

# A PRIMER ON ABSENT PERSONS IN LOUISIANA

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*This Article is the second in a series of primers on Louisiana Family Law. The Louisiana Civil Code of 1870, as amended to date, operates as the primary source of law, with other ancillary statutes and codes on particular subject matters. The law of absent persons appears in Title III of Book I of the Civil Code to prescribe the rules for those persons whose whereabouts are unknown. For the absent person or for those affected by his absence, the law provides a scheme to adequately protect the rights of the absent person while considering the needs of those affected by his absence.*

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## I. INTRODUCTION

Title III of Book I of the Louisiana Civil Code, “Of Absent Persons,” provides a regime to deal with the rights of a person

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who has disappeared and whose disappearance affects his rights or the rights of others. The law provides for the appointment of a curator to represent the absent person when he owns property in Louisiana and is unknown to be dead or alive.<sup>1</sup> The curator will maintain and may dispose of the absent person's property while awaiting his return.<sup>2</sup> After the passage of five years, the curator can seek a judicial declaration of the absent person's death, from which succession rights will flow to his heirs.<sup>3</sup> If the absent person reappears, the law gives the absent person the right to reacquire his property and inheritance from his heirs and other gratuitous transferees.<sup>4</sup>

In Louisiana, the law of absent persons underwent a comprehensive revision in 1990.<sup>5</sup> During this revision, Louisiana imported the common law presumption of death, which allows transfer of ownership of property to the absent person's heirs, rather than a gradual transfer of rights from the absent person to his heirs.<sup>6</sup> The early law governing absent persons had a two-tiered system for the transfer of property.<sup>7</sup> When a person was absent for a period of five years, his heirs were placed into provisional possession of the absent person's estate.<sup>8</sup> If the absence lasted thirty years from provisional possession or one hundred years from the absent person's birth, the heirs could assume absolute possession.<sup>9</sup>

The two-tiered system was abandoned in 1948 in favor of absolute possession after the passage of thirty years.<sup>10</sup> In 1978, the time period for absolute possession was shortened to ten

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1. LA. CIV. CODE ANN. art. 47 (2018).

2. LA. STAT. ANN. § 13:3437(A) (2018).

3. LA. CIV. CODE ANN. arts. 54–55 (2018).

4. LA. CIV. CODE ANN. art. 57 (2018).

5. See Act No. 989, 1990 La. Acts 2417–54.

6. Jeanne L. Carriere, *The Rights of the Living Dead: Absent Persons in the Civil Law*, 50 LA. L. REV. 901, 906–07 (1990). Almost all common-law states recognize, either in a statute or the common law, the presumption of death once a person is absent for a period of years. *Id.* at 906. Professor Carriere explains the problems with Louisiana's prior law of "non-functional presumption of death" because the effects of death did not follow from it. *Id.* at 926–32.

7. This system was inspired by French law. See 1 M. PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* Nos. 616–36. (La. St. L. Inst. trans., 1959).

8. LA. CIV. CODE art. 57 (1948). Provisional possession was permitted before the passage of five years when there was a strong presumption that the absent person died. LA. CIV. CODE art. 60 (1948).

9. LA. CIV. CODE art. 70 (1978).

10. Act No. 343, 1948 La. Acts 833.

years,<sup>11</sup> and shortened again to seven years in 1986.<sup>12</sup> In Act 989 of 1990, the legislature revised, amended, and reenacted the title on absent persons, recognizing a presumption of death after the passage of five years. Once presumed dead, a court could issue a judgment declaring death, thereby commencing the succession and permitting the transfer of ownership to the absent person's heirs.

## II. ABSENT PERSON, GENERALLY

An absent person in Louisiana is “one who has no representative in this state and whose whereabouts are not known and cannot be ascertained by diligent effort.”<sup>13</sup> Absent persons have been referred to as the “living dead” because there is no clear evidence as to whether the person is dead or alive; neither a representative nor a body can be found.<sup>14</sup> Either an effort to find the absent person must be made or evidence must be submitted to show it would be futile to try.<sup>15</sup>

In efforts to locate the absent person, courts have required “reasonable diligence” in the search.<sup>16</sup> In *In re Boyd*, reasonable diligence included searching the telephone book and placing missing person ads in newspapers for three days in the last two cities where the absent person was known to have lived.<sup>17</sup> Although the court recognized that a search in additional cities or the use of a private investigator might be preferable, it was not necessary for “reasonable diligence.”<sup>18</sup> As search engines proliferate in a Post-Information Age society, a more rigorous standard for reasonable diligence will likely result. People finders, broad-based searches, and online help services are readily available and cost efficient to ensure that the absent person's due process rights are protected. Ultimately, however, if there is strong evidence that the person is dead, a proceeding for

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11. Act No. 457, 1978 La. Acts 1132.

12. Act No. 270, 1986 La. Acts 565–66.

13. LA. CIV. CODE ANN. art. 47 (2018).

14. Carriere, *supra* note 6, at 901.

15. LA. CIV. CODE ANN. art. 47 cmt. (f) (2018).

16. The standard of “reasonable diligence” comes from the Code of Civil Procedure, which provides that “the attorney shall use reasonable diligence to communicate with the defendant and inform him of the pendency and nature of the action or proceeding . . .” LA. CODE CIV. PROC. ANN. art. 5094 (2018).

