LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

January 10, 2025

Friday, January 10, 2025

Persons Present:

Alpandinar, Erin N.
Bergeron, Hayden M.
Blunt, Shelton D.
Borel, Danielle L.
Braun, Jessica G.
Breard, L. Kent
Carroll, Andrea B.
Crigler, James C., Jr.
Crochet, Anne J.
Cromwell, L. David
Curry, Kevin C.
Darensburg, June Berry
Davis, Heyinwa
Davrados, Nikolaos A.
Forrester, William R., Jr.
Gregorie, Isaac M. "Mack"
Grochowski, Mateusz F.
Guice, Jon K.
Hamilton, Leo C.
Hampton, Bruce
Hawthrone, George "Trippe"
Hayes, Thomas M., III
Haymon, Cordell H.
Hernandez, Milton "MJ"
Holdridge, Guy
Jarrott, Colleen C.
Knight, Dillon
Koch, Patricia E.
Lavergne, Luke A.
Lee, Amy Allums
Lonegrass, Melissa T.
Lovett, John A.
McCallum, Jay B.
Meyer, Julia A.
Miller, Gregory A.
Norman, Rick J.
North, Donald W.
O'Connell, Caleb
Payer, Julie Baxter
Penzato, Allison H.
Philips, Harry "Skip", Jr.
Price, Donald W.
Procell, Christopher A.
Reeves, Ruth A.
Richardson, Sally Brown
Riviere, Christopher H.
Saloom, Douglas J.
Scalise, Ronald J., Jr.
Schimmel, Kathryn E.
Smith, Kenya J.H.
Sossamon, Meera U.
Thibaut, Martha A.
Thrower, Jason B.
Title, Peter S.
Vance, Shawn D.
Veron, J. Michael
Waller, Mallory C.
Walters, Edward J., Jr.
Weems, Charles S., III
Wheeler, Adrienne
White, H. Aubrey, III
Zachary, Chelsea S.
Ziober, John David

President L. David Cromwell called the first January 2025 Council meeting to order at 10:00 a.m. on Friday, January 10 at the Lod Cook Alumni Center in Baton Rouge. After asking Council members to briefly introduce themselves, the President called on Professor Sally Brown Richardson, Reporter of the Property Committee, to begin her presentation of materials.

Property Committee

Professor Richardson began with the history of the enclosed estates and utility servitudes articles in the Civil Code and explained that when the utility servitude notion was added in 2012, the Law Institute formed a Committee that repeatedly recommended that the substance of the articles concerning utilities be moved to the Revised Statutes. Over the next few legislative sessions, the Law Institute's proposals failed to pass, and the Committee was ultimately disbanded. When the Property Committee was revived in 2019, its members immediately agreed to propose another revision to move utility servitudes to Title 9 of the Revised Statutes and to clean up the enclosed estates articles. Before focusing on the substance of the proposals, the Reporter presented a PowerPoint to refresh the Council's memory of the general rules and the two exceptions contained in this Section of Chapter 3 on legal servitudes.

Now directing the Council's attention to the materials entitled "Enclosed Estates," Professor Richardson described Civil Code Article 689 as the default rule that if an estate has no access to a public road, the estate may claim and pay for a right of passage over a neighbor's property. This proposal strikes the utility servitude language and relocates the idea of indemnification to a later article because it applies to both gratuitous and default rights of passage. The discussion began with a question concerning the prescriptive period to demand a right of passage and compensation and whether they are the same or different periods. The Reporter responded that this inquiry exists under existing law and has been answered in the jurisprudence, and that the Committee's intent is to propose minimal substantive changes and clarifications only as it bifurcates the utility servitudes and enclosed estates laws. The following language was approved:

Article 689. Enclosed estate; right of passage

The owner of an estate that has no access to a public road ~~or utility~~ may claim a right of passage over neighboring property to the nearest public road ~~or utility~~. ~~He~~ The owner is bound to compensate ~~his~~ the neighbor for the right of passage acquired ~~and to indemnify his neighbor for the damage he may occasion~~.

~~New or additional maintenance burdens imposed upon the servient estate or intervening lands resulting from the utility servitude shall be the responsibility of the owner of the dominant estate.~~

The right to demand compensation from the owner of the enclosed estate may be lost by prescription. Loss of the right to demand compensation has no effect on the right of passage due to the owner of the enclosed estate.

Revision Comments – 2025

(a) This revision does not change the law regarding the right of passage for an enclosed estate. This Article expresses the default rule that when an estate has no access to a public road, the owner of the enclosed estate must be provided a servitude of passage to the nearest public road and the owner of the enclosed estate must compensate the owner of the estate over which passage is obtained for that right of passage.

(b) An estate has no access to a public road when the estate does not abut a public road and have legal access to a public road. *See* Rockholt v. Keaty, 237 So. 2d 663, 667-68 (La. 1970). An estate that has access to a public road through, for example, a servitude created by acquisitive prescription, destination of the owner, or juridical act, is not an enclosed estate.

(c) This revision clarifies that compensation is owed when a right of passage is provided under this Article. Compensation for a right of passage under this article is the fair market value of the right of passage. *See* Hutchison v. Jackson, 399 So. 2d 1238, 1241 (La. App. 3d Cir. 1981). This revision continues the rule previously stated in Article 696 that an owner [neighbor] who can demand compensation from the owner of an enclosed estate may lose that right of compensation through prescription, but the loss of the right to demand compensation does not impact the owner of the enclosed estate's ability to claim or exercise a right of passage.

(d) This revision continues to require the owner of an enclosed estate to indemnify a neighbor over whose property passage is acquired for any damage caused by the exercise of the servitude. The requirement to indemnify one's neighbor for any damage caused has been moved to Article 696 to clarify that indemnification is required for a right of passage acquired under either Article 689 or Article 694.

(e) This revision removes the utility servitude from the enclosed estates articles. The utility servitude is provided for in R.S. 9:1281 *et seq.*

Professor Richardson introduced Article 690 and quickly noted that the only suggested revision is to delete the reference to a utility and to add a Comment to emphasize that the right of passage shall be of the type necessary for the use of the enclosed estate. Although that right of passage is for vehicles in the vast majority of cases, in some cases the right of passage may simply be a foot or boat path or any other type of passage that is reasonably necessary and suitable for the type of traffic necessary to the use of the estate. With little discussion, the following provision was approved:

Article 690. Extent of passage

The right of passage for the benefit of an enclosed estate shall be suitable for the kind of traffic ~~or utility~~ that is reasonably necessary for the use of that estate.

Revision Comments – 2025

(a) This revision does not change the law. It continues to require that the right of passage for the benefit of an enclosed estate should be that which is reasonably necessary for the enclosed estate based on its use.

