

CHAPTER 12

**SUCCESSIONS
IN LOUISIANA**

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About The Author

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1. INTRODUCTION

In Louisiana, probate law is called succession law. The terms succession and estate are often used interchangeably to refer to the property that the decedent owned at death. This chapter outline discusses Louisiana succession law and procedures for intestate and testate successions.

Sources of Louisiana Probate or Succession Laws

Louisiana probate or succession laws include:

Substantive Probate Law	La. Civil Code art. 870-1429
Probate Procedures	La. Code Civ. Proc. art. 2811 <i>et seq.</i>
Tutorship Procedures	La. Code Civ. Proc. art. 4031 <i>et seq.</i>
Community Property Law	La. Civil Code art. 2325-2437

Treatises and Practice Manuals on Louisiana Probate Law

L. Carman, *Louisiana Successions*, (3d ed. LexisNexis 2012)

C. Neff, *Louisiana Estate Planning, Will Drafting and Estate Administration*, (2d ed. LexisNexis 2004)

M. Williams, *Successions: Wills and Donations*, in Louisiana Legal Services and Pro Bono Desk Manual (2005)

Louisiana Probate Laws (West 2012)

2. WHAT IS A SUCCESSION?

“Succession” is transmission of the deceased’s estate or rights to his successors. Transfer of ownership to the heirs occurs immediately upon death. La. Civ. Code art. 935. An heir may exercise rights of ownership for his interest in an asset of the estate and the estate as a whole before the qualification of an executor or administrator. La. Civ. Code art. 938. Indeed, many indigent clients will take physical possession of succession property, including immovable property, without completing the succession. Nonetheless, a succession must be opened and completed in order to exercise important legal rights as to the deceased’s property.¹

The estate of the deceased includes the property, rights, and obligations that he had at death. The estate also includes all rights and obligations that have accrued since death. La. Civ. Code art. 872.

The complexity of a succession depends on the value and type of property involved, the decedent’s debts, and whether there is conflict among family members. Often, indigent clients either have never heard of or are unfamiliar with the procedures for opening a succession. They are simply told by the bank, mortgage company or an attorney that they had to “open a succession” before they could have access to the deceased’s bank account, obtain a home improvement loan, or cash the deceased’s settlement check.

A surviving spouse may use a La. R.S. 9: 1513 affidavit to withdraw up to \$10,000 from a checking account, savings account or certificate of deposit.

¹ In estates less than \$75,000, a simpler succession procedure, called “heirship affidavit”, may suffice. See La. Code Civ. Proc. art. 3431-34.

2.1 WHY IS IT IMPORTANT TO OPEN A SUCCESSION?

A succession is opened to get legal possession of immovable and movable property, and to gain access to bank accounts, pensions or insurance proceeds for the successors. The legal possession of immovable property that results from a succession will give the successors the power to sell the property, refinance, and qualify for the homestead exemption. In the wake of Hurricanes Katrina and Rita, many successions had to be completed in order for Louisiana homeowners to access state and federal rebuilding funds

2.2 WHEN SHOULD A SUCCESSION BE OPENED?

A succession should be opened as soon as practicable after the decedent's death. Sometimes, it is necessary to immediately open successions to use the decedent's bank accounts or assets to pay funeral or medical bills.

Delay in opening a succession may cause problems. Often, successors wait many years to open a succession. As a result, they may run into problems such as lost documents or wills or face tax sales of homes for unpaid taxes. Also, waiting too many years to open a succession may make a succession more complicated and expensive. This is especially true with the passing of generations when the co-heirs lose contact with each other or die.

Judgments of Possession in Succession cases are considered "prima facie" evidence of the rights of the heirs of the Decedent. La. Code of Civ. Proc. art. 3062 The right to assert an inheritance rights is subject to a 30 year prescription, which runs from the decedent's death. See La. Civ. Code art. 3502, 934. After this, the Judgment of Possession would be final and conclusive. However, heirs should act quickly to protect their inheritance rights since heir property may be lost if transferred to a third party.

2.3 SMALL AND LARGE SUCCESSIONS

Procedurally, many successions can be handled by the filing of an *ex parte* petition for possession with a district court. If the gross value of the estate at the decedent's death is less than \$75,000, it may be possible to complete the transfer of property by recording an affidavit in the public records, rather than filing a court succession. See La. Code Civ. Proc. art. 3431-3434.

3. BASIC LAWS OF SUCCESSIONS

Successions are either **intestate** or **testate**. La. Civ. Code art. 873-876

1. **Intestate** successions occur when the decedent dies without a will, the will is invalid in whole or in part, or the will does not dispose of all of the decedent's property.

Intestate successors are called "**heirs**."

2. **Testate** successions occur when there is a valid will.

Testate successors are called "**legatees**."

When the succession is intestate, the Louisiana Civil Code determines who inherits the decedent's estate. If the decedent died testate, the will governs who inherits the decedent's estate, assuming the will is valid.

4. INTESTATE SUCCESSION

4.1 CLASSIFYING PROPERTY FOR INTESTATE SUCCESSIONS

Determining who inherits property in an intestate succession involves determining whether the property itself is community or separate under Louisiana law. Louisiana is a community property state, meaning that most property obtained by married persons is considered to be community property and each spouse owns an undivided one-half (1/2) share in that property.

The following community property rules apply to property acquired after 1979:

Property of married persons is either community or separate. La. Civ. Code art. 2335. Property acquired during a marriage is presumed to be community. La. Civ. Code art. 2340. In most cases, property acquired during a marriage will be community property. The major exceptions are property acquired by donation or inheritance to a single spouse. That property is the spouse's separate property.

The community property regime begins upon marriage and terminates with death or divorce. In a divorce, the community property regime is generally terminated retroactive to the filing date of the divorce petition upon which the divorce was granted. This means that the community property converts to separate property on that date. Sometimes property will be divided between a divorcing couple, either in the divorce proceeding, a separate partition proceeding, or by private agreement. It is not unusual, however, for divorcing couples to not address property issues in their divorce. In that case, the divorced spouses continue as co-owners, with each owning a one-half (1/2) undivided share of the former community property, which is now classified as separate property. You should include the case name, docket number, court and divorce date for any relevant divorces for inclusion in the succession pleading.

Louisiana community property laws apply to spouses domiciled in Louisiana regardless of their domicile at time of marriage. La. Civ. Code art. 2334.

Immovable property in Louisiana is generally governed by Louisiana law regardless of the acquiring spouse's domicile at time of acquisition. La. Civ. Code art. 3524. The nature of immovable property in another state acquired during the marriage is determined by reference to the Louisiana Civil Code Articles on Conflicts of Law, Articles 3523 *et al.*

Community property includes:

- property acquired during the marriage through work or effort of either spouse or with community property or with community or separate property
- property donated jointly to the spouses
- fruits of community property
- fruits of separate property (Civ. Code art. 2339)
- damages awarded for loss of community property
- all other property not classified by law as separate property.

See La. Civ. Code art. 2338.

Separate property includes:

- property acquired by spouse before establishment of community regime (unless changed by subsequent act)
- property acquired by a spouse by inheritance or donation to him individually
- property acquired by spouse with separate property or with separate property and community property where the value of the community property is inconsequential compared to the value of the separate property.
- damages for personal injuries sustained by a spouse during the community.

See La. Civ. Code art. 2341, 2344.

Note: For property acquired before 1979, wives were allowed to declare property as separate property without the concurrence of the spouse. This declaration was usually made in the act of sale. Before 1989, men were allowed to manage community property without the consent of their wives. So, sales may only have signature of husband but still be classified as community property. Make sure you know the dates of the marriage so you can determine whether property is community or separate in these older cases.

Use of community property to improve separate property or pay a mortgage may give rise to a community property claim or liability for reimbursement. La. Civ. Code art. 2364. For example, a spouse may own separate immovable property bought before a marriage, but the mortgage is paid with community funds after the marriage. Similarly, satisfaction of a community obligation with separate property gives rise to a claim for reimbursement. La. Civ. Code art. 2365. These claims for reimbursement do not confer automatic ownership rights or change the classification of the property. Spousal reimbursement claims prescribe in ten years.²

The above rules are “default” rules in the absence of any matrimonial agreement. Matrimonial agreements or spousal donations may affect the classification of property as community or separate. La. Civ. Code art. 2328, 2343, 2343.1. Be sure to ask about matrimonial agreements, donations of community property, or transfer of separate property to the community.

4.2 WHO INHERITS COMMUNITY PROPERTY BY INTESTACY?

When a married spouse dies, the surviving spouse has full ownership of his/her own one-half (½) share of the community property, which is instantly converted to separate property. The devolution of the decedent’s one-half (1/2) share of the property goes according to the following rules:

- a. If the deceased died with descendants, they share the decedent’s ½ share of community property subject to the surviving spouse’s usufruct. This intestate usufruct over community property terminates when the surviving spouse dies or remarries. La. Civ. Code art. 890. The descendants are considered to be “naked owners” during the period of the usufruct. Security is generally required from the usufructuary to protect the rights of the naked owners.

