

ESTATE PLANNING AND PROBATE ACROSS STATE LINES – LOUISIANA

I. INTRODUCTION

Presentation directed towards Texas lawyers who represent Texas clients owning Louisiana real property (real estate, including minerals). Outline is divided between (1) planning for these clients prior to death and (2) ancillary and original Louisiana probate for decedents whose death occurs without such lifetime planning being implemented.

A. Louisiana Legal Concepts and Terminology

1. Community Property.

Louisiana is a community property state like Texas, and provides definitions for what is community and separate, states a presumption of community and provides that income on separate property is itself community. See relevant Louisiana Civil Code articles reproduced below.

La. Civ. Code Art. Art. 2338. Community property.

The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

Acts 1979, No. 709, §1.

Note that property may be donated to a married couple as community property. Louisiana law also contains a definition of what constitutes separate property in Louisiana.

2. Separate Property.

La. Civ. Code Art. 2341. Separate property.

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; 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 things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime.

Acts 1979, No. 709, §1; Amended by Acts 1981, No. 921, §1.

Like Texas, Louisiana provides for a presumption of community property which may be rebutted:

La. Civ. Code Art. 2340. Presumption of community.

Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.

Acts 1979, No. 709, §1.

3. Income on Separate Property.

Fruits and revenues (i.e., income) on separate property is itself community. La. Civ. Code Art. 2339 states as follows:

La. Civ. Code Art. 2339. Fruits and revenues of separate property

The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property as provided in this Article.

A spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged. A copy of the declaration shall be provided to the other spouse prior to filing of the declaration.

As to the fruits and revenues of immovables, the declaration is effective when a copy is provided to the other spouse and the declaration is filed for registry in the conveyance records of the parish in which the immovable property is located. As to fruits of movables, the declaration is effective when a copy is provided to the other spouse and the declaration is filed for registry in the conveyance records of the parish in which the declarant is domiciled.

Acts 1979, No. 709, §1; Amended by Acts 1980, No. 565, §2; Acts 2008, No. 855, §1.

Generally, as in Texas, income on separate property is community. Note the Louisiana provisions classifying mineral production, royalties and leases from separate property as community. Also, note the

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provision allowing a spouse to file a declaration to "reserve" income as his or her separate property. There is a relatively recent requirement that a copy of the declaration be provided to the spouse (the old law permitted the reservation of income as separate to be done solely by filing a declaration in the public records). Although a public record, reservation of income as separate could be accomplished under prior law without the spouse's knowledge (who would have had to examine the public records to discover it). This procedure may be useful in situations where marriage is contemplated and one party desires a premarital agreement, but other won't consent to it.

II. DEFINITIONS OF MOVABLE AND IMMOVABLE PROPERTY, FORCED HEIR, LEGITIME, USUFRUCT AND NAKED OWNER

A. Real and Personal Property

Louisiana refers to real property as "immovable property" and personal property as "movable property." A "usufruct" can be thought of as a life estate; and "naked ownership" can be thought of as a remainder interest. The remainderman is called the "naked owner." Also, Texas statutes of limitations are called "prescription" or "prescriptive periods" in Louisiana. A probate proceeding in Louisiana is called a "succession." These definitions may help demystify some of the "voodoo" of Louisiana legal terminology.

Louisiana's unusual legal terminology can be better understood when we analogize them to concepts familiar to us in Texas. For example, in thinking about Louisiana law on "forced heirship," consider our own laws on the homestead, enshrined in our State Constitution, giving the surviving spouse a lifetime right of occupancy. Couldn't the surviving spouse's homestead rights be thought of as a form of forced heirship (a forced life estate, if you will)? The widow's allowance or family allowance?

B. Forced Heirship

1. When Applicable.

When does Louisiana's forced heirship law apply to a Texas decedent owning real or immovable property in Louisiana? La. Civ. Code Art. 3533 provides as follows:

La. Civ. Code Art. 3533. Immovables situated in this state

Except as otherwise provided in this Title, testate and intestate succession to immovables situated in this state is governed by the law of this state.

The forced heirship law of this state does not apply if the deceased was domiciled outside this state at the

time of death and he left no forced heirs domiciled in this state at the time of his death.

Acts 1991, No. 923, §1, eff. Jan. 1, 1992; Acts 1997, No. 257, §1.

Very importantly, the above provision explicitly states that Louisiana's forced heirship law does not apply to a decedent domiciled in Texas who, at death, left no forced heirs domiciled in Louisiana. Thus, if you are handling the estate of a decedent who was domiciled in Texas and who owned real (immovable) property in Louisiana, you only need to be concerned about Louisiana's forced heirship law if the decedent left children or, in rare cases, grandchildren, who themselves are domiciled in Louisiana at the time of the decedent's death.

2. Who is a Forced Heir.

In that rare circumstance where a child or grandchild is domiciled in Louisiana, you need to know if the child or grandchild is a forced heir. La. Civ. Code Art. 1493 provides this definition:

La. Civ. Code Art. 1493. Forced heirs; representation of forced heirs.

A. Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.

B. When a descendant of the first degree predeceases the decedent, representation takes place for purposes of forced heirship only if the descendant of the first degree would have been twenty-three years of age or younger at the time of the decedent's death.