(b) In determining what is reasonably necessary for the use of the enclosed estate, consideration shall be given to the use of the enclosed estate at the time of enclosure, the current use of the enclosed estate, any reasonably anticipated uses of the enclosed estate, and other relevant facts. In many cases, a right of passage for vehicular traffic may be the type of passage that is reasonably necessary for the enclosed estate, but this Article does not necessarily require that an enclosed estate receive a right of passage for vehicular traffic.

Moving to Article 691, the Reporter remarked on the removal of the paragraph relative to utilities and the addition of the Comment directing readers to its relocation in the Revised Statutes. The history of the inclusion of railroads was mentioned as well as the Committee's reasoning for maintaining the existing language. One Council member opined that the deletion of the phrase "on the right-of-way" changes the meaning, and another Council member suggested that this deletion makes the application of the article too broad. The Reporter agreed to restore the language at issue, and the following proposal was approved:

Article 691. Constructions

The owner of the enclosed estate may construct on the right-of-way the type of road, ~~utility, or~~ railroad, or other works reasonably necessary for the exercise of the ~~servitude~~ right of passage.

~~The utility crossing shall be constructed in compliance with all appropriate and applicable federal and state standards so as to mitigate all hazards posed by the passage and the particular conditions of the servient estate and intervening lands.~~

Revision Comments – 2025

(a) This revision does not change the law regarding the types of roads, railroads, or other works that may be constructed.

(b)The utility servitude is provided for in R.S. 9:1281 *et seq.* and includes the standard to which the utility crossing must be constructed.

Next, the Council reviewed the proposed changes to Article 692, and Professor Richardson explained that the structural changes were made to ensure that courts equally

balance the considerations of the shortest route and the least injurious route for the location of the passage. The Committee acknowledged that most often, the shortest route will be the least injurious, but the Article does not require the location to always be over the shortest route with the least injurious consideration being an afterthought. The Reporter pointed to Comment (b) to further explain that the test should work like a presumption that the shortest route should generally be taken but can be overcome by showing that a less injurious route exists. Concern was expressed over the change of language from "may not demand" to "is not entitled to select" as well as the use of the phrase "generally shall," and the Reporter stated that the changes were intended to give the courts latitude in determining a location without changing the law. It was noted that procedurally, the first thing a court will do is ask the parties where they want the passage to be located, so it is problematic if the parties may not demand the location. Ultimately, it was conceded that the existing language has been in the Code for over fifty years without issue, and therefore it should be retained as much as possible. The final point articulated was that the use of the phrase "intervening lands" was intentional and captures many potential estates that may end up becoming a servient estate depending upon the location of the passage granted. Professor Richardson agreed to add a Comment relative to intervening lands as potential servient estates and a Comment to point out that this Article does not apply to a right of passage created in accordance with Article 694. All of the following language was approved:

Article 692. Location of passage

The owner of the enclosed estate may not demand the location of the ~~right of~~ passage ~~or the right-of-way for the utility~~ anywhere ~~he~~ the owner chooses. The passage ~~generally shall be taken along the shortest route~~ from the enclosed estate to the public road ~~or utility at the location~~ generally shall be taken along the shortest route that is the least injurious to the intervening lands.

~~The location of the utility right-of-way shall coincide with the location of the servitude of passage unless an alternate location providing access to the nearest utility is least injurious to the servient estate and intervening lands.~~

~~The court shall evaluate and determine that the location of the servitude of passage or utility shall not affect the safety of the operations or significantly interfere with the operations of the owner of the servient estate or intervening lands prior to the granting of the servitude of passage or utility.~~

Revision Comments – 2025

(a) This revision does not change the law for the purpose of the location of the right of passage.

(b) There is a general presumption that the shortest route is the route least injurious to the servient estate, *see* Hardisty v. Young, 720 So. 2d 811 (La. App. 3d Cir. 1998); Mitcham v. Birdsong, 573 So. 2d 1294 (La. App. 2d Cir. 1991); Wells v. Anglade, 23 So. 3d 469, 472 (La. App. 1st Cir. 1945). However, the shortest route may not be the least injurious to the servient estate in which case the court may select an alternative location. In determining whether the shortest route is least injurious, courts should consider facts such as whether the location of the right of passage will interfere with the operations of the proposed servient estate, excessive costs to either the dominant or servient estate, conditions that may make the shortest route impassable, or other factors. *See, e.g.*, Inabnet v. Pipes, 241 So. 2d 595, 597–98 (La. App. 2d Cir. 1970); Pearson v. Theriot, 534 So. 2d 35, 37–38 (La. App. 3d Cir. 1988); May v. Miller, 941 So. 2d 661, 669–70 (La. App. 3d Cir. 2006).

Progressing to the next proposal, Article 693, the Reporter noted that due to the harsh nature of this rule, the Committee wished to clarify that if through a voluntary act of the owner, at the time of enclosure, an estate becomes enclosed, the neighboring estates are not required to furnish a right of passage. It is also important to note that the enclosed estate may still acquire a conventional servitude of passage, but it is not entitled to claim a legal right of passage. The Comments also clarify that this Article does and has always applied to successors simply because predial servitudes, by their very nature, run with the land. The following language was approved:

Article 693. Enclosed estate; voluntary act

If an estate becomes enclosed as a result of a voluntary act ~~or omission~~ of its owner at the time of the enclosure, the neighbors are not bound to furnish a passage to ~~him or his~~ the owner or the owner's successors.

Revision Comments – 2025

(a) This revision clarifies existing law. An estate that becomes enclosed through the voluntary actions of that estate's owner at the time the estate becomes enclosed is not entitled to a right of passage under Article 689. *See* Spotsville v. Herbert & Murrell, Inc., 698 So.2d 31 (La. App. Cir. 3d 1997). The owner of the enclosed estate may acquire a conventional servitude of passage through a voluntary transaction with a neighboring owner, but the enclosed estate owner is not entitled to claim a legal servitude of passage under Article 689.

(b) An estate becomes enclosed such that this Article applies only when the owner of the enclosed estate causes the enclosure through his voluntary actions at the time of the enclosure. For example, if an owner subdivides the property and retains the enclosed tract of land without reserving a right of passage, the enclosed estate is not entitled to a right of passage under Article 689. This Article does not apply when the enclosure is caused by the inaction of the owner of the enclosed estate, such as when the enclosure is caused by the loss of a servitude through prescription of nonuse. *See* LeBlanc v. Thibodeaux, 615 So. 2d 295 (La. 1993).

(c) This Article applies to the owner of the enclosed estate and the owner's successors. Although some courts have interpreted the Article otherwise, the plain language of Article 693 has always clearly stated that it applies to successors. *See* Yiannopoulos, Predial Servitudes § 5:23 (2013).

