Recent Legislative Developments in Successions, Donations, and Trusts
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I. Independent Administration

A. Act No. 974 (Reg. Sess. 2001) creates a new Chapter 13 (articles 3396-3396.20) of the Code of Civil Procedure entitled: Independent Administration of Estates

B. The crux of the new legislation is article 3396.15: "Except as otherwise provided in this Chapter, an independent administrator shall have all the rights, powers, authorities, privileges, and duties of a succession representative provided in chapters 4 through 12 of this Title, *but without the necessity of delay for objection, or application to, or any action in or by, the court*." The bill originally specified that publication was not necessary, but legislature deleted "publication" at behest of lobbyist for newspapers. Nevertheless, since publication was a step to obtaining court approval of the action of the succession representative, and the independent administrator is not required to seek court approval, it would seem that publication is not required despite deletion of the word "publication."

C. The court *shall* grant independent administration in the following situations:
1) When the *testament provides* for independent administration. Art. 3396.2
2) Unless testament forbids independent administration, when *all* general or universal legatees *agree* to have independent administration and collectively designate the person named as executor in the will as the independent administrator. They can also designate a dative independent administrator when the executor named in the will is unwilling or unable to serve. Art. 3396.3, 3396.4, 3396.13
3) In an intestate succession when *all* intestate successors *agree* and collectively designate a qualified person to serve as independent administrator. Art. 3396.5.

D. Note that when the testament provides for independent administration and at least one general or universal legatee (or the person appointed executor?) petitions for it, dissenting general or universal legatees cannot prevent it. In all other situations, independent administration cannot begin unless all heirs or general or universal legatees agree.

E. Protections for interested persons (other than consent requirement where applicable):
1) Security may be demanded of the independent administrator in a contradictory hearing by an interested person such as an heir, legatee, or creditor; otherwise, an independent administrator is not required to provide security. Art. 3396.14
2) Interested person may demand an annual accounting or more frequent accounting as court deems necessary, and independent administrator must file descriptive list of assets *and liabilities*, and file, serve, and seek homologation of a final account unless waived Art. 3396.17, 3396.18, 3396.19
3) Removal of independent administrator same as for regular succession representative. 3396.20
4) *Interested person may, by contradictory hearing and for "good cause," convert the independent administration to a regular administration*. Art. 3396.20
5) Heirs or universal and general legatees can always put an end to any administration, independent or regular, by accepting the succession and petitioning for possession if there is no necessity for an administration or for a further administration. Arts. 3001, 3004, 3031,3361, 3362.

F. Miscellaneous rules on consent to independent administration.

1)Act usefully specifies that administrator of minor's estate or natural tutor without need for formal tutorship can consent for minor to independent administration, and that the testamentary trustee can consent on behalf of trust beneficiaries. Art. 3396.7, 3396.9. Will independent administration become a substitute for tutorship? Is consent by a trustee to independent administration tantamount to accepting the trust?
2) Both usufructuary and naked owner must consent when consent is required. Art. 3396.8
3) Once consent is given, renunciation by an heir or legatee who consented does not necessitate consent by new heir or legatee. 3396.11. Legatee whose legacy is conditioned on survival may give consent if alive at time of petition for independent administration. Art. 3396.10
4) If successor dies before petition for independent administration, his successors or succession representative can consent. Art. 3396.12.

G. Court will order clerk to issue "Letters of Independent Administration." Terms "independent executor" and "independent administrator" have same meaning. Art. 3396, 3396.1.

H. Conclusion of independent administration is same as for regular administration: final account (unless waived) petition for possession (proof of payment of inheritance tax), judgment of possession (partial judgments of possession allowed), discharge of independent administrator. Arts. 3396.18, 3396.19. Law Institute Successions Committee may recommend amendment to add something like a common law executor's deed, which in Louisiana would be an executor's recognition of the legatee's right to possess.

I. Protection for the independent administrator: Give notice by letter to interested parties of proposed action, allowing them time to object. Same for descriptive list. In other words, follow same procedure for administering a succession only without going through the court.

II. Selected Miscellaneous Successions and Donations Amendments

A. Renunciation of Legacies. Article 965 was amended to provide that the rights of a legatee who renounces accrete to those who would succeed to them if the legatee had predeceased the decedent. Thus, if will has a provision governing the predecease of a legatee but not renunciation, the provision on predecease will govern a renunciation as well as a true predecease. The amendment also means that if there is no provision in the will concerning either predecease, renunciation, or lapse, a renunciation could trigger the "anti-lapse" rule of article 1593, which was amended to make it consistent with the change in 965. Act 824.

