

Louisiana Law Review

Volume 21 | Number 2

The Work of the Louisiana Supreme Court for the

1959-1960 Term

February 1961

1960 Amendments to the Civil Code Enacted in Connection with the New Code of Civil Procedure

Leon Sarpy

Adrian G. Duplantier

Repository Citation

Leon Sarpy and Adrian G. Duplantier, *1960 Amendments to the Civil Code Enacted in Connection with the New Code of Civil Procedure*, 21 La. L. Rev. (1961)

Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol21/iss2/23>

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

1960 Amendments to the Civil Code Enacted in Connection with the New Code of Civil Procedure

*Leon Sarpy** and *Adrian G. Duplantier***

The legislative act of 1948¹ which memorialized the Louisiana State Law Institute to prepare a Code of Civil Procedure for presentation to the legislature provided:

“The Louisiana State Law Institute is instructed to prepare comprehensive projects for the revision . . . of the Civil Code of Louisiana and of the Code of Practice of Louisiana.”

Pursuant to this mandate the Law Institute has completed the revision of the Code of Practice, and its projet of a new Code of Civil Procedure was adopted by the legislature of 1960 without change.² In executing the work, the Law Institute deemed it appropriate to adopt the policy that all basic adjective law should be embraced by the new procedural code. Therefore, all provisions of the Civil Code and Revised Statutes concerning basic procedural matters have been transferred in substance to the new Code.³ Moreover there are other changes in the Civil Code resulting from the legislation recommended by the Institute to implement the changes brought about by the new Code.⁴

As a result more Civil Code articles were affected by the 1960 Regular Session of the Legislature than by any previous session. Practically all of these changes relate directly to the Code of Practice revision. A discussion of the other 1960 legislation affecting the Civil Code appears elsewhere.⁵

There were 306 articles in the Civil Code, the subject matter

*Lecturer on Louisiana Practice, Loyola University School of Law; member, Louisiana Bar.

**Member, Louisiana Senate; Lecturer on Criminal Procedure, Loyola University School of Law; member, Louisiana Bar.

1. La. Acts 1948, No. 335.

2. La. Acts 1960, No. 15.

3. 1 LA. CODE OF CIVIL PROCEDURE ANN. 761 et seq., Concordance Tables 2 and 3; Implementation Table 4 (West, 1960).

4. La. Acts 1960, No. 30.

5. Pascal, *Civil Code and Related Subject Matter*, 21 LOUISIANA LAW REVIEW 53 (1960).

of which is carried into the new Code of Civil Procedure. The overwhelming number of these articles deals with the general subject of probate procedure in its broad sense. A striking example of a change not in the field of probate is the amendment to Civil Code Article 2315, which forms the substance of another article.⁶ As is the case with respect to the entire new Code, the articles on probate procedure are designed to co-ordinate much overlapping and conflicting material, to eliminate much obsolete matter, and to afford a more logical and orderly presentation. It is the purpose of this article to discuss the more significant changes effected by the new Code of Civil Procedure, involving articles formerly contained in the Civil Code.

SUCCESSIONS

I. PROBATING TESTAMENTS

The probating of the seldom used nuncupative testament by private act has been liberalized. Under Civil Code Articles 1649 through 1654, the two witnesses apparently must recognize all signatures to the act. The second paragraph of Article 2886 of the new Code permits separate sets of two witnesses each to identify the various signatures, thereby making probate possible where heretofore it may have been burdensome and even impossible to find two witnesses who were familiar with the signatures of all persons to the act. Further, it is noteworthy that under Article 2889 the testimony of all witnesses involved in the probate of a testament may now be taken by deposition where formerly the validity of such procedure was gravely in doubt although at times allowed by certain judges. Certified copies of nuncupative wills by public act may now be used under new Code Article 2891, whereas before Civil Code Article 1647 apparently required the original to be produced, which would be indeed difficult at present, particularly in the Parish of Orleans where the original testament may be bound with the acts of the notary, as required by law.⁷