Focusing on Article 694, Professor Richardson informed the Council that in contrast to Article 693 in which the owner himself causes the enclosure, in this circumstance, an estate has been enclosed upon through no fault of its own. Therefore, the owner of the estate who caused the enclosure is required to gratuitously provide a right of passage over his land. Discussion began with questions concerning whether a different result should apply for an alienation as opposed to a partition because it is possible for all of the co-owners to agree to the partition without any one co-owner causing an estate to become enclosed. The issue was further complicated by the fact that different types of partitions may cause different results, and unsophisticated co-owners may not be aware of their right to demand passage or the fact that their tract is landlocked and perhaps not of equal value. The Reporter acknowledged these concerns but reiterated the need for a default rule. Nevertheless, the Committee will revisit this provision and return to the Council for approval of its recommendations at a later date.

Professor Richardson then described the revisions to Article 695 as only stylistic, but members of the Council opined that the modifications may be interpreted as a change in the law because the revised language appears to be more narrow than the existing language. The Reporter reiterated the Committee's intent in modernizing the language and borrowing from Article 748 which is similar but applicable only to conventional predial servitudes. The following proposal was adopted:

Article 695. Relocation of servitude

The owner of the enclosed estate has no right to the relocation of ~~this~~ the servitude of passage after it is fixed. The owner of the servient estate has the right to demand relocation of the servitude to a more convenient place at his own expense, provided that ~~it affords the same facility to~~ the new location is equally convenient to the ~~owner of the~~ enclosed estate.

Revisions Comments – 2025

(a) This revision clarifies that in relocating the servitude the owner of the servient estate must ensure the new location of the servitude is equally convenient for the owner of the enclosed estate.

(b) The requirement that the relocated servitude must be equally convenient for the owner of the enclosed estate is similar to the requirement for the owner of a servient estate to relocate a conventional predial servitude under Article 748. However, unlike under Article 748, in order for a servient estate to relocate a legal predial servitude of passage under the enclosed estate articles, the owner of the servient estate need not show that the original location of the servitude is more burdensome for him.

Moving to Article 696, the Reporter explained that the new paragraph is a result of the relocation of language from Article 689 to emphasize that indemnification applies to rights of passage acquired under either Article 689 or Article 694. Members of the Council voiced concerns over the types of damages for which indemnification may be due and the fact that people may still confuse compensation with indemnification. Professor Richardson agreed to draft a new Comment to alleviate these concerns, and the following provision was approved:

Article 696. ~~Prescriptibility of action for indemnity~~ Indemnity

The owner of an enclosed estate having a right of passage is bound to indemnify the owner of the servient estate for any damage caused by the exercise of the right of passage.

The right ~~for~~ to demand indemnity against the owner of the enclosed estate may be lost by prescription. ~~The accrual of this prescription~~ Loss of the right to demand indemnity has no effect on the right of passage.

Finally, the Reporter requested and received approval of the deletion of Article 696.1 defining a utility. Professor Richardson then concluded her presentation and the Council recessed for lunch, after which time the President called on Professor Ronald J. Scalise, Jr., Reporter of the Successions and Donations Committee, to begin his presentation of materials.

Successions and Donations Committee

Professor Scalise began his presentation with an overview of the previous work done and discussions had by both the Committee and the Council relative to heirs property and partition in accordance with House Resolution No. 201 of the 2021 Regular Session. He next reminded the Council of its previous adoption of the short title in R.S. 9:1150 and turned members' attention to R.S. 9:1150.1. Professor Scalise explained that in this applicability statute, the only changes that were made since the Council's prior approval at its September 2024 meeting were semantic in nature, and the following language was quickly approved:

R.S. 9:1150.1. Applicability

Unless otherwise agreed to in writing by all co-owners as of the time of partition, the provisions of this Part shall be applicable whenever a petition to partition a corporeal immovable is filed by a co-owner or co-

owners owning an aggregate interest of less than fifty percent of the immovable and either of the following apply:

(1) Twenty percent or more of all co-owners are related within the eighth degree, whether by consanguinity or by adoption.

(2) Twenty percent or more of the remaining interest in the immovable is owned by co-owners who are related within the eighth degree, whether by consanguinity or by adoption.

Next, Professor Scalise noted that R.S. 9:1150.2 had also been previously approved by the Council, but the terminology was changed from "property" to "immovable" and the word "written" was added to clarify the type of judgment to be rendered after the evidentiary hearing. The following language was approved:

R.S. 9:1150.2. Fair market value

A. Upon the filing of a petition to partition a corporeal immovable by a co-owner subject to this Part, the court shall determine the fair market value of the immovable, assuming sole ownership of the immovable.

B. Prior to a hearing as required by Subsection C of this Section, the court shall appoint an independent, Louisiana licensed real estate appraiser to determine the fair market value of the immovable. Not later than ten days after the filing of the appraisal with the court, the petitioner shall send written notice informing each co-owner of all of the following:

(1) The appraised fair market value of the immovable.

(2) The availability of the appraisal at the clerk's office.

(3) That any co-owner may file with the court an objection to the appraisal not later than thirty days after the notice is sent, stating the grounds for the objection.

C. Not sooner than thirty days after a copy of the notice of the appraisal is sent to each co-owner, the court shall conduct an evidentiary hearing to determine the fair market value of the immovable, unless by consent judgment all co-owners agree on the value of the immovable as determined in accordance with this Section. A suspensive appeal without security may be taken as a matter of right from a written judgment rendered after an evidentiary hearing as provided in this Subsection. No devolutive appeal may be taken on the issue of the fair market value of the immovable.

Drawing the Council's attention to R.S. 9:1150.3 on page 9, the Reporter explained that some of this proposal was previously approved, but the Council directed the Committee to redraft Subsection C to take into account the need for various time periods due to appeals. Professor Scalise also noted the addition of a sentence to Subsection B to clarify the calculation of a co-owner's pro rata share. The following provision was approved:

R.S. 9:1150.3. Co-owners right of first purchase

A. If a co-owner files a petition to partition a corporeal immovable subject to this Part, the court shall allow the remaining co-owners to purchase at private sale the petitioner's share. The price of the petitioner's share shall be determined by multiplying the petitioner's fractional interest in the immovable by the fair market value of the immovable, as determined in accordance with R.S. 9:1150.2.

B. In the petition for partition, the petitioner shall allege the respective ownership interests of each co-owner of the immovable and the relationship

between the co-owners and shall notify each other co-owner of the right to purchase the co-owner's pro rata share of the petitioner's interest. The calculation of a co-owner's pro rata share shall be based on the percentage of ownership of potential purchasing co-owners, excluding the petitioning co-owners.

C. To exercise the right to purchase a pro rata share of the petitioner's interest, a co-owner shall file into the record a written notice exercising the option to purchase not later than:

(1) Fifteen days after the expiration of the delay for appealing the judgment in R.S. 9:1150.2(C), if no appeal is taken.