² Birch v. Birch, 55 So.3d 796 (La. App. 2 Cir. 2010).

La. Civ. Code art. 571. This requirement is waived in most situations, including when a surviving spouse obtains the usufruct through the operation of La. Civ. Code art. 890. La. Civ. Code art. 573. Two important exceptions are when the naked owner is not the child of the usufructuary or he is the child of the usufructuary and a forced heir. La. Civ. Code art. 573 (A)(2). A seller or donor of property under reservation of usufruct is not required to give security. La. Civ. Code art. 573(B).

- b. If the deceased died with no descendants, the deceased's ½ interest goes to the surviving spouse. Thus the surviving spouse owns the entire property outright as separate property. There is no usufruct in this situation. This is the main difference between the devolution of community and separate property.

4.3 WHO INHERITS SEPARATE PROPERTY BY INTESTACY?

Separate property devolves by law in favor of the heirs. Heirs are divided into **five classes** and, as to separate property, they inherit in the following order of priority under La. Civ. Code art. 880 *et seq.* If there are no heirs in one class, the property goes to all the heirs in the next class.

- a. descendants
- b. parents and siblings (sisters or brothers) and their descendants (grandchildren)
 - i. If there are siblings (or their descendants) and a surviving parent or parents, the siblings inherit subject to a joint and successive usufruct in favor of the parents
 - ii. If there are siblings and no surviving parents, siblings inherit free of usufruct
 - iii. If there are no siblings (or their descendants), the surviving parent or parents inherit.
- c. surviving spouse (in the case where the decedent was married at the time of death but had separate property).
- d. more remote ascendants (grandparents, aunts, uncles)
- e. more remote collaterals

Relatives in the most favored class inherit to exclusion of other classes. The nearest relation in a class, determined by counting degrees, inherit to the exclusion of more distant relatives in that class. It may be useful to draw a “family tree” diagram to clearly determine who inherits, if there are many heirs.

4.4 A CLOSER LOOK AT THE 5 CLASSES OF HEIRS

The order for inheritance of separate property is:

a. **Descendants:**

The descendants are the children (including adopted or illegitimate but formally acknowledged or timely established filiation), or their representatives. The children (or their descendants) take to the exclusion of other heirs.

Children who were adopted through a formal adoption proceeding are entitled to full rights as legitimate children. An adopted child may also inherit from his natural parents and relatives. However, natural persons and

relatives cannot inherit from the surrendered child. La. Civ. Code art. 214. A stepchild does not inherit unless he or she was formally adopted by the decedent.

Illegitimate children (born outside of marriage) inherit to the same extent as legitimate children only if they are formally acknowledged by the father's name on the birth certificate, by a later formal acknowledgment (by juridical act or by a written acknowledgment which is signed and notarized), or by a judgment in a timely established filiation proceeding. See La. Civil Code articles 195 *et al.*, see also La. Civ. Code art. 203, 209.

Generally, the right of illegitimate children to inherit is not an issue with the Succession of a mother, as the birth certificate will be accepted as evidence of maternity. A red flag is raised, however, in the Succession of a father, if any of the children do not have the last name of the father. This most likely means that the father does not appear on the birth certificate. The attorney should investigate further to see if the child is illegitimate, and whether he/she has the right to inherit.

If the child is illegitimate and the father's name is not listed on the birth certificate, ask the family whether the father was ever ordered by a court to pay child support. Such child support proceedings often involve an acknowledgment of paternity by the father. Acknowledgments may also occur in divorce or succession proceedings filed by the father. If an acknowledgment cannot be found in a court proceeding, ask whether the father signed a notarized acknowledgment of paternity or if the child filed a filiation action in court.

Under Act 192 of 2005, eff. June 29, 2005, unacknowledged illegitimate children have up to 1 year after their father's death to file a filiation action. Acts of informal acknowledgment by the father could be used as evidence in a civil proceeding to establish filiation.

Prior to Act 192 of 2005, the time period for filing a filiation action was very limited, either 1 year after the parent's death or 19 years after the child's birth, *whichever first occurs*. Unacknowledged children's filiation claims that were time-barred before Act of 2005, are **not** revived by Act 192 according to several circuits.³ Basically what this means is that no matter when the parent died, if the child was over 19 on June 29, 2005, he or she cannot initiate a filiation claim. This issue, however, has attracted several votes for certiorari in the Supreme Court and it is possible that the prior law, Civil Code art. 209, may be ruled unconstitutional based on advances in DNA testing for paternity.

b. Parents and siblings:

If the deceased leaves no descendants but is survived by a father, mother, or both, and by a brother or sister, or both, or descendants from them, the brothers and sisters or their descendants succeed to the separate property of the deceased subject to a usufruct in favor of the surviving parent or parents.

³ In re Succession of Faget, 938 So.2d 1003 (La. App. 1 Cir. 2006), *writ denied* 941 So.2d 40 (La. 2006); Succession of McKay, 921 So.2d 1212 (La. App. 3 Cir. 2006), *writ denied* 929 So.2d 1252 (La. 2006).

If both parents survive the deceased, the usufruct shall be joint and successive. A parent, for purposes of devolution of separate property, includes one who is legitimately filiated to the deceased or who is filiated by legitimation or by acknowledgment under La. Civ. Code art. 203 or by judgment under La. Civ. Code art. 209. If there are no parents surviving, the entire estate goes to the siblings (or their descendants) to the exclusion of all others. La. Civ. Code art. 892

Siblings and their descendants: If more than one, all siblings share equally.

If a sibling predeceases the decedent, his share goes to his descendants by representation.

Siblings related by half-blood: The property that devolves to the brothers or sisters is divided among them equally, if they are all born of the same parents. If they are born of different unions, it is equally divided between the paternal and maternal lines of the deceased: brothers or sisters fully related by blood take in both lines and those related by half-blood take each in his own line. If there are brothers or sisters on one side only, they take the entirety to the exclusion of all relations in the other line. La. Civ. Code art. 893.

Parents: If there are no siblings (or their descendants), the parents inherit the separate property.

d. Surviving spouse:

If the deceased does not leave descendants, parents, siblings or descendants from them, his spouse, if not judicially separated from him, shall succeed to his separate property to the exclusion of other ascendants and collaterals. La. Civ. Code art. 894.

e. Grandparents or Other Ascendants:

If a deceased does not leave descendants, siblings or their descendants, a spouse not judicially separated, his other ascendants succeed to his separate property. If the ascendants in the paternal and maternal lines are in the same degree, the property is divided into two equal shares, one of which goes to the ascendants on the paternal side, and the other to the ascendants on the maternal side, whether the number of ascendants on each side be equal or not. In this case, the ascendants in each line inherit by heads. La. Civ. Code art. 895.

f. Remote Collateral Relatives

If the deceased has no surviving descendants, parents, siblings (or their descendants), surviving spouse not judicially separated, or ascendants, his other collaterals succeed to his separate property. The nearest in degree to the deceased among more remote relations in each class, is called to succeed. La. Civ. Code art. 899. Among collateral relatives, the nearest in degree excludes all others. If there are several in the same degree, they share equally and by heads.

If there are no heirs, in default of blood, adopted relations, or a spouse not judicially separated, the estate of the deceased belongs to the state. La. Civ. Code art 902. This situation is extremely rare.

5. TESTATE SUCCESSIONS

5.1 DONATIONS

1. There are two kinds of donations:

- a. **Donation *inter vivos*** (between living persons): an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it. La. Civ. Code art. 1468.
- b. **Donation *mortis causa*** (in prospect of death): an act to take effect, when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable. La. Civ. Code art. 1469.

A donation's validity depends on whether:

- a. one has the capacity to give and receive,
- b. the requisite formalities are followed, and
- c. substantive limits are not violated.

2. Who can make donations?

- a. A minor under the age of sixteen years does not have capacity to make a donation either *inter vivos* or *mortis causa*, except in favor of his spouse or children.
- b. A minor who is sixteen years or older has capacity to make a donation, but only *mortis causa*. The minor may make a donation *inter vivos* in favor of his spouse or children.
- c. A person of the age of majority can give via donation *inter vivos* and *mortis causa*.
- d. To have capacity to make a donation *inter vivos* or *mortis causa*, a person must also be able to comprehend generally the nature and consequences of the disposition that he is making. *See e.g.*, La. Civ. Code art. 395, 1471, 1477.

Note: The person who challenges the capacity of a testator must prove by clear and convincing evidence that the testator lacked capacity when the will was executed. If the testator was judicially declared "mentally infirm" at the time the will was executed, the proponent of the challenged testament must prove by clear and convincing evidence that the testator had capacity. La. Civ. Code art. 1482.