II. QUALIFICATION OF SUCCESSION REPRESENTATIVE

Former Civil Code Articles 1678 and 1679 were silent as to the qualifications for a dative testamentary executor. The present custom of requiring the same qualifications of an adminis-

6. See Malone, *Torts*, 21 LOUISIANA LAW REVIEW 78 (1960).

7. LA. R.S. 35:329 (1950).

trator was expressly included in new Article 3083. Also, heretofore only a person having a prior right to the appointment could make the attack on another's application.⁸ Now under Article 3095 any person may urge the grounds for the disqualification of the applicant without it being necessary that such opponent be qualified himself to serve. But if he is qualified he must pray that he be appointed administrator.

III. INVENTORIES

One of the most significant changes in the probate field is in connection with inventories. Heretofore inventories were required in all administrations.⁹ In simple possessions, however, sworn descriptive lists were used in all parishes prior to 1936, when the legislature brought on a major change in the Parish of Orleans only, by requiring an inventory in all successions with a value of \$10,000 or more, irrespective of whether there was an administration or not.¹⁰ The result was to raise mandatory costs in simple possessions.¹¹ The New Orleans Bar Association sought repeal of this act in 1940, but the attempt failed. However, the suggested costs were lowered by the civil district court¹² to less than fifty percent as a result of that dispute.

When the Law Institute considered this problem it was determined that the rule on inventories and appraisement should be uniform. Accordingly, the usual provision for the inventory was carried over as Articles 3131 through 3137. However, Article 3136 provides that a detailed descriptive list can be substituted for the formal inventory in all cases. The resulting change is two-fold: in the Parish of Orleans the statute requiring a formal inventory in simple possessions was repealed, and further, a formal inventory can now be dispensed with even in administrations anywhere in the state. Obviously the monetary savings to the heirs may be considerable. However, in the case of minors¹³ and interdicts¹⁴ the new Code retains the inventory as formerly.

8. See LA. CIVIL CODE arts. 1118, 1119 (1870).

9. *Id.* art. 1101 *et seq.*

10. La. Acts 1936, No. 311.

11. For an exposition of the situation, see Sarpy, *Unreal Appraisements in Louisiana Estates*, 2 LOUISIANA LAW REVIEW 426 (1940).

12. Sarpy, *The Appointment of Appraisers in Orleans Estates*, 15 TUL. L. REV. 75 (1940).

13. LA. CODE OF CIVIL PROCEDURE art. 4101 (1960).

14. *Id.* art. 4549.

IV. SECURITY BY EXECUTORS

Ironically the testator has never enjoyed the privilege of requiring his executor to furnish bond, only creditors having had that right under Civil Code Articles 1677 and 1679. Such right is now given the testator under new Code Article 3153. In addition the forced heirs, surviving spouse, and creditors may also require security under Articles 3154 and 3155. Otherwise, no bond is required of any executor, other than a dative testamentary executor, who must post the usual bond required of administrators, amounting to one and one-fourth the total value of all property in the estate.¹⁵ The new provision is designed to grant the testator greater authority in safeguarding the heirs and creditors.

V. ATTORNEYS FOR ABSENT HEIRS

Tighter control by the court over attorneys appointed to represent absent heirs is provided in new Code Article 3173, which enables the judge to relieve them of their trust for any lawful reason. Further, if the absent heir advises the court of his choice of another attorney, the one appointed by the court is terminated, according to the prevalent practice. However, reasonable compensation in any event is provided for,¹⁶ although the absent heir might be held not to have any interest in the succession. In this manner, an attorney appointed to represent absent heirs is assured of some compensation for the work done, even though the heirs may decide not to retain him after he has gone to the trouble of performing some work prescribed by law, including the notification to the absent heirs.¹⁷ The lack of adequate positive law on the subject rendered interpretation by the courts somewhat difficult and called for clarification.

VI. REMOVAL OF SUCCESSION REPRESENTATIVE

Direct control by the sanction of removal over failure of the applicant to qualify timely is given to the court under the new Code¹⁸ and the procedure is expedited by permitting a summary order of removal, where the former Civil Code¹⁹ articles allowed ordinary procedure. The court may also extend the ten-day

15. *Id.* art. 3151.