C. However, when a descendant of the first degree predeceases the decedent, representation takes place in favor of any child of the descendant of the first degree, if the child of the descendant of the first degree, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or administering his or her estate at the time of the decedent's death, regardless of the age of the descendant of the first degree at the time of the decedent's death.

D. For purposes of this Article, a person is twenty-three years of age or younger until he attains the age of twenty-four years.

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E. For purposes of this Article "permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent" shall include descendants who, at the time of death of the decedent, have, according to medical documentation, an inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future.

Amended by Acts 1981, No. 884, §1, eff. Jan. 1, 1982; Acts 1989, No. 788, §1, eff. July 1, 1990; Acts 1990, No. 147, §1, eff. July 1, 1990; Acts 1995, No. 1180, §1, eff. Jan. 1, 1996; Acts 1996, 1st Ex. Sess., No. 77, §1; Acts 2003, No. 1207, §2.

Thus, a forced heir is: 1) a child of the decedent who is under 24 years of age on the date of the decedent's death, 2) a child of the decedent of any age who is permanently incapable of taking care of his person or administering his estate, 3) a child of a predeceased child of the decedent (i.e., the decedent's grandchild), when the decedent's child, if living, would not have attained 24 years of age on the date of the decedent's death, and 4) a child of a predeceased child (of any age) of the decedent, which grandchild is permanently incapable of taking care of his person or administering his estate.

One question for your Texas estate planning client owning Louisiana immovable property (which, by definition, includes mineral interests) is whether he or she has children or other descendants living in Louisiana (who meet the narrow definition above). If you encounter forced heirship issues; they may not be a problem, even if the client has a forced heir residing in Louisiana (unless your client is excluding that forced heir entirely from all gifts made in his or her estate); that is true because the amount that must be left to a forced heir is a percentage calculated on only a portion of the total estate and can be satisfied in a variety of ways. However, it would be best to consult a Louisiana Lawyer if you encounter these facts.

3. Special or Supplemental Needs Forced Heir.

A lawyer should exercise caution concerning a special needs or supplemental needs child residing in a Louisiana home or care facility. Is the Louisiana Medicaid office sophisticated enough to make a claim on behalf of that forced heir? Even if Louisiana does not assert a claim on behalf of a forced heir, the pleadings for ancillary probate that will be filed of record will show the heirship of the decedent and list his immovable property (and usually will or should allege that the decedent did or did not have forced heirs). May the decedent leave property in trust when he has a forced heir, and, if so, subject to what

restrictions? What is allowed by Louisiana law that will satisfy forced heirship claims?

C. **Forced Portion or Legitime**

1. Legitime in Trust.

The portion that must be left to a forced heir in Louisiana is called the "legitime." The legitime is defined in La. Civ. Code Art. 1494; the amount of the legitime is calculated as a fraction of the decedent's property as provided in La. Civ. Code Art. 1495; and La. Civ. Code Art. 1496 allows certain conditions to be imposed on the legitime.

La. Civ. Code Art. 1494. Forced heir entitled to legitime; exception

A forced heir may not be deprived of the portion of the decedent's estate reserved to him by law, called the legitime, unless the decedent has just cause to disinherit him.

Acts 1995, No. 1180, §1, eff. Jan. 1, 1996; Acts 1996, 1st Ex. Sess., No. 77, §1.

La. Civ. Code Art. 1495. Amount of forced portion and disposable portion

Donations inter vivos and mortis causa may not exceed three-fourths of the property of the donor if he leaves, at his death, one forced heir, and one-half if he leaves, at his death, two or more forced heirs. The portion reserved for the forced heirs is called the forced portion and the remainder is called the disposable portion.

Nevertheless, if the fraction that would otherwise be used to calculate the legitime is greater than the fraction of the decedent's estate to which the forced heir would succeed by intestacy, then the legitime shall be calculated by using the fraction of an intestate successor.

Amended by Acts 1981, No. 442, §1, eff. Jan. 1, 1982; Acts 1989, No. 788, §1, eff. July 1, 1990; Acts 1990, No. 147, §1, eff. July 1, 1990; Acts 1995, No. 1180, §1, eff. Jan. 1, 1996; Acts 1996, 1st Ex. Sess., No. 77, §1.

La. Civ. Code Art. 1496. Permissible burdens on legitime

No charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law, such as a usufruct in favor of a surviving spouse or the placing of the legitime in trust.

Amended by Acts 1981, No. 442, §1, eff. Jan. 1, 1982; Acts 1989, No. 788, §1, eff. July 1, 1990; Acts 1990, No. 147, §1, eff. July 1, 1990; Acts 1995, No. 1180, §1, eff. Jan. 1, 1996; Acts 1996, 1st Ex. Sess., No. 77, §1.

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Interestingly, Louisiana allows disinheriting a forced heir for certain specified causes.

La. Civ. Code Art. 1621. Children; causes for disinheriton by parents

A. A parent has just cause to disinherit a child if:

- (1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient.
- (2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury.
- (3) The child has attempted to take the life of a parent.
- (4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death.
- (5) The child has used any act of violence or coercion to hinder a parent from making a testament.
- (6) The child, being a minor, has married without the consent of the parent.
- (7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death.
- (8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time.

B. For a disinheriton to be valid, the cause must have occurred prior to the execution of the instrument that disinherits the heir.

