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December 1, 2016

Representative Taylor Barras  
Speaker of the House of Representatives  
P.O. Box 94062  
Baton Rouge, Louisiana 70804

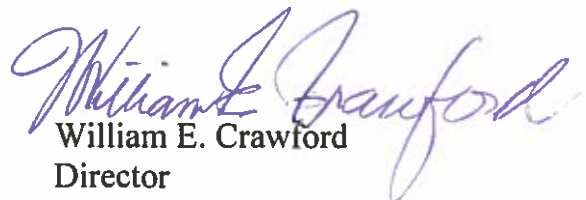
Senator John A. Alario, Jr.  
President of the Senate  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

RE: HCR 131 OF 2012

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to testamentary disposition of the survival action.

Sincerely,

  
William E. Crawford  
Director

WEC/puc

Enclosure

email cc: David R. Poynter Legislative Research Library  
[drplibrary@legis.la.us](mailto:drplibrary@legis.la.us)  
Secretary of State, Mr. Tom Schedler  
[admin@sos.louisiana.gov](mailto:admin@sos.louisiana.gov)

**LOUISIANA STATE LAW INSTITUTE  
SUCCESSIONS AND DONATIONS COMMITTEE**

**REPORT TO THE LEGISLATURE  
IN RESPONSE TO HCR NO. 131 OF THE 2012 REGULAR SESSION**

**Relative to testamentary disposition of the survival action**

Prepared for the  
Louisiana Legislature on

**December 1, 2016**

Baton Rouge, Louisiana

# LOUISIANA STATE LAW INSTITUTE SUCCESSIONS AND DONATIONS COMMITTEE

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**Special Advisors:**  
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**Subcommittee Members for HCR 131:**

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John deGravelles  
Mickey deLaup  
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Mark Neal  
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Eulis Simien, Jr.

Max Nathan, Jr., Chairman-Reporter  
Jessica G. Braun, Staff Attorney

Regular Session, 2012

HOUSE CONCURRENT RESOLUTION NO. 131

BY REPRESENTATIVE LOPINTO

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study the testamentary disposition of the right to bring a survival action pursuant to Civil Code Article 2315.1 and to report its findings and recommendations in the form of specific proposed legislation to the legislature on or before January 1, 2013.

WHEREAS, Civil Code Article 2315.1 provides a survival action in favor of certain classes of survivors to the exclusion of others; and

WHEREAS, the Legislature of Louisiana has provided that this survival action is heritable; and

WHEREAS, mandatory transfer of a survival action to the favored class under Civil Code Article 2315.1 may conflict with the decedent's testamentary wishes when the decedent has been estranged from the favored class for a considerable length of time; and

WHEREAS, testamentary disposal of a survival action may result in a more equitable distribution of a decedent's assets.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study the testamentary disposition of the right to bring a survival action pursuant to Civil Code Article 2315.1 and to make specific recommendations for legislation.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and that the Louisiana State Law Institute report its findings and recommendations in the form of specific proposed legislation to the Legislature of Louisiana on or before January 1, 2013.

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SPEAKER OF THE HOUSE OF REPRESENTATIVES

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PRESIDENT OF THE SENATE

December 1, 2016

To: Representative Taylor F. Barras  
Speaker of the House  
P.O. Box 94062  
Baton Rouge, Louisiana 70804

Senator John A. Alario, Jr.  
President of the Senate  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

**REPORT TO THE LEGISLATURE  
IN RESPONSE TO HCR 131 OF THE 2012 REGULAR SESSION**

House Concurrent Resolution No. 131 of the 2012 Regular Session requested the Louisiana State Law Institute to study the testamentary disposition of the right to bring a survival action pursuant to Civil Code Article 2315.1 and to report its findings and recommendations. The Law Institute assigned this resolution to the Successions and Donations Committee, comprised of lawyers, judges, and law professors with expertise in this area. After initial review by the Committee, a Subcommittee was created due to concerns with the tort aspects of this charge and began meeting alongside the Successions Committee.