16. *Id.* art. 3174.

17. *Id.* art. 3172.

18. *Id.* art. 3181.

19. *Id.* arts. 1158, 1677.

period for qualification.²⁰ Hence, the court is given a tighter rein over the representation of the estate by assuring a duly qualified representative.

VII. POWERS AND DUTIES OF SUCCESSION REPRESENTATIVES

The prudent administrator concept of the Civil Code²¹ is retained in new Code Article 3191, but the rule is implemented by specified duties and designated authority where the former law was silent and hence very much in doubt. For example, the investment of idle funds,²² continuation of a business,²³ leasing of property,²⁴ execution of executory contracts,²⁵ contracting of loans,²⁶ and securing them with mortgage of pledges,²⁷ are all permitted expressly under the authority of a court order. Where urgently needed the district courts have at times inclined towards granting such authority by order, under the inherent authority theory. The questionability of such judicial authority did not afford complete assurance that title examiners would approve. Express authority was sorely lacking and obviously needed. A practical result of benefit to the heirs and creditors is the professional time saving heretofore required in research to determine whether or not a succession representative could be given certain administrative authority by the court.

VIII. SALES OF SUCCESSION PROPERTY

The section on sales of succession property has sought to include all Code and statutory provisions. The history of sales by succession representatives has been recorded elsewhere,²⁸ and all provisions have been followed without limiting any of heretofore existing authority.

One change that will save successions considerable expense is the curtailment of the number of advertisements for a proposed sale. Article 1167 of the Civil Code required three advertisements in a period of ten days for movables and once a week covering a thirty-day period for immovables. Article 3272 of the

20. *Id.* art. 3181.

21. LA. CIVIL CODE art. 1147 (1870).

22. LA. CODE OF CIVIL PROCEDURE art. 3223 (1960).

23. *Id.* arts. 3224, 3225.

24. *Id.* art. 3226.

25. *Id.* art. 3227.

26. *Id.* art. 3228.

27. *Ibid.*

28. See Sarpy, *Private Sales of Succession Property*, 12 TUL. L. REV. 412 (1938).

new Code curtails notices to one for movables and two for immovables in the manner provided for by law,²⁹ but permits additional advertisements. This new concept permeates the entire Code and applies to sales under *fieri facias* as well.³⁰ Savings can thus run as high as 60% of the former cost of advertisements.³¹ Here is another example of economy in the administration of successions inuring to the benefit of the heirs.

IX. PAYMENT OF DEBTS AND ACCOUNTING

One of the most important clarifications in the probate field is the treatment given the tableau of distribution and the account.

The basic principle that no debts shall be paid without court authority has been preserved.³² In exceptional circumstances the court may order the payment *ex parte* where delay may be detrimental.³³ However, the normal method of payment is by means of a tableau of distribution,³⁴ which must be published.³⁵

The function of the tableau of distribution is to serve as a proposal to the court that certain itemized payments be made to creditors. This is not a new concept, for it was formerly provided for by Articles 1181 and 1182 of the Civil Code. Article 3303 of the new Code does no violence to but on the contrary carries over these concepts of the old Civil Code articles. Then after advertisement and homologation, payment may follow under Article 3307. Following payment a report to the court should be made in an account which should be filed annually under 3331 or in a final account under 3332. Thus the offices of the tableau of the distribution and the account are clearly defined.

In spite of Civil Code Articles 1181 and 1182, a clumsy combination of both the tableau of distribution and the account had been the widespread practice, with only one document called an "account" being used to fulfill the offices of both. Now, under the separation only the tableau of distribution need be adver-

29. See LA. R.S. 43:201 *et seq.* (1950).

30. See LA. CODE OF CIVIL PROCEDURE art. 2331 (1960).

31. In Succession of Edna E. Heuer, No. 376-584, Civil District Court for the Parish of Orleans (1960), fourteen parcels of property were sold at public auction with an advertising cost of \$1,500. Under the new Code the aggregate cost would be reduced to approximately \$500.