Acts 2001, No. 573, §1, eff. June 22, 2001.

La. Rev. Stat. §9:1841 states the rules for the legitimate placed in trust and provides as follows:

La. Rev. Stat. §9:1841. General rule
The legitimate or any portion thereof may be placed in trust provided:

- (1) The trustee after taking into account all of the other income and support to be received by the forced heir during the year shall distribute to the forced heir, or to the legal guardian of the forced heir, funds from the net income in trust

sufficient for the health, maintenance, support, and education of the forced heir.

- (2) The forced heir's interest is subject to no charges or conditions except as provided in R.S. 9:1843, 1844, 1891 through 1906 and Subpart B of Part III of this Chapter.

- (3) Except as permitted by R.S. 9:1844, the term of the trust, as it affects the legitimate, does not exceed the life of the forced heir; and

- (4) The principal shall be delivered to the forced heir or his heirs, legatees, or assignees free of trust, upon the termination of the portion of the trust that affects the legitimate.

Amended by Acts 1974, No. 126, §1; Acts 1979, No. 160, §1; Acts 1995, No. 414, §1; Acts 1999, No. 967, §1.

2. Interest of Surviving Spouse.

A surviving spouse may have an income interest over the forced heir's portion that may last for his or her lifetime. La. Rev. Stat. §9:1844 provides that the forced portion (or legitimate) may be subject to an income interest; and 9:1847 makes clear that the principal amount attributed to the forced heir may not be distributed to another income beneficiary.

La. Rev. Stat. §9:1844. Legitime burdened with income interest or usufruct

The legitime in trust may be burdened with an income interest or with a usufruct in favor of a surviving spouse to the same extent and for the same term that a usufruct of the same property could be stipulated in favor of the same person for a like period.

Amended by Acts 1974, No. 126, §1.

La. Rev. Stat §9:1847. Invasion of principal; legitime affected

A trustee may not pay principal to an income beneficiary if the payment would deprive another beneficiary of all or a part of his legitimate, notwithstanding any contrary provision of the trust instrument.

For the remaining discussion, we will assume the client's estate is not subject to Louisiana's forced heirship law. In this more common situation, one way to deal with Louisiana immovable property is to transfer it during the client's lifetime. There are several alternatives for making lifetime transfers.

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III. ESTATE PLANNING – LIFETIME TRANSFERS

A. Planning Alternatives

1. Outright Transfer

Transfer the property to beneficiaries now (may or may not be practical). Such is accomplished by signing a Conveyance or Assignment document (generally not called a Deed in Louisiana) before two witnesses and a Notary, and filing it in the Conveyance records of the Parish where the property is located. Depending on the value of the property and the number of donees, such transfer may require the use of exemption from gift and estate tax and the filing of gift tax returns. Advantages: simplicity, low cost, avoids ancillary probate. Disadvantages: gives up control, use and income from the property, and may require use of exemption and filing of gift tax return as noted above. A better alternative may be a transfer subject to retained usufruct (life estate). If that approach is taken, what happens at death? Probably can file an affidavit in the Conveyance Records without further proceedings.

2. Transfer to Entity

Transfer the property to a limited partnership or LLC. This is perhaps the best solution. Such transfer converts the property to movable (personal) property? Arguably so. La. Civ. Code Art. 3532 clearly states that succession (probate) of movables is governed by the law of the state where the decedent was domiciled:

La. Civ. Code Art. 3532. Movables

Except as otherwise provided in this Title, testate and intestate succession to movables is governed by the law of the state in which the deceased was domiciled at the time of death.

Acts 1991, No. 923, §1, eff. Jan. 1, 1992.

Further, La. Civ. Code Art. 473 provides that the interest of a person in "entities possessing juridical personality" (i.e., an interest in a partnership or LLC) is movable property:

La. Civ. Code Art. 473. Incorporal movables.

Rights, obligations, and actions that apply to a movable thing are incorporeal movables. Movables of this kind are such as bonds, annuities, and interests or shares in entities possessing juridical personality.

Interests or shares in a juridical person that owns immovables are considered as movables as long as the entity exists; upon its dissolution, the right of each individual to a share in the immovables is an immovable.

Acts 1978, No. 728, §1.

Advantages of this approach are retention of ownership of the property, including control, use and income, no making of a gift or use of gift and estate tax exemption, removal of the property from governance by Louisiana law (probably including forced heirship), and avoidance of ancillary probate. Only disadvantage is cost of establishing the entity and possible additional complexity. Perhaps can have single-member LLC that is taxed as a disregarded entity to avoid complexity.

Some issues to confront if Louisiana immovable property is placed into an entity (LLC or limited partnership):

- a. Must qualify to do business in Louisiana? Should the entity be a Texas or Louisiana LLC? If passive ownership, probably not.
- b. Is the entity subject to Louisiana income or franchise tax? What if there is income from producing minerals or rental income? Is there any difference in tax treatment from individual ownership?

