CONTEMPORARY ISSUES IN LOUISIANA LAW: SUCCESSIONS-- TO BE SHARED EQUALLY OR TO SHARE AND SHARE ALIKE?[1]

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INTRODUCTION

For many years, lawyers have sought to draft last wills and testaments in an effort to comport with their clients' wishes and to appeal to their clients' intellectual sensibilities. Sometimes lawyers are tempted to use flowery words or phrases to impress the prospective testator, who is a lay person. A thorough reading of the Louisiana Civil Code's provisions on legacies, joint or otherwise, should be carefully studied and understood by the attorney or notary before preparing or drafting a last will and testament. This article suggests that based upon the ambiguities that can result from the

[1] The statutory and jurisprudential history of legacies of the same property bequeathed to more than one individual has been as varied and complex as testaments drafted by the most skillful lawyers. Louisiana law has devolved from statutes following common law construction to those ostensibly following French commentators and their "subtle distinction" theories. Most recently, however, the law now favors what is known as "obvious intention of the testator," which is determined by considering the entirety of the will for language regarding the testator's intent.

inarticulate drafting of wills, it may be necessary to amend or revise (once again) Louisiana Civil Code article 1588, which governs legacies made to more than one individual.[2] Failure to use words that are clear and unambiguous, based upon the ordinary meaning of words, has resulted in some of the simplest drafted wills failing to comport with the client's express intent.

Under Louisiana law, there are three types of legacies: universal, general, or particular. A universal legacy is a disposition of all of the estate, or the balance of the estate that remains after particular legacies.[3] A general legacy is a disposition by which the testator bequeaths a fraction or a certain proportion of the estate, or a fraction or certain proportion of the balance of the estate that remains after particular legacies.[4] Although a particular legacy is described as a legacy that is neither general nor universal, the comments to the article further explain that it is a legacy of a certain object.[5] Each of these types of legacies may be given to more than one person in the same bequest or disposition.

When making a disposition of the same property to more than one person, the nature of the disposition can change drastically, simply by the testator's statement that the property is to be shared equally among legatees.[6] The codal article does not say this, but jurisprudence interpreting the article does.[7] Another step is required to convey the true meaning of article 1588 and the implications of the terms "to be shared equally" and "share and share alike." *In re Successions of Lain*[8], which is discussed in more detail in Part II, is the only case (found by this author) applying article 1588, as amended, to resolve the problems with the terms "to be shared equally" or to "share and share alike."[9] Louisiana Civil Code article 1588 states in pertinent part:

> A legacy to more than one person is either joint[10] or separate. It is separate when the testator ***assigns shares*** and joint when he does not. Nevertheless, the testator may make a legacy joint or separate by expressly designating it as such. [emphasis added][11]

On its face, article 1588 seemingly presents no problem. However, when attorneys draft testaments for clients who want all of their children to "share equally" or "to share and share alike," and the attorney does not adequately discuss with the client the difference between the two terms to determine the testator's explicit intent, a problem can arise. A separate legacy exists when a testator leaves

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[2] LA. CIV. CODE ANN. art. 1588 (2010).
[3] LA. CIV. CODE ANN. art. 1585 (2010).
[4] LA. CIV. CODE ANN. art. 1586 (2010).
[5] LA. CIV. CODE ANN. art. 1587 (2010).
[6] *See* comments to LA. CIV. CODE ANN. art. 1588.
[7] Succession of Lambert, 28 So.2d 1 (La. 1946*). See also* Succession of McCarron, So. 2d 63 (La. 1965).
[8] 147 So. 3d 1204, 1211(La. App. 2 Cir. 2014).
[9] *Id.*
[10] The word "conjoint" was replaced with "joint" in the 1997 revision. The terms are used interchangeably throughout this article and mean the same thing.
[11] LA. CIV. CODE ANN. art. 1588 (2010).

property to more than one individual and specifically assigns the portion that each is to take.[12] Generally, separate legacies do not create problems if one of the legatees dies. If, however, the testator leaves property to more than one individual and does not specifically assign portions to the individuals but simply states that the legatees are to "share equally," a problem is created when one of the legatees dies.[13] Generally, in this circumstance the lapsed legacy (caused by the death of a legatee) will accrete to the remaining legatee, if it is identified as a joint legacy.[14] The exception to this rule of accretion provides if the deceased legatee is the child or sibling of the testator, then the lapsed legacy will accrete to that deceased legatee's descendants by root,[15] to the extent they were in existence at the time of the decedent's death.[16] Failing to characterize the legacy as "separate" or "joint," when the testator does not assign specific shares or portions creates a problem. Using "to be shared equally" or "share and share alike," which seemingly suggests a division, is ambiguous and creates a problem[17] for an interpreter. This, unfortunately, is where the hairsplitting begins.

Part I of this article will analyze the *Lambert* decision and discuss how various Louisiana courts have interpreted *Lambert*. Part II will discuss the *Succession of Lain* decision and the confusion surrounding it, its likely impact on the issue and the opportunity for future rulings (i.e. the new appeal). Finally, Part III will provide suggestions for a final resolution to the problem, one of which is to revise or amend Louisiana Civil Code article 1588 in order to avoid the confusion set forth in the *Succession of Lain*.

I. BRINGING SOME CLARITY TO THE LAW OF JOINT LEGACIES

A. Succession of Lambert *and Its Progeny*

A thorough review of the *Lambert* decision is important to understand the state of the law since *Lambert* and the effects of its ruling on other cases. *Lambert* has been dispositive of the issue involving the use of the phrases "to be shared equally" and "share and share alike." Although the legislature amended Louisiana Civil Code article 1588 in 1997 to clarify its language, *Lambert* has not been overruled.[18]

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[12] *Id*.

