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# THE MYLOUISIANASUCCESSION.COM GUIDE TO LOUISIANA SUCCESSIONS AND PROBATE

Second Edition



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## INTRODUCTION

This guide gives straightforward answers to many questions that people have about Louisiana successions and probate. In it you will learn:

- Basic definitions relating to Louisiana successions, including plain English explanations for some of the legal jargon you will encounter
- How to tell whether a court proceeding is required
- How to deal with small estates under Louisiana law
- What types of Louisiana succession proceedings are available to you
- Whether the succession can be simplified through independent administration
- Obtaining a Judgment of Possession over a deceased person's property
- Ancillary successions for estates that have been handled in other states
- Whether there are any alternatives to a Louisiana succession that could apply
- How to determine if a Last Will and Testament is valid under Louisiana law
- How to probate a Last Will and Testament in Louisiana
- How to handle a Louisiana estate if there is no Last Will and Testament
- The responsibilities of an executor or administrator under Louisiana law
- How to apply Louisiana community property law to an estate
- Forced Heirship and spousal usufructs under Louisiana law
- Laws relating to Louisiana inheritance tax, estate tax, and gift tax

This guide is divided into short chapters to help you find answers to your questions as quickly as possible. Let's get started.

## CHAPTER 1: WHAT IS SUCCESSION?

Louisiana law uses the word “succession” to refer to the probate process. A succession is a process for distributing the assets of a deceased person to the people or organizations that are entitled to the assets.

So if a “succession” is the same thing as “probate,” why the different terminology? The difference has to do with the way Louisiana law developed.

The law of most states is based on a framework of earlier court opinions known as common law. Louisiana took a different path, choosing to use a civil law system that has its roots in French and Spanish codes.

Because of the differences in origin, Louisiana law uses different terms to refer to various legal concepts. The concepts themselves, though, are not substantially different.

### WHAT IS AN ESTATE?

The term *estate* is usually used to refer to the property that a person owned at death. Under Louisiana law, an estate includes all of the property, rights, and obligations that a person leaves after his or her death, as well as rights and obligations that don't arise until after death.

### WHAT IS THE PURPOSE OF A SUCCESSION?

The purpose of succession is to provide *clear* or *marketable* title to a deceased person's assets. After the succession process is complete, the individuals or organizations that end up with the assets can sell them, take out loans against them, and otherwise freely deal with the assets.

Successions are often required to give assurance to third parties (such as financial institutions or buyers). As part of the succession, the court will issue a Judgment of Possession that transfers title to the decedent's assets. This court involvement reassures third parties that a person who claims to own a deceased person's property is a true owner.

Common reasons for opening a succession include:

- **Clearing Title to Real Estate.** Louisiana successions are often necessary to clear title to real estate (called *immovable property* in Louisiana). Without a succession, a potential buyer, lender, or other third party doesn't really know who owns the property.
- **Access to Bank Accounts.** With few exceptions, a bank will require a succession before it will transfer the account of a deceased account holder to anyone else. In fact, because of the strict privacy rules governing banks, most banks require court documents before discussing the matter with a person's heirs.

## TESTATE VS. INTESTATE SUCCESSIONS

A Louisiana succession can be either *testate* or *intestate*. A succession is *testate* if the decedent left a will that is valid under Louisiana law. A succession is *intestate* to the extent that it is not a testate succession. Intestate successions could include, for example:

- Successions where the decedent did not leave a valid will;
- Successions in which the decedent had a will, but it was only partially valid or only disposed of a part of his or her property.

**Note:** In keeping with its tradition of standing out, Louisiana law uses the word *testament* to refer to a Last Will and Testament. But since most people use the word *will* to refer to a Last Will and Testament, we'll stick with that term in this guide.

## IS A LOUISIANA SUCCESSION ALWAYS NECESSARY?

Louisiana successions are not always necessary. A lot depends on what assets the deceased person owned and how they are titled.

Some assets – such as annuities and IRAs, insurance policies, and certain retirement plans – are not part of the Louisiana succession. These non-probate assets pass automatically to the named beneficiary, without the need for court involvement.

**Note:** This is so even if the deceased person left a Last Will and Testament that differs from the beneficiary designations. The beneficiary designations will supercede the Last Will and Testament.



## CHAPTER 2: IS A COURT PROCEEDING REQUIRED?

The first step in any legal matter involving a deceased person (decedent) is to determine whether a Louisiana succession proceeding is necessary. This Chapter provides an analysis to help make this determination.

### DID THE DECEDENT OWN SUCCESSION PROPERTY IN LOUISIANA?

It is important to determine whether the decedent owned property that could require a succession in Louisiana. If, for example, all of the decedent's property is located in another state, it may be more appropriate to open the estate proceeding in that state. If only some assets are located in Louisiana but the bulk of the estate is in another state, a Louisiana ancillary probate may be appropriate. And if the decedent didn't own any succession assets, no estate proceeding will be required.

Certain types of assets are not considered part of a Louisiana succession. These "non-probate" assets would include annuities, IRAs, life insurance policies, and qualified retirement plans with named beneficiaries. If the estate consists exclusively of non-probate assets, a succession should not be required.

**Note:** If any non-probate assets are left to someone other than the surviving spouse, it is important to analyze the assets under Louisiana's community property rules.

### DOES THE ESTATE QUALIFY FOR ONE OF THE ALTERNATIVES TO A JUDICIAL SUCCESSION?

Louisiana provides five alternatives to the judicial succession process. These alternatives apply only in very specific circumstances.

#### LOUISIANA SMALL ESTATE AFFIDAVIT

Louisiana law allows the transfer of the assets of a small succession by affidavit, without a formal court proceeding. In this context, "small" means "less than \$75,000." If the value of the deceased person's Louisiana property exceeds \$75,000, the Louisiana small succession procedure will be unavailable. This \$75,000 limitation does not apply if the decedent has been deceased for more than 25 years.

The small succession law allows third parties to rely on the affidavit to transfer small succession assets, but it does not require them to do so. As a practical matter, a court proceeding of some sort (usually an Unadministered Succession) is often required even if the succession could technically qualify as a small succession. Louisiana's small succession law is discussed in more detail in Chapter 3.

#### TRANSFER OF MOTOR VEHICLES BY AFFIDAVIT

The second alternative to Louisiana succession applies to the transfer of automobiles owned by the decedent. Louisiana law provides a procedure for transferring title to a decedent's automobile by affidavit. The procedure is available regardless of whether the decedent had a Last Will and Testament.

The transfer of an automobile by affidavit is a transfer by everyone who has an interest in the automobile to one person. The affidavit must be signed by everyone with an interest in the automobile and submitted to the Louisiana Department of Public Safety and Corrections (Office of Motor Vehicles). Upon receipt of the affidavit, the Office of Motor Vehicles will reissue title in the name of the designated person.

This procedure is usually used only when the succession is not judicially opened or when the car needs to be transferred to one person for insurance reasons before issuance of a Judgment of Possession. Otherwise, the automobile should pass through the estate along with the remainder of the assets.

Here's a link to a copy of the affidavit: [Affidavit of Heirship for Motor Vehicles](#)

#### TRANSFER OF BANK ACCOUNTS AND LAST WAGES

The last three alternatives apply specifically to employers and depository institutions (banks and credit unions). These alternatives don't create an enforceable right in the surviving spouse or heirs. If the employer or bank is uncomfortable delivering the funds, they are not forced to do so. But by providing liability protection, these laws do encourage the employer to make the transfers without requiring a succession.

