

The Birth of a Real Right: An Overview and Analysis of the Recent Revision of Book III, Title X of the Civil Code

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The Birth of a Real Right: An Overview and Analysis of the Recent Revision of Book III, Title X of the Civil Code

Bradley Schwab*

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I. INTRODUCTION

On January 1, 2013, Act 258 of the 2012 Regular Session of the Louisiana Legislature acquired the force of law. This legislation, which came on the heels of over two years' work by the Louisiana Law Institute's Rent of Lands and Annuities Committee,¹ contained a comprehensive revision of the articles in Title X, Book III, of the Civil Code. Specifically, Act 258 completely repealed the prior Civil Code articles governing rents and annuities² and replaced them with revised articles 2778 through 2789 governing annuities. These new provisions embody a number of fundamental changes in Louisiana property law, most notably the creation of a new real right—the annuity charge.

This Article provides a first look at the newly revised articles in Title X, Book III, of the Civil Code. Parts II and III closely examine revised Chapters 1 and 2 pertaining to the annuity contract and the annuity charge respectively. These Parts aim to provide practitioners with a simplified outline of these new provisions, to resolve any latent ambiguities possibly concealed within their terms, and to highlight any potential problems that they may pose with respect to other Civil Code articles. Part IV surveys the likely beneficiaries of this new legislation in light of the limited alternatives that preexisted its enactment. Finally, Part V briefly discusses some economic benefits that these new articles may create.

1. Pursuant to its charter, a principal function of the Louisiana Law Institute is “[t]o recommend the repeal of obsolete articles in the Civil Code and Code of Civil Procedure and to suggest needed amendments, additions, and repeals.” LA. REV. STAT. ANN. § 24:204(A)(8) (2007).

2. LA. CIV. CODE arts. 2778–2792 (2012).

II. REVISIONS TO CHAPTER 1 OF TITLE X, BOOK III: THE NEW AND IMPROVED ANNUITY CONTRACT

Prior to the 2012 revision, the 14 articles contained in Chapter 1 of Title X, Book III, of the Louisiana Civil Code pertained to the contract of rent of lands.³ Derived from the Roman institution of *emphyteusis*,⁴ the rent of lands provisions were first incorporated into the Civil Code in its 1825 revision.⁵ These contracts gave rise to sui generis real rights and bore many similarities to the contracts of sale and of lease.⁶ However, unlike the contracts of sale and of lease, the Civil Code provisions on rent of lands have gone largely unnoticed since their enactment in 1825. In fact, over the past two centuries, the entire body of jurisprudence regarding rent of lands is comprised of only a handful of reported decisions, none of which were decided in the past 50 years.⁷ Recognizing the uselessness of the rents of lands contract, the Louisiana Legislature decided to fully repeal those articles in Act 258 and to eradicate the outdated doctrine from the Civil Code altogether. In its place, the Legislature implemented nine articles on annuity contracts, which change the prior law in a few important respects.

A. Expanded Definition of Annuity Contract (Article 2778)

The definition of *annuity contract* in revised article 2778 is much broader than its analogue under prior law. Most notably, subsection A of article 2778 allows the transfer of “a thing” for the

3. *Id.* arts. 2779–2792.

4. A.N. YIANNPOULOS, PROPERTY § 225, in 2 LOUISIANA CIVIL LAW TREATISE 434 (4th ed. 2001).

5. *See* LA. CIV. CODE arts. 2749–2763 (1825); *see also* YIANNPOULOS, *supra* note 4, § 255, at 434. In a typical rent of lands contract, one party would convey immovable property to another perpetually, allowing the latter to hold it as owner, in return for an annual rent of a certain sum of money or quantity of fruits. *See* LA. CIV. CODE art. 2779 (2012); *see also* YIANNPOULOS, *supra* note 4, § 225, at 433.

6. YIANNPOULOS, *supra* note 4, § 225, at 434. The rights created by a rent of lands contract were themselves classified as incorporeal immovables. *See* LA. CIV. CODE art. 470 (2013).

7. *See, e.g.*, *Everett v. Clayton*, 29 So. 2d 769 (1947); *Vincent v. Bullock*, 187 So. 35 (1939); *La. & Ark. Ry. Co. v. Winn Parish Lumber Co.*, 59 So. 403, 407 (1911); *J. Grossman’s Sons v. Sanders*, 38 So. 692 (1905); *City of New Orleans v. Camp*, 29 So. 340 (1901); *Chenevert v. Lemoine*, 27 So. 56 (1900); *Buford v. Collins*, 6 So. 219 (1889); *Friedler v. Chotard*, 36 La. Ann. 276 (1884); *Bourgeois’ Heirs v. Thibodaux*, 23 La. Ann. 19 (1871); *Sainet v. Duchamp*, 14 La. Ann. 539 (1859); *Succession of Canonge*, 1 La. Ann. 209 (1846); *see also* Gregory W. Rome, *An Elegy for Emphyteusis*, 1 CIV. L. COMMENTARIES, no. 2, 2008, at 1, 4.

right to periodic payments; whereas, the prior Code provision limited such contracts to transfers of “a sum of money.”⁸ This change significantly expands the scope of nominate annuity contracts because it allows for the transfer of practically any imaginable thing for a stream of payments.⁹ However, this new group of annuity contract transactions is limited by subsection B of article 2778, which states that contracts involving the transfer of things *other than money* for “a certain or determinable price” are not annuity contracts.¹⁰ Thus, to be classified as a nominate annuity contract, a transfer of a thing other than money must be for an indeterminate or uncertain number of payments.

By excluding transfers of things other than money for a determinable price from annuity contracts, article 2778 prevents any potential conflict with the Civil Code provisions on sales because such a transaction is essentially a sale paid in amortized installments. This is an appropriate justification for limiting the breadth of the nominate annuity contract, but the same justification exists for excluding transfers of money for a fixed stream of payments in the same manner. After all, a transfer of money for a predetermined number of periodic payments is practically indistinguishable from an amortized loan,¹¹ subject to the provisions on loan of consumption.¹² The failure to exclude such transfers from the scope of annuity contracts will force courts to interpret them with reference to each other¹³ and may result in unintended consequences. For example, a court may conclude that, as the latest

8. Compare LA. CIV. CODE art. 2778 (2013), with LA. CIV. CODE art. 2793 (2012).

9. The exception being common things, such as air and the high seas, which are not subject to ownership of any kind. See LA. CIV. CODE art. 449 (2013). Article 2778 also expands upon prior law by allowing the periodic payments made under the annuity contract to be made to a third party as a stipulation *pour autrui*. See *id.* art. 2778. In contrast, the prior law only contemplated two parties to an annuity contract. See LA. CIV. CODE art. 2793 (2012).

10. LA. CIV. CODE art. 2778 (2013).

11. The contract of loan is one of the nominate contracts expressly recognized in the Louisiana Civil Code. *Id.* arts. 2891–2913. A *loan for consumption* (*mutuum*) is one whereby “a person, the lender, delivers consumable things to another, the borrower, who binds himself to return to the lender an equal amount of things of the same kind and quality.” *Id.* art. 2904. These loans may be made gratuitously or on interest. See SAUL LITVINOFF, OBLIGATIONS § 15.18, in 6 LOUISIANA CIVIL LAW TREATISE 494 (1999).

12. LA. CIV. CODE arts. 2904–2912 (2013).

13. *Id.* art. 13. See also *Macon v. Costa*, 437 So. 2d 806, 812 (La. 1983); *Rue Lafayette Mortg. Corp. v. Wenger*, 366 So. 2d 1059, 1061 (La. Ct. App. 1st 1978); P. RAYMOND LAMONICA & JERRY G. JONES, LEGISLATIVE LAW AND PROCEDURE § 7.7, in 20 LOUISIANA CIVIL LAW TREATISE 150 (2004).

expression of the legislative will,¹⁴ article 2778 effects a partial repeal of the loan articles, removing such transfers from their purview. Considering the purpose of the Title X amendments, it seems unlikely that the Legislature or the Law Institute actually intended such a result.