(2) Fifteen days after the judgment in R.S. 9:1150.2(C) becomes final and definitive, if an appeal is taken.

(3) Thirty days after the sending of the notice of a consent judgment, if a consent judgment is rendered.

Revision Comments – 2025

(a) This Section is based upon former R.S. 9:1113(B) and Section 7 of the Uniform Partition of Heirs Property Act.

(b) Subsection A allows all of the other co-owners to buy out the co-owner seeking partition, which is a core component of the Uniform Partition of Heirs Property Act. Rather than the traditional sale by auction, this sale occurs by private sale of the petitioner's share, as determined by the fair market value of the property multiplied by the petitioner's fractional ownership issue.

(c) Subsection B requires the petitioner to allege in the petition the ownership interests of all co-owners. Unlike the uniform act, which allows each co-owner to buy the entire share of the petitioner, see UPHPA Section 7(b) & (c), this Section is based upon former R.S. 9:1113, which allowed each co-owner to buy a pro rata share of the petitioner's interest.

(d) Subsection C allows each co-owner the right to purchase a pro-rata share of the petitioner's interest, provided the co-owner timely files written notice of the desire to do so with the court. Three timeframes for exercising the right to purchase are provided by this Subsection, which depend upon whether a consent judgment is obtained and whether an appeal is taken.

Moving to R.S. 9:1150.4, Professor Scalise noted that the majority of this provision was previously presented as Subsection D of R.S. 9:1150.3. In light of previous Council discussions, however, the Committee proposed the creation of separate statutes to address the different steps in exercising the option to purchase and then actually depositing the purchase price for the shares with the court. Also at the Council's direction, lines 22 through 25 of page 11 were added to ensure that the reader is aware of the round robin reallocation that takes place until all of the outstanding shares have been claimed. The Reporter then explained that the new language on lines 14 through 18 is intended to highlight the fact that once a co-owner relinquishes his option to purchase a portion, the pro rata share is recalculated, and the relinquishing co-owner may no longer participate in this process. Members of the Council opined that fifteen days from the sending of notice is not a long enough time period considering the delays experienced with the United States Postal Service. They also debated proof of delivery issues and considered requiring the use of the long arm statute, requiring the sender to file an affidavit of mailing with the court, and changing the period to fifteen days after receipt. The Reporter agreed to a few suggested changes and the following language was approved:

R.S. 9:1150.4. Exercise or failure to exercise option of purchase

A. If none of the co-owners has exercised the option to purchase a pro rata share of the petitioner's interest, the court shall order partition of the entire property pursuant to R.S. 9:1150.6.

B. If one or more but not all of the co-owners has exercised the option to purchase a pro rata share, then upon the expiration of the time to file the notice required in R.S. 9:1150.3(C), any co-owner who has failed to timely exercise the option to purchase relinquishes the right to purchase. The relinquishment of the right to purchase shall inure to the benefit of the remaining purchasing co-owners. When a potential purchasing co-owner relinquishes the right to purchase, the pro rata share shall be recalculated among only the remaining purchasing co-owners, excluding the relinquishing co-owners. Once a co-owner relinquishes the right to purchase a pro rata share, that co-owner shall not be entitled to file any subsequent notice to purchase in the pending action. The petitioner shall send written notice to the remaining purchasing co-owners stating the recalculated pro rata share of the remaining purchasing co-owners and informing them of the right to purchase their recalculated pro rata share by filing written notice into the record not later than thirty days from the sending of the notice by the petitioner. The procedures provided in this Subsection shall continue until there are no outstanding shares or no purchasing co-owner exercises the option to purchase a pro rata share. The court may use its discretion in rounding the shares of the co-owners to the nearest hundredth share.

C. If all of the co-owners have exercised the option to purchase their pro rata shares, or if at least one co-owner has exercised the option to purchase a pro rata share and no outstanding shares of the petitioner's interest remain, the court shall set a date, not sooner than sixty days after the sending of the last notice in accordance with Subsection B of this Section or sixty days after the sending of the last notice exercising the right to purchase in R.S. 9:1150.3(C), whichever is later, by which the co-owners exercising the option to purchase their pro rata shares shall timely pay the apportioned price into the registry of the court.

Revision Comments – 2025

(a) This Section is based upon former R.S. 9:1113(B) and Section 7 of the Uniform Partition of Heirs Property Act. This Section specifies varying alternatives when no co-owner exercises the right to purchase, when only some co-owners exercise the right to purchase and outstanding shares remain, and when no outstanding shares remain.

(b) Subsection A of this Section is applicable when no co-owner exercises the right to purchase. In that case, the court proceeds to partition the entire property pursuant to R.S. 9:1150.7. Subsection A also applies if no co-owner exercises the right to purchase a recalculated pro rata share pursuant to Subsection B, despite an initial expression of interest in purchasing a pro rata share.

(c) Subsection B of this Section applies if some co-owners exercise the right to purchase but outstanding shares remain. In that case, a co-owner who fails to send notice of the exercise of his right to purchase relinquishes that right, and the other co-owners shall be notified of the recalculated share and their ability to purchase the recalculated share. A second consequence of failing to exercise the right to purchase is that the relinquishing co-owner is thereafter omitted from any future opportunities to purchase other interests in the property. This Subsection also provides a method (based upon former R.S. 9:1113(B)(3) and (4)) by which pro rata shares in the property are calculated and recalculated after co-owners elect

not to purchase recalculated pro rata shares.

(d) Subsection C of this Section applies when all of the co-owners exercise the right to purchase or at least one co-owner has elected to purchase property and no outstanding shares remain. In that case, the court shall set a date for the payment of the apportioned price by the purchasing co-owners.

Professor Scalise then shifted to R.S. 9:1150.5, which was previously presented as Subsection E of R.S. 9:1150.3 and concerns the payment of the purchase price into the registry of the court. This proposal was recommitted by the Council in October of 2024 for restructuring, the inclusion of language regarding the round robin process, and clarifications regarding the recalculation of the price when a co-owner fails to deposit his purchasing price. The time period to timely pay the price into the registry of the court was extended to thirty days, and the following language was ultimately approved:

R.S. 9:1150.5. Payment of purchase price of pro rata share

A. If none of the co-owners exercising the option to purchase a pro rata share timely pays the apportioned price into the registry of the court, the court shall order partition of the entire immovable pursuant to R.S. 9:1150.6.