Transfer of bank accounts and last wages come up in three circumstances:

1. **Transfer of Bank Accounts to Surviving Spouse** – Up to \$10,000 from a decedent's bank account can be transferred to his or her surviving spouse by affidavit, without any court proceeding. The procedure is available for accounts that belonged to the decedent or accounts that were community property between the decedent and the surviving spouse, and applies regardless of whether the account is in the name of the decedent, the surviving spouse, or jointly titled. The surviving spouse must provide the bank with an affidavit stating that the total of all amounts withdrawn from all banks does not exceed \$10,000.
2. **Payment of Wages and Certain Employment Benefits to Surviving Spouse** – Louisiana law allows an employer to pay the surviving spouse of a deceased employee any wages, sick leave, annual leave, or other benefits of up to \$6,000. This method is unavailable if a divorce proceeding has been instituted. If a divorce proceeding has been instituted, or

if there is no surviving spouse, the payment can be made to any adult child of the deceased employee.

3. **Transfer of Small Deposits to Spouse or Heirs (Intestate Estates Only)** – If the decedent did not leave a Last Will and Testament, Louisiana law allows a bank to transfer up to \$5,000.00 to the decedent’s spouse and heirs at law. The spouse and heirs must provide the bank with an affidavit establishing jurisdiction, relationship, and intestacy. To qualify for this proceeding, the depositor must die intestate with the account in his or her name and there must be \$5,000.00 or less in all accounts.

If the estate assets can be transferred using these alternatives, a court proceeding will not be required. Most estates, however, will require some sort of court proceeding to fully deal with the estate. The succession proceeding may not be complicated, though, especially if the estate qualifies for an Unadministered Succession.

**Estate Planning Question: I have a Last Will and Testament. Does this mean that a succession will be unnecessary for my estate?**

Unfortunately, no. A Will does not avoid the need for a succession. There are ways to structure an estate plan to avoid succession (such as using revocable living trusts), but just having a Will won’t do the job. The need for a succession doesn’t depend on whether or not you had a Will, but on what assets you own and how they are titled.

## CHAPTER 3: DEALING WITH SMALL SUCCESSIONS UNDER LOUISIANA LAW

Like most states, Louisiana has a special procedure for dealing with small successions. In some circumstances, a small estate can be distributed to the heirs or beneficiaries without court involvement. In other cases, a small estate requires some form of court-supervised succession.

The application of the Louisiana's small succession law depends on a two-part analysis:

- Does the estate qualify as a "small succession?"
- Can the estate be disposed of by a Louisiana Small Estate Affidavit, or will a court proceeding be required?

### WHAT IS A SMALL SUCCESSION UNDER LOUISIANA LAW?

Louisiana law defines a "small" succession as "the succession or the ancillary succession of a person who has died at any time, leaving property in Louisiana having a gross value of seventy-five thousand dollars or less valued as of the date of death." This means that a state will not qualify as a small succession if the Louisiana property is worth more than \$75,000. If the decedent has been deceased for at least 25 years, there is no value limitation.

**Note:** This definition only qualifies a succession as a small succession for purposes of the small succession rules. Failure to qualify does not necessarily mean that a full Louisiana estate administration will be required; it only means that the small succession procedures are unavailable. An Unadministered Succession (Simple Putting in Possession) may still be available. See our discussion of the different types of successions in Chapter 4.

### CAN A LOUISIANA SMALL SUCCESSION AFFIDAVIT BE USED TO DEAL WITH THE PROPERTY?

If the estate qualifies as a small succession, the next step is to determine whether a Louisiana Small Estate Affidavit can be used to transfer the property. If so, a court proceeding may not be required.

Louisiana law allows the transfer of a small succession property by affidavit (i.e., a court proceeding will not be necessary) if:

- The estate qualifies as a small succession;
- The decedent either died without a will while domiciled in Louisiana *or* died with a will while domiciled in another state if the will was probated in the another state; and
- The decedent's sole heirs are his or her descendants, ascendants, brothers or sisters or descendants of brothers and sisters, surviving spouse, and/or beneficiaries of the decedent's will that was probated in another state.

If the estate meets these requirements, it can be disposed of by a Louisiana Small Estate Affidavit. The form of the Louisiana Small Estate Affidavit is defined by law.

**Note:** Although Louisiana's Small Estate Affidavit law authorizes third parties (such as banks or buyers of real estate) to rely on the affidavit, it does not force them to do so. Third parties, such as transfer agents for stock, will often require a Judgment of Possession before releasing the property. Because of this, the Louisiana Small Estate Affidavit doesn't always do the job. Some sort of judicial proceeding (usually without administration) is often required, even when a Small Estate Affidavit technically could pass title to the estate assets.

Louisiana law has special rules about who must sign the Louisiana Small Estate Affidavit. These rules differ depending on the decedent's family situation:

- If the decedent had a surviving spouse, the Small Estate Affidavit must be signed by the decedent's surviving spouse and at least one of the decedent's adult heirs.
- If the decedent did not leave a surviving spouse, the Small Estate Affidavit must be signed by two adult heirs.
- If the decedent only had one heir, the Small Estate Affidavit must be signed by that heir and another person who has knowledge of the facts listed in the Small Estate Affidavit.

If any of the heirs listed in the Small Estate Affidavit are minors, their natural guardian (called a *tutor* in Louisiana) can sign the Small Estate Affidavit on behalf of the minor heirs. The natural guardian will usually be the child's surviving parent.

## JUDICIAL ADMINISTRATION OF SMALL ESTATES

If the estate meets the definition of *small succession* but doesn't qualify for distribution by a Louisiana Small Estate Affidavit, the succession will need to be opened in court. The same rules will apply to the small succession as apply to all Louisiana successions, with a few key differences:

- Different procedures for sale of property – If the succession representative wants to sell succession property, he or she must publish notice in the newspaper of the parish where the succession was opened.
- Lower administration costs - If the succession qualifies as a small succession, the court costs are cut in half. The personal representative's fees are also capped at 5 percent of the value of the estate.

Otherwise, the succession will usually be opened with the court and treated the same as any other succession. See Chapter 4 on the types of Louisiana successions to learn more about the options available for Louisiana successions.

## DEALING WITH REAL ESTATE OWNED BY LOUISIANA SMALL ESTATES

Louisiana law has special rules for real estate (immovable property) owned by a small succession when the real estate is damaged by a federally-declared disaster or catastrophe. In that situation, if the property is left to more than one person (co-owners), the law assumes that the co-owner that possesses the property for more than a year has been designated by the other co-owners to keep up with the property. This presumed appointment to act on behalf of co-owners also gives the person possessing the property the right to mortgage the property without the consent of the other co-owners.

Unless the co-owners file a written agreement to the contrary, the court or other public entity can conclusively presume that the person who possesses the property has the right to deal with the real estate, including receiving and disbursing funds for the repair of the property.

This doesn't mean, however, that the person possessing the property can engage in self-dealing. He or she is held to a fiduciary standard (called *negotiorum gestio* in Louisiana). This requires the possessor to act in the best interest of all concerned. The possessing owner will be liable to the non-possessing co-owners for failure to act in their best interest.

The transfer of small succession immovable property (real estate) by affidavit to a third party can be contested for a period of two years from the date when the small succession affidavit is recorded in the public records. After that time, it is too late to claim that the title was transferred to the wrong heirs.

If the small estate includes real estate, the Small Estate Affidavit and the decedent's death certificate must be recorded in the land records in the parish where the real estate is located. The recording must happen at least 90 days after date of the decedent's death.