B. Designated Recipients of Annuity Payments (Articles 2780, 2784, 2785, 2786)

The *designated recipient* in an annuity contract is the party entitled to receive the periodic payments due under that contract.¹⁵ Article 2780 enables both natural persons and juridical persons to be the designated recipient of annuity payments. The Civil Code defines a *natural person* as “a human being” and a *juridical person* as “an entity to which the law attributes personality, such as a corporation or a partnership.”¹⁶ The revised articles expressly provide that an annuity contract may be established in favor of a single designated recipient or multiple designated recipients. For purposes of simplicity, each of these situations is covered separately in the subsections below.

1. Annuity Contracts with a Single Designated Recipient

An annuity can only be established in favor of a juridical person if that person “exist[s] at the time of the formation of the annuity contract.”¹⁷ Likewise, to establish an annuity in favor of a natural person, “that person must exist or be in utero at the time of the formation of the annuity contract.”¹⁸ The requirement in article 2786 that a natural person either “exist or *be in utero*” at the time that an annuity contract is formed slightly differs from the

14. See LA. CIV. CODE art. 8 (2013); see also *Pumphrey v. City of New Orleans*, 925 So. 2d 1202, 1210 (La. 2006) (“Under general rules of statutory construction, the latest expression of the legislative will is considered controlling and prior enactments in conflict are considered as tacitly repealed in the absence of an express repealing clause.” (citations omitted)); cf. LAMONICA & JONES, *supra* note 13, § 6.3, at 110 (“It is well settled in Louisiana that repeals by implication are not favored. Repeals by implication will be found only in cases of irreconcilable conflict, and only when there exists no possible construction that could give effect to both laws.” (footnotes omitted) (citations omitted)).

15. See LA. CIV. CODE art. 2778 (2013). Under article 2778, *annuity* is defined as the right possessed by a designated recipient to the periodic payments under the annuity contract. *Id.* In this sense, an annuity contract must be treated as distinct from the annuity it establishes.

16. *Id.* art. 24.

17. *Id.* art. 2786.

18. *Id.*

language used in the analogous usufruct article, which requires that the usufructuary “exist or *be conceived*” at the time the usufruct is created.¹⁹ Although seemingly insignificant, this minor linguistic difference can be very important. Whereas an embryo that is “in utero” will always be “conceived,” the same is not necessarily true when the terms are reversed, which raises the issue of how article 2786 will apply in the context of in vitro fertilization.

In vitro fertilization is a process by which a female egg is fertilized with a male sperm in a laboratory setting and the newly created embryo is then implanted into a woman’s uterus.²⁰ Under current medical practices, implantation typically occurs five to seven days after the egg is fertilized.²¹ However, an optional process called cryopreservation allows the fertilized embryo to be frozen and stored at a low temperature for later implantation.²² Studies of cryopreservation have shown that the embryo can “remain viable for at least several years, perhaps indefinitely.”²³ Under a plain reading of article 2786, an annuity contract cannot be created in favor of an in vitro fertilized embryo as a *natural person* before implantation because it is not “in utero” before that point.²⁴ However, not all is lost for the poor embryo.

Under Louisiana Revised Statutes section 9:123, “[a]n in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb.”²⁵ Thus, an annuity contract may still be created in favor of an embryo before it has been implanted into the uterus, but such an annuity contract will be governed by the provisions relating to annuity contracts in favor of juridical persons. The annuity contract provisions pertaining to juridical persons will continue to govern the contract even after the embryo is implanted in the uterus and eventually born. This result seems at odds with the purpose underlying article 2780’s distinction between natural and juridical persons. Therefore, although this issue may seldom arise in practice, the new Title X articles would benefit if article 2786 were amended to include the exist-or-be-conceived language of the

19. Compare *id.* art. 2786 (emphasis added), with *id.* art. 548 (emphasis added).

20. See generally MARC A. FRITZ & LEON SPEROFF, CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY (8th ed. 2011).

21. *Id.* at 261.

22. *Id.* at 1368.

23. *Id.* at 1369. See generally Yeong P. Lin et al., *Successful Implantation of Frozen Sibling Embryos Is Influenced by the Outcome of the Cycle from Which They Were Derived*, 63 FERTILITY & STERILITY 262 (1995).

24. See LA. CIV. CODE art. 2786 (2013).

25. LA. REV. STAT. ANN. § 9:123 (2008).

usufruct articles instead of the exist-or-be-in-utero language that it currently contains.

2. Annuity Contracts with More Than One Designated Recipient

Article 2784 sanctions the double disposition of the right to annuity payments in an annuity contract by providing that “[a]n annuity may be established in favor of successive recipients.”²⁶ A similar provision is contained in the usufruct articles.²⁷ This double disposition does not constitute a prohibited substitution²⁸ because neither designated recipient is required to preserve the thing (right to the payments). Of course, each successive recipient in such an annuity contract must satisfy article 2786’s requirement that a designated recipient either “exist” (natural and juridical persons) or “be in utero” (natural persons) at the time the contract was made.²⁹

Another way in which an annuity contract may be established in favor of more than one designated recipient is contained in article 2785, which provides:

An annuity contract may be established in favor of several natural persons, whether in divided shares or in indivision. When an annuity contract is established for the lifetimes of several recipients of payments in indivision, the termination of the interest of a recipient inures to the benefit of those remaining unless the annuity contract expressly provides otherwise.³⁰

This article’s last sentence implies that when an annuity contract is established for the lifetime of several recipients in divided shares, the death of one of those recipients does not benefit the others.³¹ Thus, it is most advantageous to the designated recipients if the right

26. LA. CIV. CODE art. 2784 (2013). This article will mostly apply to situations in which one party transfers a thing other than money in exchange for fixed periodic payments to himself until his death, after which the payments will be made to his spouse until death. However, it would also apply to an annuity contract in which one party transfers a sum of money to another in exchange for fixed periodic payments to himself for the first five years and to his child for the next five years.

27. *Id.* art. 546.

28. *Id.* art. 1520.

29. *Id.* art. 2786.

30. *Id.* art. 2758. Similar to article 2784, this provision also resembles a few usufruct articles. *See id.* arts. 541, 547.

31. *See also* 1 AUBRY & RAU, DROIT CIVIL FRANÇAIS § 301, at 54 (La. St. L. Inst. trans., 6th ed. 1965) (stating that when an obligation is divisible among creditors, “[e]ach creditor can claim only his portion of the credit”).

to the payments under an annuity contract are established in indivision. When annuity payments are conferred jointly on two or more persons, determining whether those payments were granted in divided or undivided portions will be a matter of contractual interpretation.³² An obligation to make annuity payments in favor of several recipients without a clear expression to the contrary will likely be interpreted as individual grants in divided shares because a stream of money, by its nature, is susceptible of division into equal shares.³³ Therefore, the contract explicitly providing that the right to such payments is granted in indivision is most beneficial to the designated recipients.

C. Limits on the Contractual Duration of Payments Due Under Annuity Contracts (Articles 2781, 2783)

One of the less noticeable differences between the annuity contract created under the revision and the annuity contract that existed under prior law is the limit on the contractual duration of each. The old annuity articles provided that the periodic payments due under an annuity contract “may be either perpetual or for life.”³⁴ Conversely, revised article 2781 provides: “The payments under an annuity contract may be for the lifetime of a designated natural person, or, alternatively, for a period of time.”³⁵ Although both allow periodic payments to be made for the duration of a person’s life, the old articles authorized a “perpetual” stream of payments where the new articles permit payments “for a period of time.”³⁶ This discrepancy raises a number of important questions about how revised article 2781 will fit into the framework of Chapter 1.

