SUCCESSIONS AND BASIC ESTATE PLANNING

What is a succession?

A succession is the transmission of the *estate* of the deceased to his successors. Under Louisiana law, an estate includes all property, rights, and obligations that a person leaves after his or her death, and all debts of the deceased including funeral expenses and attorney fees related to the succession process.

TYPES OF SUCCESSIONS

Intestate Succession: Simple Putting in Possession

Does not require administration of the estate.

An *intestate succession* is when the deceased died with leaving a will or there is a will that does not disposed of all his or her property. A full administration of the estate will not be required if the succession is "*relatively free of debt*", *all heirs request that the succession be completed without an administration* and *the heirs accept the estate unconditionally*.

1. **Free of debts**: Debts of the estate that are small compared to the assets, funeral expenses, attorney fees related to opening the succession, last medical bills.
2. **Heirs**: (a) heirs who are mentally competent and except the; (b) the representative of heirs who are not mentally competent; and (c) the surviving spouse of the deceased.
3. **Unconditional Acceptance**: Heirs are responsible according to their portion of the estate for debts that creditors apply for and prove within time required by law.
4. **Other Requirements**:
    a. Petition to be Placed in Possession
    b. Death Certificate
    c. Affidavit of Death, Heirship and Domicile
    d. Detail Descriptive List
    e. Judgment of Possession

Intestate Full Administration

A *full administration* requires someone to be appointed as administrator of the estate. A succession representative is a fiduciary with respect to the succession, and ***shall have the duty of collecting, preserving, and managing the property of the succession in accordance with law***. He shall act at all times as a prudent administrator and shall be personally responsible for all damages resulting from his failure so to act. Generally, he/she may be required to post security unless the heirs agree that he/she is an independent administrator. An independent administrator is not required to seek court

approval. However, he/she must act prudently and within the law. Administrator will oversee the transfer of estate assets to the heirs and the closing of the succession.

Distribution of Property in an Intestate Succession

Property of the estate is either community or separate property. Community property is property a couple acquire during their marriage. Separate property is property acquired by a spouse before marriage, property acquired by a spouse with separate things or property acquired by a spouse by inheritance or donation to him/her individually. Please see LA Civil Code Article 2341 for complete list of separate property.

Below is the legal distribution of property is deceased does not leave a will.

1. *Surviving spouse* = ½ of community property and a lifetime usufruct of the deceased's ½ of community property. That is, right to use and enjoy until surviving spouse's death or remarriage.

2. *Children* = ½ naked ownership of deceased's ½ of community property (subject to surviving spouse's usufruct). This includes children born of the marriage with surviving spouse and all other children that are the deceased via affiliation. If child of the deceased died before the deceased, that child's children will inherit his/her portion. Children will inherit outright the deceased's separate property.

3. *No Children* = Surviving spouse inherits both community and separate property.

4. *No children or surviving spouse* = Deceased's surviving parents.

5. *No children or parents* = Siblings of deceased.

6. *No children, parent or siblings* = Other collateral kin (grandparents, uncles, aunts, cousins).

Testate Succession

A testate succession is when the deceased leaves a will indicating how he or her wants his/her property distributed at death. Louisiana recognizes two types of wills – notarial will and olographic will.

Notarial Will - This type will must be executed and signed in the presence of a notary and two witnesses.

Requirements:

1. Testator declares it to be his last will and testament revoking all other wills.
2. Must be signed by the testator at the bottom of each page and dated.
3. State testator's desires regarding his property both separate and community.
4. Name of spouse and children, and children birth dates. Children below the age of 24 and of any age who because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates are forced heirs. That is, they cannot be excluded from your will. The forced portion of one forced heir is ¼ of the estate; two or more is ½ of the estate.
5. Statement of testator declaring he/she has signed in the presence of notary and undersigned witnesses.
6. Selecting the executor of your estate and dealing with creditors.
7. Statement of witnesses declaring that the instrument is *the testator's* testament and he/she has signed it at the end and on each page, and in the presence of the *testator* and each other we have hereunto subscribed their names the date of signing.

Executor of the Estate

The will designates a person(s) who serves as the executor of the estate. The executor has the responsibility of ensuring that the commands of the Will are met. He/she shall have the duty of collecting, preserving, and managing the property of the succession in accordance with law. He/she shall act at all times as a prudent administrator and shall be personally responsible for all damages resulting from his failure so to act. It is important to select a person who is trustworthy. Also, an alternative should be listed in the event the first choice refuses the appointment or is incapable of performing the duties of executor.