## CHAPTER 4: TYPES OF LOUISIANA SUCCESSION PROCEEDINGS

If a deceased person's estate cannot be transferred using one of the alternatives to Louisiana successions discussed in Chapter 2, it will be necessary to open a judicial succession. Fortunately, Louisiana's succession process is not as complicated as the probate process in some other states.

Most successions in Louisiana fall into one of two categories: Unadministered Successions and Administered Successions. There can be some variation within each category, depending on whether the decedent had a will and whether independent administration is available.

### UNADMINISTERED SUCCESSIONS (SIMPLE PUTTING IN POSSESSION)

The most common form of Louisiana succession is an Unadministered Succession (sometimes referred to as a "Simple Putting in Possession"). In this type of succession, no succession representative (usually called an *executor* in Louisiana) is appointed and no administration is necessary. After the correct documents are filed with the court, the succession attorney obtains a Judgment of Possession transferring title to the decedent's assets.

#### WHEN AN UNADMINISTERED SUCCESSIONS IS AVAILABLE: TESTATE ESTATES

If the decedent had a valid Last Will and Testament, the estate will be referred to as a *testate estate*. An Unadministered Succession is available for testate estates if all of the following conditions are satisfied:

- All people named in the will (this group of people are called *legatees*) are either competent or acting through their qualified legal representatives;
- All competent general and universal legatees (those who inherit after all specific gifts have been distributed) accept the succession unconditionally; and
- None of the creditors of the succession has demanded an administration.

If the estate qualifies for an Unadministered Succession, the Louisiana succession attorney will prepare the necessary documents to complete the succession. These pleadings typically include an Affidavit of Death, Jurisdiction, and Heirship, a Sworn Detailed Descriptive List, a Petition for Probate of Testament, a Petition for Possession, and a Judgment of Possession. Once the judge reviews these documents to make sure everything is in order, he or she will usually sign the Judgment of possession transferring ownership of property from the decedent to the legatees named in the will.

In a testate Unadministered Succession, no executor (succession representative) is appointed. Because of this, there is no need for a succession representative to join in the petition as such.

In an Unadministered Succession, at least one of the petitioners must sign a verification. As a practical matter, the Louisiana succession attorney will typically ask all of the residuary legatees to sign the verification. This demonstrates to the court that everyone is in agreement and protects the succession representative named in the will.

#### WHEN AN UNADMINISTERED SUCCESSION IS AVAILABLE: INTESTATE ESTATES

If the decedent died without a Last Will and Testament, he or she is said to have died *intestate* and the estate assets will be distributed as provided by Louisiana's intestate law. In that case, full administration of the estate will *not* be required if the succession is "relatively free of debt" and all required parties request that the succession be completed without an administration.

A succession is "relatively free of debt" if the only debts are the expenses of administration, mortgages that are paid current, and "the debts of the decedent are small in comparison with the assets of the succession."

In an Unadministered Succession, the following parties are required to sign the petition:

1. All of the heirs who are mentally competent, if they accept unconditionally; OR
2. The legal representative of the incompetent heirs, if all of the heirs are incompetent; OR
3. The surviving spouse in community with the decedent, if all the heirs are incompetent and no legal representative has been appointed for some or all of the heirs. In this scenario, the court may recognize the surviving spouse in community as entitled to possession of all community property.

**Note:** If all the heirs are competent, they must all join in the petition. If some of the heirs are incompetent, the petition should specify which heirs are competent and which are incompetent. As a practical matter, the succession attorney will typically require that the verification be signed by each competent heir, the spouse, and the legal representative of any incompetent heir.

#### NOTE: NEW ORLEANS SUCCESSIONS

If an Unadministered Succession includes real estate in New Orleans, Louisiana (or elsewhere in Orleans Parish), the Louisiana succession attorney must file a copy of the Judgment of Possession with the assessor for Orleans Parish within 15 days from the date that the judgment becomes final.

#### ADMINISTERED SUCCESSION

If the estate does not qualify for an Unadministered Succession, an Administered Succession will be necessary. This is usually required in the following circumstances:

- There is a question regarding the validity of the decedent's Last Will and Testament;



- The identity of the decedent's heirs are unclear or cannot be located or it is unclear which of them are entitled to the decedent's property;
- There is a question regarding the solvency of the estate;
- Assets need to be sold from within the succession proceeding to pay creditors;
- A forced heir claims that he or she has not received the assets to which he is entitled by law; or
- Other disputes arise regarding the succession.

In an Administered Succession, a succession representative is appointed by the court to represent the succession and resolve all outstanding issues. The succession representative is also responsible for fully administering the estate (see Chapter 6).

Once all issues are resolved and the estate is administered, the succession representative will propose a distribution to the court by filing a document known as a Tableau of Distribution. If everyone agrees with the Tableau of Distribution, the judge will approve it through a process called homologation and order the assets to be distributed accordingly.

Administered Successions are the most complex form of succession under Louisiana law. As a result, attorneys' fees and administration costs are usually higher in an Administered Succession.

## CHAPTER 5: OPENING A SUCCESSION IN LOUISIANA

This Chapter walks you through the basic steps required to open a succession in Louisiana.

### CHOOSE THE RIGHT PLACE TO BRING THE LOUISIANA SUCCESSION

Courts can only hear successions if they have jurisdiction. Because of this, it is important that the succession be opened in the right parish, determined as follows:

- If the decedent was domiciled in Louisiana at the time of death, the succession should be opened in the parish where the decedent was domiciled;
- If the decedent was not domiciled in Louisiana at the time of death, the succession must be opened in the parish where the decedent owned real estate (immovable property);
- If the decedent was not domiciled in Louisiana at the time of death and didn't own any real estate in Louisiana, the succession should be opened in the parish where the decedent's other assets are located.

If the decedent doesn't fit within any of these categories, it's probably because there's no need to open a Louisiana succession.

To determine where a deceased person is domiciled, courts look for a place where the decedent had a principal (habitual) residence – the place where the decedent lived when he or she was “at home.”

Louisiana law assumes that a person has *not* changed domicile unless there is evidence to the contrary. This evidence must show, beyond a reasonable doubt, that the decedent actually changed his or her residence *and* intended to permanently live in the new residence.

### AFFIDAVIT OF DEATH, DOMICILE, AND HEIRSHIP

As a practical matter, issues concerning the decedent's domicile are presented to the court as part of the Affidavit of Death, Domicile, and Heirship. This document is one of the first documents that the Louisiana succession attorney files with the court.

As the name suggests, the Affidavit of Death, Domicile, and Heirship also establishes the decedent's death and identifies his or her heirs. Death, marriage, and birth certificates can also be used to establish death and heirship.

The Affidavit of Death, Domicile, and Heirship must be signed by two people that know about the facts contained in the Affidavit.

## PETITION FOR PROBATE OF A TESTAMENT

A Petition for Probate of a Testament is a document that is prepared by the succession attorney, signed by the executor, and filed with the court. The purpose of the document is to ask (petition) the court to recognize the validity of the decedent's will. The Affidavit of Death, Domicile, and Heirship is usually presented with the Petition.

If the Last Will and Testament is a notarial testament, it is considered to be *self-proved*. This means that no additional testimony is required to establish its validity before the court. Once the will is presented to the court, Louisiana law provides that the court "shall order it filed and executed and this order shall have the effect of probate."

If the Last Will and Testament is in any other form, it is *not* considered to be self-proved. This requires additional evidence to demonstrate its validity to the court.