- e. The capacity to donate *mortis causa* must exist at the time the testator executes the testament. La. Civ. Code art. 1477.

3. Who has the capacity to receive a donation?:

- a. All persons have capacity to make and receive donations *inter vivos* and *mortis causa*, except as expressly provided by law. La. Civ. Code art. 1470.

When a donation depends on fulfillment of a suspensive condition, the donee must have capacity to receive at the time the condition is fulfilled. La. Civ. Code art. 1473.

- b. A person must be in existence at the time the donee accepts the gift for donation *inter vivos* or at the time of the testator's death for donation *mortis causa*.

To be capable of receiving by donation *inter vivos*, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation *mortis causa*, an unborn child must be in utero at the time of the death of the testator. In either case, the donation has effect only if the child is born alive. La. Civ. Code art. 1474.

4. Who can accept a donation?

- a. If the donee is of full age, the acceptance may be made by him, or in his name by his attorney in fact having special power to accept the donation which is made, or a general power to accept the donations that have been or may be made.
- b. Gifts to minors, not emancipated, must be accepted by tutors or the trustee if given in a trust. Either a parent of the minor, any ascendant of the minor, whether the minor is emancipated or not, or the tutor of the minor, may accept the donation for the minor whether such parent or ascendant is the donor, or the tutor of the minor or both. And a donation to be held in trust for the minor may be accepted by the trustee alone. La. Civ. Code art. 1546.
- c. Donations made for the benefit of a hospital, of the poor of a community, or establishments of public utility, shall be accepted by the administrators of such communities or establishments. La. Civ. Code art. 1549. However, the charitable organization must exist at the time the donation takes effect.
- d. If a donee, being of full age, is under interdiction, the acceptance is made for him by his curator. La. Civ. Code art. 1547.
- e. A deaf individual, knowing how to write, may accept for himself or by an attorney in fact. If he does not know how to write, the acceptance shall be made by a curator appointed by the judge for that purpose. La. Civ. Code art. 1548.

5. What May Nullify a Donation:

- Donation impoverishes donor (La. Civ. Code art. 1498)
- Lack of authentic act or donee's failure to accept⁴
- Duress
- Fraud
- Undue Influence (La. Civ. Code art. 1480)
- Person who is incapable of receiving
- Property to come in a future event, the property must exist at the time of the donation (La. Civ. Code art. 1528)
- Donation conditional on will of the donor (La. Civ. Code art. 1529)
- Condition of paying other debts and charges than those that existed at the time of the donation (La. Civ. Code art. 1530)
- Where the witnesses and notary signed the document attesting to a party's signature hours before the party actually signed.⁵

⁴ In re Succession of Jones, 86 So.3d 25 (La. App. 2 Cir. 2012).

⁵ Rittiner v. Sinclair, 374 So.2d 680 (La. App. 4 Cir. 1978).

The elderly and donations of naked ownership—a warning: Children often talk their parents into donating them a naked ownership with reservation of a usufruct to the parents. How does this affect the parents? As the usufructuaries, they lose the homestead exemption and are responsible for paying taxes. They no longer have the power to sell or mortgage their home. They remain responsible for ordinary repairs. They can't make major repairs to their home without the naked owners' consent. If the reservation of the usufruct is not timely recorded, they may even face loss of their usufruct if the naked owners transfer the home to another person or entity.

In order to annul a donation on the basis of undue influence, one must show that the donee's influence was so substantial that the donee substituted his or her own volition for that of the donor. However, if the evidence shows that the execution of the testament was well within the description of the testator, the court should not find that the testator's volition has been replaced by the donee's volition.⁶

Any person who, whether alone or with others, commits fraud or exercises duress or unduly influences a donor, or whose appointment is procured by such means, shall not be permitted to serve or continue to serve as an executor, trustee, attorney or other fiduciary pursuant to a designation as such in the act of donation or the testament or any amendments or codicils thereto. La. Civ. Code art. 1481.

5.2 WILLS (TESTAMENTS)

A will is the voice of the deceased (i.e., testator, the deceased who made the will). It speaks for the deceased and carries out his wishes of whom he wants to inherit his separate or community property. If a person makes a will, his succession is testate. Prior to 1999 there were seven different types of wills. In 1999, the Louisiana legislature narrowed the list to only two types: olographic and notarial testaments. Wills that were drafted before 1999 and were valid under those rules, are still valid. A will executed in another state and valid under that state's law will be recognized by Louisiana if the will was in writing and subscribed by the testator. La. R.S. 9: 2401.

The two kinds of wills have specific rules and forms that **MUST** be followed. Failure to follow the formalities for a will may invalidate the will, causing the succession to go intestate. If an invalid will has been probated, a petition to annul the testament may be filed. La. Code Civ. Proc. art. 2931. Only one person may execute a testament in the same instrument. La. Civ. Code art. 1571.

1. Olographic Testaments

a. Requirements for olographic testaments

An olographic will is one entirely written, dated and signed in the testator's handwriting. La. Civ. Code art. 1575. The date may appear anywhere in the testament. The testator must sign his name at the end

⁶ Succession of Tanner, 836 So. 2d 1280 (La. App. 4 Cir. 2003).

of the testament. The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament, as clarified by extrinsic evidence, if necessary. Additions and deletions on the testament may be given effect only if made by the hand of the testator.⁶ If anything is written by the testator after his signature, the testament shall not be invalid for that reason. Such writing may be considered by the court as part of the testament. La. Civ. Code art. 1575. The olographic testament is subject to no other requirement as to form.

Over the years, the courts have lessened the formalities of olographic wills, i.e., accepting slash dates instead of writing out the date. *Succession of Boyd*, 306 So. 2d 687 (La. 1975). An olographic will may be written in part pencil and ink.⁸ The entire olographic will does not have to be written on the same date.⁹ But, the basic formal requisites have remained in place, i.e., a valid olographic testament must be entirely written, dated and signed in the handwriting of the testator. In *Succession of Angele*, 546 So. 2d 262 (La. App. 1 Cir. 1989), *writ denied*, 550 So. 2d 656 (La. 1989), the court held that a will typewritten and signed by the testator was not valid, rejecting the argument that the term “written” was broad enough to include “typewritten” wills.

b. How to probate an olographic will or testament

To probate an olographic will, two witnesses must testify that the testament was entirely written, dated and signed in the testator’s handwriting.¹⁰ The jurisprudence interpreting La. Code Civ. Proc. art. 2883 has held that the phrase “credible witness” includes persons who are familiar with the testator’s handwriting, as well as handwriting experts.¹¹ Thus, proof that an alleged olographic will was entirely written, dated and signed in the testator’s handwriting is not limited to handwriting experts. A credible individual familiar with decedents’ handwriting may serve as a credible witness.¹²

Note: Wills must be probated within 5 years of the *judicial* opening of a succession. La. Code Civ. Proc. art. 2893.

c. Possible Problems with Olographic Testament:

1. Preprinted extraneous material such as a personal or business letterhead

A letterhead will not defeat the formal requisites of an olographic will provided that the testament itself is entirely written, dated and signed in the handwriting of the testator. However, courts have ignored those printed words whose presence on the document is incidental. An exception has evolved with respect to partially printed dates. To uphold a will where a portion of the date

⁷ In re Succession of Aycock, 819 So. 2d 290 (La. 2002).

⁸ Succession of Smart, 36 So.2d 639 (1948).

⁹ Oroszy v. Burkard, 158 So.2d 405 (La. App. 3 Cir. 1963).

¹⁰ La. Code Civ. Proc. art. 2883; Succession of Calhoun, 674 So. 2d 989 (La. App. 2 Cir. 1996).

¹¹ In re Succession of Jones, 356 So. 2d 80, 82 (La. App. 1 Cir. 1978), *writ denied*, 357 So.2d 1168 (La. 1978).

¹² Succession of Lirette, 5 So. 2d 197 (La. App. 1 Cir. 1941).

was printed, the handwritten portion of the date must be sufficient to be certain of the date when the printed numbers are ignored.¹³ In other words, the ignored numerals are not essential to a determination of the date.

2. A document that does not contain the intent to make actual bequests of the testator's assets.

A testator can name the beneficiaries to act on his behalf after his death. The testator can direct them to sell his home, but if he does not bequeath the sale proceeds, the will is invalid. The testator can direct heirs to divide the contents of a home among themselves, to use the life insurance money for the testator's funeral, and to pay debts from the estate. The testator can also grant the beneficiaries the power to manage the testator's debts and "full usage of the money" in an account "to solve what problems they encounter." Nevertheless, if the bequest is unclear, the will is invalid.