B.(1) If one or more but not all of the co-owners exercising the option to purchase a pro rata share fails to timely pay the apportioned price into the registry of the court, then upon the expiration of the time period in R.S. 9:1150.4(C), any co-owner who has failed to timely pay the apportioned price into the registry of the court relinquishes the right to purchase. The relinquishment of the right to purchase shall inure to the benefit of the remaining purchasing co-owners, who shall then be entitled to purchase, by pro rata share, the unpaid-for shares made available by any co-owner who relinquished the right to purchase. When a potential purchasing co-owner relinquishes the right to purchase, the pro rata share of the unpaid-for shares shall be calculated among only the remaining purchasing co-owners, excluding the relinquishing co-owners. Once a co-owner fails to timely pay the apportioned price, that co-owner shall not be entitled to file any subsequent notice to purchase in the pending action. The petitioner shall send to each co-owner who paid the apportioned price written notice of all of the following:

(a) The right to purchase a portion of the unpaid-for share of the co-owner who did not pay the apportioned price.

(b) The price to be paid by each remaining co-owner as determined by multiplying the pro rata share of each co-owner as calculated pursuant to this Paragraph by the price of the unpaid-for share.

(c) The date the price shall be timely paid into the registry of the court, which shall be thirty days from the sending of the notice.

(2) The procedures provided in this Subsection shall continue until there are no outstanding shares or no purchasing co-owner exercises the option to purchase a pro rata share. The court may use its discretion in rounding the shares of the co-owners to the nearest hundredth share. If, after completion of the process in this Subsection, an unpurchased share in the immovable remains, the court shall order the sale of only the unpurchased share pursuant to R.S. 9:1150.7(B). With regard to the remainder of the immovable, the court shall issue an order transferring the remainder of the petitioner's share in the immovable to the purchasing co-owners and disburse the amounts received to the petitioner.

C. If all of the co-owners exercising the option to purchase their pro rata shares, or at least one co-owner exercising the option to purchase a pro rata share timely pay the apportioned price into the registry of the court and no outstanding shares of the petitioner's interest remain, the court shall issue an order transferring the petitioner's share in the immovable to the purchasing co-owners and disburse the amounts received to the petitioner.

Revision Comments – 2025

(a) This Section is based upon former R.S. 9:1113(B) and Section 7 of the Uniform Partition of Heirs Property Act. This Section contemplates three distinct situations: (i) when none of the co-owners exercising the right to purchase property timely pay their apportioned price; (ii) when some but not all of the purchasing co-owners timely pay their apportioned price; and (iii) when all co-owners exercising the right to purchase property timely pay their apportioned price.

(b) Subsection A of this Section applies when no co-owner exercising the right to purchase the property pays the apportioned price to the court. In such a case, the entire property, not just the petitioner's share, is partitioned according to the procedure specified in R.S. 9:1150.6.

(c) Subsection B of this Section applies if some but not all of the co-owners exercising the right to purchase the property pay the apportioned price to the court. In that case, a co-owner who fails to pay the apportioned price relinquishes the right to purchase a pro rata share or any future shares in the property. This Subsection also provides a method (based upon former R.S. 9:1113(B)(3) and (4)) by which pro rata shares in the property are calculated and recalculated after co-owners either elect not to purchase additional shares or elect to purchase but fail to timely pay the apportioned price to the court. Importantly, under this Subsection, once a co-owner fails to pay the apportioned price, the co-owner is thereafter removed from any future opportunities to purchase additional shares of the property. Moreover, written notice must again be sent notifying the relevant parties of the right to purchase additional property and the procedure for doing so. Notice under this Subsection, however, is sent not to all co-owners but only to those co-owners who have exercised the right to purchase the property and who have actually paid the apportioned price to the court. Finally, this Subsection also provides that if an outstanding share remains after the process provided for in this Subsection, the outstanding share shall be sold by an open-market sale, and the remaining interests shall be reallocated to the co-owners and the funds dispersed to the petitioner.

(d) Subsection C of this Section applies if all co-owners exercising the right to purchase pay the apportioned price into the registry of the court or at least one co-owner exercising the option to purchase a pro rata share timely pays the apportioned price into the registry of the court and no outstanding shares of the petitioner's interest remain. In such a case, the court shall issue an order reallocating the shares and distribute the amounts received to the petitioner.

Professor Scalise next explained that R.S. 9:1150.6 was previously approved and the only changes are to the cross-references and the use of the term "immovable" instead of "property". Without discussion, the following provision was adopted:

R.S. 9:1150.6. Preference for partition in kind

A. When required by R.S. 9:1150.4(A) or 1150.5(A), the court shall order partition in kind of the immovable unless the court finds that partition in kind will result in manifest prejudice to the co-owners as a group.

B. In determining whether partition in kind may result in manifest prejudice to the co-owners as a group, the court shall consider the totality of all of the following factors and circumstances:

(1) Whether the immovable practicably can be divided among the co-owners.

(2) Whether partition in kind may apportion the immovable in such a way that the aggregate value of all of the lots is significantly lower than the value of the immovable in a state of indivision, taking into account the condition under which a court-ordered sale likely would occur.

(3) Evidence of the collective duration of ownership or possession of the immovable by a co-owner and one or more prior co-owners related by consanguinity or adoption to an existing co-owner.

(4) A co-owner's sentimental attachment to the immovable, including any attachment arising because the immovable has familial or other unique or special value to the co-owner.

(5) The lawful use being made of the immovable by a co-owner and the degree to which the co-owner may be harmed if the co-owner could not continue the same use of the immovable.

(6) The degree to which the co-owners have contributed their pro rata share of the immovable taxes, insurance, and other expenses associated with maintaining ownership of the immovable or have contributed to the physical improvement, maintenance, or upkeep of the immovable.

(7) Any other relevant factor.

C. If the court does not order partition in kind due to a finding of manifest prejudice to the co-owners as a group, the court shall order the sale of the immovable in accordance with R.S. 9:1150.7.

Revision Comments – 2025

(a) This Section is based upon Sections 8(a) and 9 of the Uniform Partition of Heirs Property Act. It applies only when another provision of this Part orders a partition in kind of the entire immovable. *See, e.g.*, R.S. 9:1150.4(A) and 1150.5(A). This Section does not apply in instances in which only a fractional interest in the petitioner's share is left unpurchased. *See, e.g.*, R.S. 9:1150.5(B)(3). In those cases, a court shall order an open-market sale of the unpurchased share pursuant to R.S. 9:1150.7(B).

(b) Unlike other laws regarding partition, this Section requires a court to consider a series of economic and noneconomic factors in assessing whether partition in kind would result in "manifest prejudice to the co-owners as a group." Traditional partition law favors partition in kind unless the thing to be partitioned is "insusceptible to partition in kind," in which case partition by licitation or private sale is conducted. Civil Code Article 811.