17. *In re Boyd*, 98-0052, pp. 6–7 (La. App. 1 Cir. 12/28/98); 723 So. 2d 1107, 1109.

18. *Id.* at pp. 8–9; 723 So. 2d at 1109–10.

a judicial declaration of death under article 30 should follow.<sup>19</sup>

An “absent person” is different from an “absentee” as defined in the Code of Civil Procedure.<sup>20</sup> An “absentee” is a person who is either a nonresident, a domiciliary who has departed the state without leaving an agent, a person whose whereabouts are unknown, or a person who may be dead.<sup>21</sup> The Code of Civil Procedure contains a host of articles on attorneys appointed to represent absentee defendants<sup>22</sup> or absentee heirs.<sup>23</sup> These attorneys represent absentee defendants or heirs in particular civil proceedings and do not have the same powers and authority as the curator over an absent person’s property. Although attorneys can be appointed over absentees who are absent persons, not all absentees qualify as an “absent person” under Title III of the Civil Code. The curator of an absent person has rights of administration and disposition and is generally related to the absent person, while an attorney appointed to represent an absentee notifies and represents the absentee in the civil suit without a broad grant of power.

### III. CURATOR APPOINTED OVER PROPERTY

Any interested party can petition the court to have a curator appointed over the property of an absent person on a showing that the absent person owns property in this state and that there is a necessity for appointment.<sup>24</sup> “Property” includes corporeals and incorporeals, movables and immovables, and “necessity” can be shown by the need to protect the absent person, the petitioner, or a third party.<sup>25</sup> On appointment, the curator has the power of administration and the power of disposition over the absent

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19. LA. CIV. CODE ANN. art. 47 cmt. (f) (2018). Under article 30, “[w]hen a person has disappeared under circumstances such that his death seems certain, his death is considered to have been established even though his body has not been found.” LA. CIV. CODE ANN. art. 30 (2018).

20. See LA. CODE CIV. PROC. ANN. art. 5251(1) (2018); see also JESSICA G. BRAUN, HANDBOOK ON LOUISIANA FAMILY LAW 1243–46 (2017).

21. LA. CODE CIV. PROC. ANN. art. 5251(1) (2018).

22. LA. CODE CIV. PROC. ANN. art. 5091 *et seq.* (2018).

23. LA. CODE CIV. PROC. ANN. art. 3171 *et seq.* (2018).

24. LA. CIV. CODE ANN. art. 47 (2018); see also Succession of Butler, 117 So. 127 (La. 1928) (finding that it was improper to appoint a curator over a person who was absent because the person owned no property at the time of his absence).

25. LA. CIV. CODE ANN. art. 47 cmts. (b), (d) (2018). Necessity can be shown by the pending administration of a succession. See *Middle Tenn. Council, Inc., Boy Scouts of Am. v. Ford*, 274 So. 2d 173, 176 (La. 1973).

person's property.<sup>26</sup>

Permitting a curator to administer and dispose of an absent person's property raises questions of due process. The United States Supreme Court, in early decisions, explained that to administer an absent person's property within the confines of the Constitution, states needed to expressly grant jurisdiction to their courts, provide the absent person with notice and an opportunity to prove his whereabouts, allow the passage of a reasonable time before a presumption of death applied, and provide a safeguard for the absent person should he reappear.<sup>27</sup> Louisiana law meets those requirements by providing courts with jurisdiction, requiring "reasonable diligence" to find the absent person before appointing a curator to manage his property, mandating a five-year absent period before a death certificate can be issued, and giving rights to the absent person upon reappearance.<sup>28</sup>

Further, Louisiana courts have recognized the importance of due process before disposing of an absent person's property. In two consolidated cases, the fourth circuit concluded that to deprive an absent person of property, the Constitution mandates the appointment of an attorney to represent him.<sup>29</sup> In the consolidated cases of *Succession of Haydel* and *Succession of Hart*, the court annulled a trial court judgment that declared William Hart dead and placed his heirs in possession of his estate because no attorney or curator had been appointed to represent Mr. Hart.<sup>30</sup> Mr. Hart's estate consisted solely of an interest in his grandfather's estate.<sup>31</sup> Mr. Hart's heirs filed a petition to have him declared dead due to his absence for five years.<sup>32</sup> On the same day the petition was filed, the trial court issued an ex parte

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26. LA. CIV. CODE ANN. art. 48 (2018).

27. *Scott v. McNeal*, 154 U.S. 34, 42 (1894); *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 473 (1904). See *Carriere*, *supra* note 6, at 910–14 for a discussion of these cases.

28. *See generally* LA. CIV. CODE ANN. art. 47 *et seq.* (2018).

29. *Succession of Haydel*, 96-0528 (La. App. 4 Cir. 12/27/96); 685 So. 2d 701. Although courts have discretion to appoint a curator to *manage* the absent person's property, courts have no discretion to *dispose* of property without the appointment of a curator to give notice to the absent person. *Id.* The United States Supreme Court has required "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" before depriving a person of his interest in property. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).