Although a document has expressions which reflect a testator's intent to direct the division of his or her property upon his death, his words must signify bequests, the necessary *animus testandi*.¹⁴

3. Having a notary or attorney sign for the testator will invalidate a will.

Louisiana courts have held an olographic testament must be entirely written, dated and signed by the testator and is subject to no other form. *Arnold v. Fenno*, 652 So. 2d 1078 (La.App. 4 Cir. 1995).

2. Notarial Testaments

- a. **The notarial testament shall be in writing, dated and executed as follows:**

1. Done before a notary and two competent witnesses
2. The testator shall declare or signify that the instrument is his testament
3. The testator must sign each page and at the end of the testament,
4. In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "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 _____, 200__" (*This is called an attestation clause*).
La. Civ. Code art. 1577.

There are slightly different procedures and declaration clauses for (1) persons who are physically unable to sign their names, (2) persons unable to read, (3) persons who are blind, and (4) persons who are deaf or deaf and blind. See La. Civ. Code art. 1578-1580.1.

¹³Succession of Heinemann, 136 So.2d 51 (La. 1931).

¹⁴In re Succession of Plummer, 847 So.2d 185 (La. App. 2 Cir. 2003).

b. Who can witness a Notarial Testament?

1. A person is not competent as a witness if he is:
 - a. Insane
 - b. Blind
 - c. Under the age of sixteen
 - d. Unable to sign his or her name
 - e. Unable to perform the special duties of a witness under the La. Civil Code Articles 1578 *et al.* These articles cover notarial testaments when the testator suffers from a physical infirmity or is illiterate.
2. Persons should not be witnesses if they are legatees since their legacies will be invalidated. The fact that a witness or the notary is a legatee does not invalidate the entire testament. A legacy to a witness or the notary is invalid, but if the witness would be an heir in intestacy, the witness may receive the lesser of his intestate share or the legacy in the testament. La Civ. Code art. 1582. Also, a spouse of a legatee may not be a witness to any testament. The fact that a witness is the spouse of a legatee does not invalidate the testament; however, a legacy to a witness' spouse is invalid. La. Civ. Code art. 1582.1.
3. Attorneys and executors as witnesses
An executor or attorney may be a witness if he has not otherwise been named as a legatee. The designation of a succession representative or a trustee, or an attorney for either of them, is not a legacy. La. Civ. Code art 1583. The notary may be named as attorney, executor, or trustee under the will, and still be the officiating notary. If the testator, in the will, names the attorney to handle his or her succession, the executor or heirs are not required to use that attorney.¹⁵ The executor or heirs can choose to use another attorney. The attorney named in the will is under no obligation to handle the succession for the testator.

5.3 REVOCATION OF WILLS

A testator may revoke his will at anytime. The right of revocation may not be renounced. Revocation may be express or tacit. Express revocation is when a testator executes a new will, adds a codicil or change, thereby revoking a prior will or particular disposition. Tacit revocation is when a testator disposes of his particular property during his or her life, i.e., selling home or car that is left to legatees in a will. La. Civ. Code art. 1695.

1. Revocation of a will

Revocation of an entire testament occurs when the testator does any of the following:

- a. Physically destroys the testament, or has it destroyed at his direction.

¹⁵Succession of Wallace, 574 So.2d 348 (La. 1991).

- b. Declares a revocation in one of the forms prescribed for testaments or in an authentic act.
- c. Identifies and clearly revokes the testament by a writing that is entirely written and signed by the testator in his own handwriting.
- d. Destroys one of multiple wills. *Succession of Talbot*, 530 So.2d 1132 (La. 1988).
- e. Destroy or revokes a second will which revives the first will, if the first will was not destroyed. La. Civ. Code art. 1607.

2. Revocation of an olographic will

Revocation of an olographic will may also occur by erasures, physical destruction and drawing lines through or deleting portions of the will

3. Revocation of a legacy or other testamentary provision

Revocation of a legacy or other testamentary provision occurs when the testator:

- a. So declares in one of the forms prescribed for testaments.
- b. Makes a subsequent incompatible testamentary disposition or provision.
- c. Makes a subsequent *inter vivos* disposition of the thing that is the object of the legacy and does not reacquire it.
- d. Clearly revokes the provision or legacy by a signed writing on the testament itself.
- e. Is divorced from the legatee after the testament is executed and at the time of his death, unless the testator provides to the contrary. (testamentary designations or appointments of a spouse are revoked under the same circumstances).

4. When revocations may be revoked

Revocations of testaments, legacies or other testamentary provisions may be revoked prior to a testator's death unless the revocation was made by physical destruction, subsequent inter vivos donation or divorce. La. Civ. Code art. 1609.

5.4 OTHER ISSUES RELATED TO TESTAMENTS

5.4.1 Forced Heirship

Forced heirship is one of the legacies of Louisiana's civil law history. For many years, all children, of whatever age, were forced heirs, meaning that they could not be deprived of their legacies, even if a testator/parent did not mention them in a testament. The Louisiana Legislature attempted to change the forced heirship laws several times in the early 1990's, but these changes were declared unconstitutional by the Louisiana Supreme Court, reviving the former laws. The forced heirship rules were successfully changed on January 1, 1996, putting restrictions on who could be considered a forced heir. Now, forced heirs are descendants of the first degree who, at the time of the decedent's death, are:

- 1. twenty-three years of age or younger, (i.e., right up to the twenty-fourth birthday), or

2. are *permanently* incapable of taking care of their persons or administering their estates at the time of the decedent's death because of a physical or mental infirmity, **or** they have an inherited, incurable condition, supported by medical records, that may cause them to be incapable of taking care of their persons or estates in the future.

This last clause seems to be an open invitation to litigation. Certainly, heirs with mental illness would seem to be natural beneficiaries of this clause, even if they are not completely disabled at the time of the decedent's death.

For pre-January 1, 1996 deaths, there is a possibility that any child, regardless of age, will be a forced heir. There are complex rules for determining whether the new laws or prior laws govern. If the decedent died before January 1, 1996 or executed his last will before January 1, 1996 and had children over 23 years old, you should review the discussion in L. Carman, *Louisiana Successions* at §§ 2.49-50.

For pre-January 1, 1996 wills where the decedent died in 1996 or later, it appears that the testator's intent as to a forced heir portion is determined on an ad hoc basis. These older children may qualify as forced heirs if the pre-January 1, 1996 law governs, or a pre-January 1, 1996 will is interpreted to give a forced portion.

<p>Note: A will that does not give the required portion to a forced heir will be partially invalid</p>

When a descendant of the first degree predeceases the decedent, representation takes place for forced heirship only if (1) if said descendant was younger than 24 years at the decedent's death or (2) if the child of said descendant, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his person or administering his estate at the time of the decedent's death, **or** they have an inherited, incurable condition, supported by medical records, that may cause them to be incapable of taking care of their persons or estates in the future, regardless of the age of the descendant of the first degree at the time of the decedent's death. La. Civ. Code art. 1493.

5.4.2 Exceptions to forced heirship

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. La. Civ. Code art. 1494.

5.4.3 Amount of forced portion and disposable portion

Since 1982, 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. La. Civ. Code art. 1495. Be sure to apply the forced heirship law in effect at the time of the decedent's death. See La. Civ. Code art. 870. Prior to 1982, the forced heirship portions were $\frac{1}{4}$ for 1 child, $\frac{1}{2}$ for 2 children and $\frac{2}{3}$ for 3 or more children. The portion reserved for the forced heirs is called the forced portion, or legitime, and the remainder is called the disposable portion. La. Civ. Code art. 1495.

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 (portion due forced heir) shall be calculated by using the fraction of an intestate successor. When calculating the forced portion, all donations made by the decedent within the last three years of his life are included in his property. La. Civ. Code art. 1495.

5.4.4 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. La. Civ. Code art. 1496. Therefore, a usufruct to the surviving spouse is a permissible burden on the legitime.

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period, and shall not require security except as expressly declared by the decedent or as permitted when the legitime is affected. La. Civ. Code art. 1499. Security can be demanded from the surviving spouse, however, by a forced heir who is not the child of that spouse. La. Civ. Code art. 1514. This statute says the forced heir "may request" such security, and the court "may order" such security as is necessary. So it appears that the court has discretion in whether to order security and how that security can be satisfied.

A usufruct can extend to movables, including cash, which would be classified as a "consumable thing." La. Civ. Code art. 536. If so, the usufructuary has the right to spend those funds and the usufruct extends to the items purchased. La. Civ. Code art. 538. It is easy to see that such "consumable" movables may be completely consumed by the usufructuary, and the naked owner has little recourse except a possible claim against the usufructuary or his/her succession when the usufruct ends. La. Civ. Code art. 538. "Nonconsumable things" include land, houses, and furniture. La. Civ. Code art. 537. The usufructuary has the right to use and possess these things but not to alienate them. La. Civ. Code art. 539. Such nonconsumable things can be sold with the permission of the naked owner(s), and the usufruct would extend to the proceeds of the sale unless the parties agree otherwise. La. Civ. Code art. 616. A usufruct may be terminated for non-use or abuse of enjoyment and duties. La. Civ. Code art. 621, 623.