3. Transfer to Revocable Trust

Another alternative is to transfer the property to a revocable trust. Requires a Conveyance or Assignment of the property to the trust. See Appendix A to outline for a form of Assignment. If done in the trust instrument itself, the trust agreement must be recorded. A Louisiana form of trust must be executed before a Notary and two witnesses. A valid Texas trust should be given full faith and credit, but it wouldn't hurt to execute the agreement before a Notary and two witnesses if it is going to own Louisiana real property. If the property is not being conveyed in the trust agreement itself, then the Settlor or Trustee may execute and record an Extract of Trust, which must contain the items set out in paragraph B of La. Rev. Stat. §9:2092, instead of recording the entire trust agreement. See Appendix B to outline for a form of Extract. La. Rev. Stat. §9:2092 provides as follows:

La. Rev. Stat. §9:2092. Recordation of instruments

- A. If at any time the trust property of either an inter vivos trust or a testamentary trust includes immovables or other property the title to which must be recorded in order to affect third persons, a trustee shall file the trust instrument, an extract of trust, or a copy of the trust instrument or extract of trust certified by the clerk of court for the parish in which the original trust instrument or extract of trust was filed, for record in each parish in which the property is located. Nevertheless, if

the trust instrument contains a transfer of immovable property or other property the title to which must be recorded in order to affect third persons, a trustee shall file the trust instrument for record in the parish in which the property is located.

B.

(1) For purposes of recording an extract of a trust instrument, such an extract shall be executed by either the settlor or the trustee and shall include all of the following:

- (a) The name of the trust, if any.
- (b) A statement as to whether the trust is revocable or irrevocable.
- (c) The name of each settlor.
- (d) The name of each trustee and name or other description of the beneficiary or beneficiaries.
- (e) The date of execution of the trust.
- (f) Any limitation or restriction on the power of the trustee to alienate, lease, or encumber immovable property contained in the trust instrument.

(2) When an extract of trust is recorded pursuant to Subsection A of this Section, any limitation or restriction in the trust instrument on the power of the trustee to alienate, lease, or encumber immovable property shall not be effective against third persons unless it is recited in the extract of trust.

(3) The provisions of this Section authorizing the filing of an extract of the trust instrument or a clerk-certified copy of the trust instrument or extract of trust without a description of the property are remedial and shall be applied retroactively to any trust extract or clerk-certified copy of either the trust instrument or extract of trust theretofore filed for record which is in substantial compliance with the provisions of this Subsection, and such extract or clerk-certified copy shall affect third persons as of the date of recordation. If the extract of an inter vivos trust instrument or clerk-certified copy thereof is recorded, the failure of the trust instrument to be in the form required by R.S. 9:1752 shall not be effective against third persons, who shall be immune from claims based on the failure of the trust

instrument to be in the form required by R.S. 9:1752.

Acts 1995, No. 257, §1; Acts 2003, No. 731, §1; Acts 2004, No. 491, §1; Acts 2012, No. 740, §1; Acts 2015, No. 225, §1; Acts 2016, No. 544, §1.

NOTE: See Acts 1987, No. 164, §3.

If advance planning is not done, then there are several succession alternatives available, including ancillary probate of a will admitted in Texas, original probate of the will in Louisiana and use of a small successions affidavit. There are two kinds of Louisiana successions - a simple putting in possession (similar to the Texas muniment procedure) and succession with appointment of an executor or administrator (who can be independent).

IV. ESTATES AND PROBATE (SUCCESSIONS); AFTER-DEATH ACTIONS AND PROCEEDINGS

A. Ancillary Succession Proceedings in Louisiana 1. Uniform Probate Law.

Louisiana has adopted the Uniform Probate Law in La. Rev. Stat. §§9:2421 through 2425. The statute requires duly authenticated (triple certified) copies from Texas probate to be filed in Louisiana with a petition for probate. Note that the typical form of Texas will is usually not in a form valid under Louisiana law (holographic, yes, called olographic in Louisiana). A Louisiana "notarial will" must be signed at the bottom of every page. La. Rev. Stat. §§9:2421-2425 provide as follows:

La. Rev. Stat. §9:2421. Will probated outside state may be allowed and recorded

A will duly proved, allowed, and admitted to probate outside of this state, may be allowed and recorded in the proper court of any parish in this state, in which the testator shall have left any estate.

La. Rev. Stat. §9:2422. Filing of will and proceedings thereon

When a copy of the will and probate thereof, duly authenticated, shall be presented by the executor or by any other person interested in the will, with a petition for the probate, the same must be filed and proper proceedings had as required by law on a petition for the original probate of a domestic will.

La. Rev. Stat. §9:2423. Admission to probate; force and effect

If upon the hearing, it appears to the satisfaction of the court that the will has been duly proved, allowed, and

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admitted to probate outside of this state, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, which probate shall have the same force and effect as the original probate of a domestic will.

L.a. Rev. Stat.§9:2424. Probate of will operative under laws of state or country not requiring probate

When a duly authenticated copy of a will from any state or country where probate is not required by the laws of such state or country, with a duly authenticated certificate of the legal custodian of such original will that the same is a true copy, and that such will has become operative by the laws of such state or country, and when a copy of a notarial will in possession of a notary in a foreign state or country entitled to the custody thereof (the laws of which state or country require that such will remain in the custody of such notary), duly authenticated by such notary, is presented by the executor or other persons interested to the proper court in this state, such court shall probate the same as in case of an original will presented for probate.

If it appears to the court that the instrument ought to be allowed in this state, as the last will and testament of the deceased the copy shall be filed and recorded, and the will shall have the same effect as if originally proved and allowed in the said court.

