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WILLS AND ESTATES IN LOUISIANA

COMMUNITY AND SEPARATE PROPERTY

Louisiana is a community property state. The word "property" as used here is not limited to real estate but includes all assets. A single, widowed, or divorced person owns separate property. A married person may own separate and community property. Any property that a married person owns before marriage or acquires by gift or inheritance during marriage is separate property. All other property of a married person, such as earnings from labor, interest, and dividends is community property. Items purchased with these earnings are also classified as community property. Even income from separate property like rent collected on a separate house or interest earned from funds in a separate account is community property unless a person has signed and filed a certain legal document stating that such income is to remain separate property. There are other important rules as to property in Louisiana. For instance, there is a very strong presumption that property of a married person is community property. Furthermore, when separate property becomes commingled or mixed with community property, it is usually considered to be transformed into community property.

MARRIAGE CONTRACT

Before marriage, a couple can enter into a contract providing that they shall not have community property. Louisiana law calls this contract a marriage contract, but you may know it as a prenuptial agreement or a pre-nup. A couple already married can also enter into a contract to end community property, but they must first get permission from the court to do so. They can divide any community property they already own.

CHANGE OF CLASSIFICATION OF PROPERTY

A married couple can transform community property into separate property and separate property into community property. Sometimes a married couple transforms property unintentionally when they commingle funds. Other times the property is purposefully transformed, usually by a donation.

YOUR ESTATE

At death your estate includes all of your separate property and if you are married, one half of the community property owned by you and your spouse. Life insurance on your life payable to a named beneficiary is not part of your estate for purposes of your Louisiana succession.

USUFRUCT

Ownership of property has three elements: the use, the fruits, and the abuse. The use of an item is simply the right to use it. Fruits are either natural or civil. The term "natural fruits" refers to anything the land produces such as timber, minerals, or fruits from an orchard. "Civil fruits" refers to income the property produces such as rent, interest, and dividends. Abuse means the right to sell or otherwise transfer property. Usufruct of property is the right to the use and the fruits, or in other words, the right to use it yourself or to receive its income or both. For example, a person with usufruct of a house can live in the house (enjoy the use) or rent the house to someone else and spend or save the income (enjoy the fruits). A person who has usufruct of property is called the usufructuary. The person who has the abuse or right to transfer ownership of property is called the naked owner. The law calls him the naked owner because the usufruct in effect strips him of his right to use the property and the right to enjoy the fruits. The rights of the naked owner are normally subject to or subordinate to the rights of the usufructuary. Louisiana law defines the rights of a usufructuary as to various types of property. The person who has the usufruct of cash has the right to spend it.

Notice in the section outlining the division of property at death without a will that, even without a will, the law gives usufruct to certain people and naked ownership to others in some situations. The usufruct granted by law in favor of a surviving spouse ends if the surviving spouse remarries; otherwise it ends when the surviving spouse dies. The usufruct granted by law in favor of parents ends when both parents have died.

Usufruct is an important concept in estate planning in Louisiana because it allows you to give use and income of property to one or more people for a time, while at the same time giving the naked ownership to others. The naked owners come into the enjoyment of the property when the usufruct ends. It is not necessary for spouses to will ownership of assets to each other for the surviving spouse to have enjoyment after the first spouse dies. To will ownership of property to the spouse may result in taxation if the asset remains in the estate of the last spouse to die, but not so with the usufruct. The property over which the surviving spouse has usufruct is not taxed in the estate of the surviving spouse. There is an exception to this rule in the case of federal estate tax on usufruct property that has qualified for the marital deduction, but this subject needs too much explanation to discuss here.

DIVISION OF YOUR ESTATE WITHOUT A WILL

Louisiana law has rules for the distribution of your property should you die without a will. The order of distribution depends upon whether the property is community or separate property. Following is a very abbreviated list of the order of heirship according to Louisiana law. If you leave no heirs in the first class, your property goes to the heirs in the next highest class. An heir in a certain classification disqualifies all heirs in any lower classification.