30. *See Succession of Haydel*, 96-0528 (La. App. 4 Cir. 12/27/96); 685 So. 2d 701.

31. *Id.* at p. 1; 685 So. 2d at 702.

32. *Id.*

judgment declaring him dead and placing his heirs in possession of his estate.<sup>33</sup> The appellate court reversed, stating:

[C]onstitutional due process mandates that an absentee be represented by an appointed attorney or curator during proceedings to have the absentee declared dead and his succession opened pursuant to La. C. C. arts. 54 *et seq.* When a party files a petition to declare an absent person dead, the party shall request the trial court to appoint an attorney to represent the absentee under La. C.C.P. art. 5091. The attorney shall use reasonable diligence to represent the absent person and defend the absent person's interests.<sup>34</sup>

If a curator had been appointed to represent the absent person during the pendency of the proceedings, an appointed attorney would have been unnecessary at the time the heirs were placed in possession of his estate. The absent person's due process rights of notice and an opportunity to be heard would have been protected by the curator, rather than an appointed attorney.

Other unique issues arise when the absent person is a spouse in community. During the community, the curatorship is limited to the absent person's separate property,<sup>35</sup> and in most cases the spouse will be named curator.<sup>36</sup> The spouse of the absent person "is entitled to a judgment decreeing [a] separation of property,"<sup>37</sup> or the spouse can seek authority from a court to act during the absence.<sup>38</sup> Although generally either spouse can manage community property alone, when concurrence of the absent spouse is needed for the other spouse to act,<sup>39</sup> the court in a summary proceeding may authorize the other spouse to act without concurrence on a showing that the action is in "the best

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33. Succession of Haydel, 96-0528, p. 1 (La. App. 4 Cir. 12/27/96); 685 So. 2d 701, 702.

34. *Id.* at p. 6; 685 So. 2d at 705.

35. LA. CIV. CODE ANN. art. 48 (2018).

36. The spouse not judicially separated is given preference as curator. LA. STAT. ANN. § 13:3433 (2018).

37. LA. CIV. CODE ANN. art. 2374(B) (2018).

38. LA. CIV. CODE ANN. arts. 2346–2349, 2355–2355.1 (2018); *see also* KATHARINE S. SPAHT & RICHARD MORENO, MATRIMONIAL REGIMES § 5.8, *in* 16 LOUISIANA CIVIL LAW TREATISE 416 (4th ed. 2013).

39. Concurrence of both spouses is needed for various actions, including the alienation, encumbrance, or lease of community immovables, as well as the donation of community property. *See* LA. CIV. CODE ANN. arts. 2347–2349 (2018).

interest of the family.”<sup>40</sup> The court may also order the other spouse to manage, alienate, encumber, or lease community property over which the absent spouse had exclusive authority, if it is in the best interest of the family.<sup>41</sup> If the other spouse does not seek a separation of property during the spouse’s absence, the community property regime will terminate at the judgment declaring death.<sup>42</sup>

#### A. PROCEDURE FOR APPOINTMENT OF A CURATOR

The procedure for appointment of a curator is similar in many respects to the procedure for the appointment of a tutor or a succession representative. An interested person may petition for the appointment of a curator for an absent person in the district court of the parish where the absent person was domiciled at the commencement of his absence.<sup>43</sup> Venue is non-waivable and therefore jurisdictional.<sup>44</sup> Evidence of the absent person’s domicile, his ownership of property in Louisiana, and any other fact to show jurisdiction may be established through affidavits and submitted with the petition.<sup>45</sup> The applicant for curator must provide notice to the absent person’s spouse not judicially separated, descendants, parents, and brothers or sisters and their descendants,<sup>46</sup> as well as to any person requesting notice of the

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40. LA. CIV. CODE ANN. art. 2355 (2018).

41. LA. CIV. CODE ANN. art. 2355.1 (2018).

42. See LA. CIV. CODE ANN. art. 51 (2018).

43. LA. STAT. ANN. § 13:3421(A) (2018). If the absent person was not domiciled in Louisiana when his absence commenced, the petition can be filed in the parish where his immovable property is situated, or if the absent person owned no immovable property in Louisiana, where the movable property is situated. LA. STAT. ANN. § 13:3421(B) (2018). Venue is non-waivable. LA. STAT. ANN. § 13:3421(C) (2018). Additionally, if two or more petitions are filed, the first-filed petition shall proceed and other petitions shall be stayed. LA. STAT. ANN. § 13:3422 (2018). During the pendency of appointment, the court may appoint a provisional curator. LA. STAT. ANN. § 13:3445 (2018).

44. LA. STAT. ANN. § 13:3421(C) (2018); *Miles v. Our Lady of the Lake Reg'l Med. Ctr.*, 2001-2272, p. 5 (La. App. 1 Cir.10/2/02); 836 So. 2d 136, 138–39 (holding that a judgment appointing a curator over an absent person rendered in a court without proper venue lacked subject matter jurisdiction and was therefore an absolute nullity).

45. LA. STAT. ANN. § 13:3423(A) (2018). However, “No fact that is at issue in a contradictory proceeding to appoint a curator for an absent person may be proved by affidavit,” and the court may require further evidence even in light of an undisputed affidavit. LA. STAT. ANN. § 13:3423(C)–(D) (2018).