The next statute for consideration was R.S. 9:1150.7 and encompasses an idea that the Council previously directed the Committee to draft as an alternative if partition in kind fails. The partitioning co-owner is given a chance to purchase the property at a premium before it goes to sale on the open market. The Reporter agreed to change the language relative to the determination of the price and remove the cross-reference to R.S. 9:1150.2 because it requires calculation of the whole but in this case, the petitioner would not be purchasing his own co-owned fractional interest. The following language was adopted:

R.S. 9:1150.7. Petitioner's right of purchase; alternatives to partition in kind

A. When required by R.S. 9:1150.6(C), the court shall allow the petitioner thirty days to purchase all of the other co-owners' interests by paying into the registry of the court one hundred twenty-five percent of the value of the other co-owners' interests as determined by multiplying the other co-owners' interests in the immovable by the fair market value of the immovable as determined in accordance with R.S. 9:1150.2. If the petitioner does so, the court shall issue an order transferring the co-owners' shares in the immovable to the purchasing petitioner and disburse the amount received to the co-owners in proportion to their interests and in the manner provided in Code of Civil Procedure Article 4626.1.

B. If the petitioner declines to purchase the property pursuant to Subsection A of this Section or when required by R.S. 9:1150.5(B), the court shall order an open-market sale of the property unless the court finds that a sale by auction would be more economically advantageous and in the best interest of the co-owners as a group.

C. If the court orders an open-market sale and the parties agree on a Louisiana licensed real estate broker to offer the property for sale, then the court shall appoint the broker. If the parties do not agree, the court shall appoint an independent, Louisiana licensed real estate broker to offer the property for sale on the terms and conditions established by the court and at a price not lower than that determined in accordance with R.S. 9:1150.2. The court shall establish reasonable compensation to be paid to the broker.

D. If the broker obtains within a reasonable time an offer to purchase the property for at least a price not lower than that determined in accordance with R.S. 9:1150.2, then the court shall order a partition by private sale in accordance with Civil Code Article 811 and Code of Civil Procedure Article 4607 et seq. If the broker does not obtain within a reasonable time an offer to purchase the property for at least a price not lower than that determined in accordance with R.S. 9:1150.2, then the court may do any of the following:

(1) Approve the highest outstanding offer, if any.

(2) Redetermine the value of the property and order that the property continue to be offered for an additional time.

(3) Order the property sold by auction.

E. Sales by auction shall be conducted in accordance with R.S. 9:3151 et seq. and Code of Civil Procedure Article 4607 et seq.

Revision Comments – 2025

(a) This Section is based upon Section 10 of the Uniform Partition of Heirs Property Act. Subsection A, however, differs from the uniform act insofar as it allows the petitioner the right to purchase the property if the co-owners decline to exercise their rights to purchase the petitioner's share. In order to avoid the property being sold on the open market, the petitioner may, but is not required to, purchase the property at a premium of one hundred twenty-five percent of the fair market value of the other co-owners' interests. If the petitioner declines to purchase the property at a premium pursuant to Subsection A, the petitioner may still purchase the immovable at the open-market sale or at auction pursuant to Subsections B through E of this Section.

(b) Although the term "immovable" has been consistently used through this Part, Subsections B through E of this Section employ the term "property" in recognition of the fact that an open-market or auction sale of the entire immovable may occur or, pursuant to R.S. 9:1150.5(B), a sale of only an unpaid-for share of the immovable may result. The term "property" is broad enough to include both the entire corporeal immovable and any incorporeal shares or interests in the immovable.

(c) Under this Section, the fair market value of the property is determined "in accordance with R.S. 9:1150.2." In some instances, this phrase should be understood to refer to the fair market value of the entire immovable, but in others, it refers to the applicable share of the property.

(d) If the property is offered for sale by a real estate broker, the broker must be licensed pursuant to R.S. 37:1430 et seq. The parties may agree upon a licensed broker, or the court shall appoint an independent licensed broker to offer the property for sale. In either case, the property must not be offered for a price lower than the fair market value of the property. The court has discretion in setting a reasonable fee to be paid to the broker.

(e) Subsection D establishes the procedures to be employed once the property is offered for sale. In the case in which an offer to purchase the property at the appropriate price is received, the sale shall be conducted pursuant to the usual procedures provided in the Civil Code and the Code of Civil Procedure. If an offer within a reasonable time and at the appropriate price is not received, then the court has discretion as to whether to allow the sale to proceed to the highest bidder, offer the property for sale for an additional time at a reassessed value, or allow a sale by auction.

The Council also previously directed the Reporter to draft a provision to ensure that the regular rules of partition are applicable to the extent that they do not conflict with the more specific provisions of the Louisiana Uniform Partition of Heirs Property Act. That notion is embodied within new R.S. 9:1150.8. Without discussion, the following provision was approved:

R.S. 9:1150.8. Partition laws; applicability

The provisions of Title VII of Book II of the Civil Code, Title IX of Book VII of the Code of Civil Procedure, and Chapter 10 of Title 31 of the Revised Statutes of 1950 remain applicable to the extent they do not conflict with the provisions of this Part.

Revision Comments – 2025

This Section reaffirms that the existing laws on co-ownership in the Civil Code, the Code of Civil Procedure, and the Revised Statutes continue to apply to the co-ownership regime and the right of partition exercised under this Part, at least to the extent not otherwise displaced by this Part. Among the laws that are not displaced and which continue to apply are the laws regarding the effect of a partition on pre-existing real rights. As a general matter, "[w]hen a thing held in indivision is partitioned in kind or by licitation, a real right burdening the thing is not affected." See Civil Code Article 812. On the other hand, "[w]hen a thing is partitioned by licitation, a mortgage, lien, or privilege that burdens the share of a co-owner attaches to his share of the proceeds of the sale." See Civil Code Article 815. See also R.S. 31:178 (limiting certain instances of partition in kind when land is burdened with mineral rights.).

The final consideration was the addition of a special effective date of January 1, 2026, to provide an opportunity for people to become familiar with the new Act. It was suggested that the special effective date language exclude application of the Act to actions pending on January 1, 2026, so that pending partitions are not affected. The Council approved the proposed language.

Next, Professor Scalise explained that while the Committee was drafting its recommendations concerning the partition of heirs property, they also reviewed existing laws on partition and special articles on the partition of successions for modernization. Civil Code Article 811 was amended a few times in an attempt to address some issues with heirs property, but the changes arguably did more harm than good such that Paragraph B should now be repealed. The Council approved the following, and the Reporter agreed to change the cross-reference to this Article that appears in Code of Civil Procedure Article 4622:

Article 811. Partition by licitation or by private sale

~~A.~~ When the thing held in indivision is not susceptible to partition in kind, the court shall decree a partition by licitation or ~~as provided in Paragraph B of this Article,~~ by private sale and the proceeds shall be distributed to the co-owners in proportion to their shares.