[13] Kathryn Venturatos Lorio, Succession and Donations § 13:5, *in* 10 Louisiana Civil Law Treatise (2d ed.).

[14] *See* LA. CIV. CODE ANN. art. 1592 (2010).

[15] LA. CIV. CODE ANN. art. 882 (2000 & Supp. 2015). LA. CIV. CODE ANN. art. 884 (2000). LA CIV. CODE ANN. art. 885 (2000). Representation of predeceased heirs is allowed in the direct descending line ad infinitum (meaning that persons who descend from each other are always allowed to represent their predeceased ascendant) and in the collateral line, but only among siblings. So, where a descendant or sibling predeceases the decedent, his descendants are allowed to inherit. Heirs who inherit by representation inherit by "roots" not "heads", i.e. all of the heirs share or split what the predeceased heir would have inherited.

[16] LA. CIV. CODE ANN. art. 1593 (2012).

[17] Kathryn Venturatos Lorio, Succession and Donations § 13:5, *in* 10 Louisiana Civil Law Treatise (2d ed.).

[18] Succession of Lambert, 28 So.2d 1 (La. 1946*). See also* LA. CIV. CODE ANN. art. 1588.

The Louisiana Supreme Court in *Lambert* dealt with the issue of determining the nature of a legacy left by the testator of the residue or remainder of his estate to his two brothers to "share and share alike," which resulted when one of the testator's brothers died before the testator.[19] The court, citing a number of cases, found the legacy to be separate in nature (i.e. one that assigned shares). It should be noted, the court looked to prior Louisiana Civil Code article 1712 to support its interpretation of the testator's will.[20] Under this article, the court stated, "The intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament."[21] In doing this, the court only considered a specific clause in the testament and interpreted the clause in light of the codal articles dealing with accretion relative to testamentary dispositions. The court based its decision on the following:

> [Louisiana Civil Code article] 1706—The right of accretion relative to testamentary dispositions, shall no longer subsist, except in the cases provided for in the two following articles.
>
> [Louisiana Civil Code article] 1707—Accretion shall take place for the benefit of the legatees, in case of the legacy being made to the several conjointly.
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> The legacy shall be reputed to be made conjointly when it is made by one and the same disposition without the testator's having assigned the part of such [each] co-legatee in the thing bequeathed.
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> [Louisiana Civil Code article] 1708 was found not to apply to the case.
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> [Louisiana Civil Code article] 1709—Except in the cases prescribed in the two preceding articles, every portion of the succession remaining undisposed of, either because the testator has not bequeathed it either to a legatee or to an instituted heir, or because the heir or the legatee has not been able, or has not been willing to accept it, shall devolve upon the legitimate heirs.[22]

The court cited a number of cases considering these provisions, including two federal cases.[23] After a thorough analysis of case law, the court found it unnecessary to view the case in the light of the "subtle distinction" [24] which had been adopted by French commentators and given effect by some Louisiana jurisprudence. The

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[19] Succession of Lambert, 28 So. 2d at 2 (La. 1946).
[20] *Id.*
[21] Succession of Lambert, 28 So.2d 1, 2 (La. 1946).
[22] *Id.* at 2-3.
[23] Mackie v. Story, 1877, 93 U.S. 589, 23 L.Ed. 986 and Waterman v. Canal-Louisiana Bank & Trust Co., 186 F. 71, 72 (5th Cir. 1911).
[24] Succession of Lambert, 28 So. 2d at 7.

Court did not believe that it was required to determine in the case before it whether such a distinction was still viable, when considering the words of future execution or mere disposition. Instead, the court looked to the testament and stated that all parts of the will must be given effect, if possible.[25] In short, the court opined it could not disregard the words "share and share alike," which meant "in equal shares or proportions."[26]

In reaching its decision, the court noted in determining the testator's intention, the entire will must be taken into consideration, and "every word must be given effect if that can be done without defeating the general purpose of the will which is to be made effective in every reasonable method."[27] The court also reasoned that definitions in popular dictionaries like *Webster's New International Dictionary, Second Edition*, as well as in both *Black's* and *Bouvier's Law Dictionaries*,[28] must be considered. Therefore, if in the popular and ordinary sense, the phrase "share and share alike" means in equal shares or proportions, then that is the effect that should be given in the testator's will.

> By giving effect, therefore, to all of the words of the will in question as must be done, especially those in the controversial clause, and by interpreting them reasonably using their popular and ordinary meaning, the conclusion is inescapable that the testator when employing the phrase 'share and share alike' deliberately and definitely divided the residue of the estate between his brothers, Albert and Robert Lambert, leaving it to them in the proportion of one-half to each; he, in other words, assigned the part of each colegatee in the thing bequeathed. It follows logically that the legacy is not governed by the above discussed exception (R.C.C. Art. 1707) to the general rule respecting testamentary accretion (R.C.C. Art. 1706), and that the lapsed portion bequeathed to Albert Lambert devolves upon the legitimate heirs of the testator (R.C.C. Art. 1709).[29]

The court, however, failed to resolve the question surrounding the viability of the "subtle distinction" of the jurisprudence:

> It is unnecessary for us to view the instant case, to the consideration of which we return, in the light of the subtle distinction, adopted by some of the French commentators and given effect by this court on numerous occasions, between a division of the gift itself and that pertaining to the execution or enjoyment of it in the future. Neither are we required to determine now whether or not such a distinction be sound and should be continued in our jurisprudence.[30]

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[25] *Id.*
[26] *Id.* at 8.
[27] *Id.*
[28] *Id.* at 8.
[29] Succession of Lambert, 28 So. 2d 1, 8 (La. 1946).
[30] *Id.* at 7.