46. LA. STAT. ANN. §§ 13:3425, :3433 (2018). Notice shall be by registered or certified mail, and the applicant must publish his request in the parish where the petition was filed. LA. STAT. ANN. § 13:3425 (2018).

application.<sup>47</sup>

The court will then order a descriptive list of the absent person's property and set the matter for hearing.<sup>48</sup> Oppositions can be filed and presented at the hearing.<sup>49</sup> Without opposition, the court will appoint the applicant if an appointment of curator is necessary<sup>50</sup> and the applicant is qualified.<sup>51</sup> If an opposition is filed, the court must give preference in the following order to the absent person's: (1) spouse not judicially separated; (2) descendants; (3) parents; and (4) brothers and sisters and their descendants.<sup>52</sup> The curator must furnish security<sup>53</sup> and take an oath to faithfully discharge his duties before receiving letters of curatorship.<sup>54</sup> At the time judgment is rendered, the court must also appoint an undercurator to oversee the actions of the curator.<sup>55</sup>

### B. POWERS AND OBLIGATIONS OF THE CURATOR

Like both the tutor in tutorship proceedings and the succession representative in succession proceedings, the curator in an absent person proceeding is given a broad grant of power, subject to court approval, and limited only by expressly prohibited actions. The curator must "take possession of, preserve, and administer the absent person's property," with

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47. LA. STAT. ANN. § 13:3426 (2018).

48. LA. STAT. ANN. §§ 13:3427, :3429 (2018).

49. LA. STAT. ANN. § 13:3428 (2018).

50. LA. STAT. ANN. § 13:3429 (2018).

51. LA. STAT. ANN. § 13:3431 (2018) ("In proceedings for appointment of a curator for an absent person, no person may be appointed who is: (1) Under eighteen years of age; (2) Interdicted, or who, on contradictory hearing, is proved to be mentally incompetent; (3) A convicted felon, under the laws of the United States or of any state or territory thereof; (4) A nonresident of the state who has not appointed a resident agent for the service of process in all actions and proceedings with respect to the curatorship, and caused such appointment to be filed in the curatorship proceeding; (5) A corporation not authorized to perform the duties of curator in this state; (6) A person indebted to the absent person, except a spouse in community, unless he discharges the debt prior to the appointment; (7) An adverse party to a suit to which the absent person is a party; or (8) A person who, on contradictory hearing, is proved to be incapable of performing the duties of curator, or to be otherwise unfit for appointment.").

52. LA. STAT. ANN. § 13:3433 (2018).

53. LA. STAT. ANN. § 13:3434 (2018). Security can include bonds or mortgages. Security may be unnecessary in small curatorships. LA. STAT. ANN. § 13:3444 (2018).

54. LA. STAT. ANN. § 13:3435 (2018).

55. LA. STAT. ANN. § 13:3436 (2018).

court approval when needed.<sup>56</sup> The curator must act prudently, and with court approval, can perform all functions to administer and dispose of the absent person's property.<sup>57</sup> Court approval is also needed to compromise a claim, continue the business of the absent person, place the absent person's property in trust, or perform a contract of the absent person.<sup>58</sup> This grant of power is broad and can empower the curator to act without further court approval for purposes of a particular business or function.<sup>59</sup>

The curator must also enforce all obligations in favor of the absent person and represent the absent person in civil matters.<sup>60</sup> The curator must act as a prudent administrator and will be personally responsible for damages due to his failure to act.<sup>61</sup> Curators are prohibited from acquiring property of the absent person or making donations of the absent person's property.<sup>62</sup> Annually, and at termination of the curatorship, the curator must file an accounting of the absent person's property.<sup>63</sup> For his work, the curator is entitled to reasonable compensation.<sup>64</sup>

Curators and undercurators can be removed or can resign on several bases. An interested party can seek removal of the curator or undercurator for failing to discharge his duties, mismanaging the absent person's property, becoming disqualified, or if removal is in the best interest of the absent person.<sup>65</sup> A curator or undercurator can resign for any reason the court deems sufficient, and a successor curator or undercurator

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56. LA. STAT. ANN. § 13:3437 (2018).

57. LA. STAT. ANN. § 13:3438 (2018). The activities over which court approval is needed include, but are not limited to, lease, sale, purchase, exchange, borrow, loan, mortgage, deposit, and investment. LA. STAT. ANN. § 13:3438(1) (2018). These activities mirror those of the succession and tutorship articles.

58. LA. STAT. ANN. § 13:3438(2)–(5) (2018); *see also* LA. STAT. ANN. § 13:3440 (2018) (procedure to seek court approval). In *Burns v. Van Loan*, in which the administrator sold the absent person's property without proper authority, the court adjudicated title to the heirs of the absent person, overruling the purchaser's pleas of acquisitive prescription. *Burns v. Van Loan*, 29 La. Ann. 560, 563 (La. 1877).

59. LA. STAT. ANN. § 13:3440(D) (2018).

60. LA. STAT. ANN. § 13:3437 (2018).

61. *Id.*

62. LA. STAT. ANN. § 13:3439 (2018). Court approval can be obtained for the curator to acquire the property of the absent person. LA. STAT. ANN. § 13:3439(A) (2018).