1. Term and Life Annuities

The language of article 2781 permits the periodic payments due under an annuity contract to be made “for a period of time.” This class of annuities is like the common law concept of an annuity certain, under which a series of payments are made at

32. See LA. CIV. CODE arts. 1815, 2758 (2013).

33. *Id.* art. 1815; SAUL LITVINOFF, OBLIGATIONS § 9.3, in 5 LOUISIANA CIVIL LAW TREATISE 207 (2d ed. 2001) (“Following the language of the Louisiana Civil Code, it must be concluded that some things that may be objects of performance are divisible because of their nature, as in the case of a sum of money, which is no doubt the clearest possible example.”).

34. LA. CIV. CODE art. 2794 (2012).

35. LA. CIV. CODE art. 2781 (2013).

36. Compare LA. CIV. CODE art. 2781 (2013), with LA. CIV. CODE art. 2794 (2012).

equal intervals over a fixed period of years, regardless of whether the designated recipient dies before the period ends.³⁷ Through simple arithmetic, the “price” of such an annuity contract for periodic payments over a fixed period of time can easily be determined at the time of contracting. Therefore, in light of article 2778’s statement that “[a] contract transferring ownership of a thing other than money for a certain or determinable price payable over a term is not an annuity contract,”³⁸ the only annuity contracts that can be made “for a period of time” are those involving the transfer of money for periodic payments. However, as mentioned above, the propriety of designating such transactions as annuity contracts is questionable, considering the conflict between the annuity and loan provisions that will undoubtedly ensue.

Article 2781 also permits the periodic payments due under an annuity contract to be made “for the lifetime of a designated natural person.” Such an annuity contract contains conditional rights and obligations with a resolutive condition (i.e., the death of the “designated natural person”).³⁹ Because a natural person’s lifetime cannot be considered “certain or determinable” under article 2778, this class of annuity contracts may be used for the transfer of all types of things.⁴⁰ Interestingly, article 2781 does not appear to require that the “designated recipient” of the payments from a life annuity be one in the same as the “designated natural person” whose life determines the duration of those payments. For example, if an elderly person with health issues is worried that the annuity contract is a bad choice due to his unpredictable lifespan, he can designate himself as the recipient of the annuity payments and designate another person whose life will govern the duration of those payments. That way, if he dies before the person designated in the contract, his heirs would inherit the right to receive the annuity payments pursuant to article 2783.⁴¹ Also, although article 2781 requires the duration of a life annuity be determined by a natural person’s life, it does not exclude juridical persons from

37. See BLACK’S LAW DICTIONARY 105 (9th ed. 2009).

38. See LA. CIV. CODE art. 2778 (2013).

39. This is because an annuity contract is “immediately enforced but will come to an end when the uncertain event occurs.” See *id.* art. 1767. This class of annuity contracts is like the common law contingent annuity, which involves “an uncertain number of payments, depending on the outcome of a future event.” See BLACK’S LAW DICTIONARY 105 (9th ed. 2009).

40. See LA. CIV. CODE art. 2778 (2013).

41. The rights and obligations of the parties to an annuity contract are both assignable and heritable unless the contract or a contrary provision of law dictates otherwise. *Id.* art. 2783. Under Louisiana law, all obligations are presumed to be heritable and transferrable. See *id.* art. 1984.

receiving payments under a life annuity. This allows one to establish a life annuity in favor of a trust or other juridical person in exchange for a transfer of either money or something else.

2. Availability of Perpetual Annuities

Unlike the prior law, article 2781 does not explicitly sanction perpetual annuities, which leaves uncertain the availability of such instruments under the revision.⁴² One would have trouble arguing that the statute's reference to an obligation "for a period of time" necessarily includes a "perpetual" obligation, which, by definition, continues forever.⁴³ Interestingly, despite the prior law's explicit statement that an annuity "may be either perpetual or for life,"⁴⁴ it was commonly interpreted as also permitting annuities "for a designated term."⁴⁵ The permissive nature of the word *may* in article 2781 suggests that its terms are subject to the general principles of contractual freedom.⁴⁶ Thus, because the text of article 2781 can be interpreted in multiple ways, its failure to mention a perpetual stream of payments is likely not dispositive of whether a contract for such payments will be considered an annuity contract under Chapter 1.⁴⁷ In these situations, the statute must be interpreted so that it "best conforms to the purpose of the law."⁴⁸

Because "[l]egislation is a solemn expression of legislative will,"⁴⁹ the proper interpretation of a law depends on ascertaining legislative intent. As a general principle of statutory interpretation, when an amendment to a statute deletes an express provision in the text of a prior version of that statute, courts should assume that the Legislature intended to make a substantial change in the law.⁵⁰

42. Compare LA. CIV. CODE art. 2781 (2013), with LA. CIV. CODE art. 2794 (2012).

43. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 923 (11th ed. 2003).

44. LA. CIV. CODE art. 2794 (2012).

45. See YIANNOPOULOS, *supra* note 4, § 150, at 347.

46. LA. REV. STAT. ANN. § 1:3 (2003) ("The word 'shall' is mandatory and the word 'may' is permissive.").

47. When the language of a statute is ambiguous, it should serve only as a starting point for the interpretation of a statute. See *In re Succession of Boyter*, 756 So. 2d 1122, 1129 (La. 2000); see also LAMONICA & JONES, *supra* note 13, § 7.4, at 137–38.

48. LA. CIV. CODE art. 10 (2013).

49. *Id.* art. 2.

50. See *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." (citations omitted)); see also *Bouis v. Aetna Cas. & Sur. Co.*, 91 F. Supp. 954, 958 (W.D. La. 1950).

Another aid in discovering legislative intent is the judicial canon of statutory construction, *expressio unius est exclusio alterius*,⁵¹ which presumes that when a statute provides for one thing in its text, it presumptively excludes all matters not included.⁵² Although both of these canons of statutory construction suggest that article 2781 does not contemplate the existence of a perpetual annuity, the comments to that article suggest otherwise.

The Official Revision Comment to article 2781 states: “In accord with Article 2794 of the Louisiana Civil Code of 1870, which declares that ‘[the] annuity may be either perpetual or for life’ the payments under an annuity contract may be for the life of a designated recipient or for a period of time, certain or indefinite.”⁵³ While revision comments do not form part of the law in Louisiana, their purpose is to aid courts in the proper interpretation of the Code. This is certainly the case for the comment to article 2781, which was included in Act 258 by the Louisiana Law Institute in the initial bill presented to the legislature.⁵⁴ In such circumstances, the Louisiana Supreme Court has placed significant weight on the comments’ text in determining the legislators’ understanding and intent.⁵⁵ Therefore, although the courts will ultimately decide the true breadth of article 2794, the most logical conclusion is that the Legislature did contemplate the possibility of perpetual annuity contracts when enacting it.

D. Annuity Contracts That Fail to Provide a Designated Term (Article 2782)

When the parties to an annuity contract fail to provide a term for the annuity payments’ duration, the terms of article 2782 apply. This article provides two different remedies to such situations, depending on whether the designated recipient is a natural or juridical person: “In the absence of a designated term, an annuity established in favor

51. Literally translated from Latin to mean: “[The] expression of one thing implies the exclusion of another.” LAMONICA & JONES, *supra* note 13, § 7.6, at 147.

52. The Louisiana Supreme Court has a long history of recognizing the maxim *expressio unius est exclusio alterius* as a useful aid in determining legislative intent. *See Int’l Paper Co., Inc. v. Hilton*, 966 So. 2d 545, 558–59 (La. 2007); *Filson v. Windsor Court Hotel*, 907 So. 2d 723, 728 (La. 2005); *State ex rel. Fitzpatrick v. Grace*, 175 So. 656, 662 (1936); *City of Shreveport v. Price*, 77 So. 883, 885 (1918).

53. LA. CIV. CODE art. 2781 cmt. a (2013) (alteration in original).

54. 2012 La. Sess. Law Serv. Act 258 (H.B. 466) (May 25, 2012) (West).