It seems the issue will turn on whether the legacy contains a clear assignment of parts. An application of the court's decision to the previously mentioned circumstance of a testator leaving his "entire estate to his identified legatees to be shared equally" requires one to conclude that the legacy is joint. When, as articulated in *Lambert*, giving effect to all of the words of Willie James Lain's testament, especially those in the controversial clause, and by interpreting them reasonably using their popular and ordinary meaning, the conclusion is inescapable; the testator when employing the phrase "to be shared equally" deliberately left the entirety of his estate to both of his named legatees, thus creating a joint legacy. The lapse of one of the legacies would cause accretion in favor of the remaining legatees. The plain language of the will is unambiguous, in that Mr. Lain wanted his estate to be shared only by those persons whom he identified. By the very language of the will, it can be presumed the testator intended all of his property to pass to his named legatees under the will. The plain and ordinary meaning of the phrase "to be shared equally" connotes a joint sharing of the whole.

B. Interpretation By Other Courts

Following the rationales set forth in *Linder*[31] and *Peters*[32], if a universal legacy has been made for the benefit of more than one person, then a determination must be made whether the legacy is joint (to them together) or separate (an assignment of shares), if the testator has used language such as "to be shared equally."[33] This issue has been considered a number of times by state and federal courts, including the United States Supreme Court.[34] The resulting state of the law appears to be one of statutory construction and jurisprudential interpretation based on "the obvious intention" of the testator.[35] Courts have long been left with the task of determining a testator's intent where the language is ambiguous.

In *Lebeau v. Trudeau,*[36] the testator's property was to be disposed of in the following manner:

> I desire to dispose by this will, of all that I possess, and in no respect to die intestate. I wish my debts first paid; I liberate my slave; I give all the residue of

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[31] *See* In re Succession of Linder, 92 So. 3d 1158 (La. Ct. App. 2012) (holding that "a 'universal legacy' is a testamentary disposition by which the testator gives to one or more the whole of the property he leaves at his decease).

[32] *Succession of Peters*, 192 La. 744 (La. 1939) (where testator made particular bequests to widow and unborn child and left remainder of estate, which remainder he described, to his brothers and sisters in equal proportions. The residuary legatees, i.e. the brothers and sisters, were "universal legatees").

[33] The 1997 revision to Article 1588, which became effective in 1999, changed the term "conjoint" to "joint".

[34] Mackie v. Story, 1877, 93 U.S. 589, 23 L.Ed. 986; Succession of Schonekas, 155 La. 401, 99 So. 345, 346; Succession of Wilcox, 165 La. 803, 116 So. 192, 193; Succession of Maus, 177 La. 822, 149 So. 466.

[35] *See* Succession of McCarron, 172 So. 2d 63 (La. 1965).

[36] 10 La. Ann. 164, 165; 1855 WL 4399, (La. 1855). *Disapproved by* Succession of McCarron, 172 So. 2d 63 (La. 1965).

> my property to *Lezine Lebeau, Polixene Bertrand, John Demoruelle, Emma Bertrand, John Bertrand, Elizabeth Wilson, Laure Grousard, L. H. Trudeau*, to be equally divided among them. No one else is to participate in my estate. They are the persons to whom all my property is to be given.

The Louisiana Supreme Court concluded the legatees were conjoint since the testator appeared to be calling them all to partake equally in the totality of the estate.[37] The court opined that the Code contemplated an "express specification and assignment" of shares to the legatees in order for the legacies to be a separate and distinct legacy to each of them.[38] By looking at the testator's intention, the court considered whether the words used, which suggested an assignment, were to be interpreted as referring to the disposition of the will or merely its execution. In this instance, the court relied upon whether the words used could be interpreted as referring to the execution of the will, which would direct how the legatees were to participate, or could be interpreted as referring to the actual part each would receive, limiting each of them to that portion only. The court's decision comported with what it believed to be the "obvious intention" of the testator.[39]

The oldest Louisiana case addressing the construction of the terms at issue here is *Parkinson v. McDonough*.[40] In *Parkinson*, the court looked to the testator's intention along with the French commentary on article 1044 of the Code Napoléon to determine the meaning of "to be equally divided among them."[41] The court concluded that such language referred to the execution of the disposition and not the disposition itself.[42] The pertinent language in the will is as follows: "I will and bequeath to the orphan children of my old friend Godfrey Duher, and which are now under my charge, and are named Mary, Nancy, James, and Eliza, one share, or one-eighth part of all my property, to be equally divided among them."[43] The plaintiffs contended that the doctrine of accretion was applicable to this clause because one of the legatees had predeceased the testator. The *Parkinson* court opined that:

> In cases of doubtful or equivocal expressions in testaments, when disputes arise on matters to which they relate, it is a primary duty of the courts of justice to ascertain with all possible precision the intention of the testator, and if it be consistent with law, to give it effect. It held that the legacy was conjoint in view of the testator's fatherly affection for the orphaned children.[44]

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[37] *Id.* at *166.*
[38] *Id.* at *165.*
[39] *Id*. at 165-166.
[40] Parkinson v. McDonough, 4 Mart. (n.s.) 246 ; 1826 WL 1595 (La. 1826).
[41] *Id.*
[42] *Id. at 251.*
[43] *Id*. at 248.
[44] *Id*.