63. LA. STAT. ANN. § 13:3443 (2018).

64. LA. STAT. ANN. § 13:3442 (2018).

65. LA. STAT. ANN. § 13:3432(B) (2018). Disqualification is provided for in LA. STAT. ANN. § 13:3431 (2018).

must be named simultaneously.<sup>66</sup>

### C. EFFECTS ON THE ABSENT PERSON

Even though a curatorship has been established over the property of the absent person, the absent person retains full legal capacity to make juridical acts.<sup>67</sup> The curatorship over an absent person is distinct from the curatorship over an interdicted person, as the interdicted person loses his capacity to act.<sup>68</sup> Even after a person is declared absent, he can sell or donate his property, notwithstanding the curator's right to do the same.<sup>69</sup> Third parties who acquire rights in the absent person's immovable property, however, are protected by the public records doctrine.<sup>70</sup> Any conflicting claims of ownership are governed by the first act filed in the registry of the parish where the immovable property is located.<sup>71</sup> For movable property, delivery takes the place of registration.<sup>72</sup>

An absent person's marriage is terminated by the judgment declaring the absent person dead.<sup>73</sup> Although the absent person is presumed dead after the passage of five years, there is no legal authorization for the spouse to remarry unless the absent spouse has been judicially declared dead.<sup>74</sup> Any marriage during the first five years of absence without a declaration of death would be absolutely null.<sup>75</sup> Although not express in any codal provision, if the absent person reappears after death has been declared, his marriage will have terminated and all rights flowing therefrom will have ended.<sup>76</sup> The widow's reliance on the declaration of

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66. LA. STAT. ANN. § 13:3432(C) (2018).

67. LA. CIV. CODE ANN. art. 49 (2018).

68. See LA. CIV. CODE ANN. art. 395 (2018).

69. See LA. CIV. CODE ANN. art. 49 (2018).

70. See LA. CIV. CODE ANN. art. 49 & cmt. (b) (2018).

71. LA. CIV. CODE ANN. art. 49 (2018).

72. LA. CIV. CODE ANN. art. 49 cmt. (b) (2018).

73. Marriage is terminated upon the death of either spouse. LA. CIV. CODE ANN. art. 101 (2018).

74. Although article 101 provides that a marriage terminates upon "[t]he issuance of a court order authorizing the spouse of a person presumed dead to remarry," the court order referenced in the article applies only to military personnel. LA. CIV. CODE ANN. art. 101 & cmt. (e) (2018) (citing LA. STAT. ANN. § 9:301 (1990)).

75. An existing marriage is an impediment to marriage and results in an absolutely null marriage. LA. CIV. CODE ANN. arts. 88, 94 (2018).

76. Some states have "Enoch Arden" provisions, which make clear that marriages remain dissolved even though the absent spouse may reappear. Louisiana does not have a general provision, except in the case of military personnel. See *Carriere*, *supra* note 6, at 963–66.

death to remarry should pretermite any challenge to a subsequent marriage.

The absent person will retain rights as a successor until the time the absent person is presumed dead or has been declared dead.<sup>77</sup> One who is an absent person for five years is presumed dead.<sup>78</sup> If the absent person is presumed dead or has been declared dead at the time a succession would have been opened in his favor, the estate of the deceased will devolve as if the absent person had predeceased the decedent.<sup>79</sup> A declaration of death is not required for accretion to take place in favor of other successors.<sup>80</sup> However, a declaration of death is needed to open the absent person's succession.<sup>81</sup>

When carefully considering the succession rights of absent persons, an interesting issue arises. In the title on "Absent Persons," article 58 makes clear that a person presumed or declared dead cannot be a successor to a third party's estate,<sup>82</sup> leading to the reverse assumption that during the first five years of absence, prior to being presumed or declared dead, the absent person can be a successor. His curator, in his absence, will appear on his behalf and accept any rights of succession. Conversely, in the title on "Natural and Juridical Persons," article 31 requires that a person who claims a right that has accrued to another person must prove that the other person existed at the time the right accrued.<sup>83</sup> Absent persons, by definition, cannot be proven to be dead or alive.<sup>84</sup> Arguably, the curator appointed for an absent person cannot prove that the absent person existed at the time the right accrued to him, as is required under article 31. Articles 58 and 31 were passed in the

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77. See LA. CIV. CODE ANN. art. 52 cmt. (2018).

78. LA. CIV. CODE ANN. art. 54 (2018). This provision was taken in part from the Greek Civil Code. LA. CIV. CODE ANN. art. 54 cmt. (a) (2018).

79. LA. CIV. CODE ANN. art. 58 (2018).

80. LA. CIV. CODE ANN. art. 58 cmts. (b)–(c) (2018).

81. LA. CIV. CODE ANN. art. 55 (2018). The succession shall be opened on the date of death established in the judgment. *Id.* A presumption of death will not suffice. See 4 C. AUBRY & C. RAU, COURS DE DROIT CIVIL FRANÇAIS § 590 (La. St. L. Inst. trans., 1971).