We suggest that you select a person who can serve as an independent administrator. An independent administrator is not required to seek court approval for actions taken on behalf of the estate and generally he/she is not required to post a security bond.

Probate Proceedings

The will must go through probate proceedings. Any person with an interest in the succession may petition a court for probate of the will. La. C.C.P. art. 2851.The petition to open the succession or probate a Will is filed in the parish where the deceased was domiciled at the time of his/her death. Some important documents that you will need to open a succession are death certificate, Will, petition for possession, detailed descriptive list of deceased's assets and debts, affidavit of heirship, notice to creditors and judgment of possession. Letters of administration are issued to the executor of the estate by the clerk of court office. Once the executor has completed his/her legally required duties and proper documents are filed a judgment of possession will be signed by the court. This judgment only places the heirs in possession of their designated portion of the estate. If items are donated to more than one heir, each heir becomes an undivided owner of the thing (land, house, etc.).

Olographic Testaments

An olographic will is one entirely written, dated and signed in the testator's handwriting. La. Civ. Code art. 1575. The date may appear anywhere in the testament. The testator must sign his name at the end of the testament. The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament. Additions and deletions on the testament may be given effect only if made by the hand of the testator. If anything is written by the testator after his signature, the testament shall not be invalid for that reason. Such writing may be considered by the court as part of the testament. The olographic testament is subject to no other requirement as to form. It must go through probate by the court.

Small Affidavit Succession

An estate that is worth less than $125,000 is considered a small succession and can be opened and properly distributed by an Affidavit of Small Succession. This does not require a Court proceeding. The affidavit must meet the requirements of Louisiana law. It can be done for a testate succession or intestate succession.

Living Trust

Establishing a trust is an alternative to a Will and the probate process. *A trust is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another. Property susceptible of private ownership, and any interest in such property may be transferred in trust.* A living or revocable trust is created while the person is alive and funded with the assets that are chosen to transfer into it. The trustee has full power to manage these assets. But using a trust involves a complex set of tax rules and regulations. Before moving forward with a trust, consider working with a professional who is familiar with the rules and regulations. A living trust will also designate a beneficiary, or beneficiaries, much like a will, to whom the assets are structured to automatically pass upon your death. If you create a revocable living trust, you may change the terms of the trust, the trustee, and the beneficiaries at any time. You can also terminate the trust altogether. A living trust provides a simple private transfer method as an alternative to court probation which can be costly and lengthy. The cost involved in the setting up a living trust can range into the thousands of dollars depending on your assets. All assets are not easily transferred into a living trust. ***Please consult a legal advisor who is knowledgeable in respect to living trusts before making it a part of your estate planning.***

Living Will

Without a living will love ones are left to make difficult decisions about a person who has become incapacitated and unable to express his or her desires regarding medical care. It allows a person to make a declaration instructing his physician to withhold or withdraw life-sustaining procedures or designating another to make the treatment decision and make such a declaration for him, in the event he is diagnosed as having a terminal and irreversible condition. The form required to draft a living will can be found on the Louisiana Secretary of State website.

Power of Attorney

The general/durable power of attorney/mandate allows you to appoint another person of your choosing to make financial and day-to-day decisions and to manage your affairs in the event you become unable to do so. If you become incapacitated without this legal document, then you and your family will be involved in a court proceeding known as an interdiction. This is the court proceeding where a judge determines who should make

these decisions for you under the ongoing supervision of the court. The cost of having a POA is much less expensive than the alternative court proceeding.

Types:

- Durable Power of Attorney: *agent becomes you for the tasks stated in the document*.
- Springing Power of Attorney: *the POA becomes effective when certain conditions are met*.
- Limited Power of Attorney: *agent's authority is limited to particular task*.
- Financial Power of Attorney: *allows agent to financial decisions - banks prefer it*.

Drawbacks:

- Durable: easily abused
- Springing: argument about conditions and whether they were met

These POA's are ineffective at the grantor's death.

Health Care Power of Attorney

A health care power of attorney has become an important part of estate planning. It is different from the Living Will. When in the opinion of the declarant's appointed Agent and attending physician, the declarant is unable to make or communicate a choice regarding a particular health care decision the Agent is authorized to make the decision. The document must be prepared and signed while you are competent, and it is not affected by your later disability or incapacity. The document can give your agent authority to make specific healthcare decisions, or the authority to make any and all healthcare decisions you could make if you were able, including life sustaining procedures. However, as long as you can make your own decisions, you and not your agent, have the authority to make your own treatment decisions.