It appears the court relied on what it considered "expressions of fatherly affection" contained in the will to conclude the testator intended the four orphans alone should take his property "conjointly."[45]

In *Mackie v. Story*, [46] the United States Supreme Court, applying the rationales set forth in *Parkinson* and *Lebeau*, held that the phrase "to be divided equally between them" to be conjoint in nature.[47] In this case, Norman Story, a resident of New Orleans, died leaving a will, which stated, "I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them."[48] The legatees were the decedent's brothers.[49] Henry predeceased the decedent, leaving children, and Benjamin survived.[50] The issue the Court had to consider in this case was whether the whole legacy accrued to Benjamin or whether only one-half of it did, leaving the other share to lapse and fall intestate.[51]

The Court affirmed the lower court's ruling, finding the legacy was conjoint, and by the right of accretion, the entire legacy accrued to Benjamin, which does not represent what may occur under common law.[52]

> The civil law does not recognize the common-law distinction between joint tenancy and tenancy in common. A gift to two persons jointly, if it takes effect, inures to their equal benefit without any right of survivorship. If one dies, his share goes to his legal representatives. Hence the words 'to be divided equally between them' added to such a legacy only expresses what the law would imply without them.[53]

The Court further reasoned that the use of such a phrase did not alter the character of the legacy, but was merely a description of it.[54]

> Where the whole thing bequeathed is given to two persons, if one of them fails to receive the benefit of the disposition, either because he dies before the testator, or is incapable to take it, or refuses to take it, or because as to him it is revoked, the whole goes to the other legatee by accretion; for the whole was given to both, and it is presumed to be the will of the testator that he shall not die intestate as to any part, but that the whole shall pass by his will; and this, notwithstanding it may be divisible between the two legatees, if received by both. But where an aliquot part is bequeathed to one, and another aliquot part to

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[45] *Id*. at 248-249.
[46] Mackie v. Story, 93 U.S. 589 (1876).
[47] *Id*. at 593.
[48] *Id*. at 589.
[49] *Id.*
[50] *Id.*
[51] *Id*. at 589.
[52] *Id.*
[53] *Id.* at *590.*
[54] *Id.*

> another, then they are separate legacies, and that part which is bequeathed to one is not bequeathed to the other; as, if the testator should say, 'I give one-half of my bank stock to each of my two sons,' or, 'I give my bank stock to my two sons, one-half to each.' Here there is an assignment of parts by the testator himself; and the legacies are separate, and not conjoint. [55]

Several courts have followed this same line of reasoning in successive cases that followed *Story* until the *Succession of Schonekas*.[56] In *Schonekas*, the Louisiana Supreme Court dealt with the issue of using the words "share and share alike." The court decided the case in 1924, by a division of the court composed of three judges, at a time when the court was divided into sections. The court held the term "share and share alike" was an assignment of parts to the co-legatees of the thing bequeathed, and therefore, the legacy was not a conjoint legacy.[57] The court reasoned, "The bequest in question was not manifestly conjoint within the meaning of article 1708 of the Civil Code, 'for it cannot be said, nor is it even contended, that the disposable portion, of which the legacy consists, is not susceptible of division without deterioration.'"[58] It noted further that the legacy was not a conjoint legacy within the meaning of article 1707 of the Civil Code because the testator, in making the disposition, had assigned the parts by the mere use of the language:

> I give and bequeath unto my daughters, Delia Schonekas, wife of C. B. Kern, and Lilly Schonekas, divorced wife of Herman Roos, share and share alike, the disposable portion of my estate; that is so much, as the law will allow me to give to them in addition to what they are entitled to as my children.[59]

The court found that each of the legatees was not called to the legacy for the totality or whole of the estate, but only for half.[60] In other words, "there was no solidarity of vocation or calling between them"… "here the assignation of parts affects the disposition itself, and is, for that reason, principal and dispositive, and not accessorial and regulational."[61]

This decision was binding for four years, until the Louisiana Supreme Court's 1928 decision in *Succession of Wilcox.*[62] In *Wilcox*, the court had to consider the meaning of the following provision of the will: "[T]he remainder of my estate . . . I will and bequeath unto my nieces . . . and to my nephews . . . share and share alike."[63] The court held that the phrase "share and share alike" meant the residue

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[55] *Id.* at 590.
[56] Succession of Schonekas, 99 So. 345, 346 (La. 1924).
[57] *Id.* at 348.
[58] *Id.*
[59] *Id*. at 348-349.
[60] *Id.* at *349.*
[61] *Id.* at 349.
[62] Succession of Wilcox, 116 So. 192, 196 (La. 1928).
[63] *Id.* at 193.

"should be divided" and therefore, should be regarded as conjoint rather than dispositive.[64]

The court ultimately found no difference in the phrases "to be shared equally" and "share and share alike."[65] Hence, each phrase referred to a future execution of the disposition. *Succession of Lambert* ultimately overruled *Wilcox* and subsequent cases (in part at least).[66] *Succession of McCarron*[67] presented the issue of "subtle distinction" wherein the testator used the phrase "to be shared equally."[68] These words are clearly of future import under the jurisprudence endorsing the distinction, and therefore, raise the issue of the continued viability of the distinction.[69] The court, however, rejected the distinction, finding the prior jurisprudence that endorsed the theory based on the testator's intentions.[70] The argument presented in *McCarron* was that the French commentators were in disagreement on the question because the Louisiana Codal Articles in question did not appear in the Code Napoléon.[71] Thus, the court concluded that language of futurity, such as "to be divided equally," may in some cases be interpreted as referring to future execution, but only if doing so will "effectuate the obvious intention of the testator (as expressed elsewhere in the will that the co-legatees should benefit by any lapse as to the part of one)."[72] The court determined the phrase, as used in the testator's will, contained an assignment of parts and was not conjoint, simply because no other language was present indicating how the lapsed legacy was to be distributed.[73]