The Committees conducted lengthy research of the laws of the fifty states on the inclusion of survival damages in an estate and a creditor's access to them. Roughly thirty-five states include the damages recovered as part of the estate, and creditors have a claim against some or all of the damages recovered in sixteen states. The Committees also carefully reviewed relevant scholarly articles and Louisiana jurisprudence, including *Juneau v. State Dept. of Health & Human Servs.*, No. 2015-CA-1382 (La. App. 1<sup>st</sup> Cir. 2016) 2016 WL 3654771, *Rainey v. Entergy Gulf States, Inc.*, 885 So.2d 1193 (2004), *Mazoue v. Avondale Industries, Inc.*, 839 So.2d 171 (2003), *Nathan v. Touro Infirmary*, 512 So.2d 352 (La. 1987), *Gibbs v. Magnolia Living Center, Inc.*, 870 So.2d 1111 (2004), *The Article 2315.1 Survival Action: A Probate or Non-Probate Item*, 61 La.L.Rev. 417 (2001), and *Common Law "Intervention": The Rights of Successors and the Uneasy History of Louisiana's Survival Action*, 77 Tul.L.Rev. 737 (2003). It is clear that, presently in Louisiana, the survival action is excluded from the estate.

The Committees wholeheartedly agreed that the fundamental principles of succession law should allow a decedent to dispose of his estate by testament. However, the law as provided in Article 2315.1 creates a longstanding exception to the principles of succession law by excluding the survival action from the estate of the decedent. The Committees recognize that other property, such as life insurance proceeds, estate annuities, certain employer and employee contributions, and U.S. bonds, are also excluded by law from the estate.

Therefore, the exclusion of the survival action from a decedent's estate is not an unusual occurrence. And going even further back to *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138

L.Ed.2d 45 (1997), the Committees accept the notion that regardless of the disposition in a testament, legislative acts control.

The Committees repeatedly discussed the example of a decedent who has been estranged from a child. Several members felt that the child should not inherit the survival action and, at a minimum, believed that the decedent should have the opportunity to provide otherwise in a testament. Therefore, the Committees considered amending Article 2315.1 to allow the testament to control and, in the absence of a testamentary disposition, the class of beneficiaries provided in present law would inherit the action.

The discussion quickly moved to the practical implications of Article 2315.1. Many tort expert members, who represent both plaintiffs and defendants, expressed strong opinions regarding the simplicity and certainty of our present law. The Committees understood that many other states appreciate our clear treatment of the survival action and damages recovered. A major concern was that, if this right flowed through the succession, creditors would have rights to the damages. The Committees believe that this would lead to unfavorable results, as creditors should not benefit from a person's injury.

The unique circumstances surrounding survival claims also present problems. Survival actions often go hand in hand with wrongful death actions, and changes to the law could result in increased attorney fees, greater confusion, and fewer settlements. The Committees did note that, although wrongful death actions often follow survival actions, they may involve different issues. Including a survival action within the estate could cure some problems related to numerous beneficiaries, infighting, and undue influence, but these are normal concerns that practitioners are accustomed to addressing in every case.

The Committees also discussed the basic reality that many people in Louisiana do not have testaments due to economic constraints, and requiring the extra expenditures required with a succession proceeding is not good policy. It was also noted that the result under present law is very close to the result reached when a decedent dies intestate.

The Committees also considered the common law history of this law, the Jones Act, and issues related to forced heirship, representation, carving out creditors, an executor's fiduciary duty, the sale of litigious rights, blended families, the added burden of proving the existence or the validity of a testament in every survival action case, the interplay between a succession proceeding and a tort suit, accounting and reimbursement, community property, tax consequences, grouping spouses and children in the same tier, and universal successors.

Ultimately, the Committees agreed with the court's interpretation of the law in *Juneau v. State Dept. of Health & Human Servs.*, No. 2015-CA-1382 (La. App. 1<sup>st</sup> Cir. 2016) 2016 WL 3654771. The Committees recognized that the unusual facts in this case may have led to a less than desirable result but determined that the potential substantive and procedural harm in proposing amendments is too great of a risk to take.

For these reasons, the Law Institute does not recommend any changes to present law Civil Code Article 2315.1.