If there is no dispute regarding the validity of an olographic testament (handwritten will), it can be provided by affidavits from two witnesses. These affidavits will state that the witnesses are familiar with the decedent's handwriting and that the will meets the requirements of an olographic testament (in the testator's handwriting, signed, dated). The affidavits must be signed after the death of the testator.

If there is a dispute regarding the validity of an olographic testament, the testament will be probated only after a contradictory trial. Because of this, probate of contested estates are usually much more expensive than probate of uncontested estates.

See Chapter 12 for more information about the forms of wills that are recognized by Louisiana law.

## CHAPTER 6: LOUISIANA ESTATE ADMINISTRATION

Administration is the process of collecting and managing the assets, paying creditor claims, and dealing with any issues that must be resolved before the decedent's assets can be distributed. It includes all of the steps that must happen between the time the estate is opened with the court and the date that the Judgment of Possession is issued transferring assets to the heirs. The Louisiana succession representative is responsible for administering the estate.

As discussed in Chapter 4, there are two basic types of Louisiana successions: Unadministered Successions and Administered Successions. As these names suggest, the primary difference between the two is whether administration is required.

In an Unadministered Succession, the administration process is unnecessary. But even if administration is required, the process can be simplified if the succession is eligible for independent (as opposed to court-supervised) administration. Independent administration requires less court costs, attorney fees, and publication costs.

### INDEPENDENT ADMINISTRATION IN LOUISIANA

In an independent administration, the succession representative does not need court permission to pay debts, list property for sale, sell real or personal property of the estate, borrow, exchange, lease, or invest succession property. This avoids the time and expense of having to ask the court for authority to take each step.

Independent administration can be required or prohibited in a valid Last Will and Testament. If not mentioned in the will, it is a matter of consent. If the decedent had a will that does not prohibit or allow independent administrators, all general and universal legatees (those who inherit the property after specific gifts are satisfied) must consent to independent administration. If the decedent died intestate, all intestate successors must consent.

If any of the universal legatees or heirs are minors, each child's natural guardian (usually a parent) can consent to an independent administration on their behalf, without the need for a formal guardianship (called a *tutorship* in Louisiana). But a formal guardianship proceeding may still be required before a minor legatee or heir is put into possession of a decedent's property.

The consent to independent administration is usually presented when the estate is opened, but a succession that has been opened under an administration can be converted to an independent administration at a later date under some circumstances.

Independent administrators are not required to post a bond with the court unless required by the will (which would be unusual). If a bond was obtained in a prior court-supervised administration, it should be released when the estate is converted to an independent

administration. The court may require a bond, though, if an interested party requests security in a contradictory hearing.

**Note:** When the requirements for independent administration are satisfied, independent administration will be granted as a matter of law. The court has no discretion to require court-supervised administration if the estate qualifies for independent administration.

## IF COURT-SUPERVISED ADMINISTRATION IS REQUIRED

If the succession doesn't qualify for independent administration, the succession representative is responsible to administer the estate under court supervision. This requires the court to oversee every step of the administration process, including:

- **Inventory** - As part of the administration, the succession representative must file an inventory of the assets of the estate. Louisiana law allows for a Sworn Detailed Descriptive List of the assets of the decedent to be filed in lieu of the inventory. This document must identify and list the assets owned by the decedent and the fair market value of each item on the date of death. As a practical matter, the Sworn Detailed Descriptive List is almost always used in lieu of an inventory.
- **Bond** – The personal representative may be required to post bond in an amount that exceeds one-quarter of the gross value of the estate (1.25 percent of the estate value).
- **Annual Accountings** - The succession administrator is required to file an annual accounting with the court. This accounting is similar to a balanced checkbook ledger. It starts with the beginning balance for the period and includes all income and expenses of the estate for the period of the accounting. Copies of the accounting is then provided to the heirs or legatees of the estate, along with a notice that it can be approved by the court if no objection is made within 10 days. If no objection is made, the court can approve the accounting.
- **Dealing with Assets of the Estate** - The succession administrator is responsible for dealing with assets of the estate, including sale of items (if necessary to pay debts), leases, mortgages, and other contracts involving the succession. Prior court approval is generally required for each action.
- **Payment of Debts** - Any creditor of the estate can submit a claim to the succession representative for payment. No particular form is required. If the succession representative doesn't respond within 30 days acknowledging or rejecting the claim, he or she is deemed to have rejected it.

The succession representative should generally not pay debts from assets of the estate without publication and court authority. The only exceptions are for urgent debts and pursuant to an

order to continue a business (if debts incurred in the regular course of the business are due). All other debts are included in the Proposed Tableau of Distribution that must be approved by the court prior to payment.

## CHAPTER 7: CLOSING THE ESTATE – THE JUDGMENT OF POSSESSION

Once the succession has gone through Louisiana estate administration (if required), the Louisiana succession attorney will prepare a Petition for Possession and other documents needed to close the succession. The attorney then presents these documents to the court and obtains a Judgment of Possession.

It is important to realize that the Judgment of Possession comes at the *end* of a succession in Louisiana. It is not a standalone document that can simply be prepared by a Louisiana succession attorney; rather, it is an order signed by a judge stating that everything necessary has been done to put the heirs or legatees in possession of a deceased person's property.

The purpose of the Judgment of Possession is to provide third parties (such as banks, investment brokers, or real estate title companies) with a court-ordered transfer of assets to the heirs or legatees. The Judgment of Possession puts the heirs or legatees in possession of the decedent's assets. The Judgment of Possession will:

- Identify the parties that are entitled to the decedent's assets (the spouse, heirs, legatees, or usufructuary, as applicable);
- Put the proper parties in possession of the assets;
- If the decedent is married, recognize the surviving spouse as being entitled to possess an undivided one-half of all community property; and
- List the last known address of at least one heir, legatee, or surviving spouse that is put into possession of the property.

## CHAPTER 8: ANCILLARY SUCCESSIONS

Each state's probate laws are only effective for property located within that state's borders. If a non-resident dies with property in Louisiana, a special form of succession known as an ancillary probate will be needed to admit the decedent's Last Will and Testament and deal with the non-resident's Louisiana assets.

For example, assume that a Mississippi resident dies, leaving real estate in Louisiana. A Mississippi probate proceeding will be required to deal with the decedent's Mississippi property. Because the decedent lived in Mississippi, the Mississippi proceeding would be referred to as the *domiciliary probate*. But the Mississippi proceeding is only effective for real estate located in the State of Mississippi. A second proceeding—the *ancillary probate*—will need to be brought in Louisiana to deal with the Louisiana real estate.

The ancillary probate should be opened in the parish where the decedent owned real estate. If the decedent's Louisiana assets do not include real estate, the ancillary proceeding should be opened in the parish where the decedent owned other assets.

Ancillary proceedings differ from other court-supervised proceedings in a few ways:

- If the estate is opened in the decedent's home state, it is unnecessary to formally probate the will in Louisiana. An authenticated copy of the will can be admitted in Louisiana and, assuming it met the requirements of the law where the testator was domiciled at death or when the will was executed, it will be recognized as valid under Louisiana law.
- The personal representative appointed in the domiciliary proceeding doesn't have capacity to handle the Louisiana succession until he or she is appointed as succession representative by the Louisiana court. (There is one narrow exception in the wrongful death context.)
- The personal representative appointed in the domiciliary proceeding is given priority for appointment in the Louisiana proceeding, assuming he or she otherwise meets the requirements for serving as a Louisiana succession representative.