The *McCarron* court considered the distinction made by the defendant that *Lambert* had essentially overruled two prior cases, *Succession of Wilcox*[74] and *Succession of Maus,*[75] where the language, "share and share alike," was used in the will, and thus did not apply to this case.[76] The court made a great effort not to overrule cases, which contained the language "to be equally divided."[77] According to the defendant, this could only mean the court recognized the difference between a present division of a gift (share and share alike) and a future division of a gift (to be divided equally).[78] The court disposed of the defendant's argument by refusing to overrule *Parkinson* and *Lebeau*.[79]

> However, our recognition in the *Lambert* case of such a distinction did not constitute an approval thereof. We refused to overrule the *Parkinson* and *Lebeau*

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[64] *Id.* at *194.*
[65] *Id.*
[66] Succession of Lambert, 28 So. 2d 1 (La. 1946).
[67] Succession of McCarron, 172 So.2d 63 (La. 1965).
[68] *Id.* at *64.*
[69] *Id.* at *65.*
[70] *Id.* at *65.*
[71] *Id.* at *65.*
[72] *Id.* at 67.
[73] *Id.* at *67.*
[74] Succession of Wilcox, 116 So. 192, 196 (La. 1928).
[75] Succession of Maus, 149 So. 466 (La. 1933).
[76] Succession of McCarron, 172 So.2d 63, 66 (La. 1965).
[77] Succession of McCarron, 172 So.2d 63, 67 (La. 1965).
[78] *Id.*
[79] *Id.* at *67.*

> cases simply because they could be distinguished and it was, hence, unnecessary for us to do so. We were careful, however, to include in the opinion certain language which would preclude any notion that we had approved their reasoning. Thus, we stated: 'It is unnecessary for us to view the instant case, to the consideration of which we return, in the light of the subtle distinction, adopted by some of the French commentators and given affect by this court on numerous occasions, between a division of the gift itself and that pertaining to the execution or enjoyment of it in the future. Neither are we required to determine now whether or not such a distinction be sound and should be continued in our jurisprudence.[80]

Simply stated, the court concluded that if the prior cases meant the phrase "to be divided equally" is not to be construed as an assignment of parts, and differs from the other phrases, then it was not going to follow those cases.[81] It considered such a distinction to be a hard and fast rule of testamentary construction, entirely too "subtle and refined" to stand as the basis for the interpretation of wills; especially in light of the fact that in many, if not most, cases the wills are composed by "persons of ordinary understanding and not by judicial writers."[82] Hence, it is unclear where *Parkinson* and *Lebeau* stand in terms of precedence, since the court, although not expressly overruling them, has not completely endorsed their holdings.

Following *McCarron*, each court was left with the task of determining the intent of the testator where the testament contained words of futurity. In *Hopson v. Ratliff*,[83] the decedent left the residue of her estate to her sister and three nieces "to be divided among them equally" after particular legacies were satisfied. Two other intestate heirs were left out of the will. The sister predeceased the decedent. The court noted the "state of the law" appeared to be that the phrase "share and share alike" is incapable of creating a joint legacy, while the phrase "to be equally divided among them" may create a joint legacy, but only to the extent such interpretation will effectuate the "obvious intention" of the testator.[84] Having found the language in the will was ambiguous, since the intention of the testator was not "obvious," the court held it was not a conjoint legacy.[85] In relying on former Louisiana Civil Code article 1712 for guidance in interpreting the testator's intent, the court looked to the broad question of where the testatrix wanted her property to go, rather than whether or not she intended the legacy to be joint.[86] The court reasoned that because the will contained no language regarding where her property was to go in the event any of the named legatees were to predecease her,

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] Hopson v. Ratliff, 426 So.2d 1377, 1378 (La. Ct. App. 1983).
[84] *Id.* at 1380.
[85] *Id.* at 1381.
[86] *Id.* at 1380.

then determining how she wanted it distributed is mere speculation.[87] Accordingly, when words of futurity are used, one must apply the "obvious intention" standard of the *McCarron* case, (i.e., one must look to the entire will for language regarding the testator's intent on how to dispose of the lapsed legacy.)[88] Application of this reasoning to cases involving the disposition of the "entire estate" to named individuals "to be shared equally" should explicitly and expressly demonstrate that the testator intended for his or her property to be inherited only by those persons mentioned in his or her will.

II. *SUCCESSION OF LAIN* AND THE PROBLEM OF JOINT AND SEPARATE LEGACIES: THE RETURN TO PRE-REVISION, POST-*LAMBERT* CONFUSION

It appeared the ambiguities expressed in prior cases were finally resolved, until the 2014 case of *In Re Succession of Lain.*[89] This case presents some interesting issues in the context of joint and separate legacies. The facts presented in *Lain* are all too representative of what happens in many successions. In this case, Mr. Willie James Lain and Mrs. Rosie Mae Lain (husband and wife) executed separate reciprocal statutory wills in 1981, each leaving his or her entire estate to the other. Rosie Mae died in 2006, but her will was not immediately probated. Willie James sought the assistance of a notary to execute a new notarial will. The new will—which was executed before the notary and two witnesses, who signed an attestation clause on July 26, 2006—made only one bequest which read as follows: "I revoke all wills that I have previously made . . . I leave my entire estate to be shared equally among my natural and adopted children who are Mary Lee Lain . . . and John Simon."[90]