32. LA. CODE OF CIVIL PROCEDURE art. 3301 (1960).

33. *Id.* art. 3302.

34. *Id.* art. 3303.

35. *Id.* art. 3304.

tised. The account need not be advertised but must be served on each heir and residuary legatee under Article 3335. The new provisions will enable more orderly records in succession administrations.

X. COMPENSATION OF SUCCESSION REPRESENTATIVE

Two changes with respect to the commission of a succession representative are worthy of note. Article 3351 of the new Code authorizes the court to increase the commission of an administrator or executor "upon proper showing that the usual (2½ per cent) commission is inadequate"; the former Civil Code Article 1069 included no such provision. Article 3353 reverses the former rule that an executor who is a legatee is entitled to compensation only if the testament so indicates,³⁶ by providing that he shall be entitled to compensation unless the testament provides to the contrary.

XI. JUDGMENT OF POSSESSION: REOPENING

The Civil Code articles on successions made no provision for a partial judgment of possession, or for the reopening of a succession proceeding after the discharge of the succession representative. The new Code expressly recognizes both.³⁷

TUTORSHIP

The most significant change effected by the new Code in tutorship procedure is the adoption of the "Prudent Man" rule³⁸ for the investment of minors' funds in lieu of the "legal list" provision in the present Civil Code.³⁹ All investments included in the former "legal list" are represented by fixed dollar value, such as mortgages, savings accounts, and government bonds. By contrast, under the new Code, subject to court approval,⁴⁰ "a tutor is authorized to acquire and retain every kind of property and every kind of investment," including corporate stocks. The change is of course designed to protect the minor's principal against erosion caused by inflation.⁴¹ The new provision is broad

36. LA. CIVIL CODE art. 1686 (1870).

37. LA. CODE OF CIVIL PROCEDURE arts. 3362, 3372 (1960); LA. CODE OF PRACTICE art. 3393 (1870).

38. LA. CODE OF CIVIL PROCEDURE art. 4269 (1960).

39. LA. CIVIL CODE art. 348 (1870).

40. LA. CODE OF CIVIL PROCEDURE art. 4270 (1960).

41. For a full discussion of the "Prudent Man" approach to the investment of fiduciary funds, see Sarpy & Duplantier, *Minor's Investment in Louisiana, A Legal Anachronism*, 33 TUL. L. REV. 803 (1959).

enough to permit the tutor to purchase real estate, including a home for the minor.

Article 4031 *et seq.* of the new Code should clarify the question of the proper venue for tutorship proceedings. Civil Code Article 307 fixed the venue at the domicile of the minor or, for a minor with no domicile in this state, at the parish where the minor's principal property was situated. Article 4031 specifies the proper venue for resident minors for each situation which gives rise to a tutorship, and Article 4032 discards the "principal property" concept for nonresident minors in favor of a provision similar to that in successions,⁴² permitting the proceedings to be conducted in any parish where property of the minor is situated.

Article 4069 of the new Code is perhaps the most important of several changes designed to protect the minor's property, for which protection Louisiana has always been noted. Formerly, a bank could be appointed as separate tutor of the minor's property only with consent of the tutor of the person.⁴³ The new provision permits the appointment for good cause, regardless of objection by the custodian of the minor's person, and even where there is a natural tutor. For the first time,⁴⁴ the court is given discretion under Article 4035 to require a bond from the minor's father or mother, where the usual legal mortgage is insufficient. Under the former law, opportunity often existed for a natural tutor to squander the minor's funds, with the minor having as his only protection a legal mortgage against a tutor who had never owned any property. Similarly, the former provision authorizing the appointment of a dative tutor without bond⁴⁵ has been limited by Article 4463 to situations where the minor's assets are less than \$2,000.00.