55. *See, e.g., Green v. Auto Club Grp. Ins. Co.*, 24 So. 3d 182, 185 (La. 2009); *Wartelle v. Women’s & Children’s Hosp., Inc.*, 704 So. 2d 778, 783 (La. 1997); *Mock v. Mock*, 411 So. 2d 1063, 1065 (La. 1982).

of a natural person terminates upon the death of that person, but one in favor of a juridical person is without effect.”⁵⁶ At least two aspects of this article’s terms warrant discussion. First, the language *without effect* is unclear in reference to annuity contracts in favor of juridical persons when there is no designated term. Second, there is no apparent explanation for the article’s different treatment of annuity contracts without a designated term in favor of natural persons and those in favor of juridical persons.

1. Defining Without Effect

It is an often repeated maxim of the Louisiana Supreme Court that “the starting point for the interpretation of any statute is the language of the statute itself.”⁵⁷ The Civil Code dictates that “[w]hen a law is clear and unambiguous” its terms should be given full effect, and “no further interpretation may be made in search of the intent of the legislature.”⁵⁸ However, the meaning behind article 2782’s term *without effect* is not “clear and unambiguous” because it may be construed as referring to either a relative nullity,⁵⁹ an absolute nullity,⁶⁰ or an inexistent act,⁶¹ all of which may be deemed to have no effect. Practically, whether an act is classified as inexistent or absolutely null will have little bearing on how a court

56. LA. CIV. CODE art. 2782 (2013).

57. See, e.g., *Miller v. LAMMICO*, 973 So. 2d 693, 705 (La. 2008) (citations omitted); *In re Succession of Boyter*, 756 So. 2d 1122, 1129 (La. 2000) (citations omitted); *Touchard v. Williams*, 617 So. 2d 885, 888 (La. 1993) (citations omitted).

58. LA. CIV. CODE art. 9 (2013). See also *LAMONICA & JONES*, *supra* note 13, § 7.4, at 137–38.

59. The Louisiana Civil Code defines *relative nullity* as a contract that “violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made.” LA. CIV. CODE art. 2031 (2013).

60. The Louisiana Civil Code defines *absolute nullity* as a contract that “violates a rule of public order, as when the object of a contract is illicit or immoral.” *Id.* art. 2030.

61. Under French doctrine, an inexistent act is one that “lacks an element essential to its formation and when this element is such that the act cannot be conceived of with this feature absent from it.” 1 *PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, No. 345, at 231 (La. St. L. Inst. trans., 12th ed. 1959). This definition is very similar to the language of Louisiana Civil Code article 2029, which states the general proposition that “[a] contract is null when the requirements for its formation have not been met.” LA. CIV. CODE art. 2029 (2013). Indeed, in at least one case, the Louisiana Supreme Court has confirmed inexistent acts as one of three distinct categories of nullity in Louisiana. See *Cox v. Lea’s Heirs*, 35 So. 275, 280 (1903) (on rehearing). Therefore, although the Louisiana Civil Code does not expressly mention “inexistent acts,” this doctrine remains an independent legal precept in Louisiana.

will treat it.⁶² Be that as it may, the proper categorization of the term *without effect* in article 2782 remains important because the consequences of classifying an act as either inexistent or absolutely null differ substantially from the consequences of an act's classification as a relative nullity.⁶³

Because the term *without effect* in article 2782 is “susceptible of different meanings,” it must be given the meaning that “best conforms to [its] purpose.”⁶⁴ To ascertain the purpose of a law, one should only examine “the legislation itself in its entirety or related legislation.”⁶⁵ A great deal of insight into the legislative intent underlying article 2782's term *without effect* may be gleaned from the Official Revision Comment, which states: “In the absence of a designated term, an annuity established in favor of a juridical person is without effect because a substantive legal requirement for the formation of the contract has not been met.”⁶⁶ In light of this clarification, an act that is “without effect” seems to fit neatly within the description of an inexistent act, namely an act that “lacks an element essential to its formation and . . . cannot be conceived of with this feature absent from it.”⁶⁷ Therefore, an annuity contract in favor of a juridical person with no designated term is an inexistent act.

62. The distinction between an absolute nullity and an inexistent act is largely of academic significance: An absolute nullity is an act “annulled by operation of law,” whereas, an inexistent act is one “which the law need not annul because it has not come into existence.” PLANIOL, *supra* note 61, No. 333, at 222. However, these types of nullity should not be viewed as one and the same because the Civil Code does give limited effect to absolute nullities in rare circumstances. *See* LA. CIV. CODE art. 2033 (2013) (“[A] performance rendered under a contract that is absolutely null because its object or its cause is illicit or immoral may not be recovered by a party who knew or should have known of the defect that makes the contract null.”).

63. In contrast with absolute nullities and inexistent acts, which are imprescriptible and may be raised by anyone, relative nullities have a five-year prescriptive period and may be invoked only by “those persons for whose interest the ground for nullity was established, and may not be declared by the court on its own initiative.” LA. CIV. CODE art. 2031 (2013). *See also id.* arts. 2029–2030, 2032.

64. *See id.* art. 10; *see also In re Succession of Boyter*, 756 So. 2d 1122, 1129 (La. 2000).

65. LAMONICA & JONES, *supra* note 13, § 7.8, at 155.

66. LA. CIV. CODE art. 2782 cmt. (2013) (emphasis added). Courts have found the Official Comments to a Civil Code article helpful in revealing the legislative intent and purpose in enacting the statute. *See* *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307, 312 (La. 2012); *Broussard v. Hilcorp Energy Co.*, 24 So. 3d 813, 816 n.5 (La. 2009); *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 797 (La. 2005).

67. PLANIOL, *supra* note 61, No. 345, at 231.

2. Seeking a Justification for the Juridical Discrimination

The conclusion reached in the previous discussion begs the question *why* article 2782 does not give effect to such contracts in the first place. When an annuity in favor of a natural person is lacking a designated term, article 2782 supplies the missing term—“the death of that [natural] person.”⁶⁸ Therefore, a designated term is clearly a nonessential element to the formation of an annuity contract in favor of a natural person, but it is an essential element to the formation of an annuity contract in favor of a juridical person. To understand the drafters’ justification for discriminating against juridical persons in article 2782, one must first consider each different way that the article could have been written so to supply a term to annuity contracts in favor of juridical persons. There are two possible ways that this could have been done, both of which ultimately prove to be unacceptable.

The drafters could have supplied a missing term to annuity contracts in favor of juridical persons with a provision stating that the right to the periodic payments terminates upon the dissolution of the juridical person. Certainly, this would have made article 2782’s treatment of annuity contracts in favor of juridical persons appear comparable to its treatment of those in favor of natural persons. However, the drafters properly denied this approach because when the parties to an annuity contract forget to designate a term, it should not be inferred that they bargained for the rights and obligations under the contract to continue perpetually. Therefore, due to a juridical person’s potentially infinite lifespan, the imposition of such a term in the absence of one would undermine the parties’ contractual intent and provide one side with an undeserved windfall.

The drafters also could have supplied a missing term to annuity contracts in favor of juridical persons with a provision assigning such contracts a predetermined fixed term. This approach provides a tidy solution to the perpetual-existence problem and has been previously adopted in the usufruct articles. Like many of the other articles pertaining to annuity contracts, article 2782 has an analogue in the Civil Code provisions on usufruct.⁶⁹ Article 608 provides that when a usufruct is established in favor of a juridical person, the usufruct terminates when the entity ceases to exist or upon the lapse of 30 years from the date of the commencement of the usufruct.⁷⁰ By supplying the missing term to these contracts,

68. See LA. CIV. CODE art. 2782 (2013).

69. *Id.* arts. 607–608.