John Simon died on July 16, 2011. Willie James Lain never updated the testament before his death on June 7, 2012. The trial court ordered the probate of the 2006 will as well as a letter written by the decedent in 2012 to Nelda Lawrence. Nelda claimed to be the child of John Simon, who was purportedly adopted by Willie James Lain.[91] The trial court found the letter to be a codicil to the notarial will and that John Simon was the adopted child of Willie James Lain, which entitled Nelda to the lapsed legacy[92] pursuant to Louisiana Civil Code article 1593.[93] The Louisiana Court of Appeal for the Second Circuit reversed the judgment, finding the letter was not a valid codicil[94] and that Nelda Lawrence failed to prove Willie James

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[87] *Id.* at *1381.*
[88] *Id.* at 1379.
[89] In re Successions of Lain, 147 So.3d 1204, 1206 (La. Ct. App. 2014).
[90] In re Successions of Lain, 147 So.3d 1204, 1206 (La. Ct. App. 2014).
[91] *Id.* at *1206.*
[92] *Id.* at *1209.*
[93] "If a legatee, joint or otherwise, is a child or sibling of the testator, or a descendant of a child or sibling of the testator, then to the extent that the legatee's interest in the legacy lapses, accretion takes place in favor of his descendants by roots who were in existence at the time of the decedent's death." LA. CIV. CODE art. 1593 (1997).
[94] In common practice, a "**codicil**" is merely an addition to a will and part of it. Succession of Patterson, 177 So. 692, 694 (La. 1937); Succession of Manion, 79 So. 409 (La. 1918).

Lain ever formally adopted John Simon.[95] The court, after considerable discussion, stated the lapsed legacy to John Simon should fall to the intestate heirs of Willie James Lain.[96] The court also noted that the rulings of the Louisiana Supreme Court in *Succession of Lambert*[97] and *Succession of McCarron*,[98] remained intact even after revision of the statutes. Hence, it noted the jurisprudential rule that a "legacy made to multiple people 'to be shared and shared alike' or 'shared equally' is a designation of shares and thus a separate legacy, unless the testator clearly had a contrary intent."[99] The case, however, was remanded to the trial court for a determination of the intestate heirs of the decedent, Willie James Lain, and a "determination of the effect of the lapsed legacy of John Simon."[100] This ruling begs the question of whether the issue of the effect of the lapsed legacy was properly before the court. In other words, the question is why would the Second Circuit remand the case and ask the trial court to determine the effect?

Although a bit opaque in light of recent jurisprudence, the rule is clear that where a bequest in a testament is to more than one individual and the testator provides that his "entire estate is to be shared equally" among them, such language constitutes a universal legacy made jointly to each of them. Such a bequest bestows the entirety of the estate upon both legatees, allowing accretion to take place in favor of the remaining legatee, where one of them has predeceased the testator. This, of course, assumes the predeceased legatee is not a member of the preferred class created by the exception of Louisiana Civil Code article 1593. It appears a bequest such as this would indicate the testator's intent to favor only those individuals who were identified by name to inherit his property. The fact that the testator stated he wanted them to share the estate equally should be seen as merely a statement of futurity as it relates to execution of the disposition and should not operate to defeat the obvious purpose and intent of the testator.

There is much statutory, as well as jurisprudential, support and authority for this proposition. For instance, Louisiana Civil Code article 1585 provides, "[a] universal legacy is a disposition of all of the estate, or the balance of the estate that remains after particular legacies. A universal legacy may be made jointly for the benefit of more than one legatee without changing its nature."[101]

The comments to Louisiana Civil Code article 1585, often referred to as *dicta*, provide a great deal of insight into the legislative intent of this revision. Pursuant to the comments, it is well established, jurisprudentially, that one may leave the entire estate or the residue to more than one legatee without destroying the universality of the legacy if the legatees are "conjoint."[102] There is an example, whereby the testator bequeaths his entire estate to A, B,

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[95] *Id.* at *1214.*
[96] *Id.* at *1214.*
[97] Succession of Lambert, 28 So. 2d 1 (La. 1946).
[98] Succession of McCarron, 172 So. 2d 63 (La. 1965).
[99] *Lain*, 147 So. 3d at 1211.
[100] *Lain*, 147 So. 3d at 1215.
[101] LA. CIV. CODE art. 1585.
[102] *Id.*

and C conjointly.[103] This is a universal legacy, although the practical effect of such a legacy is to give each of them one-third of the estate. Because it is "conjoint," if one predeceases the other two, his share will accrete to the two remaining legatees.[104]

Although Willie James Lain failed to use the term "joint," it can be argued his intent was evidenced by the words "my entire estate to be shared equally among my natural and adopted children."[105] Mary Lee Lain and John Simon were the only named legatees in the will, and according to the clear language of the will, they were the sole beneficiaries of the decedent's entire estate. Therefore, a persuasive argument can be made that the legacy was indeed a universal legacy (i.e., a legacy of the whole estate to each of them or if one of them died then the other should enjoy the entire estate alone).[106] The revision to Louisiana Civil Code article 1588 made clarifications in the law but failed to completely resolve the issue. The *Succession of Lambert*[107] and the cases following it hold that conjointness is destroyed if the testator uses a phrase such as "share and share alike" or "to be equally divided between them," which does no more than re-state the legal consequences of his disposition. Although the revision to article 1588 does not overrule *Lambert* and its following cases, it did eliminate some of the harshness of the decision. Under this revision, if the testator assigns shares, the legacy is presumed to be "separate," as opposed to joint, so the same result will be reached as under the *Lambert* decision. The testator may nonetheless make the bequest joint in nature by using appropriate language to do so, and the mere use of the phrase "share and share alike" should not preclude that result. This provision and the coordinating provisions of Louisiana Civil Code article 1593 seemingly eliminate some of the harshness of the *Lambert* rule.