L.a. Rev. Stat. §9:2425. Short title; interpretation

This Part may be cited as the Uniform Probate Law, and shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of the states which enact it.

Thus, for a will probated in Texas, obtain a “duly authenticated” copy of the will and order admitting it to probate (triple certified) from the clerk of court to be probated in Louisiana. Such probate will have the same force and effect as a will originally probated in Louisiana. The succession procedure is very straightforward and, unless contested, can all be handled by mail. Pleadings are fairly similar to ours with a few additions, which I discuss below. However, see ethics discussion below regarding unauthorized practice of law.

2. Small Succession Affidavit.

LA Code Civ. Proc. Art. 3421 Small Succession Affidavit Procedure; 3431 - may be used for testament probated in another state (and certain intestacy proceedings). See also LA C.C.P. Arts. 3432.1 and

3434. See Appendix C to outline for a form of Small Successions Affidavit.

L.a. Code Civ. Proc. Art. 3421. Small successions defined

A small succession, within the meaning of this Title, is the succession or the ancillary succession of a person who at any time has died and the decedent's property in Louisiana has a gross value of one hundred twenty-five thousand dollars or less valued as of the date of death or, if the date of death occurred at least twenty years prior to the date of filing of a small succession affidavit as authorized in this Title, leaving property in Louisiana of any value.

Amended by Acts 1976, No. 187, §1, eff. Jan. 1, 1977; Acts 1979, No. 71, §1, eff. Jan. 1, 1980; Acts 1980, No. 582, §1; Acts 2009, No. 81, §1, eff. June 18, 2009; Acts 2011, No. 323, §1, eff. June 29, 2011; Acts 2012, No. 618, §1, eff. June 7, 2012; Acts 2017, No. 96, §1.

L.a. Code Civ. Proc. Art. 3431. Small successions; judicial opening unnecessary

A. It shall not be necessary to open judicially the small succession of a person domiciled in Louisiana who died intestate, or domiciled outside of Louisiana who died intestate or whose testament has been probated by court order of another state, and whose sole heirs are the following:

- (1) His descendants.
- (2) His ascendants.
- (3) His brothers or sisters, or descendants thereof.
- (4) His surviving spouse.
- (5) His legatees under a testament probated by court order of another state.

B. Any person appointed as public administrator by the governor may use the affidavit procedure of this Chapter to take possession of the estate of the deceased for transmittal to the state provided there is no surviving spouse or other heir present or represented in the state, and provided he has advertised one time in the official journal of the parish where a succession would have been opened under Article 2811, and verifies that he has received no notice of opposition.

C. The legal notice required in Paragraph B of this Article shall read as follows:

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"Notice is hereby given to any heirs or creditors of _____ that _____, Public Administrator for the parish of _____, intends to administer the intestate succession of _____, under the provisions of Small Successions as set forth in Chapter 2 of Title V of Book VI of the Code of Civil Procedure. Anyone having an objection to such administration of the succession should notify _____ at _____

—."

D. Repealed by Acts 2011, No. 323, §2, eff. June 29, 2011.

Amended by Acts 1984, No. 623, §1, eff. July 12, 1984; Acts 1990, No. 701, §1; Acts 1995, No. 111, §1; Acts 2006, No. 257, §1, eff. June 8, 2006; Acts 2009, No. 81, §1, eff. June 18, 2009; Acts 2011, No. 323, §§1, 2, eff. June 29, 2011; Acts 2012, No. 618, §1, eff. June 7, 2012.

La. Code Civ. Proc. Art. 3432.1. Affidavit for small succession for a person domiciled outside of Louisiana who died testate; contents

A. When it is not necessary under the provisions of Article 3431 to open judicially a small succession, at least two persons, including the surviving spouse, if any, and one or more competent legatees of the deceased, may execute one or more multiple originals of an affidavit, duly sworn before any officer or person authorized to administer oaths in the place where the affidavit is executed, setting forth all of the following:

- (1) The date of death of the deceased, and his domicile at the time thereof.
- (2) The fact that the deceased died testate.
- (3) The marital status of the deceased, the location of the last residence of the deceased, and the name of the surviving spouse, if any, and the surviving spouse's address, domicile, and location of last residence, together with the names and last known addresses of the legal heirs of the deceased, and identifying those of the legal heirs who are also forced heirs of the deceased.
- (4) The names and last known addresses of the legatees of the deceased, and the

statement that a legatee not signing the affidavit was given ten days notice by U.S. mail of the affiants' intent to execute an affidavit for small succession and did not object.

- (5) A description of the property left by the deceased, including whether the property is community or separate, and which, in the case of immovable property, must be sufficient to identify the property for purposes of transfer.
- (6) A showing of the value of each item of property subject to the jurisdiction of the courts of Louisiana, and the aggregate value of all such property, at the time of the death of the deceased.
- (7) A statement describing the respective interests in the property which each legatee has inherited and whether a legal usufruct of the surviving spouse attaches to the property.
- (8) An attachment consisting of certified copies of the testament and the probate order of another state.
- (9) An affirmation that, by signing the affidavit, the affiant, if a legatee, has accepted the legacy of the deceased.
- (10) An affirmation that, by signing the affidavit, the affiants swear under penalty of perjury that the information contained in the affidavit is true, correct, and complete to the best of their knowledge, information, and belief.