70. *Id.* art. 608.

article 608 serves the dual purpose of preserving the testator's intent on the one hand and solving the perpetual-existence problem on the other.⁷¹ However, the annuity contract is incompatible with a wholehearted adoption of the usufruct approach. If article 2782 were to provide that the stream of annuity payments terminates when the juridical person ceases to exist, or upon the lapse of 30 years, it would violate the terms of article 2778 in all cases involving transfers of things other than money.⁷² Therefore, the drafters correctly refused to provide a term like the one in the usufruct articles to annuity contracts. This leaves the current approach taken in article 2782 with respect to annuity contracts in favor of juridical persons without a designated term as the only acceptable option.

E. Default Rules When No Title X Rule Applies (Article 2779)

Article 2779 articulates the specific titles of the Civil Code that will apply to annuity contracts when no specific provisions are contained in Title X. For this purpose, it splits annuity contracts into three different categories,⁷³ each governed by different titles of Book III when Title X is silent on an issue: (1) All onerous annuity contracts are governed by both Title III⁷⁴ (Obligations in General) and Title IV⁷⁵ (Conventional Obligations or Contracts); (2) onerous annuity contracts for the transfer of a thing other than money are also governed by Title VII⁷⁶ (Sales); and (3) gratuitous annuity contracts are governed by Title II⁷⁷ (Donations). Although the prior law was silent on the applicability of other titles, the default provisions in article 2779 are uncontroversial. In fact, similar provisions govern many of the different nominate onerous contracts in Book III, including those on sale,⁷⁸ lease,⁷⁹ partnership,⁸⁰ loans,⁸¹ and deposit.⁸² Likewise, many of Book III's

71. See *Female Orphan Soc'y v. Young Men's Christian Ass'n*, 44 So. 15 (1907); see also LA. CIV. CODE art. 2679 (2012) (limiting the maximum duration of lease contracts to 99 years).

72. Article 2778 provides that contracts transferring things "other than money for a certain or determinable price" are not annuity contracts. LA. CIV. CODE art. 2778 (2013).

73. *Id.* art. 2779.

74. *Id.* arts. 1756–1905.

75. *Id.* arts. 1906–2057.

76. *Id.* arts. 2438–2659.

77. *Id.* arts. 1467–1751.

78. See *id.* art. 2438.

79. See *id.* art. 2669.

80. See *id.* art. 2802.

81. See *id.* art. 2892.

articles applicable to nominate contracts involving the transfer of a thing other than money express that the rules of sale in Title VII apply absent an applicable rule in the relevant Title.⁸³ Lastly, Article 2779's command that the rules applicable to donations apply to gratuitous annuity contracts⁸⁴ is similarly unremarkable. These default provisions will be useful in clarifying a few issues that the revised articles do not expressly address.

One matter left unanswered in Chapter 1's annuity contract articles is whether these contracts are subject to rescission for lesion beyond moiety.⁸⁵ Under article 2779, annuity contracts involving the transfer of money are subject to the provisions in Titles III and IV when no special provision exists in the annuity contract articles. Article 1965 in Title IV declares: "A contract may be annulled on grounds of lesion only in those cases provided by law."⁸⁶ Because no article in Titles III, IV, or X can be read to subject annuity contracts to lesion, this doctrine is clearly inapplicable to annuity contracts for the transfer of money.

Article 2779 subjects annuity contracts for the transfer of a thing other than money to the rules in Titles III, IV, and VII when no special provision in the annuity articles applies. Article 2589 in Title VII provides that "[t]he sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable."⁸⁷ Thus, the application of the relevant provisions in Title IV and Title VII leads to the conclusion that lesion does apply to annuity contracts for transfers of immovables. However, even if lesion is theoretically applicable to

82. *See id.* art. 2927.

83. One example is the contract of exchange, in which "each party transfers to the other the ownership of a thing other than money." *Id.* art. 2660. *See also id.* art. 2664. Another is the contract of giving in payment, in which "an obligor gives a thing to the obligee, who accepts it in payment of a debt." *Id.* art. 2655. *See also id.* art. 2659. The repealed rent of lands articles, concerning transfers of land for an indefinite stream of payments, similarly dictated that the rules in Title VII applied when no relevant Title X article existed. LA. CIV. CODE art. 2783 (2012).

84. *See* LA. CIV. CODE art. 1910 (2013) ("A contract is gratuitous when one party obligates himself towards another for the benefit of the latter, without obtaining any advantage in return.").

85. *Id.* art. 2589 ("The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable. Lesion can be claimed only by the seller and only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court.").

86. *Id.* art. 1965.

87. *Id.* art. 2589.

annuity contracts for transfers of immovables, courts may refuse to apply this doctrine to such a contract for two reasons.

One reason that a court may not apply lesion to these contracts is because transactions “that are speculative and conjectural as to identity and value are not subject to rescission on the grounds of lesion beyond moiety.”⁸⁸ In short, whether courts apply lesion to contracts depends on the level of certainty with which the contract can be valued at the time of the transfer. Lesion requires the seller to show that the amount that he received was “less than one half of the fair market value of the immovable.”⁸⁹ In the annuity contract context, this determination will compare the value of the periodic payments due under the contract and the value of the thing given in exchange. It is unlikely that a court will find the fair market value of an annuity contract containing a reservation of usufruct or right of habitation to meet this level of certainty.⁹⁰ However, annuity contracts without such a reservation of usufruct or right of habitation do not pose the same problem.⁹¹

The second reason that a court may refuse to apply lesion to an annuity contract for the transfer of an immovable is that, realistically, these transactions will be primarily utilized in intrafamily transactions. In transactions between related parties, a court can easily find the donative intent required to classify the entire transaction as a donation instead of a sale.⁹² Thus, even if it can be shown to a legal certainty that a contract is “less than one half of the fair market value of the immovable,” a court will likely uphold the transfer as an *inter vivos* onerous or remunerative

88. *White v. Oakley*, 191 So. 2d 904, 906 (La. Ct. App. 1st 1966) (citations omitted). *See also Doshier v. La. Church of God*, 71 So. 2d 868, 870 (1954); *Cook v. Mixon*, 700 So. 2d 1264, 1267–70 (La. Ct. App. 2d 1997); *Succession of Witting*, 46 So. 606 (1908) (“[T]he burden is on the vendor to prove lesion by evidence peculiarly strong and convincing, and of such a nature as to exclude speculation and conjecture.”).

89. LA. CIV. CODE art. 2589 (2013).

90. *See Cheramie v. St. Pierre*, 382 So. 2d 1003, 1005 (La. Ct. App. 2d 1980) (holding that a conveyance of property subject to a life usufruct is speculative and conjectural and therefore not subject to rescission for lesion).

91. To show lesion in such a contract, one would first ascertain the market value of the immovable at the time of the transaction. Then, this dollar amount may be used to determine the periodic amount of money that an insurance company would pay for a life annuity for that amount. Finally, this periodic amount that the designated recipient would have received under a commercial insurance annuity would then be compared to the amount actually received under the contract in question to determine if it is less than one-half of the market value.

92. *See Hamilton v. Hamilton*, 522 So. 2d 1356 (La. Ct. App. 2d 1988); *Fenger v. Cagnolatti*, 292 So. 2d 901 (La. Ct. App. 4th 1974).

donation.⁹³ Civil Code articles 1526 and 1527 suggest that a transfer of a thing for less than two-thirds its value will be classified as a donation *inter vivos*.⁹⁴ Ultimately, it is unlikely that the sales concept of lesion will affect annuity contracts at all.