82. See LA. CIV. CODE ANN. art. 58 (2018).

83. This provision was taken in part from the Greek Civil Code. LA. CIV. CODE ANN. art. 31 cmt. (a) (2018). Article 31 and its source provisions (articles 37 and 38 of the Greek Civil Code) were meant to replace the commorientes presumptions. See LA. CIV. CODE ANN. art. 935 cmt. (g) (2018). Under the Greek system, a person not presumed dead or declared dead is considered alive and capable of being a successor.

84. Cf. PLANIOL, *supra* note 7, at 619.

same Act in 1990, but no reported case has addressed the issue.<sup>85</sup>

Because the law protects property of the absent person for the first five years of his disappearance in the hopes that he returns, rights to a succession that accrue during these five years should belong to the absent person through the curator. The curator can prove his existence as an “absent person,” but no absent person’s existence can be certain. In fact, the absent person may have predeceased the decedent during the first five years of his absence; if the date of the absent person’s death becomes known, a judgment declaring death can be amended.<sup>86</sup> But, because article 31 appears in the general articles on natural and juridical persons and article 58 applies specifically to absent persons, the maxim that a specific law governs over a general one should apply.<sup>87</sup> Furthermore, the Greek Civil Code, under which a person not presumed dead or declared dead can be a successor, influenced both revisions (natural persons and absent persons) in Louisiana.<sup>88</sup> As a result, the absent person should have a right to successions that open in his favor during the first five years of his absence.

#### IV. TERMINATION OF CURATORSHIP

Termination of the curatorship, either of right or by declaration of death, ends all rights of the curator over the absent person’s property.<sup>89</sup> Either the absent person or his successors will have rights to the property remaining at termination. The curator must file a final accounting of his management, and the curator must restore the property to the absent person or his successors.<sup>90</sup>

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85. Under prior law, if the absent person disappeared before the opening of a succession to which he was a successor, he would be excluded. *See* *Fields v. McAdams*, 15 So. 2d 246, 248–49 (La. Ct. App. 1 Cir. 1943) (because curatrix could not prove that her absent spouse was alive when his parents died, as the only heir, the absent spouse could not take in his parents’ successions).

86. LA. CIV. CODE ANN. art. 56 (2018).

87. A general rule of statutory construction provides that a specific statute controls over a more general statute. *Burge v. State*, 2010-2229, p. 5 (La. 2/11/11); 54 So. 3d 1110, 1113; *see also* A.N. YIANNPOULOS, *CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW, A COURSEBOOK: TEXTS, CASES AND MATERIALS* 239, 257–58 (2d ed. 1999).

88. *See* LA. CIV. CODE ANN. art. 31 cmt. (a) (2018); LA. CIV. CODE ANN. art. 54 cmt. (a) (2018).

89. *See* LA. CIV. CODE ANN. arts. 50–51 (2018).

90. LA. CIV. CODE ANN. art. 52 (2018); LA. STAT. ANN. § 13:3443 (2018).

### A. TERMINATION OF RIGHT

The curatorship over an absent person's property terminates, without the necessity of getting a judgment, "when the absent person appoints a person to represent him in the state, when his whereabouts become known, or when he dies."<sup>91</sup> The representative or the absent person may appear anywhere in the world, and once a representative has been appointed to act on the absent person's behalf or the status of the absent person is known, the curatorship shall terminate.<sup>92</sup> Once the curator has knowledge of the termination, he must file a notice in the curatorship proceeding that his authority has ended.<sup>93</sup> If the curator performs any acts of administration or disposition after the termination, third parties will be protected unless notice of the termination has been filed in the curatorship proceedings.<sup>94</sup>

### B. TERMINATION BY DECLARATION OF DEATH

The curatorship over an absent person's property also terminates when a court issues a judgment declaring the absent person's death.<sup>95</sup> Once an absent person has been missing for a period of five years, the absent person is presumed to be dead.<sup>96</sup> Once presumed dead, any interested party can petition the court for a judgment declaring the absent person dead.<sup>97</sup> In the absence of heirs, the curator must seek the declaration of death after the absent person is presumed dead.<sup>98</sup> In the event that heirs exist but refuse to seek the declaration of death, the curator should be permitted to seek the declaration as well.

In its declaration of death, the court must determine the date on which the absence commenced and the date of death of the absent person.<sup>99</sup> The absence commences on the date the court determines the person left their last known domicile, and

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91. LA. CIV. CODE ANN. art. 50 (2018).

92. LA. CIV. CODE ANN. art. 50 cmt. (b) (2018).

93. LA. CIV. CODE ANN. art. 53 (2018).

94. *Id.*

95. LA. CIV. CODE ANN. art. 51 (2018).

96. LA. CIV. CODE ANN. art. 54 (2018). In the wake of Hurricanes Katrina and Rita, the time period for a presumption of death was shortened to two years "[i]f the absence commenced between August 26, 2005, and September 30, 2005, and was related to" either hurricane, and the absent person was not currently charged with a felony offense under United States or Louisiana law. *Id.*

97. *Id.*

98. LA. CIV. CODE ANN. art. 51 (2018).

99. LA. CIV. CODE ANN. art. 54 (2018).

the date of death, without other knowledge, occurs five years thereafter.<sup>100</sup> The date of death set by the court will result in termination of the marriage and the community, if one exists, and the opening of the absent person's succession.<sup>101</sup> If, however, clear and convincing new evidence establishes a date of death different than the date established by the court, the judgment shall be amended reflecting the new date of death.<sup>102</sup> Succession rights will flow in accordance with the amended date of death; successors and beneficiaries could change as a result of the amended date of death.<sup>103</sup> The Code does not prescribe rules in the event of an amendment, but the rules governing good faith possessors of property would likely apply.