B. If the deceased had no surviving spouse, the affidavit must be signed by at least two persons who have actual knowledge of the matters stated therein.

C. In addition to the powers of a natural tutor otherwise provided by law, a natural tutor may also execute the affidavit on behalf of a minor child without the necessity of filing a petition pursuant to Article 4061.

Acts 2012, No. 618, §1, eff. June 7, 2012.

La. Code Civ. Proc. Art. 3434. Endorsed copy of affidavit authority for delivery of property

A. A multiple original of the affidavit authorized by Article 3432, shall be full and sufficient authority for the payment or delivery of any money or property of the deceased described in the affidavit to the heirs of the deceased and the surviving spouse in community, if

any, in the percentages listed therein, by any bank, financial institution, trust company, warehouseman, or other depository, or by any person having such property in his possession or under his control. Similarly, a multiple original of an affidavit satisfying the requirements of this Article shall be full and sufficient authority for the transfer to the heirs of the deceased, and surviving spouse in community, if any, or to their assigns, of any stock or registered bonds in the name of the deceased and described in the affidavit, by any domestic or foreign corporation.

- B. The receipt of the persons named in the affidavit as heirs of the deceased, or surviving spouse in community thereof, constitutes a full release and discharge for the payment of money or delivery of property made under the provisions of this Article. Any creditor, heir, succession representative, or other person whatsoever shall have no right or cause of action against the person paying the money, or delivering the property, or transferring the stock or bonds, under the provisions of this Article, on account of such payment, delivery, or transfer.

- C. (1) A multiple original of the affidavit, to which has been attached a certified copy of the deceased's death certificate, shall be recorded in the conveyance records in the office of the clerk of court in the parish where any immovable property described therein is situated, after at least ninety days have elapsed from the date of the deceased's death.

- (2) An affidavit so recorded, or a certified copy thereof, shall be admissible as evidence in any action involving immovable property to which it relates or is affected by the instrument, and shall be prima facie evidence of the facts stated therein, including the relationship to the deceased of the parties recognized as heir, surviving spouse in community or usufructuary as the case may be, and of their rights in the immovable property of the deceased.

- (3) An action by a person, who claims to be a successor of a deceased person but who has not been recognized as such in an affidavit authorized by Article 3432, to assert an interest in property formerly owned by the deceased, against a third person who has acquired an interest in the property, or against his successors by onerous title, is prescribed two years

from the date of the recording of the affidavit in accordance with this Paragraph.

Amended by Acts 1974, No. 524, §1; Acts 2009, No. 81, §1, eff. June 18, 2009; Acts 2011, No. 323, §1, eff. June 29, 2011.

B. Original Probate under Louisiana Law

This procedure allows for the probate of a will not admitted to probate (if, for example, all property outside Louisiana was held in a revocable trust). Louisiana's rules on wills (testaments) are set forth in part in Civil Code Article 3528, which provides as set forth below:

La. Civ. Code Art. 3528. Formal validity of testamentary dispositions

A testamentary disposition is valid as to form if it is in writing and is made in conformity with: (1) the law of this state; or (2) the law of the state of making at the time of making; or (3) the law of the state in which the testator was domiciled at the time of making or at the time of death; or (4) with regard to immovables, the law that would be applied by the courts of the state in which the immovables are situated.

Acts 1991, No. 923, §1, eff. Jan. 1, 1992.

There are two types of original succession proceedings in Louisiana, with and without administration. A proceeding without the appointment of an estate representative (without administration) is a simple placing in possession; and the second (with administration) involves the appointment and later discharge of a personal representative (an executor or administrator). Either can be done in a testate or intestate proceeding. An intestate proceeding in Louisiana is much simpler than in Texas, and does not require the appointment of an ad litem.

I. Simple Placing in Possession (like Mummiment of Title)

The provision for probate of a non-Louisiana will is contained in the Louisiana Code of Civil Procedure Art. 2888, set forth below:

La. Code Civ. Proc. Art. 2888. Foreign testament

A written testament subscribed by the testator and made in a foreign country, or in another state, or a territory of the United States, in a form not valid in this state, but valid under the law of the place where made, or under the law of the testator's domicile, may be probated in this state by producing the evidence required under the

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law of the place where made, or under the law of the testator's domicile, respectively.

2. Administration of Louisiana Succession.

Louisiana has independent administration of estates (which I understand was patterned on Texas law). An Executor (or personal representative) can qualify to act in Louisiana. Essentially person applying is subject to the same disqualifications as in Texas. Important provisions dealing with these qualifications are contained in the following Articles of the Louisiana Code of Civil Procedure:

La. Code Civ. Proc. Art. 2811. Court in which succession opened

A proceeding to open a succession shall be brought in the district court of the parish where the deceased was domiciled at the time of his death.

If the deceased was not domiciled in this state at the time of his death, his succession may be opened in the district court of any parish where:

- (1) Immovable property of the deceased is situated; or,
- (2) Movable property of the deceased is situated, if he owned no immovable property in the state at the time of his death.

