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Warren L. Mengis

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## The Article 2315.1 Survival Action: A Probate or Non-Probate Item

Warren L. Mengis\*

Louisiana law exclusively determines what happens to the property of Louisiana residents when they die.<sup>1</sup> Accordingly, the Louisiana legislative scheme provides rules to govern the process known as succession. Louisiana Civil Code article 871 defines succession as “the transmission of the estate of the deceased to his successors . . . .” Article 872 defines the “estate” as the “property, rights and obligations that a person leaves after his death. . . .” Beneficiaries of the estate are divided into three categories: creditors, taxing authorities, and heirs/legatees.

There is little question but that creditors are the favored class when it comes to dividing the property left by the deceased. Article 3183 states that the property of the debtor is the common pledge of his creditors. It is made clear in our jurisprudence, however, that a creditor has no right to property or proceeds which never formed a part of the estate of the deceased. Therefore, a number of items have been legally exempted from inclusion in the estate.<sup>2</sup>

For example, in *Sizeler v. Sizeler*,<sup>3</sup> the Louisiana Supreme Court held that the proceeds of a life insurance policy payable to a specific beneficiary form no part of the estate of the deceased, rather it inures directly to the beneficiary. The principle set forth in *Sizeler* was codified in Louisiana Revised Statutes 22:647(A).<sup>4</sup> Even where a life insurance policy is payable to the estate, courts have held that it does not inure to the benefit of creditors.<sup>5</sup> The legislature has also excluded from a deceased’s estate annuities payable to a specific

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\* Professor of Law, Paul M. Hebert Law Center, Louisiana State University.

1. See Succession of Gheens, 148 La. 1017, 88 So. 253 (La. 1921):

We begin with the fundamental principle that the rules of transmission and devolution of property are exclusively within the power and control of the individual sovereign state. If it sees fit, it may ordain that no one shall inherit the estate of a deceased person, and that the entirety shall inure to the public fisc . . . .

*Id.* at 1018, 88 So. at 253.

2. Each of the exclusions discussed below has basically been adopted by the Louisiana Department of Revenue and inserted into inheritance tax law. See La. R.S. 47:2404(C) (1990).

3. 170 La. 128, 127 So. 388 (La. 1930).

4. La R.S. 22:647(A) (Supp. 2001), states:

The lawful beneficiary, assignee, or payee, including the insured’s estate, of a life insurance policy or endowment policy. . . shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured and of the person effecting the policy or the estate of either, and against the heirs and legatees of either, and against the heirs and legatees of either such person, and such proceeds and avails shall also be exempt from all liability for the debt if such beneficiary, payee, or assignee or estate, existing at the time the proceeds or avails are made available for his own use.

5. See Succession of Sweeney, 607 So. 2d 996 (La. App. 3d Cir. 1993); *Madison v. Sun Life Assur. Co. of Canada*, 191 So. 336 (La. App. Ori. 1939).

beneficiary.<sup>6</sup> Pursuant to Louisiana Revised Statutes 23:652 and Louisiana Civil Code article 1505, employer and employee contributions made under any plan of deferred compensation that designates specific beneficiaries are excluded from the deceased's estate. Finally, by mandate of federal law, co-owner U.S. bonds are excluded from the decedent's estate when the co-owner survives the deceased.<sup>7</sup>

Now we turn to what may or may not be another exemption: the 2315.1 survival action. Consider the following hypothetical: James Polk was seriously injured in an automobile accident. He timely filed suit for personal injury and property damage. Before trial James died, survived only by his brother, Richard. James left a valid will in which he bequeathed all of the property of which he died possessed to his favorite charity, Saint Jude Children's Research Hospital.

Pursuant to Louisiana Civil Code article 2315.1 and Article 801 of the Code of Civil Procedure, Richard filed a motion to substitute himself for James in the suit. In the meantime, the executor of James' estate filed a descriptive list in which he included an estimate of the recovery from the suit under the survivor's action. The executor then intervened in the suit contending that although Richard may be the proper substitute for the decedent as plaintiff, any recovery on the suit should fall into the estate of the deceased and ultimately pass to St. Jude according to the will.