5.4.5 The disposable portion in absence of forced heirs

If there is no forced heir, donations inter vivos and mortis causa may be made to the whole amount of the property of the donor, unless they are prohibited dispositions of the entire patrimony under La. Civ. Code art. 1498. See La. Civ. Code art. 1497. A donation inter vivos cannot divest the donor of all his property, he must reserve to himself enough for subsistence. La. Civ. Code art. 1498. This article reflects the public policy of not allowing donors to impoverish themselves so as to become wards of the state. Such restrictions do not apply to "mortis causa" donations, for obvious reasons.

5.4.6 The Different types of Testamentary Dispositions or Legacies

There are three types of testamentary dispositions, namely, the universal, the general, and the particular. La. Civ. Code art. 1584.

- a. A universal legacy is the disposition of all of the estate, or the balance of the estate that remains after particular legacies. La. Civ. Code art. 1585.
- b. A general legacy is a disposition by which the testator bequeaths a fraction of a certain proportion of the estate, or a fraction of certain proportion of the balances of the estate that remains after particular legacies. La. Civ. Code art. 1586.
- c. A legacy that is neither general nor universal is a particular legacy. La. Civ. Code art. 1587.

These classifications become important if a legacy lapses under La. Civ. Code art. 1589, or if one of the legatees renounces his/her inheritance, or if there are insufficient assets to satisfy all legacies. La. Civ. Code art. 1601. If the property remaining after payment of the debts and satisfaction of the legitime proves insufficient to discharge all particular legacies, the legacies of specific things must be discharged first and then the legacies of groups and collections of things. Any remaining property must be applied toward the discharge of legacies of money, to be divided among the legatees of money in proportion to the amounts of their legacies. When a legacy of money is expressly declared compensation for services, it shall be paid in preference to all other legacies of money.

5.4.7 Lapsed Legacies

A legacy may lapse for several reasons including, *inter alia*, (1) the legatee dies before the testator, (2) the legacy is renounced (but only to extent of renunciation), and (3) the legacy is declared invalid. La. Civ. Code art. 1589.

The will controls the disposition (or “accretion”) of a lapsed legacy. La. Civ. Code art. 1590. In the absence of a governing will provision, the following rules (which became effective on July 1, 1999) will determine to whom a lapsed legacy goes:

1. The lapsed legacy goes to descendants of the legatee, joint or otherwise, if the legatee is the testator’s child or sibling, or a descendant thereof. La. Civ. Code art. 1593. The general rules of testamentary accretion do not apply to these relatives.
2. **Joint Legacy.** A legacy is “joint” if made to more than 1 person without assigning shares.¹⁶ For example, “I give my immovable property to A and B.” If a joint legatee dies before the testator, his share goes to the other joint legatees equally. La. Civ. Code art. 1592, 1588.
3. **Particular or General Legacy.** When these legacies lapse, they go to the successor who, under the will, would have received the thing if the legacy had not been made. La. Civ. Code art. 1591, 1586-87.
4. A lapsed legacy, which is not disposed of under the above rules (Code art. 1590-93), goes ratably to the “universal legatees.” La. Civ. Code art. 1595, 1585.
5. Any portion of the estate not disposed of under the above rules devolves by intestacy rules. La. Civ. Code art. 1596.

¹⁶ A will with the language “share and share alike” or “to share equally” is not a joint legacy. Each party will own a specific portion without a right of survivorship in favor of co-legatees.

5.4.8 Proving the Existence of a Will When the Original is Lost

The attorney, in all cases, shall present the original testament to the court to be filed and executed. If it is a testament other than a statutory testament, notarial testament, or nuncupative testament by public act, then the testament must also be proven, or probated. La. Code Civ. Proc. art. 2852. An olographic will would fall under this statute. The petitioner must present the testament to the court even if he/she doubts the validity of the testament. La Code Civ. Proc. art. 2853.

If the petitioner cannot locate the original will, then the attorney should search for the original. If it was a notarial will, the attorney should try to contact the notary to see if there is an original will in the notary's possession. The Secretary of State has a central registry of wills. If the testator registered his will, information about the will can be obtained from the Secretary of State. See La. R.S. 9: 2446-47. Also, some parishes allow wills to be registered with the clerk of court or notarial archives. In Orleans and other parishes there are will "books" and in your petition you can reference at which book and page a will is located without presenting an original. In Jefferson Parish, and possibly others, the clerk of court stores wills and releases them with a proper petition. Nevertheless, the registration of wills is rare.

If the original cannot be located, then the attorney has additional hurdles to overcome when proffering a copy. In the event that the original copy of a will is lost, where the will was duly executed, and in possession of, or readily accessible to, the testator, there is the legal presumption of revocation by destruction.¹⁷ Where there is the legal presumption of revocation by destruction, the onus of rebutting this presumption is cast upon those seeking to establish the will, by clear proof (1) that the testator made a valid will, (2) of the contents or substance of the will, and (3) of the fact that the will, though it could not be found at the testator's death after diligent search, was never revoked by him.¹⁸ This is most usually done by an affidavit of the client with personal knowledge that the original will existed after the death of the decedent, but was lost or destroyed by some other force, such as a house fire or natural disaster.

The attorney should also petition the Court, asking that the Court direct that a search be made for the testament by a notary of the parish. La. Code Civ. Proc. art. 2854.¹⁹ This requirement most likely stems from the prior system in which notaries were required to keep files of their notarized documents. Presumably, the notary who notarized the missing testament would be the one charged with finding it, although this is not stated in the statute. Although the statute does say that the notary must be appointed by the court, experience has shown that many courts will accept an affidavit from the notary who prepared the document, stating that they possess a copy of the testator's testament, and that the proffered copy is the same as the one in his/her records. This affidavit, along with an affidavit from persons with knowledge about the loss of the will after the decedent's death, should be sufficient to probate the copy.

If the will is not a notarial document, or the notary is unknown, the attorney should have the court appoint a notary to search the public registries for the missing will. If the notary fails to find the original will, then the client can submit his

¹⁷Succession of Talbot, 530 So.2d 1132 (La. 1988).

¹⁸Succession of Nunley, 224 La. 251, 69 So.2d 33, 35 (1953).

¹⁹See La. Code Civ. Proc. Form 810a (West).

copy with an affidavit. If it is an olographic will, the affidavit of the client should include allegations that the affiant knows the handwriting of the decedent and that the affiant believes the olographic will was written by the decedent.

If the client knows that there was a will, but does not have a copy, there is case law supporting the proof of the contents of a will by parol evidence.²⁰ Nevertheless, the parol evidence is acceptable only if the witness actually read the testament and remembered its contents. Statements by the decedent are not enough.²¹

If the client does not have sufficient evidence to prove the contents of a will, or to overcome the presumption of revocation, then the petition should state these facts and pray that the court find that the succession should proceed under the laws of intestacy.

6. OTHER LEGAL ISSUES RELATED TO ALL SUCCESSIONS

6.1 CAPACITY TO INHERIT

To inherit property, a successor must exist at the decedent's death. La. Civ. Code art. 939. However, an unborn child conceived at decedents' death and born alive is considered to have existed at the decedent's death and therefore can inherit from the decedent. La. Civ. Code art. 940. Age and mental capacity are irrelevant to capacity to inherit. La. Civ. Code art. 939.

Notwithstanding any contrary laws, a child conceived after the decedent's death, shall be deemed the child of such decedent with the capacity to inherit from the decedent if:

- the decedent specifically authorized in writing his surviving spouse to use his gametes, and
- the child was born to the surviving spouse, using gametes of the decedent, within **three** years of the decedent's death.

6.2 ACCEPTANCE AND VOLUNTARY EXCLUSION FROM AN INHERITANCE

1. Heirs have three options when the decedent dies:
 - a. accept that succession unconditionally,
 - b. accept with benefit of inventory; or
 - c. renounce the succession.

Acceptance may be either formal or informal. Formal acceptance is where the successor expressly accepts in writing or assumes the quality of successor in a judicial proceeding. Informal acceptance is where the successor does some act that clearly implies his intent to accept. La. Civ. Code art. 957. Acceptance obligates the successor to pay estate debts up to his share of the estate. La. Civ. Code art. 961; 1416.

A creditor of a successor may, with judicial authorization, accept succession rights in the successor's name if the successor has renounced them in whole or in part to the prejudice of his creditor's rights. In such a case, the renunciation may be annulled in favor of the creditor to the extent of his claim against the successor, but remains effective against the successor. La. Civ. Code art. 967.

²⁰Succession of Davis, 347 So.2d 906, 907 (La. App. 3 Cir. 1977).

²¹Puentes v. Gaines, La. Ann. 85 (La. 1873), reversed as to other matters, 92 U.S. 10.