~~B. In the event that one or more of the co-owners are absentees or have not consented to a partition by private sale, the court shall order a partition by private sale and shall give first priority to the private sale between the existing co-owners, over the sale by partition by licitation or private sale to third parties. The court shall order the partition by private sale between the existing co-owners as identified in the conveyance records as of the date of filing for the petition for partition by private sale. The petition for partition by private sale shall be granted first priority, and the sale shall be executed under Title IX of Book VII of the Code of Civil Procedure.~~

Focusing on the Code of Civil Procedure, the Reporter detailed the enhanced notice requirements required by the UPHPA and the recommendation to add language to require the affixing of notice at a prominent location on the immovable. The Council debated adding size and font requirements but decided that due to the various types and locations of property, it is not feasible to specify those things. The following language was approved:

Article 4624. Publication of notice

Notice of the institution of the proceeding shall be published at least once in the parish where the partition proceeding is instituted, in the manner provided by law. This notice shall set forth the title and docket number of the proceeding, the name and address of the court, a description of the property sought to be partitioned, and the primary terms of the private sale and shall notify the absent defendant that the plaintiff is seeking to have the property partitioned by licitation or by private sale under Civil Code Article 811, this Chapter, and Chapter 1 of this Title, and that the absent defendant has fifteen days from the date of the publication of notice, or of the initial publication of notice if there is more than one publication, to answer the plaintiff's petition. <u>If the property sought to be partitioned is a corporeal immovable, the petitioner, contemporaneous with publication of notice, shall also affix a copy of the notice in at least one prominent location on the immovable.</u>

Professor Scalise then concentrated on the antiquated partition of successions articles from the 1825 and 1870 Civil Codes and noted the fact that there are only a handful of cases on this topic. The conversation addressed Article 1292 and the need for further clarification of the language to emphasize that this is partition of the entire estate and intestacy is presumed. Articles 1290 and 1291 will be repealed, and the following changes to Articles 1292 and 1293 were approved with the additional request to add a sentence to the Comment to Article 1292 to define the term "estate" in this context:

CHAPTER 12. OF THE PARTITION OF ~~SUCCESSIONS~~ <u>ESTATES</u>
SECTION 1. OF THE NATURE OF PARTITION,
AND OF ITS SEVERAL KINDS

Article 1292. Undivided ownership rights until partition

When ~~a person, at his decease, leaves several~~ the decedent's estate devolves in favor of multiple heirs, each of them becomes an undivided ~~proprietor~~ co-owner of the ~~effects of the succession,~~ estate for ~~the part or portion coming to him, which forms among the heirs a community of property, as long as it remains undivided~~ his respective share.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1292 (1870).

Article 1293. ~~Partition of a succession, definition~~ Intestate partition; definition

The partition of ~~a succession~~ an estate is the division of the ~~effects, of which the succession is composed,~~ estate among all the coheirs~~, according to their respective rights~~.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1293 (1870).

The Council quickly agreed to repeal Articles 1295, 1296, 1297, 1299, 1300, 1301, 1305, and 1306 and to preserve Article 1302 for partitions of estates even when there is a testament as follows:

Article 1302. Testamentary partition

~~There is no occasion for partition, if the deceased has regulated it between his lawful heirs, or strangers, or if the deceased~~ Partition shall not be demanded only when a testator has assigned specific assets of the estate to his legatees and may only be demanded when the testator has allocated undivided shares of the estate to his legatees. Partition also shall not be demanded when a testator has expressly delegated the authority to his executor to allocate specific assets to satisfy a legacy expressed in terms of a quantum or value~~; and in such case the judge must follow the will of the testator or his executor~~.

~~The same thing takes place when the testator has expressly assigned specific assets of his estate, or delegated the authority to assign specific assets of his estate, in satisfaction of the forced portion of his children.~~

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1302 (1870).

Next, the Reporter introduced Section 2 of this Chapter of the Civil Code and noted that it is possible for one thing to be left to more than one person and therefore for that thing to be partitioned. One Council member first raised concerns that Articles 1307, 1302, and 1293 may be inconsistent because although a person may seek partition of an estate, a person is not allowed to demand partition of a specific asset unless that asset is owned in indivision. Professor Scalise commented that a person gaining possession from an estate of one thing that was left to him is not partition of the estate, it is just being placed in possession. Members of the Council then inquired as to the meaning of the term "owner" in Article 1309 and whether it includes the entire bundle of rights: usus, fructus, and abusus, as well as what are real rights. Professor Scalise agreed to change the term "in common" to the more appropriate civil law term "in indivision," and the following

changes were approved along with the repeal of Articles 1308, 1310, 1311, 1312, 1313, 1314, 1315, 1318, 1319, 1320, and 1321:

SECTION 2--~~AMONG WHAT PERSONS~~ PARTITION ~~CAN BE SUED FOR~~ BETWEEN CERTAIN PERSONS

Article 1307. Partition between heirs and legatees

A partition may be ~~sued for by any heirs, testamentary or ab intestate~~ demanded by any of the heirs or legatees who hold property in indivision.

~~It can also be sued for by any universal legatee or legatee under an universal title, and even by a particular legatee, when a thing has been bequeathed to him in common with one or more persons.~~

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1307 (1870). It is also consistent with Article 807.

Article 1309. Partition between ~~possessors in common~~ holders of real rights

~~It is not indispensable to be owner in common in order to be able to support the action of partition; possession alone, when it is lawful and proceeds from a just title, will support it.~~ Holders of real rights in indivision may demand partition of these rights.

Thus, co-usufructuaries of the same ~~estate~~ property can institute among themselves ~~the~~ an action of partition.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1309 (1870). It is also consistent with Articles 542 and 543.

Moving to Section 3 and Civil Code Articles 1325 through 1346, the Reporter requested the deletion of all of these articles except Articles 1325, 1326, and 1328. With respect to Article 1326, Council members debated the need for a new appraisal if a party has already provided a separate appraisal to contradict the detailed descriptive list or the inventory. Professor Scalise accepted a few changes and the following, along with the recommended repeals, were approved:

Article 1325. Inventory ~~within one year of partition suit~~ or detailed descriptive list

The public inventory~~, which may have been made by the parties interested at a time not exceeding one year previous to the suit for a partition~~ or the detailed descriptive list of the succession shall serve as the basis of the partition, unless ~~one of the heirs~~ an heir or legatee demands ~~a new~~ an appraisal ~~appraisement,~~ and proves that the ~~effects mentioned in the~~ inventory or detailed descriptive list is not accurate ~~have not been estimated at their just price, or at the value they have acquired since the date of this act~~.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1325 (1870). For production of a detailed descriptive list, see Code of Civil Procedure Article 2952.

Article 1326. ~~New appraisement~~ Appraisal

~~In this case the judge is bound to order a new appraisement of the effects to be divided, which shall be made by experts appointed by him to that effect, and duly sworn by the officer who is appointed to make the proces verbal of the appraisement.~~ If the inventory or detailed descriptive list is not accurate, the judge may order an appraisal of the assets of the estate to be partitioned.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1326 (1870).

