of Civil Procedure effected by the legislation, however, are consistent with the changes in substantive law, as reflected in the proposed Civil Code articles.

59. La. Code Civ. P. art. 2887 dealing with the requirements for probating a statutory testament is not repealed in Senate Bill 1379, but, in light of the amendment to Article 2891, this article would appear to be unnecessary.