Article 4272 allows the court to condition its approval of a proposal under which cash is received by a tutor, with the requirement that the funds be deposited temporarily in the registry of the court, to be withdrawn only under court order, and to be invested directly in a court-approved investment.⁴⁶

42. LA. CODE OF CIVIL PROCEDURE art. 2811 (1960).

43. LA. R.S. 6:322(6) (1950).

44. LA. CIVIL CODE art. 318 (1870) provides in part: "Every tutor, except the father and mother, . . . shall give . . . security."

45. *Id.* art. 271.

46. Frequently, substantial sums paid to tutors in matters such as the settlement of personal injury claims on behalf of minors are expended by the tutors and never invested for or received by the minors. LA. CODE OF CIVIL PROCEDURE art. 4272 (1960) gives the court control over such funds.

Several articles of the new Code give the court discretion to regulate the amount of the tutor's bond. The bond may be reduced where circumstances justify it, and may thereafter be increased for any reason,⁴⁷ and particularly where the tutor realizes cash from a sale⁴⁸ or mortgage⁴⁹ of the minor's property.

Article 4322 fills two deficiencies in the prior law by specifying the place at which a public sale of minor's property is to be conducted, and the place for the advertising.⁵⁰ The number of advertisements is reduced here as elsewhere in the new Code.⁵¹

The procedure for a final account by the tutor has been liberalized by the new Code. Under former Civil Code Article 357, a tutor was required to file a final account upon expiration of the tutorship. Article 4392 gives the minor the option of requiring a final account, or of making an extrajudicial settlement with his tutor.

Article 4461 of the new Code increases the maximum for "Small Tutorships" from \$500.00⁵² to \$2,000.00,⁵³ as is true with respect to "Small Successions."⁵⁴

ADMINISTRATION OF MINOR'S PROPERTY DURING MARRIAGE OF PARENTS

The new Code adopts the general approach of former Civil Code Article 222 to the effect that where both parents are living, with no separation or divorce, action affecting the minor's property may be taken in the same manner as provided for tutors, the father occupying the place of the tutor. However, one important change is effected. The recent Supreme Court decision⁵⁵ recognizing as valid a release of a minor's personal injury claim without court approval is legislatively overruled by Article 4501.

47. *Id.* art. 4131.

48. *Id.* art. 4304.

49. *Id.* art. 4267.

50. LA. CIVIL CODE art. 341 (1870) is silent on both points.

51. LA. CODE OF CIVIL PROCEDURE art. 4322 (1960); LA. R.S. 43:203 (1950), as amended, La. Acts 1960, No. 34.

52. Former LA. R.S. 9:821 (1950).

53. Three distinctions are provided for "Small Tutorships." A descriptive list may be substituted for an inventory (LA. CODE OF CIVIL PROCEDURE art. 4462 (1960)), a dative tutor may be appointed without bond (*id.* art. 4463), and court costs are reduced by one half (*id.* art. 4464).

54. *Id.* art. 3421.

55. *Blades v. Southern Farm Bureau Casualty Ins. Co.*, 237 La. 1, 110 So.2d 116 (1959).

INTERDICTION AND CURATORSHIP OF INTERDICTS

The following changes in provisions formerly found in the Civil Code dealing with interdiction are noteworthy:

(1) Article 4541 makes it clear that the only proper venue is the parish of the defendant's domicile.⁵⁶

(2) Article 4545 specifically recognizes the right of a Louisiana court to interdict a Louisiana domiciliary being treated in another state, regardless of the duration of absence.⁵⁷

(3) Civil Code Article 397 assessed all costs against the plaintiff if the suit were unsuccessful; Article 4551 gives the court discretion in such a case to tax the costs, or any part thereof, against any party.

(4) Article 4552 adds a new procedure, under which the clerk must record in his conveyance records a notice of the filing of the interdiction suit.

56. LA. CIVIL CODE art. 392 (1870) provided: "Every interdiction shall be pronounced by the competent judge of the *domicile or residence* of the person to be interdicted."

57. This overrules *Interdiction of Toca*, 217 La. 465, 46 So.2d 737 (1950).