Article 2315.1 and the Louisiana Code of Civil Procedure seem to allow Richard to maintain the survival action. However, in *Carl v. Naquin*<sup>8</sup> the first circuit court of appeal indicated that although the designated beneficiary of the survival action under Article 2315.1 may have the sole right to *bring* the action, it is not certain that he will *receive* the proceeds therefrom. The hypothetical presented above, therefore, presents two issues, one procedural (who can maintain the survival action) and the other substantive (who will receive the proceeds from the action). These issues may be summarized in the following question: Is the Article 2315.1 survival action a probate or a non-probate item?

In *Carl v. Naquin*, the deceased had instituted before her death a suit against a nursing home and its employees alleging abusive treatment. After she died the succession administrator attempted to substitute himself as the plaintiff. The defendant argued that the succession should be dismissed from the action because, as a matter of law, the deceased's brother was the only proper party plaintiff. The court agreed and noted that the deceased's brother

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6. See La R.S. 22:647(B)(Supp. 2001), which states:

The lawful beneficiary, assignee, or payee, including the annuitant's estate of an annuity contract . . . shall be entitled to the proceeds and avails of the contract against the creditors and representatives of the annuitant or the person effecting the contract, or the estate of either against the heirs and legatees of either such person, saving the rights of forced heirs, and such proceeds and avails shall also be exempt from all liability for any det of such beneficiary, payee or assignee or estate, existing at the time the proceeds or avails are made available for his own use.

7. See *Succession of Harrel*, 622 So. 2d 253 (La. App. 1st Cir. 1993).

8. 637 So. 2d 736 (La. App. 1st Cir. 1994).

was "to be given first preference as 'legal successor' and pursuant to the application of [Louisiana Code of Civil Procedure article] 801 together with [Civil Code article] 2315.1, he [was] the proper party plaintiff." The court noted that Article 2315.1(B) conferred rights to the succession representative only in "the absence of any class of beneficiary set out in [Article] 2315.1(A) . . . ." <sup>9</sup> Accordingly, the court dismissed the succession administrator as the party plaintiff. However, the court allowed the succession to remain in the suit by classifying it as an *intervenor*. <sup>10</sup>

In support of its decision, the court referred to *Nathan v. Touro Infirmary*, <sup>11</sup> in which the Louisiana Supreme Court held that a succession representative was the proper party plaintiff to continue a suit initiated by the deceased before his death because there was no Article 2315 survivor. The court agreed with the procedural aspect of *Nathan*, but it did not read Article 2315.1 as an exception to Louisiana's descent and distribution laws. <sup>12</sup> In other words, the *Naquin* court did not read *Nathan* as answering who would receive the proceeds:

This instant case, like *Nathan*, involved a situation in which the decedent instituted suit prior to his death. Unlike *Nathan*, there exists a Louisiana Code Article 2315 beneficiary in the instant case. Although *Nathan* stands for the proposition that the decedent's brother, not the appointed administrator, is the property party plaintiff, *Nathan* does not stand for the proposition that the proceeds from the suit will be the brother's property, not the property of the legatees named by the decedent. <sup>13</sup>

By virtue of holding that the succession could remain in the suit as an intervenor, it is clear that the *Naquin* court believed that the succession did have a claim to the proceeds from the action; in what else besides the proceeds of the survival action would the succession have an interest and, therefore, qualify as an intervenor? Indeed, in our hypothetical the executor of James's succession could argue that the actual holding of *Naquin* compels the conclusion that Richard's brother could bring the action but could not share in the proceeds.

Such a result seems contrary to the very existence of Article 2315.1. Did the legislature intend Article 2315.1 to operate merely as a procedural rule governing who is the proper party plaintiff? Or did the legislature intend Article 2315.1 to serve as a substantive exception to the law of successions by rendering the survival action a non-probate item? Indeed, why would an Article 2315.1(A) beneficiary even bother to substitute himself for the decedent

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9. *Id.* at 738.

10. *Id.* at 739.

11. 512 So. 2d 352 (La. 1987).

12. The use of the word "heritable" in Article 2315.1(C) may have caused the court's doubt. But the article refers only to the "heirs of the named beneficiaries" in Article 2315.1(A).