6.3 RENUNCIATION

Renunciation is voluntary and involves the successor “giving up” his/her right to inherit from the decedent. Renunciation must be express and in writing. La. Civ. Code art. 964. A pre-bankruptcy renunciation (other than a “donative” renunciation) may prevent a creditor from seizing the renouncing heir’s share.²² Furthermore, the Fifth Circuit has held that a pre-bankruptcy renunciation of an inheritance is not a fraudulent transfer that would deny discharge.²³ An heir may revoke his renunciation if no other heir has accepted.

In the absence of a renunciation, a successor is *presumed* to accept succession rights. Nonetheless, for good cause the successor may be compelled to appear in court to specifically accept or renounce. La. Civ. Code art. 962.

The rights of an intestate successor who renounces accrete to those persons who would have succeeded to them if the successor had predeceased the decedent. A renunciation produces a result similar to representation of the successor by his descendants. La. Civ. Code art. 964. In the absence of a governing testamentary disposition, the rights of a testate successor who renounces also accrete to those persons who would have succeeded to them if the legatee had predeceased the decedent. La. Civ. Code art. 965. This was a major change from the law existing previous to July 1, 1999.

For renunciations prior to July 1, 1999, a renouncing heir’s share went to the co-heirs of the same degree. The law is unsettled as to which law applies to decedents who died **before** July 1, 1999, when a successor renounces **after** July 1, 1999. See C.Neff, *Louisiana Estate Planning, Will Drafting and Estate Administration*, II-1.2.2.2A. We are not aware of any case law on the applicability of the pre-July 1, 1999 renunciation rules. However, note that Civil Code art. 870 states that succession rights are governed by the law in effect on the date of the decedent’s death.

Prior to July 1, 1999, renunciation had to be done by authentic act, i.e., a written act before notary and 2 witnesses. Civil Code art. 1017. This is no longer required but would be advisable.

Care must be taken in planning renunciations. In some instances, an heir who renounces may end up getting a share of the inheritance if another heir subsequently renounces. For example, a decedent is survived by 3 children, A, B and C, and the goal is to concentrate title in A. B renounces, but B has no descendants. B’s share will go to A and C. If C later renounces and has no descendants, his inheritance will go to A and B. This devolution to B after his renunciation can be prevented by having B also renounce any accretions in his original renunciation. See Official Revision Comment to Civ. Code art. 964.

Co-heirs in an intestate succession will often tell the attorney that they wish to renounce a succession so that another heir may inherit the entire property. Children will often want to do this, thinking the estate will then go to a surviving parent. The attorney should counsel such clients as to the effect of a true renun-

²² See e.g., *Matter of Simpson*, 36 F.3d 450 (5th Cir. 1994); *In re Brumfield*, 1998 WL 834999 (M.D. La. 1998). One district court has opined that *Simpson* is no longer good law after *Drye v. United States*, 528 U.S. 49, 52 (1999). See e.g., *In re Schmidt*, 362 B.R. 318, 321-23 (Bankr. W.D. Tx. 2007). However, the Fifth Circuit recently considered *Drye* and reaffirmed *Simpson* as to both Louisiana and Texas, holding that a pre-petition renunciation of an inheritance is not a fraudulent transfer that would deny discharge under 11 U.S.C. § 727 (a)(2). See *In re Laughlin*, 602 F.3d 417 (5th Cir. 2010).

²³ *In re Laughlin*, 602 F.3d 417 (5th Cir. 2010).

ciation, namely, that the property will often devolve to their own children, creating an even more fractious ownership scheme. The co-heir may then wish to donate their share to another specific co-heir in the succession, who would not otherwise inherit through a renunciation. This is possible, and is called a “donative renunciation.” Note that Civil Code art. 960 states that a donative renunciation is deemed to be an acceptance, since the renouncer is really accepting the succession and then directing it to another person. This factor may be important when considering whether the donating heir will be held liable for succession debts up to his share of the estate or if the acceptance of the succession may affect a person’s eligibility for public benefits such as SSI or Medicaid.

Note: A donative renunciation must be by authentic act since it is in substance a donation rather than a renunciation.

6.4 REPRESENTATION

Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented. La. Civ. Code art. 881. Representation does not take place in favor of ascendants. Representation is only permitted in the descending and collateral lines. La. Civ. Code art. 882, 884. Representation can take place in both intestate and testate successions.

If representation is permitted, the partition is made by roots. If one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the same branch inherit by heads. La. Civ. Code art. 885. Descendants inherit by one share per each descendant, so that multiple descendants in the same degree do not necessarily divide the decedent’s estate per capita, but do split pro rata the share of the predeceased ancestor whom they represent. La. Civ. Code art. 885.

If the owner of immovable property dies, and then one or more of the successors dies before a succession can be filed for the original owner, it is not necessary to file a succession for each deceased person in order clear the title to that immovable property.²⁴ Representation can be used to substitute the second generation for those who are deceased in the first generation of heirs/legatees, and so on. In fact, it is prohibited for a deceased person to inherit in a succession La. Civ. Code Art. 58. In this case, the succession attorney would lay out the path of succession in the petition, ending with the still living successors.

This is true because the intermediate generation of successors never came into legal possession of the immovable property during their lifetime, and thus the immovable property should not be considered part of their separate estates. Although these successors may have had corporeal possession of the property during their lifetime, they would not have been listed as legal owners in the parish land records, and would not have had the rights that go along with legal possession. (If, however, this intermediate successor had his own immovable property, vehicles, bank accounts, etc, then it would be necessary to open his succession in order to transfer that property.)

²⁴In re Succession of Parker, 882 So.2d 748 (La. App. 2 Cir. 2004).

6.5 GROUND FOR INVOLUNTARY EXCLUSION FROM AN INHERITANCE

6.5.1 Unworthiness

Unworthiness is an involuntary termination of inheritable rights that must be declared by the court. When an heir is declared unworthy, he is deprived of the right to inherit. La. Civ. Code art. 941. The grounds for a successor to be declared unworthy are:

- a. conviction of a crime involving the intentional killing, or attempted killing, of the decedent, or
- b. judicial determination of participation in the intentional, unjustified killing, or attempted killing, of the decedent. La. Civ. Code art. 941.

Reconciliation or forgiveness will cure the grounds of unworthiness. A declaration of unworthiness deprives a heir of his right to inherit from the decedent. For other consequences, see La. Civ. Code art. 945.

An action to declare a successor unworthy may be brought only by a person who would succeed in place of or in concurrence with the successor to be declared unworthy, or by one who claims through such a person. When a person, who may bring the action, is a minor or an interdict, the court may appoint an attorney to represent the minor or interdict for purposes of investigating and pursuing an action to declare a successor unworthy. La. Civ. Code art. 942.

An action to declare a successor unworthy is subject to a liberative prescription of five years from the death of the decedent as to intestate successors and five years from the probate of the will as to testate successors. La. Civ. Code art. 944.

6.5.2 Devolution of succession rights of successor declared unworthy

If the decedent died intestate and the successor is declared unworthy, the successor's rights devolve as if he had predeceased the decedent. However, if the decedent died testate, then the succession rights devolve under the provisions for testamentary accretion as if the unworthy successor had predeceased the testator. La. Civ. Code art. 946.

When the succession rights devolve upon a child of the successor who is declared unworthy, the unworthy successor and the other parent of the child cannot claim a legal usufruct upon the property inherited by their child. La. Civ. Code art. 946.

6.6 SUCCESSION DEBTS

If the debts of the succession are not partitioned, each heir remains liable for his share of the succession. Nevertheless, in order to equalize the shares, those heirs who take the largest allotments may be charged with the payment of a larger portion of the debts. La. Civ. Code art. 1371.

In any case, a successor, who accepts the succession, is obligated by succession debts to the extent of the value of the property received by him, valued as of the time of receipt. La. Civ. Code art. 1416.

The heirs or legatees may be sent into possession of the decedent's estate on an ex parte petition if the succession is "relatively free from debt" La. Code

Civ. Proc. art. 3001(A). A rough rule of thumb would be that the debts should not surpass one-quarter of the gross value of the succession. Mortgages and other secured debts are not considered in this calculation, as the creditor is protected by the fact that the debt is secured by the assets.

6.7 MARITAL PORTION

When a spouse dies rich in comparison with the surviving spouse, the surviving spouse is entitled to claim the “marital portion” for the estate of the deceased spouse. La. Civ. Code art. 2432. There is no definitive test to determine when a surviving spouse is entitled to a marital portion.²⁵ However, the marital portion usually should be awarded when the comparison of assets show a ratio of 1 to 5 in favor of the deceased spouse.²⁶ Earnings or earning capacity of the surviving spouse are not factors in determining whether a marital portion is due.²⁷

The marital portion is 1/4 of the succession in ownership if the deceased spouse died without children, the same fraction in usufruct for life if he is survived by 3 or fewer children, and a child’s share in such usufruct if he is survived by more than 3 children. La. Civ. Code art. 2434. The marital portion is reduced by any legacy to the surviving spouse and payments due her as a result of the death, e.g., life insurance or social security. La. Civ. Code art. 2435. The surviving spouse’s right to claim the marital portion is personal and nonheritable. This right prescribes three years from date of death. La. Civ. Code art. 2436. A formal claim within a succession or lawsuit is the safest way for a surviving spouse to enforce her claim for a marital portion.