Community Property

- Descendants--Your children (and any children of a child who predeceases you) get the naked ownership, and your surviving spouse gets the usufruct until remarriage. (La. CC arts. 888 & 890)
- Surviving spouse (La. CC art. 889)

Separate Property

- Descendants--your children (and the children of any child who predeceases you)
- Brothers & sisters, or their descendants (your nieces and nephews) if they predeceased you, subject to life usufruct of your parents (La. CC art. 891) A special formula determines the share of any half-brothers and half-sisters. (La. CC art. 893).
- Brothers & sisters or descendants of any predeceased brothers & sisters (La. CC art. 892)
- Parent(s) (La. CC art. 892)
- Surviving spouse (La. CC art. 894)
- Ascendants other than parents (your grandparents or great-grandparents for instance) (La. CC art. 895)
- Collaterals other than brothers, sisters, or descendants from them (for instance, your aunts & uncles or cousins) (La. CC art. 896)
- State of Louisiana (La. CC art. 902)

REPRESENTATION

Representation means that in certain situations, if a person who had been your heir dies before you do or renounces an inheritance from you, someone else stands in his place or represents him and is an heir to your succession by representation. The most common example of this is that in your succession your grandchildren represent their parent (your child) who died before you.

FORM FOR A LAST WILL AND TESTAMENT

A male person making a will is called a testator; a female, a testatrix. A person receiving gifts in a will is called a legatee, although for simplicity, sometimes referred to as an heir. To give property by will is to bequeath it, and the gift is called a bequest or legacy. Since July 1, 1999, there are only two forms of wills recognized in Louisiana. However, if you have a will that was valid when made, it is still valid.

Louisiana recognizes the handwritten or olographic will. The only form requirements are that the will be handwritten, dated, and signed in your own handwriting. The month should be written as a word rather than abbreviated by a number so that there is no confusion about the date. No witnesses are necessary. While it is possible to write a will using this form, it is not advisable to do so unless the will is reviewed by a qualified attorney to be certain your will reflects your intention.

The will form used most often in Louisiana is the notarial will. It is very similar to the statutory will used before July 1, 1999. It must be witnessed and notarized. This is the form of will normally used by attorneys.

A will is made by only one person. For example, a husband and wife cannot sign the same will. However, they may make similar wills that reflect their common intent.

CONTENTS OF A WILL

By making a will, you are able to give property to people who do not inherit as heirs according to law. You may make a gift to your favorite church or charity. You may also appoint an executor (a female is an executrix) to tend to your affairs such as the paying of bills or selling assets after your death. It is now possible to provide that your executor may serve as an independent executor or administrator, which allows him to act without court supervision, legal delays, or publication of legal notice in the newspaper. The will can be used to name a guardian or tutor (a female is a tutrix) for minor children and to suggest or name a specific attorney or law firm to handle your estate. A will may be used to give a spouse the usufruct for life rather than the usufruct that ends at remarriage as provided by law and to give a spouse the usufruct of separate property.

The law treats gifts made to your children and grandchildren during the last three years of your life as advances on their inheritance. If a gift is considered an advance on a child's inheritance, the share of your property to which he or she is entitled would be reduced by the amount of the gift. If you do not want these gifts treated as advances, you may want a provision in your will stating that gifts made during lifetime are not advances on inheritance unless you make a statement to the contrary at the time you make the gift.

A will does not avoid probate or a succession, the legal procedure necessary for the transfer of assets to heirs. Neither does the lack of a will avoid the need for a succession.

WHERE TO KEEP YOUR WILL

Once your will is made, consider carefully where you are going to keep it. You should not hide it or put it where it is not likely to be found. The main concern is to keep it safe from fire or destruction. You especially want to keep it safe from destruction by a person who will inherit from you if you die without a will but to whom your will gives less than that provided by law. A safe deposit box is a good place especially if someone besides the

person making the will is able to enter the box. It may not be the best place if you are the only person authorized to enter the box because someone will have to know where to find the key and a court order will be required to enter the box. Some parish Clerks of Court will hold your will for safekeeping. Normally copies are made of the original will, and the copies should have a note attached or written on them stating where the original can be found because there have been cases when copies of a will were found but never the original. Further, consider telling your executor, attorney, and others you trust where you place your will for safekeeping.

CHANGING OR REVOKING YOUR WILL

You can change or revoke your will at any time. A change can be made by making a new will or by making a codicil, which is an amendment or addition to your will. It is best to have an attorney assist with a codicil because it must be in one of the forms authorized for a will and its terms must fit into the existing will without causing conflict or confusion. It is best to avoid the use of a codicil because of the confusion that may result. There is little room for confusion if you make an entirely new will. Do not attempt to change your will by crossing out, erasing, or writing in the margin. You may invalidate the will or have an invalid change. The easiest way to revoke your will is to destroy it. If you revoke your will, your assets will be distributed at your death according to law as though you never had a will.

REVIEWING YOUR WILL

You should not make a will and then feel that you can forget about it. You should review your will periodically to be sure it is up to date. Changes in the law may make it advantageous or necessary for you to make a new will. Changes in your personal and family status may call for changes in your will. Your financial status may change making a new will necessary. If you move to another state, you should make a new will according to the laws of your new state.