III. RESOLVING THE ISSUE OF JOINT AND SEPARATE LEGACIES: LESSONS FOR *SUCCESSION OF LAIN*: WHERE DO WE GO FROM HERE?

The review of *Lain* by the Louisiana Court of Appeal, Second Circuit presents a tremendous opportunity for the overruling of *Lambert*. The issue may be presented squarely to the Louisiana Supreme Court for clarification and final resolution after almost seventy years of confusion.

A. Reviewing Sources of Law

Louisiana Civil Code articles 1585, 1589, 1590, 1592, 1593 and 1595 should be closely examined by the Louisiana Court of Appeal, Second Circuit in *Lain* in conjunction with the clear language of Willie James Lain's testament. Pursuant to Louisiana Civil Code article 1585, "[a] universal legacy is a disposition of all of the estate, or the balance of the estate that remains after particular legacies. A

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[103] *Id.*
[104] *Id.*
[105] *In re* Successions of Lain, 147 So. 3d 1204, 1206 (La. Ct. App. 2014).
[106] *In re* Succession of Linder, 92 So. 3d 1158 (La. Ct. App. 2012); Succession of Peters, 189 So. 122 (La. 1939).
[107] Succession of Lambert, 28 So. 2d 1 (1946).

universal legacy may be made jointly for the benefit of more than one legatee without changing its nature."[108] Louisiana Civil Code article 1589, provides in pertinent part:

> A legacy lapses when:
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> (1) The legatee predeceases the testator.
>
> (2) The legatee is incapable of receiving at the death of the testator.
>
> (3) The legacy is subject to a suspensive condition, and the condition can no longer be fulfilled or the legatee dies before fulfillment of the condition.
>
> (4) The legatee is declared unworthy.
>
> (5) The legacy is renounced, but only to the extent of the renunciation.
>
> (6) The legacy is declared invalid.
>
> (7) The legacy is declared null, as for example, for fraud, duress, or undue influence.[109]

Pursuant to Louisiana Civil Code article 1590, "[t]estamentary accretion takes place when a legacy lapses.[110]" Accretion takes place according to the testament or, in the absence of a governing testamentary provision, according to the following articles.[111] Pursuant to Louisiana Civil Code article 1592, "[w]hen a legacy to a joint legatee lapses, accretion takes place ratably in favor of the other joint legatees, except as provided in the following article."[112] Louisiana Civil Code article 1593 provides the following:

> If a legatee, joint or otherwise, is a child or sibling of the testator, or a descendant of a child or sibling of the testator, then to the extent that the legatee's interest in the legacy lapses, accretion takes place in favor of his descendants by roots who were in existence at the time of the decedent's death. The provisions of this Article shall not apply to a legacy that is declared invalid or is declared null for fraud, duress, or undue influence.[113]

And finally, Louisiana Civil Code article 1595 provides:

> All legacies that lapse, and are not disposed of under the preceding Articles, accrete ratably to the universal legatees. When a general legacy is phrased as a residue or balance of the estate without specifying that the residue or balance is the remaining fraction or a certain portion of the estate after the other general legacies, even though that is its effect, it shall be treated as a universal legacy for purposes of accretion under this article.

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[108] LA. CIV. CODE ANN. art. 1585.
[109] LA. CIV. CODE ANN. art. 1589 (2012).
[110] LA. CIV. CODE ANN. art. 1590 (2012).
[111] LA. CIV. CODE ANN. art. 1590 (2012).
[112] LA. CIV. CODE ANN. art. 1592 (2012).
[113] LA. CIV. CODE ANN. art. 1593 (2012).

According to article 1592, where the legacy is joint, the accretion takes place in favor of the remaining legatee when one of them predeceases the testator, except as provided in article 1593.[114] This article provides for the creation of a favored class, which gives rise to an exception to the general rule of accretion.[115] Where, as in *Lain,* the court determined the legatee was not the child or sibling of the testator, article 1593 will not apply.[116] Thus, failing proof that the predeceased is a member of the favored class (i.e., the "child or sibling" of the testator) the general rule of accretion among joint legatees should apply. The natural effect of this would allow the remaining legatee to enjoy the whole of the legacy to the exclusion of all others.

Such a disposition would reflect the intent of the testator to leave his entire estate to the named legatees jointly, the predecease of one causing accretion to the remaining legatee pursuant to articles 1585 and article 1595, who for all practical and legal purposes is a universal legatee under the will. To come to a contrary conclusion under circumstances such as those presented in *Lain* would circumvent basic legal principles set forth in the Civil Code.

As stated at the outset of this article, there are three types of legacies: universal, general or particular. A universal legacy is a disposition of all of the estate, or the balance of the estate remaining after particular legacies.[117] A general legacy is a disposition by which the testator bequeaths a fraction or certain proportion of the estate, or a fraction or certain proportion of the balance of the estate remaining after particular legacies. [118] The disposition of the decedent's "entire estate to be shared equally among my natural and adopted children who are Mary Lee Lain . . . and John Simon," as set forth in *Lain* was in fact, a disposition of all of the testator's property to each one of them. When one of them died, the remaining legatee should have received the whole. The 1997 Revision Comments to article 1585 noted:

> (b) The jurisprudence has recognized that *leaving the entire estate or the residue of the estate to multiple legatees does not destroy the universality of the legacy, provided that the legatees are conjoint legatees.* Thus, a legacy of the entire estate to A, B and C conjointly is a universal legacy, even though its practical effect is to leave one-third of the estate to A, one-third to B and one-third to C. By the nature of the legacy's being conjoint, if A predeceases B and C, A's share of the estate accretes to B and C. The new code article uses the word "joint" in referring to such legatees, which is consistent with prior jurisprudence and with the new terminology by which the former "conjoint" legacy is now called a "joint" legacy.[119]