B. Olographic Testament: Article 1575 amended to say that testator must sign at the end of the testament, but that if anything appears after the signature, the testament shall not be invalid and such writing may be considered by the court, in its discretion, as part of the testament. As for date, the day, month, and year are sufficient if reasonably ascertainable from the information in the testament as clarified by extrinsic evidence, if necessary. Act 824

C. Prohibited Substitutions: Article 1520's definition of what kind of substitution is prohibited was amended to incorporate the holding of *Baten v. Taylor*, 386 So. 2d 333 (La. 1978), which clarified the existing definition. Two kinds of legacies are now clearly permitted that previously some courts had stuck down: 1) the simple fiduciary bequest, "The family portrait to A, and A is to give it to my grandson when he is 21"; 2) the substitutio de eo quod supererit, "Everything to my husband, and whatever remains at his death, if anything, shall go to Tulane." Look to the law of usufruct to determine the rights and duties of the parties in these legacies. It is

still prohibited to say "I leave my estate at A. A must preserve it and at his death pass it on to B." In that case the entire disposition is null. Act 825

D. Vulgar Substitutions -- Survivorship Conditions: Article 1521 amended to permit a condition that the legatee must survive the testator by a period not exceeding six months (up from ninety days). Act 825

E. What Law Governs—Article 870 amended to state that testate and intestate succession rights, including the right to claim as a forced heir, are governed by the law in effect on the date of the decedent's death. In conjunction with this amendment, Article 1611, on interpretation of legacies, was amended to provide that when a testament uses a term the legal effect of which has changed since the will was written, the court may consider the old law in determining the testator's intention in interpreting the will. The confusing transitional provisions on the changes in the law of forced heirship, R.S. 9: 2501, were repealed. Act. 560.

F. Disinherison—Act 573 reenacts the grounds for disinherison (Civil Code arts. 1617-26) that were accidentally repealed, with slight changes.

III. Trusts

A. Prudent Investor Rule—Act 520 amends sec. 2127 of the Trust Code to adopt the "prudent investor" standard or care for investing in place of the "prudent man" standard. Under the prudent investor standard, the trustee may invest so as to produce an acceptable return for the portfolio as a whole. He thus may employ "modern portfolio theory of investing" wherein, based upon sophisticated risk-and-return analysis, it is acceptable to take a risk with a part of the portfolio in the hope of achieving above-average return. The trustee will not be liable if the risky investment loses, so long as the portfolio as a whole produces an acceptable return. The new standard is intended to free the trustee from having to make conservative investments of the entire portfolio. In satisfying the standard, the trustee must take into account the purposes, terms, distribution requirements, and other circumstances of the trust.

B. Delegating Performance—Act 520 amends Trust Code sec. 2087 to permit delegation of investment and asset management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. Because risk analysis of modern portfolio theory involves technical methods, a trustee may not have the sophistication necessary to engage in this kind of investing. Henceforth,

the trustee will be able to delegate investment decision making to an expert agent. The trustee must use reasonable care in selecting the agent, establish the scope and terms of the delegation consistent with the purposes and terms of the trust, review periodically the actions of the agent, and seek redress for the agent's breach of duty. The act provides that the agent owes a duty to the beneficiary, as well as to the trustee who hired the agent, to use reasonable care and skill. An agreement between the agent and the trustee relieving the agent of that duty is contrary to public policy and void. Where the trustee has delegated the investment function, the trustee ought not to continue to charge for that function, only for oversight. Watch out for double charging.

C. Power to Adjust

1) Act 520 creates Trust Code secs. 2158-2163 which give the trustee the power to make an adjustment between principal and income when the interest of one or more beneficiaries is defined by reference to the "income" of a trust and the trustee determines that the adjustment is necessary in order for the trustee to satisfy his duty to be fair and reasonable to all the beneficiaries, taking into account the purposes of the trust. Example 1: Under prudent investor standard the trustee invested most of the trust portfolio in growth stocks. The total return (income plus gain) of the portfolio is positive, but the income, as opposed to gain, is too low to be fair to the income beneficiary. The trustee may make an adjustment giving the income beneficiary some of the gain. In other words, the trustee can sell some of the principal and give it to the income beneficiary. Example 2: Trustee invested most of portfolio in CDs with high interest rates. He can adjust to be fair to principal beneficiary by giving him some of the income. The power to adjust means the line between income and principal does not have to be strictly observed.

2)When power to adjust is denied—Trust Code sec. 2159
a) if it would prevent marital deduction or charitable deduction because spouse or charity did not receive all income
b) if it diminishes value for gift-tax purposes of the income interest in a trust to which a person transfers property with intent to qualify for a gift tax exclusion
c) if possessing or exercising the power to adjust would cause an individual to be treated as the owner of all or part of the trust for income tax purposes
d) if the terms of the trust instrument clearly deny the trustee the power to make adjustments.

e) if trustee would benefit himself, directly or indirectly, unless all current beneficiaries consent or the court authorizes after notice to all current beneficiaries. Sec. 2160

3) Safeguard: "Percentage Limit"—Trust Code sec. 2161 requires court approval for an adjustment from principal to income if the amount of adjustment from principal, when added to the amount of net income for the year, exceeds 5% of net fair market value of assets at the beginning of the year. Likewise, court approval is necessary for an adjustment from income to principal if the amount of the adjustment reduces the net income for the year below 5% of the net fair market value of the assets at the beginning of the year. This does not mean that a 5% adjustment without court approval is always fair.