A person may not be appointed as a succession representative in Louisiana if he fails any of the requirements provided under La. Code Civ. Proc. Art. 3097, which reads as follows:

La. Code Civ. Proc. Art. 3097.
Disqualifications

A. No person may be confirmed as testamentary executor, or appointed dative testamentary executor, provisional administrator, or administrator who is:

- (1) Under eighteen years of age;
- (2) Interdicted, or who, on contradictory hearing, is proved to be mentally incompetent;
- (3) A convicted felon, under the laws of the United States or of any state or territory thereof;
- (4) A nonresident of the state who has not appointed a resident agent for the service of process in all actions and proceedings with respect to the succession, and caused such appointment to be filed in the succession proceeding;
- (5) A corporation not authorized to perform the duties of the office in this state; or

- (6) A person who, on contradictory hearing, is proved to be unfit for appointment because of bad moral character.

B. No person may be appointed dative testamentary executor, provisional administrator, or administrator who is not the surviving spouse, heir, legatee, legal representative of an heir or legatee, or a creditor of the deceased or a creditor of the estate of the deceased, or the nominee of the surviving spouse, heir, legatee, or legal representative of an heir or legatee of the deceased, or a co-owner of immovable property with the deceased.

Amended by Acts 1964, No. 4, §1; Acts 1972, No. 347, §1; Acts 1985, No. 528, §1, eff. July 12, 1985.

Louisiana law sets forth the rule for jurisdiction for a proceeding involving a non-Louisiana decedent, essentially any parish in Louisiana where the decedent left property situated. Note that, except for New Orleans (Civil District Court for the Parish of Orleans), the state of Louisiana is divided among numbered Judicial District Courts where succession proceedings are filed.

La. Code Civ. Proc. Art. 3401. Jurisdiction;
procedure

When a nonresident dies leaving property situated in this state, a succession proceeding may be instituted in a court of competent jurisdiction in accordance with Article 2811.

Except as otherwise provided in this Title, the procedure in such a succession shall be the same as provided by law for the succession of a Louisiana domiciliary.

Some nice things about Louisiana successions - can be handled by mail, unless contested; and the end result is a Judgment of Possession recognizing the heirs or legatees as the owners and placing them into possession of the estate. The Judgment also will discharge the succession representative. In Texas, we prepare an Application for Probate whereas, in Louisiana, it is called a "Petition for Probate." We prepare an Inventory and List of Claims and, in Louisiana, the Inventory is called a "Sworn Descriptive List of Assets." There are a few other minor differences, but one important difference is that in Louisiana, the attorney will file a "Petition for Possession" and obtain a "Judgment of Possession" signed by the Judge. If there is immovable property located in more than one parish (which is common with mineral interests), the lawyer will have a choice regarding where to file the ancillary succession. All

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property is listed on the Sworn Descriptive List, Petition and Judgment of Possession; and a certified copy of the Judgment (or an Extract thereof) is recorded in the other parishes where property is located, and furnishes authority for third parties to transfer assets. If you have a choice, it is a good idea to call the clerk's office or check the website before filing. Certain parishes (East Baton Rouge, for one) charge exorbitant filing fees. Also, there are local rules of Court that vary from one parish to another.

V. ETHICAL ISSUES

A. Legitimate Practice as Licensed Texas Lawyer

1. Preparation of Texas revocable trust agreement that will hold Louisiana immovable property
2. Preparation and filing (?) of a conveyance document that will transfer Louisiana immovable property into the trust
3. Preparation and filing (?) of an Extract of Trust in Louisiana that comports with the Louisiana statute

B. Unauthorized Practice of Law

1. Preparation and filing of Small Successions Affidavit in Louisiana parish where immovable property is situated
2. Preparation of Louisiana succession pleadings to be filed in Louisiana by client in proper person
3. Preparation and filing of Louisiana succession pleadings with Louisiana Court

APPENDIX A - ASSIGNMENT

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS, that for and in consideration of Ten and No/100 (\$10.00) Dollars and Other Good and Valuable Consideration paid,

_____**(Assignor)**, a resident of the State of Texas,
with mailing address of _____, Texas 7 _____,
hereinafter referred to as "Assignor,"

does hereby GRANT, CONVEY, SELL, ASSIGN and TRANSFER unto

_____ **Trust**, created under Trust Agreement
dated _____, _____ (Year) executed by _____
as Grantor and Trustee, acting herein
through _____, its sole Trustee, hereinafter
referred to as "Assignee,"

all of Assignor's right, title and interest in and to the oil and gas leaseholds, working interests, sulphur, minerals, royalties, other mineral rights, other real property interests, including fee title, surface rights, easements and rights of way and any other property interests located in _____ Parish, Louisiana, including but not limited to those described on Exhibit A attached hereto and made a part hereof, together with all of Assignor's interest in oil and gas wells, casing, equipment, gathering lines and pipelines located on or used in connection therewith.

This Assignment is made without any warranty of title, express or implied, and is made subject to all of the terms and conditions of the leases herein assigned. This Assignment includes all of Assignor's entire interest in the property assigned.

IN WITNESS WHEREOF, this Assignment is executed on _____, 2018.

WITNESSES:

ASSIGNOR:

_____ (Name of Assignor)

ASSIGNEE:

_____ Trust
By _____
_____, Sole Trustee

STATE OF TEXAS

COUNTY OF DALLAS

On this _____ day of _____, 2018, before me, the undersigned authority, personally appeared _____, **individually and as sole Trustee of the _____ Trust**, duly authorized to act therein, to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that she executed the same as her own free act and deed and as the free act and deed of the _____ Revocable Trust for the purposes and considerations therein expressed on behalf of said Trust.