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[114] LA. CIV. CODE ANN. art. 1593 (2012).
[115] *Id.*
[116] LA. CIV. CODE ANN. art. 1593 (2012), comment (b).
[117] LA. CIV. CODE ANN. art. 1585 (2012).
[118] LA. CIV. CODE ANN. art. 1586 (2012).
[119] LA. CIV. CODE ANN. art. 1588

B. Rectifying the Succession of Lain: Analysis on Appeal

Lambert and its progeny appear to be out-of-step with the Legislature's intent, as provided for in the most recent revision to the articles treating of joint legacies. The cases allow significant legal consequences to turn on a simple phrase, which only restates the legal consequences of the disposition. In other words, under the *Lambert* theory, where a testator bequeaths a piece of property in its entirety to more than one person, the fact that she says they are to "share it equally" will change the disposition of it if one of the legatees predeceases the testator. This is an apparently harsh legal consequence, which leaves one begging the question whether most of these "ordinary" people, who are not legal scholars, intended that if one of their legatees does not survive them, whether the property should go to someone that the "ordinary" person left out of the will. Do these "ordinary" testators actually intend for the mere use of the phrase "to be shared equally" to entail such a harsh consequence? The more reasonable conclusion would be that such use of fancy words (often used to assure the client that his wishes of equality among his successors will be honored) should not cause such a harsh result. This is especially reasonable, since the legacy would be joint in the absence of these words and accretion would accrue in favor of the remaining legatee.

Hence, the proper test for determining the testator's "obvious intention" is to look to the language of the will itself and give effect to those provisions of the will that are consistent with the law. One proposition has been restated in prior jurisprudence; that where effect can be given to the testator's will, it should be given, especially in light of the fact that "the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament."[120]

The previous quotation from *Lambert* indicates the court seeks to uphold the desires and intent of the testator. Where the clear language of the testament shows the decedent's intent, then it should be followed. This should also follow in cases such as that of Willie James Lain (who appears to be an "ordinary" lay person from the reading of his letter submitted into evidence[121]), and who also apparently intended his entire estate to pass via his Last Will and Testament to only those persons he considered his "natural and adopted children who are Mary Lee Lain . . . and John Simon." To hold otherwise would be to disregard the plain language of the statute relating to interpretation of testaments, as well as a long line of jurisprudence, which supports a finding that "to be shared equally" can create a joint legacy. The revision to article 1588 was made for the purpose of removing the harshness of its application and allowing jointness to be found in some situations where the testator has used the phrase "to be shared equally" or "share and share alike." The legislature should have taken the additional step of overruling *Lambert,* in an effort to clarify the intent of the statute once-and-for-

[120] Succession of Lambert, 28 So. 2d 1 (La. 1946).
[121] *Lain*, 147 So. 3d at 1208.

all. A suggested amendment to the article would be a revision to read as follows:

> A legacy to more than one person is either joint or separate. It is separate when the testator [specifically] ***assigns shares*** [in terms of a number], and it is joint when he does not. [The mere use of language such as "to be shared equally" or "share and share alike" shall not automatically destroy the jointness of the legacy; unless expressly stated by the testator.

Such a revision to article 1588 by the legislature should be made to solidify the proposition that where a testator leaves property to two or more persons and uses language that does not directly assign shares or parts, but merely suggests the idea of sharing among the legatees, the legacy must be found to be joint. This is an excellent case, ripe for review by the Louisiana Supreme Court, to provide certainty on the issue.

CONCLUSION

The statutory and jurisprudential history of legacies of the same property left to more than one individual has been as varied and complex as testaments drafted by the most skilled lawyers. The law has devolved from statutes following common law construction to those appearing to follow French commentators and their "subtle distinction" theories, and we have come back to the "obvious intention of the testator," after looking to the entire will for language regarding the testator's intent.[122] It seems that instead of sparring over phrases like "to be shared equally" or "share and share alike," one should be looking to the disposition of the "thing" itself. Where a testator has left the entirety of the thing to named individuals, then that should be the disposition of it—if one of the individuals dies, accretion should take place in favor of those remaining—unless the predeceased individual should be a member of the most favored class under article 1493.[123] This would be the most reasonable conclusion to reach in the *Lain* case, where the disposition in the testament of Willie James Lain stated that he leaves his "entire estate to be shared equally among my natural and adopted children who are Mary Lee Lain . . . and John Simon." Clearly, this should be a disposition of the whole estate to Mary Lee Lain and John Simon in the form of a joint legacy. The predecease of John Simon would cause an accretion of his share to Mary Lain, given that Mr. Simon was found not to be a member of the "most favored class" after all. Using the "obvious intentions" of the testator test as handed down in *McCarron,* which also followed *Lambert,* one must conclude Willie James Lain intended to leave all of his property to Mary and John. To allow intestate heirs to take part in a succession where the testator never contemplated leaving an item of his property to them, would be to ignore the "obvious intention" of the decedent, which was to favor his "natural and adopted" children.

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[122] *Id. at 1214.*

[123] LA. CIV. CODE ANN. art. 1593. A child or sibling of the testator who was in existence at the death of the testator.

As indicated in the comments to the statutes in question, the revisions of these articles were intended to clarify the law, to the extent that the simple usage of such phrases should no longer be allowed to automatically defeat "jointness" of a legacy. The revision, however, fails to fully resolve the issue because it left alive and well the holding of *Lambert*. Where the language of the testament is clear, there should be no ambiguity. The question of the nature of the legacy left to more than one person should turn on the testator's "obvious intention" as expressed in his will, not as speculated by others.