4) Procedure and remedies for abuse of discretion are specified in Trust Code sections 2162-63.

5) Effective date: Power to adjust applies to all trusts created on or after Jan. 1, 2002. With respect to trusts created before Jan. 1, 2002, power to adjust applies on Jan. 1, 2004 unless trust instrument designates an earlier date or all current beneficiaries designate an earlier date in writing delivered to trustee.

IV. Selected Miscellaneous Trust Legislation

A. Foreign Trusts—Act 890 creates R.S. 9: 2262.1-.4

1) Act validates for Louisiana the form of a trust legally executed according the law of the state where executed or of the settlor's domicile. So an inter vivos trust in writing and signed but not in authentic form or acknowledged would be "deemed legally executed" if it is valid where executed or where settlor was domiciled.
2) Act also provides that if the "parties" have expressly chosen the law of a particular state to govern the trust, the "authority" of a trustee of a foreign trust "to execute and deliver a conveyance" of a Louisiana immovable may be "evidenced in any manner that is lawful under the law" that the parties have chosen. (a) Does this just govern "evidence" of a trustee's authority, (b) does "authority" mean merely that the trustee has the power to sell, mortgage, etc., trust property *to a third party*, or (c) does "authority to convey" include a conveyance of property *to a beneficiary* pursuant to the dispositive provisions of the trust? If (c) is included in the meaning of the provision, does it effectively permit foreign law to override Louisiana law with respect to the substantive dispositive provisions of the trust?

Suppose the foreign trust contains a clause choosing the law of state X to govern, and contains a substitution not valid under the Louisiana Trust Code but valid in state X. Suppose also that the trustee would have authority under the law of state X to convey trust property according to the terms of the substitution, and that the law of state X allows the trustee to certify that he has this authority. Does that mean that if the trust owns Blackacre in Louisiana, the trustee can certify that he has authority to convey Blackacre to a beneficiary, and then the conveyance would be valid even if it violated the Louisiana Trust Code provisions on substitutions? Note also that the act defines "foreign trust" to include a trust which by the terms of the instrument is governed by the law of a jurisdiction other than Louisiana. Thus a Louisiana settlor can create a foreign trust by designating the law of state X. Did the Louisiana legislature intend to create a way to avoid the Louisiana Trust Code's provisions as applied to Louisiana immovables? Most probably new R.S. 9: 2262.1-.4 only applies to the trustee's authority to convey trust property *to third persons.*

B. Removal of Trustee—Act 594 amending T.C. sec. 1789
Provides that a corporate trustee shall be removed upon the petition of a settlor or any current beneficiary, if the court determines that removal is in the best interest of the beneficiaries as a whole, another corporate entity that is qualified to be trustee has agreed to serve, and the trust instrument does not forbid such removal. No "cause" such as mismanagement need be shown. Example: Trustee Bank is acquired by an out-of-state bank, which moves the trust department out-of-state. If Louisiana beneficiaries can find a Louisiana bank to replace Trustee Bank, then, if Trustee Bank refuses to resign, beneficiaries can have Trustee Bank removed and Louisiana bank substituted.

C. Combination and Division of Trusts—Act 594, T.C. sec. 2030
Trustee can now combine as well as divide two or more trusts on written notice to current beneficiaries, provided combination or division does not impair any rights or adversely affect purpose of trusts.

D. Delegation of Right to Revoke—Act 594, T.C. sec. 2045
Settlor may expressly delegate right to revoke in trust instrument or in power of attorney referring to the trust.

E. Limitation on Class Trusts—Act 594, T.C. sec. 1891
Class trusts will be limited again to children, grandchildren, great grandchildren, nieces, nephews, grandnieces, grandnephews, and great grandnieces and great

grandnephews, or any combination. This returns the law to the way it was in 1997. If any dynasty trusts were created meanwhile, they are valid as to any property transferred to the trust prior to effective date of Act 594.

V. Community Property

Preemption or Preclusion of Community Property--Act 642, creating R.S. 9: 2801.1.

1) Act provides that when federal law or the provisions of a statutory pension or retirement plan, state or federal, including but not limited to social security, preempt or preclude community classification of property that would have been classified as community property under the principles of the civil Code, the spouse of the person entitled to such property shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property.

2) Where federal preemption would apply, as in Boggs v. Boggs, 520 U.S. 833 (1997), which concerned an ERISA-covered pension when non-participant spouse died, the remedy of Act 642 may itself be preempted.