Once the judgment declaring the death of the absent person is filed in the curatorship proceeding, third parties are on notice that the curatorship has terminated.<sup>104</sup> Any acts thereafter performed by the curator can be declared null.<sup>105</sup>

## V. REAPPEARANCE OF ABSENT PERSON

An absent person, upon reappearance, is entitled to recover his property and inheritance in the condition that it exists when he returns.<sup>106</sup> If the absent person reappears during the curatorship, the curatorship terminates and the curator must return the property to the absent person.<sup>107</sup> This property would include any inheritance acquired by the curator during the curatorship. If the absent person appears after being declared dead, the absent person can recover his property in the condition in which he finds it from his successors and their transferees by gratuitous title.<sup>108</sup> If the absent person was presumed dead or

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100. *In re Boyd*, 98-0052, p. 5 (La. App. 1 Cir. 12/28/98); 723 So. 2d 1107, 1110.

101. LA. CIV. CODE ANN. arts. 55, 2356 (2018). The date of death can also affect rights to life insurance proceeds and wrongful death claims. *See Ledet v. Dep't of Health & Human Res.*, 465 So. 2d 98, 101 (La. Ct. App. 4 Cir. 1985).

102. LA. CIV. CODE ANN. art. 56 (2018). Those previously recognized as successors are bound to restore the estate to the new successors but may keep any gathered fruits of the property. *Id.* If they are unable to restore the property in kind, they are bound to restore its value, and there is no recourse against third parties. LA. CIV. CODE ANN. art. 56 cmt. (c) (2018).

103. *See* LA. CIV. CODE ANN. art. 56 cmts. (b)–(c) (2018).

104. LA. CIV. CODE ANN. art. 53 cmt. (c) (2018).

105. *See id.*

106. A specific provision exists for the reappearance of military personnel who are presumed dead. *See* LA. STAT. ANN. § 9:1442 (2018).

107. LA. CIV. CODE ANN. arts. 50, 57 (2018).

108. LA. CIV. CODE ANN. art. 57 (2018).

declared dead when a succession would have opened in his favor, he can also recover his inheritance in the condition in which he finds it from those who succeeded in his default and from their transferees by gratuitous title.<sup>109</sup> Additionally, nothing prevents the absent person from seeking rights of an omitted heir against transferees of immovable property by onerous title as long as the interest is asserted within two years of a final judgment of possession from which the absent person was omitted.<sup>110</sup>

Under the right of restitution, the property must be returned in the condition in which it exists, which could include real rights in favor of third parties.<sup>111</sup> The absent person is also entitled to recover from his successors the net proceeds of things alienated and the diminution in value of things encumbered.<sup>112</sup> The Code does not provide whether a successor will be responsible to the absent person for the value of the proceeds if, at the time of reappearance, the successor had consumed the proceeds. At that point, the policy of protecting the absent person should be outweighed by the reasonable acts of the successor, in disposing of the property and enjoying the proceeds, after the absent person is declared dead and believing that he is the rightful owner.<sup>113</sup>

The revision comments make clear that the ability of the absent person to recover fruits of the property acquired during his absence is governed by the rights of accession by good and bad faith possessors.<sup>114</sup> Although the absent person may recover his property and inheritance, he generally will be unable to recover fruits generated from the property.<sup>115</sup> The shift in policy to protect the successor or transferee over the absent person is present here. The successors and gratuitous transferees are considered possessors of the property and, if in good faith, are

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109. LA. CIV. CODE ANN. art. 59 (2018).

110. LA. CIV. CODE ANN. art. 59 cmt. (d) (2018); LA. STAT. ANN. § 9:5630 (2018).

111. LA. CIV. CODE ANN. arts. 57, 59 cmt. (c) (2018).

112. LA. CIV. CODE ANN. arts. 57, 59 (2018).

113. Articles 2304 and 2305 of the Civil Code, by analogy, support protecting the good faith “owner” of a thing not owned. When the thing not owned is destroyed, damaged, or cannot be returned, the person who received the thing in good faith is only bound to restore its value if the loss was caused by his fault. LA. CIV. CODE ANN. art. 2304 (2018). A person in bad faith is bound to restore its value even if the loss was not caused by his fault. LA. CIV. CODE ANN. arts. 2304–2305 (2018). Professor Carriere disagrees; she concludes that heirs would be encouraged to spend the money on something other than property, thereby stripping the absentee of protection. Carriere, *supra* note 6, at 955.