PROBATE OF WILL

Probate of a will is the presenting of the will to a judge to have it recognized as being valid as to form and method of execution. The probate of a will by a judge does not necessarily mean that the contents of the will, such as the gifts made in the will, are valid. For example, the will may fail to give children their forced portions and still be valid as to form and execution. Further, probate of the will does not transfer the property from the testator to the legatees.

FORCED HEIRSHIP

Many people mistakenly believe that in Louisiana you are not allowed to disinherit your children or write them out of your will. While this was the law at one time, changes to the

law were made that redefine forced heirship and give you more control over who gets your assets than you would have had under the old law.

Law makers recognized that under most circumstances, certain classes of persons should not be disinherited, so they kept forced heirship when certain conditions exist.
Forced heirs include

- your child 23 years of age or younger (until his 24th birthday)
- your child regardless of age who is permanently unable to care for himself or to manage his affairs because of mental incapacity or physical infirmity
- your predeceased child's child (your grandchild) if your predeceased child would have been 23 or younger at the time of your death had he not predeceased you.
- your predeceased child's child (your grandchild) who is permanently unable to care for himself or to manage his affairs because of mental incapacity or physical infirmity regardless of how old your predeceased child would have been at the time of your death.

The existence of a forced heir can affect how your estate is distributed. If you have only one forced heir, 1/4 of your estate is the legitime, or the forced portion, to which your forced heir is entitled. If you have two or more forced heirs, the forced portion is 1/2 of your estate. For instance if your will leaves your entire estate to your church, and you have a child who is 18 years old, the child would get 1/4 of your estate (the forced portion), and your church would get the other 3/4 (the disposable portion). If you were to leave your entire estate to your favorite museum, and you have ten-year-old triplets, the triplets would split 1/2 of your estate (the forced portion), and the museum would get the other half.

There are many other factors dictating how forced heirship will affect your estate that require discussion in great detail. Know that the above explanation is the general rule of forced heirship; other conditions may change how the rule is applied.

SUCCESSION

Succession can mean the transfer of assets from the decedent to his heirs and legatees, but the word succession is more commonly used to mean the suit filed in court in connection with a person's death. A will does not take the place of a succession proceeding in Louisiana. The estate of a person owning property usually requires a succession regardless of the existence or lack of a will.

Briefly, a simple succession proceeding requires filing several documents:

- a legal document (called an affidavit) proving death and heirship
- a list of the decedent's assets and the value of those assets
- a court order called a Judgment of Possession, which recognizes the heirs and legatees of a decedent.

When the judge signs the Judgment of Possession, the succession proceeding is complete, and the estate property transfers from the decedent to the heirs or legatees.

BANK ACCOUNTS AND SAFETY DEPOSIT BOXES

Until 1975, the law made a bank responsible to pay the inheritance tax if the bank paid funds from an account or allowed entry into a safety deposit box of a person who had died. Therefore, banks "froze" accounts and safety deposit boxes. The law was amended in 1975 and now provides that a bank may deal with accounts and safety deposit boxes according to its contract with its customer "until the bank receives notice in writing addressed to it of the death of the customer." Since this change in the law, very few joint accounts and joint safety deposit boxes are "frozen" as the result of a death.

Even when a person dies leaving an account that is not registered jointly with another person, a bank or other institution is authorized to pay up to $10,000 to the surviving spouse from the decedent's funds after the institution obtains an affidavit from the surviving spouse stating that the total withdrawn from all institutions does not exceed $10,000. In other words, the surviving spouse may withdraw a total of $10,000 from all financial institutions combined, not $10,000 from each institution where the decedent has an account.

LOUISIANA INHERITANCE TAX

No inheritance tax is due for deaths occurring after June 30, 2004, regardless of the date the succession is opened. Any inheritance taxes due for deaths occurring prior to June 30, 2004 were deemed due January 1, 2008, and prescribed on December 31, 2011. The elimination of the Louisiana inheritance tax does not relieve heirs or legatees of the obligation to open a succession when required.

LOUISIANA GIFT TAX

The same law that completely eliminated the inheritance tax return also repealed the Louisiana gift tax beginning July 1, 2008. For gifts made on or after that date, no Louisiana gift tax will be owed and no Louisiana gift tax return will be required. The repeal does not impact federal gift tax.