III. REVISIONS TO CHAPTER 2 OF TITLE X, BOOK III: CREATION OF THE ANNUITY CHARGE

When an annuity contract is used to transfer an immovable for a stream of payments, there are many ways that the transferor may find himself in a precarious position. If the transferee loses his job, faces unexpected bills, or becomes bankrupt, the transferor may not receive the full balance of the annuity payments on time or at all. In these situations, if the transferee had previously disposed of the immovable or encumbered it with a real right, the transferor will be left with little recourse because an annuity contract is simply a personal obligation. The Louisiana Legislature addressed these concerns in revised article 2787, which authorizes the parties to an annuity contract transferring an immovable to establish “a charge on the immovable for the periodic payments due under the contract.”⁹⁵ It further provides that if such an annuity charge is established, the designated recipient of the payments “acquires a real right for periodic payments.”⁹⁶ This marks the first appearance of the annuity charge in Louisiana’s Civil Code. It also stands as the first addition of a real right to the Code since the enactment of the building restrictions articles in the 1970s.⁹⁷ For these reasons, the revision to Chapter 2 of Title X, Book III, has the potential to bring about significant changes in the existing landscape of Louisiana property law. The following sections are dedicated to examining its contents.

A. General Characteristics of the Annuity Charge as a Real Right

As with the enactment of any new property right in Louisiana, a cloud of uncertainty looms over many of the basic characteristics of

93. See LA. CIV. CODE art. 1526 (2013); see also *Fenger v. Cagnolatti*, 292 So. 2d 901, 904 (La. Ct. App. 4th 1974) (finding there to be sufficient evidence to show that the transfer of the real property from a mother to her son was really an onerous and remunerative donation given to him for his acts of uprooting his family, moving to his mother’s home, and caring for his mother for the remainder of her life).

94. See LA. CIV. CODE arts. 1526–1527 (2013).

95. LA. CIV. CODE art. 2787 (2013).

96. *Id.*

97. Act No. 170, 1977 La. Acts 629–45.

the right created by the annuity charge. Determining how the annuity charge fits into the Civil Code's existing taxonomy of such rights should help clarify some of these issues. At the broadest level of classification, there are two categories of real rights in Louisiana—perfect ownership and *iura in re aliena*—and the annuity charge in article 2787 clearly falls into the latter.⁹⁸ Louisiana doctrine further classifies real rights as either principal⁹⁹ or accessory.¹⁰⁰ In this regard, the annuity charge should be considered an accessory rather than a principal real right because its sole purpose is to secure the periodic payments due under an annuity contract.¹⁰¹

The annuity charge's status as a real right provides several practical benefits to the party in whose favor it was created. First, if the transferee under an annuity contract becomes insolvent, the holder of an annuity charge is entitled to be paid what he is owed before other creditors having merely personal rights.¹⁰² With respect to other holders of real rights, the "first in time" rule will govern.¹⁰³ Second, the holder of the annuity charge need not worry about the transferee selling the property and skipping town because the annuity charge is a right over the immovable itself and continues to exist in whoever's possession it may be found.¹⁰⁴ However, like any other real right, for the annuity charge to be effective as to third parties, "the annuity contract establishing it [must be] recorded in the conveyance records of the parish in which the immovable is located."¹⁰⁵

Article 2787 permits the use of an annuity charge to secure the payments due under an "annuity contract transferring an immovable."¹⁰⁶ Implicit within this provision is the possibility that the annuity charge may be used to secure annuity contracts for the transfer of buildings, construction, standing timber, or other unharvested crops when the transferor does not own the ground on which such things stand.¹⁰⁷ The terms of this article also seem to

98. See YIANNPOULOS, *supra* note 4, § 237, at 482.

99. *Id.* § 223, at 427 ("The principal real rights pertain to the substance of the thing which is placed at the service of the holder of the right.").

100. *Id.* ("The accessory real rights, that is, accessory to obligations of which they guarantee payment, pertain to the pecuniary value of a thing.").

101. See LA. CIV. CODE art. 2787 (2013).

102. YIANNPOULOS, *supra* note 4, § 215, at 413; LITVINOFF, *supra* note 33, § 1.5, at 9.

103. YIANNPOULOS, *supra* note 4, § 215, at 413.

104. *Id.* at 412–13; LITVINOFF, *supra* note 33, § 1.5, at 9.

105. LA. CIV. CODE art. 2788 (2013). See also *id.* art. 3338(1). Such recordation will not create a presumption "that the instrument is valid" or a presumption "as to the capacity or status of the parties." *Id.* art. 3341.

106. *Id.* art. 2787.

107. See *id.* art. 491.

contemplate the use of an annuity charge to secure an annuity contract for the transfer of an incorporeal immovable, such as the rights under a lease, a predial servitude, or mineral rights.¹⁰⁸ Furthermore, the reference to *annuity contract*, without more, may be read to include nominate annuity contracts created under article 2778 as well as innominate annuity contracts. Although there exists no clear policy reason to restrict the annuity charge's applicability to nominate annuity contracts, the most plausible reading of article 2787 is one which does just that, simply because the annuity charge and annuity contract both appear within Title X.

B. Limits on the Duration of the Annuity Charge

Under Article 2790, the annuity charge is expressly limited in duration—it “may not exceed thirty years, except that it may continue for the lifetime of a recipient who is a natural person.”¹⁰⁹ This limit on an annuity charge's duration may pose a problem for annuity contracts in which the designated recipient is not the same person to whose lifetime the stream of payments is tied. In theory, an annuity charge could be used to secure an annuity contract under which the perpetual payments are to be paid to one person for the duration of another person's life. If the person whose life determines the duration of the annuity payments lives past 30 years but the designated recipient does not, a plain reading of article 2790 suggests that any annuity charge on the immovable would terminate after 30 years. However, the personal rights and obligations surrounding the periodic payments in the underlying annuity contract would not terminate despite termination of the annuity charge securing those payments.

C. Enforcement of the Annuity Charge

The provision in revised article 2791 establishes the legal process by which a designated recipient may enforce the annuity charge should the transferee fail to periodically pay under the annuity contract. Under its terms, “the [designated] recipient may obtain judgment for the amounts due and may enforce the judgment

108. See *id.* art. 470; see also YIANNOPOULOS, *supra* note 4, § 147, at 340 (“[R]ights classified as incorporeal immovables ought to be governed by the laws applicable to corporeal immovables, unless such laws are unsusceptible of application to rights.”).

109. LA. CIV. CODE art. 2790 (2013). Of course, an annuity charge may also terminate before this time through the principles of confusion if the payment designee under an annuity contract containing the charge becomes the owner of the property subject to the charge. See *id.* art. 1903.

by execution upon the immovable subject to the annuity charge in accordance with law.”¹¹⁰ Because its language seems to require a “judgment for the amounts due” before the immovable is seized and sold, article 2791 does not appear to contemplate annuity charge enforcement through executory proceedings.¹¹¹ The effect of a judgment in a proceeding for the enforcement of an annuity charge “does not extinguish the annuity charge for amounts thereafter becoming due under the contract.”¹¹² This makes the annuity charge far superior to a mortgage for securing annuity contracts because the mortgagee’s real right on the property would terminate after the sale, whereas the annuity charge remains on the property in the hands of the purchaser to secure all future payments coming due under the annuity contract.¹¹³

IV. THE NEED FOR THE REVISION: THE REVERSE MORTGAGE PROBLEM

One of the stated purposes of the revision to Title X was “to provide for Louisiana owners a modern, effective, and efficient tool for acquisition of financial resources as an alternative to the so-called reverse mortgage.”¹¹⁴ For many of America’s senior citizens, maintaining a home can be an enormous financial burden. Although the ability to sell one’s house to alleviate this problem is always an option, most seniors want to live in their homes for the rest of their lives.¹¹⁵ This dilemma led to the development of the reverse mortgage, a financial instrument that both provides seniors with a considerable amount of money and also allows them to remain in their houses. Generally speaking, a *mortgage* is “[a] conveyance of title to property that is given as security for the payment of a debt.”¹¹⁶ A homeowner with a conventional mortgage makes periodic amortized payments to the lender according to the loan’s requirements, which eventually extinguish the debt and

110. *Id.* art. 2791.

111. Executory proceedings are commonly “used to effect the seizure and sale of property, without previous citation and judgment” to enforce a conventional real mortgage. LA. CODE CIV. PROC. art. 2631 (2013).