Funeral Declaration

This is a declaration of how you want your body and funeral handled after you die. Getting a notarized document stating your wishes is highly recommended. This prevents confusion and provides clear directions. If you fail to leave a declaration regarding your memorial the below statute applies.

§655. Right of disposing of remains; military personnel; limitation of liability

A. Except as provided in Subsection F of this Section, *unless other specific directions have been given or the designation of a specific person to control disposition has been made by the decedent in the form of a notarial testament or a written and notarized declaration, the following persons, in the priority listed, have the right to control and authorize the interment of a deceased person, as defined in R.S. 8:1*:

(1) The person designated to control disposition by the decedent in the form of a notarial testament or a written and notarized declaration.

(2) The surviving spouse, if there is no pending petition for divorce filed by either spouse prior to the death of the decedent spouse.

(3) A majority of the surviving adult children of the decedent.

(4) A majority of the surviving adult grandchildren of the decedent.

(5) The surviving parents of the decedent.

(6) A majority of the surviving adult siblings of the decedent.

(7) A majority of the surviving adult persons respectively in the next degrees of kindred as established in Civil Code Article 880 et seq.

**This document is meant to provide basic information regarding Louisiana successions and estate planning. Please consult an attorney to guide you through the process of estate planning, wills and successions.*

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STATE OF LOUISIANA
PARISH OF

STATE OF LOUISIANA

LIVING WILL DECLARATION

Be it known that on 4th day of November before me, _____, a notary public duly qualified in and for the above stated state and parish, and in the presence of the named and undersigned competent witnesses, personally appeared _____, a person over the age of majority and a resident of East Baton Rouge Parish, Louisiana, "declarant," in this declaration, who declared:

I, _____, being of sound mind, willfully and voluntarily make known my desire that my dying shall not be artificially prolonged under the circumstances set forth below and do hereby declare.

If at any time I should have an incurable injury, disease or illness, or be in a continual profound comatose state with no reasonable chance of recovery, certified to be a terminal and irreversible condition by two physicians who have personally examined me, one of whom shall be my attending physician, and the physicians have determined that my death will occur whether or not life-sustaining procedures are utilized and where the application of life-sustaining procedure would serve only to prolong artificially the dying process, I direct (initial one only):

___ That all life-sustaining procedures, including nutrition and hydration, be withheld or withdrawn so that food and water will not be administered invasively.

___ That life-sustaining procedures, except nutrition and hydration, be withheld or withdrawn so that food and water can be administered invasively.

I further direct that I be permitted to die naturally with only the administration of medication, or the performance of any medical procedure deemed necessary to provide me with comfort care. In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this declaration shall be honored by my family and physician(s) as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from such refusal.

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Thus, done and passed on the ____day of _____, 20___ in the presence of the undersigned competent witnesses who have signed their names together with the declarant and me, notary.

Parish of _____, State of Louisiana.

_____
DECLARANT:
_____

The declarant has been personally known to me, and I believe him/her to be of sound mind.

WITNESSES:

_____
Sign above and print name below

_____
Sign above and print name below

_____
Notary
Notary or Bar Roll Number
My commission expires _____

<u>LIVING WILL (another option)</u>

PARISH OF

STATE OF LOUISIANA

LIVING WILL DECLARATION

I, _____**,** being of sound mind, willfully and voluntarily make known my desire that I will still receive standard medical care, such as pain management, antibiotics, food cardiopulmonary treatments or IV fluids:

If at any time I should have an incurable injury, disease or illness, or be in a continual profound comatose state and there is reasonable chance of recovery, certified by two physicians who have personally examined me, one of whom shall be my attending physician, and the physicians have determined reasonable life-sustaining procedures are utilized and where the application of life-sustaining procedure would serve to prolong my life, I direct (initial one only):

____That all life-sustaining procedures including intubation, advanced airway interventions, mechanical ventilation and all other lifesaving mechanism be used to preserve my life. Also, nutrition and hydration shall be administered invasively.

In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this declaration shall be honored by my family and physician(s) as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from such refusal.

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Thus, done and passed on the ____day of _____, 20___ in the presence of the undersigned competent witnesses who have signed their names together with the declarant and me, notary.

Parish of _____, State of Louisiana.

_____
DECLARANT:
_____

The declarant has been personally known to me, and I believe him/her to be of sound mind.

WITNESSES:
_____

Sign above and print name below

_____
Sign above and print name below

_____
Notary
Notary or Bar Roll Number

My commission expires _____