FEDERAL GIFT TAX

There is no gift tax on gifts to a spouse. According to federal law in 2014, you can give $14,000 to any person in any calendar year without paying tax or loss of the lifetime exclusion allowed by federal law. The lifetime exclusion amount is indexed for inflation, and the 2014 exemption is $5.34 million per person. If you are married, you and your spouse can each make gifts of $14,000 per donee each calendar year. The importance of such gifts is to reduce your estate. The gifts do not qualify for an income tax deduction as gifts to charity do. A good estate planning tactic is to remove the most rapidly appreciating property from your estate by gift provided you are able to do so without loss of income needed during your lifetime. By removing appreciating property from your estate, you limit the continued increase in its size, thereby reducing death taxes.

FEDERAL ESTATE TAX

The 2012 American Taxpayer Relief Act, also known as the "fiscal cliff legislation," was signed into law by President Obama on January 2, 2013. The 2012 Act makes some significant changes to the federal estate tax law. Unlike previous legislation that were temporary stop-gap measures, this law has no sunset provision, which means that the changes are permanent (at least until Congress changes it again).

The federal estate tax exemption is $5 million per person; this amount is adjusted annually for inflation. With the inflation adjustment, the 2014 amount is $5.34 million per person. Accordingly, with both spouses entitled to these exemptions, a total of $10.68 million can be transferred free of federal estate tax.

The federal estate tax maximum rate is 40%.

The unused exemption of the first spouse to die is available to the surviving spouse if elected by the Executor of the deceased spouse's estate on a timely filed U.S. Estate Tax return.

MARITAL DEDUCTION -- FEDERAL ESTATE TAX

By federal tax law, a person is entitled to a deduction from gift and estate tax for any gift made to a spouse. This is referred to as a marital deduction. The result is that any gift to a spouse is not taxable. In the case of a married couple, it is possible to use the marital deduction to write their wills so that there is no estate tax when the first spouse dies. This is accomplished by an outright gift to the surviving spouse or giving income for life over the decedent's assets to the surviving spouse (in Louisiana a usufruct for life). The result is that there is no estate tax to pay when the first spouse dies. The surviving spouse should attempt to reduce his/her estate by making lifetime gifts. It should be noted that though it is stated above that life insurance is included in the federal estate for estate tax purposes, insurance payable to a spouse will escape estate tax as a gift qualifying for the marital deduction.

DEATH WITH DIGNITY -- LIVING WILL
DECLARATION CONCERNING LIFE SUSTAINING PROCEDURES

Louisiana law provides a suggested form for a document to be signed by you if you do not wish doctors and hospitals to take heroic measures or keep you alive with life support equipment once your doctors are sure that you cannot get well. This form includes a section that allows you to state your preference regarding a feeding tube. This document can be placed on file with your doctor or presented by you or your family to the doctor or hospital at an appropriate time.

POWER OF ATTORNEY

You can have money in the bank, but if you are in a bad accident, have a stroke, become senile, etc. and cannot withdraw funds or sign checks, it will be difficult for others to care for you and manage your affairs. A joint checking account on which someone in addition to yourself can sign checks may be all you need, but a power of attorney prepared in advance of such a situation is a better solution.

TRUSTS AND LIFE INSURANCE

Trusts and life insurance can be used in estate planning; however, these subjects call for explanation in great detail and are not discussed in this short booklet.

The foregoing information will not make you an expert on wills, successions, or estate planning and is not a substitute for advice from a qualified attorney. It is general information that you may not be able to apply properly to a specific situation. Remember that inheritance and tax laws have gone through many changes over the last decade and can be expected to continue to change.

This material was prepared by the Cancienne Law Firm, Houma, Louisiana. The firm's law practice includes assisting clients with wills, trusts, other estate planning documents, and successions.

02/14

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HOW TO BEGIN YOUR ESTATE PLANNING

What should you do if you want our office to assist you with estate planning?

A. Call our office for an appointment 4 or 5 days before you would like a meeting. We will not need for you to bring any information with you to the first meeting -- except to think about an executor and if you have minor children, a tutor (commonly called a guardian).

B. At the first meeting, we will talk for about an hour. We will spend time
talking about your **family**
asking **what you would like to see happen to your assets**
talking about the **pertinent tax and estate laws**
talking about the **provisions of your Will** and
giving you a **legal check-up** by discussing:
a **filing system** and if you like, **teach you a simple filing system**
beneficiaries of life insurance policies and retirement accounts
titling of bank accounts and **CDs**
Powers of Attorney and **Living Wills**

C. At the end of our first meeting, we will quote a fee for the legal services involved or, if there are some things up in the air, an approximate fee. If the fee is not satisfactory, tell us, and we will stop the process right there. You will owe us nothing. If the fee is satisfactory, we will prepare the necessary documents, which will take a week or two.