112. LA. CIV. CODE art. 2791 (2013).

113. *See id.*

114. LA. CIV. CODE art. 2787 cmt. a (2013).

115. AARP, FIXING TO STAY: A NATIONAL SURVEY OF HOUSING AND HOME MODIFICATION ISSUES 24–25 (2000), available at http://assets.aarp.org/rgcenter/il/home_mod.pdf.

116. BLACK’S LAW DICTIONARY 1101 (9th ed. 2009). These security devices are commonly used with residential housing loans.

release the property from the mortgage.¹¹⁷ In contrast, the homeowner with a reverse mortgage does not have to make any payments to the lender, and the interest that accrues on the loan is simply added to the outstanding debt.¹¹⁸ In essence, “[a] reverse mortgage is a loan against the equity a senior has built up in his or her home.”¹¹⁹

This concept was first introduced in the 1960s, but it became popular only after Congress passed the Housing Community and Development Act (HCDA) of 1987. The HCDA of 1987 created the Home Equity Conversion Mortgage (HECM) program and provided federal insurance to all reverse mortgage loans that met certain criteria.¹²⁰ To be eligible for such a HECM loan, a homeowner must (1) be 62 years old or older, (2) have substantial equity in his home, and (3) receive approved counseling about the program.¹²¹ Under the HECM program, borrowers are not required to repay the loan amount as long as they live in the home subject to the loan, adequately maintain the property, and pay property taxes and homeowner’s insurance premiums on time.¹²² The HCDA of 1987 viewed the reverse mortgage as a means of allowing millions of cash-strapped Americans who were relatively rich in home equity to draw on some (but not all) of that stored value.¹²³ In recent years, the use of the reverse mortgage as a financial device has exploded.¹²⁴ Between 2001 and 2009, the annual volume of

117. Each payment of a conventional mortgage includes both interest and principal. The payments increase the equity in the home by the amount of the principal included in the payment.

118. See BLACK’S LAW DICTIONARY 1103 (9th ed. 2009).

119. NORMA PAZ GARCIA, PRESCOTT COLE & SHAWNA REEVES, EXAMINING FAULTY FOUNDATIONS IN TODAY’S REVERSE MORTGAGES 5 (2010), available at <http://www.consumersunion.org/pdf/reverse-mortgage-report-2010.pdf>. The most significant financial asset of the vast majority of America’s seniors is the family home. See AM. BAR ASS’N, REVERSE MORTGAGES: A LAWYER’S GUIDE TO HOUSING AND INCOME ALTERNATIVES 9 (David Bridewell & Charles Nauts, eds. 1997). In a 2000 survey, 86% of respondents 55 or older indicated that they own their homes. AARP, *supra* note 115, at 17.

120. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 417(a), 101 Stat. 1815 (1988) (codified as amended at 12 U.S.C. § 1715z-20).

121. U.S. DEP’T OF HOUSING & URBAN DEV. (HUD), HOME EQUITY CONVERSION MORTGAGES HANDBOOK 2, 4–5 (1994), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4235.1/42351c1HSGH.pdf>.

122. GARCIA, COLE & REEVES, *supra* note 119, at 37. Reverse mortgage loans are “non-recourse” home loans, meaning that the debt is secured only by the home, and the lender cannot pursue the borrower(s) upon a default, even if the amount of the debt exceeds the house’s market value. HUD, *supra* note 121, at 1, 6.

123. See *id.* at 1.

124. GARCIA, COLE & REEVES, *supra* note 119, at 3.

these loans increased a stunning 1,373%, a number that will certainly increase in the near future as the first wave of the baby boomers quickly approaches retirement.¹²⁵ Recently, however, it has become increasingly clear that the HECM loan should be considered a last resort for those in need of cash.¹²⁶

For several reasons, reverse mortgage loans are an inefficient and risky way of obtaining cash. The expensive fees associated with obtaining the loan are often added to the principal balance from the outset, which allows the lender to collect additional interest on them.¹²⁷ Additionally, almost all reverse mortgage loans involve compounding interest rates.¹²⁸ Most troubling is that many seniors entering reverse mortgages are unaware of the substantial risk that the loan may come due before dying or, even worse, that it will become due immediately after dying and leave their spouses with nothing.¹²⁹ In August 2010, the Department of Housing and Urban Development published the results of an internal audit brought about by the increasing default rate of HECM loans, which found that upwards of 20,000 of the outstanding loans were currently in default.¹³⁰ In short, reverse mortgages have left thousands of America's seniors with very uncertain retirements.¹³¹

Before last summer, the reverse mortgage was the only practical way that Louisiana's property owners could quickly obtain cash from the stored equity in their homes and still have the ability to

125. *Id.* at 1–2.

126. *Id.* at 6–8.

127. *Id.* at 6–7.

128. Reverse mortgages are exempt from Louisiana's prohibition on compounding interest and laws on usury. *See* LA. REV. STAT. ANN. § 9:3504(A) (2009).

129. This typically occurs when one spouse is old enough (over 65) to qualify for the reverse mortgage and the other is not. Reverse mortgage counselors have been reported even to have promoted this situation by telling couples that they are eligible for more money if only one spouse signs the loan. In these situations, when the spouse who signed onto the mortgage dies, the other spouse will be forced to pay off the loan's balance or face foreclosure because, unlike the signatory spouse whose ability to live in the house is protected by the loan, the surviving spouse is not similarly protected.

130. GERALD R. KIRKLAND, AUDIT REPORT: HUD WAS NOT TRACKING ALMOST 13,000 HECM LOANS WITH MAXIMUM CLAIM AMOUNTS OF POTENTIALLY MORE THAN \$2.5 BILLION 11 (2010), *available at* <http://www.hud.gov/offices/oig/reports/files/ig1060003.pdf>. The report found that this increase in default rates was due to more borrowers failing to pay the taxes or homeowners insurance premiums on their homes as required under the terms of the loan. *Id.* at 9–10.

131. Ironically, these government-backed financial instruments, intended to free up extra money for struggling seniors, have left many widows and widowers on the brink of foreclosure.

reside there. By revising the articles in Title X of the Civil Code, the Louisiana Legislature provided property owners with a modern, effective, and efficient alternative to the reverse mortgage for *inter vivos* acquisition of financial resources.¹³² When used in conjunction with a reserved right of habitation,¹³³ an annuity contract transferring an immovable for a stream of payments will have effects analogous to those of a reverse mortgage. However, one must keep in mind that, although the revision may have been prompted by the problems associated with this financial instrument, the revised articles in Title X, Book III, were not designed to provide a functional equivalent to the reverse mortgage. They were simply intended to provide an alternative method for Louisiana's seniors to obtain a secured stream of payments from their existing home equity.

V. ANCILLARY FINANCIAL BENEFITS OF THE ANNUITY CHARGE CONTRACT

The previous Part discussed how an annuity contract secured by an annuity charge provides an alternative to the reverse mortgage that is simple, feasible, and secure for the recipient, without the risk of eviction or foreclosure inherent in the reverse mortgage. In addition to these virtues, annuity charge contracts may provide at least two other advantages over the reverse mortgage. First, the current wording of federal and state bankruptcy statutes suggests that the periodic payments due under an annuity contract will be immunized from the beneficiary's creditors in bankruptcy. Second, the current enrollment and accounting requirements of the Louisiana Medicaid program favor the annuity charge contract in a number of ways.