Once the personal representative is appointed by the Louisiana court, the succession is handled under Louisiana's general succession procedures. If all requirements are met, an ancillary probate can be handled without administration.



## CHAPTER 9: INTESTACY – DYING WITHOUT A WILL IN LOUISIANA

If a person dies without a valid Last Will and Testament, he or she is said to have died *intestate*. His or her estate will be handled by *intestate succession*. This means that the deceased person's assets will be distributed under Louisiana intestate law.

**Note:** The application of Louisiana intestate law is mechanical. It doesn't leave room for shifting assets or altering distributions based on circumstances. Because of this inflexibility, you should not rely on Louisiana intestate law to take the place of a Last Will and Testament.

Louisiana's intestate rules distribute a deceased person's assets to various relatives, beginning with the children and spouse and extending to other descendants, ancestors, and descendants of ancestors. The exact application of Louisiana intestate law depends on two factors:

- Whether the decedent's property is community property or separate property
- The degree of relationship of each family member to the decedent

### COMMUNITY PROPERTY VS. SEPARATE PROPERTY

Louisiana is one of a handful of states that uses a community property system for ownership of property. Under this system, a person's assets are grouped into categories of community property and separate property. As discussed below, the treatment of each asset at a person's death depends a great deal on whether the asset is separate or community property.

If a person is (or has been) married, it is important to first analyze the estate assets to determine which assets are community property and which assets are separate property. See Chapter 10 for additional information on the rules governing community and separate property.

### TREATMENT OF SEPARATE PROPERTY UNDER LOUISIANA INTESTATE LAW

If a person dies without a will in Louisiana, his or her *separate* property is distributed among his relatives. The Louisiana Code groups the relatives into categories and gives certain categories priority over others.

**Distribution to surviving descendants.** Under Louisiana's intestate succession laws, separate property is distributed first to a deceased person's children. Each child of the deceased person will share equally in the separate property.

If any of the deceased person's children are also deceased, their descendants (the deceased person's grandchildren) will inherit "by roots" (equivalent to *per stirpes* in other states). This

means that a deceased child's descendants will share equally in the share that their deceased parent would have taken if he or she had survived.

For example, assume Shemp has three sons, Curly, Larry, and Moe. Moe dies several years before his father, Shemp, leaving two daughters. At Shemp's death, his two surviving children (Curly and Larry) will each inherit one-third of his separate property. The other one-third will be split between Moe's two daughters, giving them one-sixth each.

**No surviving descendants, but with surviving parents and siblings.** If a person is not survived by any descendants, his or her separate property will pass to his or her siblings, subject to a usufruct for life to the decedent's parents. If both of the decedent's parents are alive, they will share the usufruct. If only one parent is alive, or upon the later death of one parent if both are living, the usufruct belongs to the surviving parent.

**No surviving descendants or parents, but with surviving siblings.** In this case, the surviving siblings will share equally in the deceased person's separate property if the siblings have the same parents as the deceased person.

Things are more complicated if the deceased person had half-brothers and half-sisters. If so, the deceased person's separate property is divided equally between his or her mother's and father's family lines. The mother's family line gets one-half of the property and the father's family line gets the remaining half. Any brothers and sisters with the same parents will inherit through both lines. The half-brothers and half-sisters will only inherit through the mother's or father's line, as the case may be.

In this context, descendants of deceased half-siblings do *not* inherit the share that their parent would have inherited. The children of a deceased half-brother would not inherit in the same manner as a full-blood sibling.

**No surviving descendants or siblings, but with surviving parents.** The parents will inherit the deceased person's separate property. If both parents are alive, they will inherit equally. Otherwise, the property will pass to the surviving parent.

**No surviving descendants, parents, siblings, descendants of siblings, or spouse.** Separate property is distributed to the deceased person's other relatives (first to "ascendants," if any, then to "collaterals"), depending on the family relationship.

## TREATMENT OF COMMUNITY PROPERTY UNDER LOUISIANA INTESTATE LAW

Under Louisiana's intestate law, a deceased person's community property is distributed to his spouse or descendants, depending on the family situation. Here are the two possible scenarios:

- **Surviving descendants and surviving spouse.** When the deceased person has descendants and a surviving spouse, the community property will be split into two parts – *usufruct* (called a life estate in most states) and *naked ownership* (called a remainder interest in most states). The surviving spouse is given a usufruct (life estate) over the deceased person's community property and the descendants receive the usufruct (remainder interest) after the spouse's death or remarriage.
- **Surviving spouse and no surviving descendants.** All community property passes to the surviving spouse.

If the deceased person had surviving descendants only (no surviving spouse), there would be no community property.

**Note:** The division of community property into a usufruct for the surviving spouse and naked ownership interest to the descendants means that both the spouse and the descendants must consent to a sale of the property. This can cause many practical family issues, especially in the second marriage situation. Proper estate planning can avoid these issues.

## SPECIAL RULE FOR REAL ESTATE ACQUIRED BY GIFT (DONATION)

Gifts (donations) of real estate (immovable property) are treated differently from other intestate property. If the deceased person was given real estate by an ancestor and has no children, that real estate will pass back to the ancestor at death. Keep in mind that a gift to one spouse would be categorized as separate property.

## CHAPTER 10: LOUISIANA COMMUNITY PROPERTY LAW

Louisiana law regulates a married person's ability to buy, sell, or otherwise control their property through a system of community property laws. In this context, "property" is defined broadly to include most assets that a person could own. Property includes homes, land, financial accounts, stock, pensions, wages). All of these assets could be affected by the marriage relationship.

### WHAT IS COMMUNITY PROPERTY UNDER LOUISIANA LAW?

The default rule is that property owned by a married person is community property. Unless the property is specifically classified as separate property, it will be considered community property.

Absent a prenuptial agreement, most assets acquired during the marriage are considered to be community property. Community property specifically includes:

- All property acquired during the marriage under the community property laws through the effort, skill, or industry of either spouse;
- Property acquired with community property or with a mix of community and separate property (unless the value of the community property used to acquire the asset is inconsequential in comparison with the value of the separate property used);
- Property given to the spouses jointly;
- The proceeds from the sale of community property;
- Damages awarded for loss or injury to part of the community property; and
- All other property not classified by law as separate property.

Separate property is property belongs exclusively to one of the two spouses. Assets acquired by a deceased person while unmarried, or acquired during the marriage by gift, is considered to be separate property. Separate property specifically includes:

- Property acquired by a spouse prior to the before marriage;
- Assets acquired by a spouse with separate property or with a mix of community and separate property when the value of the community property used to acquire the asset is inconsequential in comparison with the value of the separate property used;
- Damages awarded to a spouse for personal injury sustained by him or her;
- Property acquired by a spouse by inheritance or donation to him individually;
- Damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse;

- Damages or other indemnity awarded to a spouse in connection with the management of his separate property; and
- Assets acquired by a spouse as a result of a voluntary partition of the community during the existence of the community regime.

The way an asset is titled does not usually matter in determining whether it is separate or community property. Instead, you must look to the source of the funds used to purchase the asset. If the asset was purchased during the marriage, it is usually community property even if it is only titled in one spouse's name.

#### TREATMENT OF RETIREMENT ASSETS UNDER LOUISIANA COMMUNITY PROPERTY LAW

Under the usual community property rules, each qualified retirement plan or IRA that was acquired during the marriage would be treated as community property under Louisiana law. These rules still apply in the divorce context. Upon divorce, each spouse has a community property interest in the qualified retirement plan or IRA, regardless of whether that spouse contributed to the plan.