D. When you come to sign, we will **explain the documents** in great detail, **answer questions, sign the documents, and put them in special envelopes with instructions as to where they are to be kept.**

E. All of this can usually be accomplished in two meetings, but if more time is required, we take whatever time is necessary.

SUMMARY:
1. Call for an Appointment
2. First Meeting
Family & goals
Tax & estate laws
Your Will
Legal Check-up
Fee Discussion
3. Second Meeting
Review documents
Answer questions
Sign documents & organize documents for safekeeping

CANCIENNE LAW FIRM

Cancienne Law Firm focuses its law practice on Wills and Estates; however, we sometimes prepare trusts, form limited liability companies or corporations, handle real estate transactions, assist with marriage agreements, etc. Almost all of the legal work we do that is not specifically Wills and Estates is related to our Wills and Estate work. We have one simple mission: Offering the best legal services we are capable of providing at a fair fee.

Cancienne Law Firm had its start when L. Milton Cancienne Jr., a Houma native, began his law practice in Terrebonne Parish as a sole practitioner in 1965 after 14 months of employment as an attorney in a general law practice. In 1978, Milton incorporated his law practice using the name L. Milton Cancienne Jr., A Professional Law Corporation. When Milton's son Troy Cancienne joined the practice in 2000, they began Cancienne Law Firm. A third attorney, Rachel South Boquet, joined the firm in 2007.

Our education and other qualifications are:

L. Milton Cancienne Jr.
J.D. (Law), Louisiana State University Law School, 1964
B.S. (Accounting), Louisiana State University, 1960
Terrebonne High School, 1957
Estate Planning & Administration Specialist, *Board Certified by the Louisiana Board of Legal Specialization*
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Louisiana Super Lawyer by *Law & Politics*
Top Lawyers of Acadiana by *Acadiana Profile*
Featured Lawyer *Acadiana Profile*, February-March 2013 issue
Reader's Choice Award Winner for Best Estate Planning Attorney by *The Courier*
Elton Darsey Lifetime Achievement Award by the Terrebonne Bar Association
Member, New Orleans Estate Planning Council

Troy D. Cancienne
J.D. (Law), Loyola University New Orleans School of Law, 2000
B.S. (Finance), Louisiana State University, 1997
Vandebilt Catholic High School, 1993
Clerk to the Honorable John R. Walker, 32nd Judicial District Court, 2003-2004
Completed the Certified Financial Planners (CFP) Professional Education Program, College for Financial Planning, 2007
Member, New Orleans Estate Planning Council

Rachel South Boquet
J.D. (Law), Loyola University New Orleans School of Law, 2004
M.Ed. (Secondary English Education), Louisiana State University, 1999
B.A. (English), Louisiana State University, 1998
Vandebilt Catholic High School, 1994
Clerk to the Honorable John R. Walker, 32nd Judicial District Court, 2004-2006
Managing Editor, Loyola Law Review, 2003-2004
Member, New Orleans Estate Planning Council
Member, National Academy of Elder Law Attorneys

We are very proud of our experienced and capable staff:

Marlene S. Chiasson
Started as secretary trainee for L. Milton Cancienne Jr. through H.L. Bourgeois High School Cooperative Office Education program in 1976
Serves as Paralegal for Successions; Notary Public; Office Manager; Office Accountant; Stock, Bond and Bank Account Transfer Specialist; Liaison to Judges' offices, Clerk of Court personnel, and bank personnel

Jeanice St. Germaine
Started as secretary trainee for L. Milton Cancienne Jr. through H.L. Bourgeois High School Cooperative Office Education program in 1982
Serves as Paralegal for Wills, Successions, Trusts, Donations, Corporations, and Limited Liability Companies; Notary Public; Proofreader; Index Specialist; Billing Clerk; Liaison to Louisiana Secretary of State's office
Jeanice is married to Marlene's brother Glenn, so Jeanice and Marlene are sisters-in-law.

Lauren A. Molaison
Started as secretary trainee for Cancienne Law Firm in 2002
Serves as Paralegal for Wills, Powers of Attorney, and Living Wills; Receptionist; Typist; Proofreader; Liaison to Judges' offices, Clerk of Court personnel, and bank personnel; Supply Manager; File Clerk; Courier
Lauren is the daughter of a sister of Marlene and Glenn, so Lauren is the niece of Marlene and Jeanice.