A. Bankruptcy Protection

Annuity contracts under these new Civil Code articles may be able to provide asset-shielding benefits to the designated recipient of the payments under that contract should he fall into bankruptcy. The United States Bankruptcy Code provides that when a debtor files a bankruptcy petition, commencing bankruptcy proceedings, an estate

132. This was one of the stated purposes of the legislation. *See* LA. CIV. CODE art. 2787 cmt. a (2013).

133. *See id.* art. 630 ("Habitation is the nontransferable real right of a natural person to dwell in the house of another."); *see also* A.N. YIANNPOULOS, PERSONAL SERVITUDES § 8:11, *in* 3 LOUISIANA CIVIL LAW TREATISE 546-48 (5th ed. 2011).

is created, which includes all of the property in which the debtor had a legal or equitable interest at the time that the petition is filed.¹³⁴ The debtor may then proceed to exempt certain property from that bankruptcy estate.¹³⁵ Under the Bankruptcy Code, the debtor is allowed to choose¹³⁶ between two sources of such allowable exemptions: (1) the list of ten exemptions contained in 11 U.S.C. § 522(d),¹³⁷ or (2) the exemptions contained in the applicable law of the State where the debtor's domicile was located 730 days before the petition is filed.¹³⁸ Thus, the Federal Bankruptcy Code allows a debtor in a bankruptcy proceeding to rely on Louisiana law to exempt property from the bankruptcy estate.

Under the relevant section of the Louisiana Revised Statutes,

[t]he lawful beneficiary, assignee, or payee . . . of an annuity contract shall be entitled to the proceeds and avails of the contract against the creditors and representatives of the annuitant . . . and the proceeds and avails shall also be *exempt* from all liability for any debt of the beneficiary, payee, or assignee or estate, existing at the time the proceeds or avails are made available for his own use.¹³⁹

This section defines an *annuity contract* as any contract that “[s]tates on its face or anywhere within the terms of the contract that it is an ‘annuity’ including but not limited to an immediate, deferred, fixed, equity indexed, or variable annuity, irrespective of current pay status or any other definition of ‘annuity’ in Louisiana law.”¹⁴⁰ A plain reading of this section leads to the conclusion that the periodic payments to which an annuity contract designee is entitled under Civil Code article 2778 are immune from that designee's bankruptcy creditors under 11 U.S.C. § 522(d).¹⁴¹

134. See 11 U.S.C. § 541 (2006 & Supp. V 2011).

135. *Id.* § 522.

136. Under the relevant Bankruptcy Code provision, “an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, *in the alternative*, paragraph (3) of this subsection.” *Id.* § 522(b)(1) (emphasis added).

137. *Id.* § 522(b)(2).

138. *Id.* § 522(b)(3). The debtor can also rely on exemptions contained in federal law other than those in § 522(b)(2). *Id.*

139. LA. REV. STAT. ANN. § 22:912(B)(1) (Supp. 2013) (emphasis added).

140. *Id.* § 22:912(B)(2).

141. See *In re Orso*, 283 F.3d 686, 697 (5th Cir. 2002).

B. Medicaid Benefits

The annuity charge contract is much more appropriate than a reverse mortgage for those who will eventually need long-term nursing home care.¹⁴² The astronomical costs of nursing home care can quickly wipe out an individual's entire life savings unless he qualifies for means-tested benefit programs such as Medicaid. Because Medicaid is essentially a health insurance program for the poor, one's income and total assets must fall below a limit determined state by state to be eligible.¹⁴³ In Louisiana, single applicants can have at most \$2,000 in total assets and can make at most \$2,022 per month.¹⁴⁴ All other assets above these limits are considered "countable assets" and will have to be "spent down" before the senior can be eligible for Medicaid benefits. An applicant's home is not considered an asset for eligibility. However, reverse mortgage payouts will impact a borrower's Medicaid eligibility.¹⁴⁵ A senior who has entered a reverse mortgage for a lump-sum payment will have to spend down this money before Medicaid will begin making payments.¹⁴⁶ Furthermore, the terms of many reverse mortgages require the senior to actually live in the house, so those requiring an extended stay in a nursing home risk having the balance of the loan come due.¹⁴⁷ In contrast, the senior who opts for an annuity contract instead of a reverse mortgage will have neither of these headaches as long as the monthly or annual payments do not exceed Medicaid's limit.

Although a person's primary residence is not a quantifiable asset for Louisiana long-term care Medicaid eligibility, the beneficiary's home is not equally protected after death. All states implementing a Medicaid program are required to establish an estate recovery program in accordance with Subchapter XIX of the Social Security

142. This discussion will also apply to those who intend to utilize Medicaid benefits because they have chronic conditions uncovered by an insurance plan.

143. Most states use a percentage of the federal poverty guidelines as the measuring stick to determine eligibility.

144. LA. DEP'T OF HEALTH & HOSPS., OFFICE OF AGING & ADULT SERVS., NURSING FACILITY SERVICES FACT SHEET 2 (2011), available at http://new.dhh.louisiana.gov/assets/docs/OAAS/publications/Nursing_Facilities_Fact_Sheet_CAAA.pdf. Married applicants can have at most \$3,000 in total assets and can make at most \$4,044 per month. *Id.*

145. GARCIA, COLE & REEVES, *supra* note 119, at 7.

146. *Id.*

147. Fed. Trade Comm'n, *Consumer Information: Reverse Mortgages*, FTC.GOV (Mar. 2011), <http://www.consumer.ftc.gov/articles/0192-reverse-mortgages> ("[A] borrower can live in a nursing home or other medical facility for up to 12 consecutive months before the loan must be repaid.").

Act¹⁴⁸ “for the purpose of recovering medical assistance payments made on behalf of individual recipients from the succession estates of those individuals.”¹⁴⁹ Under Louisiana’s program, the State will maintain a lien on the beneficiary’s interest in the residence and, upon his or her death, enforce the lien up to the amount of care the beneficiary received.¹⁵⁰ Accordingly, even if a reverse-mortgage debtor manages to avoid foreclosure while still alive, once he passes away and the mortgage creditor is satisfied, the residual value of his house will then be subject to the state’s claims because a house subject to a reverse mortgage remains in the senior’s estate until the lender forecloses on the loan. In contrast, the medical estate recovery program will not affect the estate of a senior who opts for an annuity charge contract instead because the immovable is fully transferred out of the senior’s estate at the time of contracting. The annuity charge contract therefore better serves the interests of a senior’s decedents by offering much more protection to the value of their inheritance.

VI. CONCLUSION

The 2012 revision to Title X, Book III, of the Louisiana Civil Code brought about a number of important substantive changes to Louisiana law—it effectuated the long-awaited repeal of the rent of lands articles, it improved the prior articles pertaining to annuity contracts, and it created the annuity charge as a real right that may secure performance under an annuity contract. The revision advances the ongoing modernization of the Civil Code that the Law Institute began years ago and desirably responds to the societal developments that have occurred in recent years. The newly enacted annuity contract and annuity charge articles are groundbreaking innovations that may serve as a template for similar provisions in other civil law jurisdictions. In large part, the dedicated members of the Louisiana Law Institute’s Rent of Lands

148. 42 U.S.C. § 1396p (2006 & Supp. V 2011).

149. LA. REV. STAT. ANN. § 46:153.4(D) (2010). However, the department shall not take any action to recover in the case of undue hardship.

150. LA. DEP’T OF HEALTH & HUMAN SERVS., RULE, MEDICAID ESTATE RECOVERY (1996), available at http://www.doa.la.gov/osr/reg/may96/9605_049.pdf. If certain criteria are met, the State may even execute a lien on the beneficiary’s immovable property before death. 42 U.S.C. § 1396p(a)–(b). Three criteria must be met before a State can execute such a lien: (1) The beneficiary must be an inpatient in a nursing facility; (2) he or she must not be reasonably expected to be discharged from the medical institution and return home; and (3) there must be no spouse, child under 21, or sibling of the beneficiary residing in the house. *Id.*

and Annuities Committee provided the finished product. They spent well over two years identifying problems in prior law, drafting legislation, critically examining the new articles, and reworking them over and over again. These distinguished lawyers, judges, and professors dedicated countless, uncompensated hours to improving the law of Louisiana and deserve recognition for their work. Although some parts of this Article may appear critical of the revised articles, these criticisms are primarily levied at the ambiguities that form an inherent part of any legislation. All things considered, the 2012 revision to Title X is truly a legislative *tour de force*.