The rules can be tricky in the succession context, depending on whether the deceased person was a participant or non-participant spouse and whether the plan is subject to ERISA (most retirement plans) or an IRA, which is not subject to ERISA.

**Note:** A *participant spouse* is one for whom or by whom the retirement account is established. For example, for a qualified retirement account, the participant spouse would be the employee for whom the account is established. A *non-participant spouse* is the spouse of the plan participant.

#### TREATMENT OF QUALIFIED RETIREMENT PLANS AS COMMUNITY PROPERTY

Most types of qualified retirement plans are governed by ERISA. The United States Supreme Court decision in *Boggs vs. Boggs* held that ERISA preempts Louisiana community property law.

If the succession involves the estate of the *participant spouse*, the rules are clear: the account will pass to the designated beneficiary, without regard to the non-participant spouse's community property interest. The deceased person's will is irrelevant; the beneficiary designation will control.

The more difficult situation arises when the *non-participant spouse* attempts to leave his or her community interest in a qualified retirement plan to someone other than the participant spouse. This could occur by Last Will and Testament or through operation of Louisiana's intestate laws.

Because of the Federal preemption of Louisiana law, a non-participant spouse cannot leave his or her community property interest in a qualified retirement account to anyone. The account is treated as belonging to the participant spouse alone. Upon the non-participant's spouse's death, the account passes to the surviving (participant) spouse, as though there was never a community property interest.

#### TREATMENT OF IRAS AS COMMUNITY PROPERTY

Because ERISA does not apply to IRAs, the Supreme Court's decision in *Boggs* probably does not apply in the IRA context (although this is not fully settled). If the surviving spouse is the designated beneficiary of the IRA, the entire IRA (both halves of the community property interest) should pass to the surviving spouse.

If the plan is an IRA and if the beneficiary is someone other than the surviving spouse, the deceased spouse's estate may owe an accounting to the surviving spouse to equalize the community property interest. An accounting would not be required if the surviving spouse is the IRA beneficiary.

**Note:** It is important to distinguish between the federal tax consequences of an IRA and the community property rights under Louisiana law. No matter how the asset is distributed under Louisiana law, community property laws do not apply to IRAs for federal tax purposes. IRC § 408(g). The entire IRA is included in the deceased owner's estate for estate tax purposes.

This area of law is not completely settled. For planning purposes, uncertainty can sometimes be avoided if both spouses name the other spouse as beneficiary of any qualified plans and IRAs. A careful analysis of estate planning objectives is essential.

## CHAPTER 11: LOUISIANA INHERITANCE TAX, ESTATE TAXES, AND GIFT TAXES

This Chapter provides a brief overview of tax considerations involved in Louisiana successions.

### LOUISIANA INHERITANCE TAX

An inheritance tax is a tax imposed on someone who inherits money from a deceased person. Inheritance taxes can apply regardless of whether the deceased person had a Louisiana Last Will and Testament or died intestate.

Like the Federal estate tax laws, Louisiana's inheritance tax laws changed significantly in the last several years. Two things are clear under the current law:

- There is no Louisiana inheritance tax for people who die after June 30, 2004.
- There is no Louisiana inheritance tax for people who died on or before June 30, 2004, and an inheritance tax return was not filed before July 1, 2008.

If the decedent falls within either of these categories, there is no need to think any more about Louisiana inheritance tax. No inheritance tax is owed, and there's no need to file an Inheritance and Estate Tax Return with the Louisiana Department of Revenue. (In fact, as discussed below, the Louisiana Department of Revenue has stopped issuing receipts.)

It is unclear whether people who died on or before June 30, 2004, will be subject to inheritance tax if an inheritance tax return was filed before July 1, 2008. The current law does not address this situation. Although this makes no sense from a policy perspective (it rewards those who failed to timely file inheritance tax returns and penalizes those who did), the Louisiana Department of Revenue appears to have taken the position that any inheritance taxes owed on filed returns is still due and payable. Thankfully, this should affect an increasingly small number of estates.

The repeal of the Louisiana inheritance tax has caused several changes to the way that Louisiana successions have traditionally been handled. Under the current law:

- There is no longer a need to file an Affidavit of Small Succession (Louisiana Small Estate Affidavit) with the Louisiana Department of Revenue. The Department of Revenue now has nothing to do with Affidavits of Small Successions.
- The Louisiana Department of Revenue has stopped issuing Inheritance Tax Waiver and Consent to Release Forms and receipts for Affidavits of Small Successions.

## LOUISIANA ESTATE TAX

Under prior Federal law, each estate was given a credit for death taxes paid to a state. Like many states, Louisiana's estate tax was a "sop tax" (also called a "sponge tax"). Louisiana's estate tax statute levied an estate tax that was equal to the amount of this Federal credit.

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) repealed the Federal credit for taxes paid to a state. Since Louisiana's estate tax laws were tied to this credit, this had the practical effect of repealing Louisiana's estate tax. Because the Louisiana estate tax only applied if a credit was allowed against the Federal estate tax, and since that credit was repealed effective January 1, 2005, there is no Louisiana estate tax for deaths occurring on or after January 1, 2005.

As a technical matter, Louisiana Estate Tax Returns are still required if the decedent's net estate is worth at least \$60,000.00. But since there is currently no Louisiana estate tax, and since the Louisiana Department of Revenue is no longer staffed to process these returns, they are no longer filed.

## LOUISIANA GIFT TAXES

The Louisiana Gift Tax has traditionally applied to any gifts that exceeded the Federal annual exclusion. That tax was repealed effective July 1, 2008. There is no longer any Louisiana Gift Tax for transfers occurring on or after July 1, 2008.

If a gift in excess of the Federal annual exclusion was made before July 1, 2008, a Louisiana Gift Tax return should be filed by April 15 of the year following the gift. A Louisiana gift tax may then be owed, depending on the circumstances. Failure to pay the tax could make the donor, the executor, and/or the donee liable for the tax, upon the value of the gift.

## NEW ORLEANS INHERITANCE TAX

New Orleans had a separate inheritance tax that is now defunct. This tax used to apply to property located in Orleans Parish or owned by an Orleans Parish domiciliary. The tax applied to decedents who died between July 15, 1985, and December 30, 1989. If the tax hasn't been collected by now, it is probably time-barred.



## CHAPTER 12: REQUIREMENTS FOR A LAST WILL AND TESTAMENT

Just calling a document a “Last Will and Testament” does not make it valid under Louisiana law. Louisiana has specific requirements that must be satisfied before a document will be considered a valid Louisiana will.

It is important for the Last Will and Testament to be in the required form. Unless the document falls within one of the categories of Louisiana’s Last Will and Testament forms, it will not be sufficient to leave property at death (called a *disposition mortis causa* in Louisiana). If this happens, the Last Will Testament will be unenforceable and deceased person’s assets will be distributed under Louisiana intestate law.

Louisiana case law has shown that the formal requirements for a Louisiana Last Will and Testament are strictly enforced. Even if it is clear that the person intended someone to receive property at death, the document will not be valid if it is not in a proper Louisiana Last Will and Testament form.

**Note:** Because of Louisiana’s strict requirements, it is particularly dangerous to rely on a generic “Last Will and Testament” form from a non-attorney. Failure to get the form exactly right will result in an invalid document or, perhaps worse, lead to estate litigation. Although this is true in most states, it is especially important in Louisiana due to Louisiana’s unique civil law system. Most companies that prepare generic will forms are not familiar with these rules.