13. 637 So. 2d at 739.

if by doing so he still would not have a claim to the proceeds outside of the succession?

Prior to 1986, Article 2315 clearly recognized a property right to recover damages arising out of an offense or quasi offense. The article included a general action for damages, as well as the survival action and the wrongful death action.<sup>14</sup> Although these actions were not the same, in any given situation they arose out of the same incident, so courts tended to confuse them.<sup>15</sup>

In 1986, pursuant to Legislative Act 211, the provisions of Article 2315 were broken into three separate articles: 2315, 2315.1 and 2315.2.<sup>16</sup> Although none of the new provisions specifically describes the right to recover damages as a "property right," Articles 2315.1 and 2315.2 both provide that the right of action under either of them is heritable. Therefore, Article 2315.1 provides that an action for damages that is instituted before the death of the decedent is a heritable right that survives in favor of the beneficiaries listed in paragraph A of the article.<sup>17</sup> If there are none, the action survives in favor of the succession representative of the decedent.<sup>18</sup>

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14. See 1986 La. Acts No. 211, § 1.

15. See *Reed v. Warren*, 172 La. 1082, 136 So. 59 (1931). The Court held that survivors were entitled to bring one action for the pain a decedent suffered before his death and for their own damages sustained as a result of the death. The Court explained that the then prevailing law allowed for additional damages in a wrongful death suit for any damages suffered by the survivors, but did not grant them a separate cause of action to assert such damages.

16. Article 2315 provides for a general action for damages. Article 2315.1 provides for the survival action. Article 2315.2 provides for the wrongful death action.

17. Article 2315.1 currently provides, in pertinent part:

A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

- (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.
- (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.
- (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.
- (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

18. Article 2315.1 currently provides, in pertinent part:

B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.

The pre-1986 version of Article 2315 did not list the decedent's succession representative as a possible beneficiary of the action. This lacuna was underscored in *Haas v. Baton Rouge General Hospital*, 364 So. 2d 944 (La. 1978) (holding that a decedent's husband's administrator was the proper party plaintiff to continue the decedent's personal injury claim when she had died without children and had been survived by her husband who died shortly thereafter because at her death the cause of action had been transmitted to her husband and then to his heirs upon his death). In that case, the deceased was survived by her husband who died shortly after her. The *Haas* court pointed out that the succession representative of the victim had no right to bring the action to recover damages because one of the

On the other hand, Article 426 of the Code of Civil Procedure states that "an action to enforce an obligation is the property of the obligee which, on his death, is transmitted with his estate to his heirs, universal legatees or legatees under universal title . . . ." Under that language, it might be argued that the 2315.1 survival action is a probate item. However, the quoted language is followed in Article 426 by the phrase: "except as otherwise provided by law." Arguably, Article 2315.1 is the law that provides otherwise and thereby excludes 2315.1 survival actions from the estate. Indeed, Code of Civil Procedure article 801 makes provision for the 2315.1(A) exception to Article 426 in providing that "when a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party on ex parte written motion." Article 801 defines "legal successor" as (1) the survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and (2) the succession representative of the deceased or the heirs and legatees of the deceased if the succession is not under administration.<sup>19</sup>

In summary, the Civil Code clearly provides that if a person dies during the pendency of an action, the survivor under Article 2315.1(A) has the first option to continue the suit. If there is no survivor under Article 2315.1(A) the executor of the decedent's estate may continue the action. The Code of Civil Procedure likewise contemplates the above scenario and allows for it procedurally. In neither the Civil Code nor in the Code of Civil Procedure is there made a distinction between who is the proper party plaintiff in a survival

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named beneficiaries existed at the time of her death. However, the court permitted the succession representative of the surviving husband to bring the action because it was included in the beneficiary's estate and therefore, transmitted upon his death to his heirs according to the laws of succession. See *also* *Hellpenstell v. Bonnell Hosp.*, 523 So. 2d 887 (La. App. 4th Cir. 1988).