Notary Public in and for the State of Texas

My Commission Expires: _____

EXHIBIT A

_____ Parish, Louisiana

1. Insert Legal Description.
2. Insert Legal Description.

APPENDIX B - EXTRACT

EXTRACT OF TRUST INSTRUMENT

(Settlor or Trustee), a resident of the State of Texas, with mailing address of _____, Texas 7_____, hereby executes this Extract of Trust Instrument and, pursuant to the provisions of La. R.S. 9:2092, states the following:

- 1) _____ is the Settlor and sole Trustee of the _____ Trust, a valid trust created under Texas law by Trust Agreement dated _____ (Year) executed by _____ as Settlor and as Trustee;
- 2) The name of the trust is the _____ Trust;
- 3) The _____ Trust is revocable;
- 4) The name of the Settlor of the trust is _____;
- 5) The name of the sole Trustee of the trust is _____; and the names of the beneficiaries of the trust are _____, _____ and _____;
- 6) The date the trust was executed is _____; and
- 7) The Louisiana immovable property to be subject to the trust is all of _____'s right, title and interest in and to the oil and gas leaseholds, working interests, sulphur, minerals, royalties, other mineral rights, other real property interests, including fee title, surface rights, easements and rights of way and any other property interests located in _____ Parish, Louisiana, together with all of _____'s interest in oil and gas wells, casing, equipment, gathering lines and pipelines located on or used in connection therewith.

This Extract of Trust Instrument is made and executed this _____ day of _____, 20_____, in Dallas, Texas.

WITNESSES:

(Settlor or Trustee)

STATE OF TEXAS

COUNTY OF DALLAS

On this _____ day of _____, 20_____, before me, the undersigned authority, personally appeared _____, to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that she executed the same as her own free act and deed for the purposes and considerations therein expressed.

Notary Public in and for the State of Texas
My Commission Expires: _____

APPENDIX C - AFFIDAVIT

15th JUDICIAL DISTRICT COURT FOR THE PARISH OF ACADIA

STATE OF LOUISIANA

NO. _____ DIVISION _____ DOCKET NO. _____

**SUCCESSION OF
(NAME OF DECEDENT)**

FILED: _____
DEPUTY CLERK _____

SMALL SUCCESSION AFFIDAVIT

NAME OF AFFIANT #1 AND NAME OF AFFIANT #2 ("Affiants") furnish the following information to the Court pursuant to Article 3432.1 of the Louisiana Code of Civil Procedure and have actual knowledge of the facts set forth below.

1. Name of Decedent ("Decedent") died on Date of Death, domiciled in Dallas, Dallas County, Texas, at the age of Age of Decedent.

2. Decedent left a valid Last Will and Testament dated Date of Decedent's Will, which was never revoked.

3. Decedent was married to Name of Surviving Spouse at the time of his death, and his last residence was located in Dallas, Dallas County, Texas. Decedent's legal heirs and their last known addresses are as follows:

Name of Child #1
Address of Child #1

Name of Child #2
Address of Child #2

Name of Surviving Spouse
Address of Surviving Spouse

Decedent has no forced heirs.

4. The legatees of the Decedent and their last known addresses are as follows:

Name and address of legatee #1; and

Name and address of legatee #2.

All legatees are executing this Affidavit.

5. The property left by the Decedent located in the State of Louisiana is the following described immovable property, which was Decedent's and surviving spouse's community property:

INSERT LEGAL DESCRIPTION OF IMMOVABLE PROPERTY

6. The estimated value of the immovable property described in Paragraph 5 above was \$ _____ (INSERT VALUE) for the Acadia Parish property and \$ _____ (INSERT VALUE) for the Lafayette Parish property at the time of Decedent's death.

7. Name of Surviving Spouse owns a one-half community interest in the immovable property described in Paragraph 5 above and Decedent's one-half community interest was bequeathed to (Name of Legatee, such as a trust or the surviving spouse, for example), and is not subject to any usufruct.

8. Decedent's Last Will and Testament was probated in the Probate Court No. 2 of Dallas County, Texas, under Cause No. PR-_____-2. Certified copies of Decedent's Will and Order Admitting Will to Probate are attached hereto, together with a certified copy of Decedent's death certificate.

9. By signing this Affidavit, Affiants swear that they have accepted the legacy of the deceased.

10. By signing this Affidavit, Affiants swear that the information contained in this Small Succession Affidavit is true, correct and complete to the best of their knowledge, information and belief.

Name of Affiant #1, individually and as Co-Trustee of the _____ Management Trust dated (Date of Trust)

Name of Affiant #2, as Co-Trustee of the
Management Trust
dated (Date of Trust)

SWORN TO AND SUBSCRIBED before me by the said Name of Affiant #1 on this

_____ day of _____, 2018.

[SEAL]

Notary Public, State of Texas
My Commission Expires: _____

SWORN TO AND SUBSCRIBED before me by the said Name of Affiant #2 on this

_____ day of _____, 2018.

[SEAL]

Notary Public, State of Texas
My Commission Expires: _____