For indigent clients, the marital portion will often be an issue when the family home was the separate property of the deceased spouse. Establishing the right to a marital portion may be essential to preventing the eviction of the surviving spouse from the family home.

6.8 EFFECT OF INHERITANCE ON PUBLIC BENEFITS

You should know inheriting the assets of a succession may have a negative effect on any public benefit received by an heir or legatee. Many public benefit programs have an asset limit, and exceeding that limit can create ineligibility for the assistance, at least for a period of time. For example, inheriting a share in a family home worth only a few thousand dollars can endanger the receipt of SSI and Medicaid benefits for disabled or elderly persons, unless the recipient or a co-heir (who does not own another residence) is residing in the property. This is a particular concern for nursing facility residents since their care must usually be financed by Medicaid. Housing assistance can also be affected by a succession. There are exceptions to the asset limit rules and the attorney should look at the regulations for the specific program or consult an attorney extremely conversant with those rules in order to advise the client about the effects of the succession. Note that this issue will almost always arise in the situation where a forced heir inherits due to permanent disability. Ironically, the forced heirship laws designed to protect such disabled persons could end up creating a period of ineligibility for their health care programs.

²⁵ Succession of Zilke, 378 So.2d 500 (La. App. 4 Cir. 1980).

²⁶ Succession of Adams, 816 So.2d 988, 990 (La. App. 3 Cir. 2002).

²⁷ Succession of Thumfart, 289 So.2d 850, 853 (La. App. 4 Cir. 1974).

Unfortunately, donating inherited assets to others or renouncing a succession will also affect a heir's eligibility for SSI, Medicaid payments for nursing home care, and other public assistance. There are some options for establishing a Medicaid trust to protect a heir's eligibility for Medicaid and SSI. Often this must be done as part of a will to avoid all adverse consequences. We believe that establishing a Medicaid trust with a reputable company is the best option for clients who are interested in a Medicaid trust.

7. PROCEDURAL ISSUES IN SUCCESSION CASES

7.1 SMALL SUCCESSIONS BY AFFIDAVIT

Formerly, small successions, which were defined as a succession valued at less than \$50,000, could be handled by affidavit, without the necessity of filing a court succession. Immovable property, however, could not be transferred by this process. Any succession involving immovable property had to be filed in court in order to obtain a Judgment of Possession signed by a judge and recorded in the parish Conveyance Office. This process involved the filing of several separate documents, including the Petition for Possession, the Affidavit of Death, Heirship, and Jurisdiction, and a Descriptive List of the Decedent's Assets and Liabilities. To complete this process, the successors had to pay for court costs and for an attorney to prepare and file these documents.

Unfortunately, these requirements often discouraged people, especially low income persons, from completing the legal work necessary to clear the title of their inherited property. Such people may have had corporeal possession of the property, but they did not have legal possession, and could not sell the property, use their property as collateral for loans, or take advantage of the homestead exemptions for owners. Hurricanes Katrina and Rita in 2005 exposed this problem in the southern parishes of Louisiana as thousands of homeowners could not access federal and state rebuilding funds because of unresolved succession issues. The problem, however, was statewide in nature. The onerous requirements of a court succession to transfer immovable property also lay in stark contrast to the ability to transfer unlimited amounts of funds through insurance policies by a simple signature on a contract.

In 2009, the Legislature enacted Act 81 which simplified the process of transferring certain immovable property. Immovable property that met the definition of "small succession property" contained in the statute could be transferred to the heirs simply by drafting an "Affidavit of Small Succession" and recording it in the Parish Conveyance Office. In fact, this statute formalized a process that had been used for many years in the rural parishes of the state.

The original Act 81 of 2009 had several restrictions on the property that could be transferred, including that the property could not be worth more than \$50,000, that it had to be the Decedent's primary residence, and that it had to be transferred by the laws of intestacy. The new statute proved to be such a great success, however, that in both 2011 and 2012, the Legislature revised the statute to broaden the definition of "small succession property" and to expand the use of this simplified process.

7.2 QUESTIONS FOR SMALL SUCCESSION CASES

WHAT CONSTITUTES A “SMALL SUCCESSION PROPERTY?”

The new statutes on small succession affidavits are found at La. Code of Civil Procedure, art. 3421 *et al.* Immovable property can now be transferred by Affidavit if the following two conditions are met:

- a. The value of the decedent’s estate in Louisiana was worth \$75,000 or less at the time of death, or any value if the death occurred 25 years before the recording of the Small Succession Affidavit.
- b. The Succession is intestate or the decedent was domiciled outside of Louisiana and his/her testament was probated by the Court of another state.

Note that the property does not have to be the decedent’s primary residence anymore, and does not even have to be residential property. Generally, those who own property in Louisiana and leave a testament must have that testament reviewed by a judge in a court succession, but there is an exception for out of state residents whose testaments have already been probated.

Due to the fact that many people own partial shares of property, such as husband and wives, and siblings, the \$75,000 limit still encompasses a great many estates.

WHAT INFORMATION MUST BE CONTAINED IN THE AFFIDAVIT?

The required information is set out in the statute and is generally the same information that would be contained in the documents of a court succession. The decedent’s date of death, his last residence, his spouse and family information, and the names and last known residences of all the heirs should be listed. There should also be a listing of the decedent’s estate, along with the values of the property. The legal description of any immovable property must be included.

There are also several stock paragraphs that should be contained in every Affidavit, which are listed in the statute. The heirs must accept the succession without administration, and they should also state that they are aware that filing false information in the Affidavit could incur civil and criminal penalties.

Also, a certified death certificate must be attached to the Affidavit.

WHO CAN SIGN THE AFFIDAVIT?

At least two persons, including the surviving spouse, must sign the Affidavit. If there is no surviving spouse, then at least two heirs must sign. Although this situation is not covered by the statute, those rare successions that have only one heir should presumably be signed by a second person who knew the decedent and can personally attest to the facts in the Affidavit.

If there are any heirs who do not sign the Affidavit, the statute states that the completed Affidavit must be mailed to their last known address, and they must be given at least 10 days to object. If any heir could not be located after a diligent search, then that fact can be stated in the Affidavit. Since heirs are presumed to accept, the Affidavit can still be recorded in that situation.

OTHER ISSUES WITH SMALL SUCCESSIONS BY AFFIDAVIT

The Affidavit should be recorded in every parish where the decedent owned immovable property. Affidavits should be recorded immediately so that the heirs will get notice of any adverse actions (e.g., code enforcement or tax sales) by the local parish governments. Certified copies of the Affidavit can be used as presumptive proof by any third party that the property has been transferred to the named heirs.

The statute does not limit the use of the Small Succession Affidavit to persons who died after the enactment of the statute. Old successions that have never been opened can be resolved by the new Affidavit process. If any of the heirs died intestate without being put into legal possession of the property, include their information in the Affidavit and name the still living heirs who inherit through representation.

A natural tutor may also execute the affidavit on behalf of a minor child without the necessity of filing a tutorship petition under art. 4061 of the Code of Civil Procedure.

Heirs who have not been recognized as an heir in a recorded Small Succession Affidavit have two years from the date of the recordation of the Affidavit to assert an interest in immovable succession property against a third person (or his successors in title) who acquired an interest in the immovable succession property. La. Code Civ. Proc. art. 3434 (C)(3).

7.3 FILING A COURT SUCCESSION

If a succession is testate, or is valued above \$75,000, then a succession proceeding must be filed in court. Creditors of the succession or co-owners of succession property who are not heirs/legatees of the decedent may also file to open a succession.

7.3.1 EX PARTE SUCCESSIONS

Many successions for indigent clients may be handled by an ex parte petition for possession when the decedent's estate is "relatively free from debt." In such cases, a petition for possession is filed on behalf of the surviving spouse and/or competent heirs. For procedures to place the surviving spouse and/or heirs in possession without an administration, see La. Code Civ. Proc. art. 3001-08 (intestate successions) and La. Code Civ. Proc. art. 3031-35 (testate successions). In uncontested testate successions, the petition for probate and possession can be combined into one pleading.