114. LA. CIV. CODE ANN. art. 57 cmt. (c) (2018).

115. *Id.*

entitled to keep the fruits they have gathered.<sup>116</sup> Additionally, with respect to improvements made on immovable property by a good faith possessor, the absent person may not demand their demolition and removal and is bound to pay either the cost of material and workmanship, the current value, or the enhanced value of the immovable.<sup>117</sup>

“For purposes of accession, a possessor is in good faith when he possesses by virtue of an act translative of ownership and does not know of any defects in his ownership.”<sup>118</sup> An “act translative of ownership” is an act sufficient to transfer property, such as a sale, exchange, or donation.<sup>119</sup> Any legatee through a valid donation *mortis causa* will be a good faith possessor, unless he knows of a defect in his ownership. Because an intestate heir continues the possession of the decedent, if the decedent possessed the property pursuant to an act translative of ownership, so too does the intestate heir.<sup>120</sup> Therefore, the ability of the intestate heir to retain the fruits of the absent person’s property depends on the nature of the absentee’s possession—either good or bad faith.

If the successors or gratuitous transferees are in bad faith, they are bound to restore the fruits gathered or their value but have a claim for reimbursement of expenses.<sup>121</sup> The absent person may also demand from the bad faith possessors the removal of improvements made on immovable property and reimbursement for any damage that he has sustained.<sup>122</sup>

Although the right of the absent person to prove his ownership is a petitory action and is not subject to liberative prescription,<sup>123</sup> the right of the successor to assert acquisitive

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116. LA. CIV. CODE ANN. art. 486 (2018); *see also* LA. CIV. CODE ANN. art. 57 cmt. (c) (2018); LA. CIV. CODE ANN. art. 59 cmt. (c) (2018).

117. LA. CIV. CODE ANN. art. 496 (2018).

118. LA. CIV. CODE ANN. art. 487 (2018).

119. LA. CIV. CODE ANN. art. 487 cmt. (b) (2018) (quoting LA. CIV. CODE art. 503 (1870)).

120. LA. CIV. CODE ANN. art. 936 (2018); *see also* LA. CIV. CODE ANN. art. 487 cmt. (f) (2018).

121. LA. CIV. CODE ANN. art. 486 (2018).

122. LA. CIV. CODE ANN. art. 497 (2018). If the absent person does not demand removal, he may keep the improvements, but is bound to pay either the current value of the materials and workmanship, or the enhanced value of the immovable. *Id.*

123. *See* LA. CIV. CODE ANN. art. 481 (2018); A.N. YIANNPOULOS, PROPERTY § 10:12, *in* 2 LOUISIANA CIVIL LAW TREATISE 571 (5th ed. 2015).

prescription against the absent person should be available.<sup>124</sup> Because the absent person has the right to reacquire his property upon return and thereby void title in his successors, ownership should only be permitted through thirty-year acquisitive prescription without just title. The interest of the successor after thirty years of uninterrupted possession should outweigh any interest in restitution otherwise available to the absent person.

In the realm of a possessor's rights and obligations, it is noteworthy that the possessor's rights to fruits and improvements are asserted only against the *owner* of the thing, not against other possessors.<sup>125</sup> Therefore, the rights of a possessor presuppose that the absent person was the owner of the thing he now wishes to reclaim from the possessor. What transpires if the absent person was simply a possessor of the thing (not the owner) when he became absent and now he has reappeared? If acquisitive prescription has not accrued, then both parties are possessors of the same character.<sup>126</sup> If the true owner is unknown, the absent person may claim that he is the "provisional owner" of the thing and exercise rights as owner until the true owner is established.<sup>127</sup>

## VI. PRESUMPTION OF DEATH FOR MILITARY PERSONNEL

Louisiana has specialized statutes to deal with the absence of military personnel. If a person is on active duty in the military and has been reported missing in action, he can be presumed dead when the armed services accepts the presumption of death.<sup>128</sup> The person seeking to prove death need not offer evidence of death; he need only a certified copy of an official certificate of the armed services or the soldier's service records indicating the armed services has accepted the presumption of death.<sup>129</sup> The succession can then be opened in the same manner as any other deceased person.<sup>130</sup> If the soldier presumed dead is

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124. Early treatise writers agree. *See* Carriere, *supra* note 6, at 957–58.

125. LA. CIV. CODE ANN. arts. 486, 526 (2018).

126. *See* LA. CIV. CODE ANN. art. 936 (2018).

127. *See* LA. CIV. CODE ANN. art. 3423 (2018); *see also* YIANNOPOULOS, *supra* note 123, § 12:9, at 691.

128. LA. STAT. ANN. § 9:1441 (2018).

129. LA. STAT. ANN. § 9:1443 (2018); *see also* Pierce v. Gervais, 425 So. 2d 922 (La. Ct. App. 4 Cir. 1983).

130. LA. STAT. ANN. § 9:1442 (2018). The succession may be opened in the parish where the soldier was domiciled at the time of entering the armed service. LA. STAT.

alive, and he demands return of his property within thirty years from the date of the judgment of possession, his heirs or legatees must then return the property they still own, subject to all encumbrances, and pay him the value of any property alienated and any amount of encumbrances placed on the property.<sup>131</sup> The heirs or legatees must also return a share of the annual revenues of his property.<sup>132</sup>

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ANN. § 9:1442(A) (2018).

131. LA. STAT. ANN. § 9:1442(B) (2018).

132. *Id.* If the soldier returns within five years, the heirs of legatees must return two-thirds; after five but within seven years, they must return one-half; and after seven years, they need not return any. *Id.*