Given the holding in *Haas*, it was arguable under the pre-1986 version of Article 2315 that the survival action would terminate if none of the beneficiaries named Article 2315.1 survived the decedent. However, that possibility was eliminated by the 1986 amendment, and the deceased's succession representative now has the right to recover all damages in the absence of any class of beneficiary set out Article 2315.1(A).

19. In the landmark decision of *J. Wilton Jones Co. v. Liberty Mutual Insurance Company*, the court observed that prior to the adoption of the Louisiana Code of Civil Procedure in 1960, a tort action was extinguished by the victim's death. The Louisiana Code of Civil Procedure now provides expressly for the maintenance of such an action: (1) Article 428 provides unequivocally that an action, once commenced, does not abate upon the death of the party; (2) Article 801 provides that "when a party dies during the pendency of an action which is not extinguished by his death, his legal successor (the survivors designated in Article 2315.1 of the Civil Code if the action survives in their favor, otherwise, the succession representative) may have himself substituted for the deceased party on ex parte written motion"; and (3) Article 426 provides that "an action to enforce an obligation is the property of the obligee which, on his death, is transmitted with his estate to his heirs, universal legatees or legatees under universal title, except as otherwise provided by law."

Where no action has been instituted, the right to institute an action survives for only one year after the victim's injury. But the right to recover survives beyond that period if an action has been timely instituted. In other words, where the victim has instituted an action, the "right to recover" the victim's damages survives as long as the instituted action is not abandoned. Prior to abandonment, the survivors may be substituted at any time to pursue the victim's claim.

action and who has the right to the proceeds from a survival action. To the contrary, article 2315(A) operates as an exception to the general rule of Article 426 of the Code of Civil Procedure, which itself indicates that exceptions may be created. Getting back to the hypothetical, though the executor would argue that the proceeds of the action should belong to the succession under the rule of *Naquin*,<sup>20</sup> Richard should claim ownership of the proceeds under the clear language of Civil Code article 2315.1 and Article 801 of the Code of Civil Procedure. This writer believes that Richard should prevail. The proceeds from a survival action should be excluded from the estate of the decedent if there exists a survivor under Article 2315.1. Indeed, it is clear from the discussion above that the deceased may have property rights that do not go through the "succession process." Furthermore, Article 801 of the Louisiana Code of Civil Procedure specifically provides that a "legal successor" includes *survivors* designated in Article 2315.1 of the Civil Code, when the action survives in their favor. Albeit, one should consider the intent of the deceased as clearly expressed in his last will and testament, but the United States Supreme Court, in *Boggs v. Boggs*, held that legislative acts (whether federal or state) govern the disposition or transmission of certain assets, regardless of a testator's attempt to divert them.<sup>21</sup>

The provisions of Article 2315.1 point to the conclusion that the legislature intended for the survival action to be "self-contained" and unaffected by the succession distribution laws. The cases involving this situation clearly hold that a right of action does not pass through a victim's succession to be transmitted to his heirs as an inheritance. Instead, the cause of action devolves exclusively upon the specially designated classes of beneficiaries or survivors set forth in Article 2315.1.<sup>22</sup>

From the foregoing, it would appear that James Polk's action for recovery of both personal injuries and property damage could be maintained by his surviving brother, Richard, who would fall into category three of beneficiaries under Article 2315.1 (and there are no beneficiaries in a higher order) *and* that Richard would be entitled to the monetary damages recovered. If this were not so, why would Richard, who is unquestionably the proper procedural party, bother to pursue the action?

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20. He might also argue the same point under the doctrine of *le mort saisit le vif*. See *Succession of Stauffer*, 119 La. 66, 43 So. 928 (La. 1907):

By the fiction of law, 'le mort saisit le vif,' the heir is seized of right, but not in fact, until he accepts the succession and is sent into or takes possession according to law. As long as the property is under administration it remains in the custody of the law, and the rights of heirs and legatees are in abeyance until the administration is closed.

21. 520 U.S. 833, 117 S. Ct. 1754 (1997).

22. See, e.g., *Haas v. Baton Rouge Gen. Hosp.*, 364 So. 2d 944 (La. 1978); *Moore v. Kinney*, 315 So. 2d 340 (La. App. 3d Cir. 1975).