### FORMS OF LOUISIANA LAST WILL AND TESTAMENT

Under current law, there are only two forms of wills under Louisiana law: the *notarial testament* and the *olographic testament* (called a holographic testament in other states). In order for either type of will to be valid, it must either:

- Meet the requirements of Louisiana law (discussed below);
- Meet the requirement of the law of the state (other than Louisiana) where the will was executed at the time that the will was executed;
- Meet the requirements of the law where the testator was domiciled at death or when the will was executed; or
- If it affects real estate, meet the requirements of the law of the state where the real estate is located.

Either type must be made by the testator (and not be someone else acting on his or her behalf). Joint wills (e.g., a single will signed by both a husband and a wife) are not permitted in Louisiana.

## REQUIREMENTS FOR A NOTARIAL TESTAMENT UNDER LOUISIANA LAW

The Louisiana Civil Code sets out five different forms of notarial testaments. The correct form depends on the physical and mental condition of the testator. The specific conditions are:

- When the testator knows how to sign his name and to read and is physically able to do so
- When the testator is literate and sighted but physically unable to sign
- When the testator is unable to read
- When the testator is blind but knows how and is physically able to read braille (notarial testament in braille form)
- When the testator has been legally declared physically deaf or deaf and blind and who is able to read sign language, braille, or visual English

Most wills fall under the first category (when the testator can read and sign his or her name). In that case, the testator must:

- Sign the will on each separate page of the will;
- Sign the will at the end;
- Do all signing in the presence of a notary *and* two competent witnesses; and
- Declare or signify to the notary and two competent witnesses that the instrument is his testament.

In addition, the testator must sign the will at the end and on each separate page and the notaries and each of the two witnesses should sign a statement in the following form while the testator, the notary, and the two witnesses are all together:

In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

This clause that the notary and two witnesses signs is called a witness attestation clause. It is a statement *by the witnesses and the notary* that all of the testamentary formalities have been followed. This requirement is strictly enforced. Failure to include it will invalidate the will, as many Louisiana cases have demonstrated.

## REQUIREMENTS FOR AN OLOGRAPHIC TESTAMENT (HANDWRITTEN WILL) UNDER LOUISIANA LAW

An olographic testament (handwritten will) is one that is entirely written, dated, and signed in the handwriting of the testator. A few comments on these requirements:

- **Handwritten** – The entire document must be in the handwriting of the testator. Issues arise with handwritten wills when people use fill-in-the-blanks forms that are partially typed and partially handwritten. In that case, a court will look to the handwritten portion of the document to determine whether it meets the requirements of an olographic testament.
- **Dated** – The date can appear anywhere in the will. If the date is unclear, the court may look at other evidence to determine the date.
- **Signed** - Although the testator must sign his or her name at the end of the document, anything written below the signature will not necessarily invalidate the will. (The court may or may not consider this other language to be part of the will.)

**Note:** Of course, the document must still show the testator's intent for it to serve as a Last Will and Testament. Not just any handwritten note will suffice. For example, one case held that a handwritten letter to an attorney asking the attorney to draft a will did not qualify as an olographic will. If the testator just intended the document to be a letter or note, it won't qualify as a will merely because it is in the testator's handwriting and signed and dated.

The cases involving olographic testaments show a general trend toward loosening the rules. If the document is in the handwriting of the testator, shows the testator's intent to dispose of property at death, and is signed and dated, it can usually be admitted as an olographic testament.

## PRIOR FORMS OF LOUISIANA LAST WILL AND TESTAMENT

Before July 1, 1999, the Louisiana Civil Code recognized three other forms of Louisiana wills:

- Nuncupative Testament by Public Act
- Nuncupative Testament by Prior Act
- Mystic Testament

The changes that took effect on July 1, 1999, eliminated these forms. To be valid, all wills after July 1, 1999, must either be an olographic testament or notarial testament. But any wills that were validly executed before July 1, 1999, using one of the old forms will still be valid.

## CHAPTER 13: THE ROLE OF THE LOUISIANA SUCCESSION REPRESENTATIVE

Louisiana has several different types of succession proceedings (see Chapter 4) and alternatives to succession (see Chapter 2). Because of these options, most Louisiana successions can be handled without estate administration. If an administration is necessary, though, the court will appoint someone to administer the estate. This person is known as a succession representative (sometimes called an *executor*, *administrator*, or *personal representative*).

The succession representative is responsible for collecting, preserving, and managing the property of the succession in accordance with law. During the succession, the succession representative is treated as owning all property of the succession and having the right to enforce all debts of the succession.

### WHO CAN SERVE AS PERSONAL REPRESENTATIVE IN LOUISIANA?

If the decedent had a Last Will and Testament, the person named in the will as executor will usually serve as the succession representative, as long as that person is not:

- Under eighteen years of age;
- Mentally incompetent;
- A convicted felon;
- A nonresident of the state who has not appointed a resident agent for service of process and caused such appointment to be filed in the succession proceeding;
- A corporation that is not authorized to perform the duties of the office of succession representative in Louisiana; or
- A person who, after a hearing, is determined to be unfit for appointment because of a bad moral character.

If the estate will be distributed under Louisiana's intestate law or if a dative testamentary executor (someone other than the executor named in the Last Will and Testament) will be appointed, the succession representative must, in addition to meeting these requirements, be:

- A surviving spouse, heir, or legatee;
- A legal representative of an heir or legatee;
- A creditor of the decedent or the estate;
- The nominee of the surviving spouse, heir, legatee, or legal representative of an heir or legatee; or
- A co-owner of real estate with the decedent.

If more than one person wants to serve as succession representative of an intestate succession, the court will give priority to the best qualified among the surviving spouse, competent heirs or

legatees, or the legal representatives of any incompetent heirs or legatees of the deceased, then to the best qualified of their nominees, then to the best qualified of the creditors of the deceased or a creditor of the estate of the deceased, or a co-owner of immovable property with the deceased. In this context, “best qualified” means the person with the best qualifications (personally and by training and experience) to handle the succession.

If no one meeting these requirements applies for appointment as succession representative within three months from the date of death, the court can appoint an attorney as administrator and set his or her compensation. The attorney would be governed by the same rules that apply to other succession representatives.

#### LOUISIANA PERSONAL REPRESENTATIVE’S BOND REQUIREMENTS

The succession representative is required to post bond (security) to insure his or her performance of duties. This bond would be usually issued by an insurance company, but the personal representative’s real estate can also be used as security.

The amount of the bond must exceed by one-fourth the total value of all property of the estate. For example, if the assets of the estate are worth \$500,000, the representative’s bond would be no less than \$625,000 ( $\$500,000 \times 1.25$ ). The court has the discretion to lower the bond if it can be shown that it is more than what is needed to protect the creditors and heirs.

A person named in a Last Will and Testament as executor is usually not required to post a bond. Neither is a personal representative in an independent administration. In either case, though, the surviving spouse, forced heirs, or creditors can require a bond.

## CHAPTER 14: FORCED HEIRS AND HEIRSHIP

Louisiana has a unique system of laws intended to prevent a person from disinheriting his or her children. These laws, which are derived from the Louisiana Constitution, place restrictions on a person's ability to leave his or her property to someone other than their children in certain circumstances.

### WHAT IS A FORCED HEIR?

Louisiana defines "forced heir" to include:

- A child who is under age 24 at the time of the decedent's death; and
- A child of any age who is permanently incapable of taking care of themselves or administering their financial affairs.

Grandchildren of the decedent can also be considered forced heirs if their parent (the decedent's child) died before the decedent and, at the time of the decedent's death, would have been under age 24 or permanently incapacitated.