Article 1328. ~~Summary proceeding~~ Proceeding for action of partition

~~The judge, before whom the action of partition is brought, is bound to pronounce thereon in a summary manner, by which is always meant with the least possible delay and in preference to the ordinary suits pending before him.~~ Except as otherwise provided by law, an action for partition is subject to the rules regulating ordinary proceedings but shall be tried with preference over other ordinary proceedings.

Revision Comments – 2025

This provision is new. It changes the law in part by making partition proceedings ordinary proceedings but still retaining a preference over other ordinary proceedings for partitions. It is based in part on Article 1328 (1870). Summary proceedings are still appropriate for partitions in instances in which other laws provide for summary proceedings. *See* Code of Civil Procedure Article 2592(5).

Next, the Reporter explained the recommendation to repeal the entirety of Section 4 with the exception of Article 1380. With little discussion, the Council approved the following changes to Article 1380 as well as the repeal of Articles 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1370, 1371, 1372, 1373, 1378, and 1379:

~~SECTION 4--HOW THE RECORDER OF THE PARISH OR THE NOTARY IS BOUND TO PROCEED IN THE JUDICIAL PARTITION~~

Article 1380. Subsequent discovery of property~~;~~ amendment of partition

If, after the partition, ~~a discovery should be made of some property not included in it~~ additional property is discovered, the partition ~~must~~ may be amended ~~or made over again, either in totality, or of the discovered property alone~~ to include the newly discovered property.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1380 (1870). *See also* Article 1401.

The Reporter then noted that Section 5 consists only of Civil Code Article 1382 and explained that the recommendation is to simply update the language. One Council member instead suggested the repeal of this Article due to the incorrect notion of "giving up rights" and the voluntary implication of the phrase. The Council agreed with this suggestion and approved the repeal.

Professor Scalise continued with Section 6 and the proposed amendment of Article 1384 and repeal of Articles 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, and 1396. The Council suggested, and the Reporter accepted, clarifying the

language regarding acquiring rights and incurring obligations, and the following language was approved:

SECTION ~~6~~ 4--OF THE WARRANTY OF PARTITION

Article 1384. Reciprocal warranty against disturbance or eviction

~~The coheirs remain respectively bound to warrant, one to the other, the property falling to each of their shares against the disturbance and eviction which they may suffer, when the disturbance or eviction proceeds from a cause anterior to the partition.~~ When an estate is partitioned, each co-owner acquires the rights and incurs the obligations of a seller with respect to the thing transferred by him and the rights and obligations of a buyer with respect to the thing transferred to him.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1384 (1870). *See also* Article 816.

After the Reporter introduced the final Section, Section 7, the Council questioned whether recission or annulment is the correct term and whether two separate sentences are necessary in proposed Article 1400 to clarify that recission is for lesion and partitions may be annulled. After redrafting Article 1400 and the heading of this Section, all of the following, as well as the repeal of Articles 1399, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, and 1414, were approved:

SECTION ~~7~~ 5--OF THE NULLITY OR RESCISSION OF PARTITION

Article 1400. ~~Provisional partitions involving minors, interdicts, or absent persons~~ Grounds for nullity or rescission of partition

~~But if these formalities have not been fulfilled, as the partition is only considered as provisional, it is not necessary to sue for the rescission of it, but a new partition may be demanded for the least lesion, which the minor, person interdicted, or absent person, may have suffered.~~

A partition may be null on the same grounds as a contract of sale. It may also be rescinded for lesion if the value of the property received by a co-owner is less by more than one-fourth of the fair market value of the portion the co-owner should have received.

Revision Comments – 2025

This provision is new. It is based, in part, on the principles underlying Articles 1399, 1400, and 1401 through 1414 (1870).

Article 1401. Omission of succession effects not cause for rescission

The ~~mere~~ omission of a thing~~, belonging to the succession,~~ of the estate is not a ground for rescission, but simply for a supplementary partition or amendment of the original partition.

Revision Comments – 2025

This provision is new. It does not change the law. It expresses the principle underlying Article 1401 (1870). *See also* Article 1380.

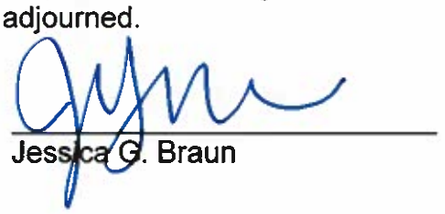
Moving to the next set of materials, Professor Scalise introduced a new Civil Code Article to specifically address the enforceability of penalty clauses in certain juridical acts. Presently, courts use Civil Code Article 1519 and the "contrary to the laws or to morals" standard and have historically upheld only narrowly drawn provisions. In the recent

Succession of Bonnie Babin Maloney case, however, the Supreme Court invited the legislature to evaluate whether public policy dictates that laws prohibiting penalty clauses should exist. The Reporter shared that the Committee's research revealed that Florida is the only state that prohibits no-contest clauses in wills and that most states take the Uniform Probate Code approach, which prohibits enforcement if probable cause to challenge the will exists. Although the Committee debated many different standards, it ultimately landed on and is recommending the use of the probable case standard in proposed Civil Code Article 1519.1 to align with the Restatement of Property treatise and other states' jurisprudential interpretations.

The Council immediately resisted the use of a probable cause standard, expressing concerns that it is too vague and that its extensive use in the criminal context would cause confusion in the civil law. Discussion continued over the use of such terms as "good grounds," "good faith," "sufficient basis," "clear and convincing," "more likely than not," "factual or legal basis," "reasonable basis," "justifiable grounds," and "frivolous." Members of the Council made repeated suggestions to consult Code of Civil Procedure Article 863 as a guide, but the Reporter expressed his belief that this standard is too low. Other members of the Council spoke in favor of the proposed language and the ability to borrow content from other states and suggested just reiterating in the Comments that this probable cause standard is not the same as the standard used in the criminal context. Another suggestion was to replace the term of art with the actual articulation of the standard to maintain the ability to rely on previous jurisprudence. One Council member read a proposal to include the language from the Restatement on lines 32 through 35 of page 3, and although the Reporter cautioned that other states may use a slight variation that would not be captured in that language and in those states' jurisprudence, a majority of the Council appeared to be in favor of the proposal.

The Council also examined the use of the phrase "is absolutely null" and questioned whether this is appropriate in cases where there may be more than one challenge by more than one person. Instead, members of the Council suggested providing that the penalty provision is unenforceable or has no effect. As debate closed, a motion to incorporate the standard from the Restatement into the text of the proposal in lieu of using the term "probable cause" was approved, and the material was recommitted to the Successions and Donations Committee with these instructions.

Professor Scalise then concluded his presentation, and there being no additional business, the January 10, 2025 Council meeting was adjourned.



Jessica G. Braun