### WHAT ARE THE RIGHTS OF A FORCED HEIR?

Forced heirs are entitled to a certain portion of a decedent's estate. This portion is called the "forced portion." Calculation of the forced portion is complicated, requiring a number of value computations and comparisons.

### COLLATION OF PRIOR GIFTS BY FORCED HEIRS

Louisiana law provides a procedure for refund to the estate for any gifts made by the decedent prior to his or her death. This refund may be actual (return of the actual gift) or fictitious (bookkeeping entry of a credit representing the amount of the gift).

This process, known as *collation*, is built on the assumption that the decedent intended to benefit each of his or her descendants equally. Anything that the decedent left to an heir before his or her death is treated as an advancement of that heir's inheritance and is taken into account in distributing the rest of the decedent's assets.

Unlike other heirs, the decedent's children who are forced heirs may demand collation. This right only extends to gifts made within three years of death. Gifts made more than three years before the decedent's death are not subject to collation.

### WAYS TO RESTRICT FORCED HEIRSHIP

There are several ways that a forced heir's rights may be legally restricted.

## USUFRUCT

A decedent is free to give his surviving spouse a usufruct (similar to a common law *life estate*) over his or her property. This usufruct can extend to the forced portion of the decedent's estate. The usufruct can include community property, separate property, or both. It doesn't matter whether the forced heir is a child of the surviving spouse.

## LEGITIME TRUST

The decedent may leave the forced portion to a type of trust referred to as a *legitime trust*. For this type of trust to be valid, the trust must meet the following conditions:

1. All net income from the trust must be distributed to the forced heir for his or her health, education, support, or maintenance, taking into account the other resources available to the forced heir;
2. The forced heir's beneficial interest in the trust must be free of all charges and conditions other than the ordinary restraints on alienation, permissible usufruct rights of a surviving spouse, placement in a class trust, or provisions applicable to the interests of a principal beneficiary;
3. The term of the trust cannot exceed the life of the forced heir (except to the extent that the interest is subject to the surviving spouse's income interest or usufruct); and
4. All principal must be distributed to the forced heir upon termination of the trust.

If a trust provision violates these requirements, it must be reformed to comply with them.

**Note:** A legitime trust is an important planning tool for people with disabled children who are receiving or could receive governmental benefits. These benefits could be cut off if the child receives assets that exceed the resource limits established in the governmental programs. Because of the forced heirship laws, simply disinheriting the child will not prevent this. Instead, a special form of trust (known as a Special Needs Trust) should be used to provide for the supplemental needs of the child without disqualifying him or her from governmental benefits.

## SURVIVORSHIP REQUIREMENT

The decedent may condition a distribution to a forced heir by providing that the forced heir must survive the decedent by a period of up to six months, but only if the forced heir dies without heirs or descendants. This is a common provision in estate planning for tax and other purposes.

## WHAT HAPPENS IF A FORCED HEIR RENOUNCES HIS OR HER LEGITIME?

If a forced heir renounces his or her legitime, it passes to the disposable portion of the decedent's estate. It does not augment the forced portion, meaning that none of the other forced heirs will receive a greater share.



## CHAPTER 15: USUFRUCTS AND NAKED OWNERSHIP

A *usufruct* is a right by one person over the property of another. It is similar to a *life estate* in common law jurisdictions, except that a usufruct can last for a specific period of time other than a lifetime. The person who owns the property is known as a *naked owner* (equivalent to a *remainderman* in a common law state). Usufructs often arise under Louisiana intestate law dealing with community property.

For example, assume that Michelle leaves a right to a parcel of property to Hillary for life, with Biden to have full ownership at Hillary's death. In this type of arrangement, Hillary would have a right over the property that ultimately belongs to Biden. Hillary's right would be a *usufruct* and she would be called the *usufructuary*. Biden would be the *naked owner*.

A usufruct is considered to be a *real right* under Louisiana law, meaning that it confers direct or immediate authority over the property. A usufruct can apply to real estate or other types of property. A usufructuary can use, possess, and administer the property, as well as collect the income, utility, profits, and other advantages produced from the property. When the usufruct ends, however, the usufructuary will need to account to the naked owners for use of the assets.

### HOW USUFRUCTS ARE CREATED

Usufructs often arise by operation of law, apart from any voluntary act by the property owner. There are several contexts in which usufructs are created by law:

- A surviving spouse has a usufruct over any *community* property inherited by a deceased spouse's descendants under Louisiana intestate law;
- A deceased person's surviving parents have a usufruct over any *separate* property of a deceased person who doesn't have descendants when that property is inherited by the decedent's siblings under Louisiana intestate law; and
- Parents of minor children have a usufruct over any property inherited by the child (but not over property received by lifetime gift).

A person can create a voluntary usufruct by lifetime gift or in his or her Last Will and Testament. This is a useful estate planning technique, especially in previous marriage situations. It is common for a spouse's will to give the surviving spouse a usufruct over all community property. This provides for the spouse during her lifetime while ensuring that the decedent's children (who may not be the spouse's children) ultimately receive the property.

Usufructs can also be used for tax planning purposes, such as granting the surviving spouse an interest that will qualify for the Qualified Terminable Interest Property election under Federal tax law.

Usufructs are also used to make a lifetime transfer of a residence to children, reserving a usufruct in the parents to remain in the home. This allows the parents to remain in the home during their lifetime, with the home to pass automatically to the children at death without a succession. This technique has significant drawbacks, however, and should not be undertaken without legal advice from a qualified attorney.

## CHAPTER 16: FOUR STEPS TO GET YOU STARTED

If you are ready to get started with dealing with a deceased person's final affairs, we suggest that you begin with these four steps. These steps will help you determine whether succession is necessary and, if necessary, communicate efficiently with an attorney.

### STEP 1: MAKE A LIST OF THE DECEDENT'S ASSETS

You need to know what assets the decedent owned, where they are located, how much they are worth, and how they are titled (whether there are any co-owners or TOD designations). Knowing this information will help you decide how to deal with the estate under Louisiana law, or if you need to handle it in another state.

### STEP 2: DETERMINE WHETHER THERE IS A VALID LAST WILL AND TESTAMENT

You also need to know there is a valid Last Will and Testament. If so, it will tell you who has the first choice of administering the estate and who should receive the assets.

### STEP 3: MAKE A LIST OF THE NAMES AND ADDRESSES OF THE PARTIES INVOLVED

You cannot resolve Louisiana estate issues without knowing the names and addresses of the other parties involved. Save yourself (and your attorney) some time by putting together a list right away. Keep your eye on three groups:

1. Individuals or organizations named in the Will;
2. Close relatives of the decedent (especially spouses and children); and
3. Creditors or potential creditors of the decedent's estate.

Because each of these groups could be affected by the Louisiana succession proceeding, you should identify them early.

### STEP 4: TALK TO A LOUISIANA SUCCESSION ATTORNEY

Consult with a Louisiana succession attorney early in the process. Certain deadlines could affect your rights if too much time passes without action on your part. A succession attorney can help you navigate this process and ensure that filings are made in a timely manner.

The choice of attorney is up to the personal representative. If you feel that you need an attorney, you should hire an attorney that understands Louisiana successions law and communicates effectively.

Louisiana law recognizes that the succession process is too difficult for most people to navigate without an attorney. Because of this, reasonable attorneys' fees are allowable succession costs and usually paid from the estate assets. As long as there are enough assets in the estate to pay

attorney's fees, the attorney's fees are an expense of the estate and do not come out of the personal representative's pocket.

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