In Louisiana, jurisdiction for a succession lies in the judicial district court for each parish, and the Civil District Court in Orleans Parish. Venue is controlled by the decedent's domicile at the time of death. A petition for possession must be brought in the district court for the parish where the decedent was domiciled at the time of his death. La. Code Civ. Proc. art. 2811-12. If the decedent was not domiciled in Louisiana at the time of his death, his succession may be opened in the district court of the parish where his movable property is located.²⁸ If the property is immovable property, then the succession should be opened in the parish where the immovable property is located. For non-residents, there may be more than one possible venue if the decedent owned property in more than one parish.

²⁸See La. Civil Code art. 3532-33; In re Howard Marshall Charitable Remainder Annuity Trust, 709 So.2d 662 (La. 1998).

SUCCESSION

In an intestate succession, a petition for possession may send the heirs into possession by the *ex parte* petition of:

1. All the competent heirs if all competent heirs accept the succession and the succession is relatively free of debt. La. Code Civ. Proc. art. 3001, 3004; or
2. 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. La. Code Civ. Proc. art. 3004; or
3. The legal representative of the incompetent heirs, if all of the heirs are incompetent and a legal representative has been appointed. La. Code Civ. Proc. art. 3004.

Also, a surviving spouse in community of an intestate decedent can use an *ex parte* petition for possession to be recognized as the owner of his undivided one-half of the community and of the other one-half to the extent he has the usufruct (similar to "life estate") thereof. La. Code Civ. Proc. art. 3001.

Technically, it only requires the signatures of two heirs to file a court succession, the petitioner and a second person to sign the Affidavit of Death, Jurisdiction, and Heirship. In the absence of a written renunciation, a successor is presumed to accept succession rights. La. Civ. Code art. 962. For these reasons, many attorneys in Louisiana will file *ex parte* succession proceedings with the signatures of two persons, unless they have knowledge that a successor wishes to renounce, or a successor is absent and cannot be located.

In an intestate succession, if a competent heir can't be located, the other heirs, including the absentee heir, can be sent into possession after appointment of an attorney to represent the absentee and a contradictory rule against the absentee's attorney. La. Code Civ. Proc. art. 3006.

In a testate succession, a petition for probate and possession may send the legatees into possession on the *ex parte* petition of all legatees if:

1. Each legatee is competent or acting through a legal representative;
2. Each legatee accepts the succession; and
3. None of the creditors has demanded administration.

La. Code Civ. Proc. art. 3031.

A surviving spouse in community of the testator may be recognized by *ex parte* petition as entitled to possession of the community property as provided in Code. Civ. Proc. art. 3001. *See* La. Code Civ. Proc. art. 3031 (B).

If the will named a succession representative, that person must join in the petition for possession in order for judgment to be rendered *ex parte*. La. Code Civ. Proc. art. 3033. A simple solution to this requirement is to have the succession representative sign the verification of the Petition for Possession or an affidavit that she declines the appointment.

7.4 SUCCESSION PLEADING FORMS

The attorney must file the necessary petitions in the court that has jurisdiction and venue. The goal of opening a succession is to obtain the Judgment of Possession.

1. The attorney must file the following documents:

- Petition for Possession
- Affidavit of Death, Domicile and Heirship
- Sworn, Descriptive List of Assets and Liabilities
- Renunciations or donations (if applicable)
- Judgment of Possession

2. Petition for Possession includes:

Allegations establishing the decedent's date of death, his domicile at the time of death, whether the succession is testate or intestate, and identifying the legal heirs or legatees,

The original testament should be attached (if there is one) and proof of the testament, if necessary.

Technically, you only need one person to sign the Petition for Possession, along with another person who personally knew the decedent to sign the Affidavit of Death, Domicile, and Heirship. The Petition should allege that all the successors accept the succession if not all of them are signing the verification. You should have written consent from the other heirs that they have accepted the succession.

3. Affidavit of Death, Domicile and Heirship:

The affidavit is the evidence to prove the allegations of the Petition for Possession. La. Code Civ. Proc. art. 2821-22. It must be signed by at least two competent affiants who personally knew the decedent and have personal knowledge of the facts. The Affidavit echoes the facts alleged in the Petition for Possession. The affidavit must state the decedent's death, marriages and all other facts necessary to establish jurisdiction and decedent's relationship to the heirs. It is good practice to cite the case name, docket number, court name and divorce judgment date of the decedent's divorces.

The law does not require proof by death certificate. An affidavit of jurisdiction, death and heirship signed by 2 witnesses is sufficient proof for the court. It is, however, good practice to ask the client for a death certificate, an obituary or funeral program to ensure that all heirs are included in the Petition for Possession.

4. A Sworn, Descriptive List of Assets:

The sworn descriptive list must list all assets of the decedent, or that the decedent owned an interest in, at the time of death. The descriptive list does not have to show the estate's debts. But, some practitioners do. The values reported for the decedent's property is the fair market value at the time of death. The list must be sworn to by any heir, legatee or other interested party. La. Code Civ. Proc. art. 2952. For a married decedent, this usu-

ally consists of his separate property and one-half of the community property. Divorced decedents may also co-own former community property that has not been partitioned.

One of the more common assets is real estate. Put the legal description of the property in the Descriptive List, street addresses alone are not adequate. Make sure to copy the legal description exactly from previous deeds. Changes in the legal description of immovable property can cause confusion about which property is being identified and create a “cloud” over the title.

This sworn descriptive list must also include: the amount of money in bank or credit union accounts, stocks, bonds, cash, mortgages, notes, and other miscellaneous property of significant value (jewelry, household goods and personal effects, such as jewelry, automobiles, boats, livestock, farm products and growing crops, farm machinery, royalties, rights, claims, debts due the decedent, interest in partnerships, interests in business, cash surrender value of insurance on the life of another, accrued dividends at date of death, returned premiums of insurance policies).

The value of the heirs’ naked ownership of their share of community property can be reduced by the value of the surviving spouse’s usufruct over their share. Use the valuation tables at R.S. 47: 2405 to value the naked ownership.

There are also other types of assets that are distributed “outside” of the succession and are not included in the Descriptive List:

1. Life insurance unless payable to the estate. La. R.S. 22:647 (A)-(B). Life insurance proceeds are exempt from forced heirs’ claims. La. Civ. Code art. 1505(c).
2. Annuities payable to a named beneficiary. La. R.S. 22: 647 (B). **But, an annuity acquired during the existence of a community property regime is includable in the decedent’s estate to calculate the interest of the surviving spouse in community.** Only non-retirement annuities are subject to forced heir claims. La. Civ. Code art.1505(c).
3. IRA and Simplified Employee Pension Plan (SEP). These plans are exempt from Louisiana inheritance tax unless payable to the estate. La. R.S. 47: 2404 (c). **But, if a non-participant spouse has a community property claim to the surviving spouse’s IRA or SEP, said claim should be listed in the sworn descriptive list.**
4. Retirement or pension plans. These plans are generally payable to a beneficiary, don’t pass through the estate and are exempt from Louisiana inheritance tax. La. R.S. 47: 2404(c). If the plan directs the proceeds to the estate, the pension plan would become an asset of the estate.
5. U.S Savings Bonds. Ownership is determined by federal law, not Louisiana law.
6. Bank account with co-depositor. Don’t include in estate if these funds were actually the property of the co-depositor.

If a client does not know where the assets are or can’t get access to information from banks, he may need to file a petition to be appointed as the administrator.

Liabilities can also be listed: expenses incidental to the last illness of the decedent that were due and unpaid at the time of death (can be shown as net after anticipated insurance reimbursement), property taxes accrued prior to the date of the decedent's death, notes unsecured by a mortgage or other lien, and any income taxes accrued and unpaid at date of death. If a community regime existed at the time of death, these debts are considered community debts and are only one-half deductible.

5. Judgment of Possession:

The Judgment of Possession will declare that the decedent's heirs or legatees are entitled to be placed in possession of all of the property belonging to the decedent. The Judgment should lay out the assets of the estate (including the legal description of any immovable property), name each successor, and list the proportion that each successor inherits. If any usufructs have arisen from the succession, they should be listed also. The Judgment will recognize the successors as the owners of the property they inherit and can be relied upon by third parties in determining ownership. The Judgment of Possession is the only succession document that is recorded in the public record, so it should include all the necessary information needed to determine ownership of all property of the succession.

For testate successions, there must also be an order from the Judge that probates the testament. Some attorneys include this language in the Judgment of Possession. Since recordation fees in the public records are often determined by the number of pages, other attorneys like to create a separate probate order so that the Judgment of Possession can be kept to a minimum of pages. After July 1, 1999, notarial and statutory wills are self-proving. An olographic will still needs proof, which can be done by an affidavit unless the judge orders oral testimony. La. Code Civ. Proc. art. 2883.

The Judgment of Possession must include the last known address of at least one of the heirs, legatees or surviving spouse.

A judgment of possession may place the heirs into possession even if there are liens, including tax liens, on the real estate. The heirs take the estate subject to liens.

Neither the clients nor attorney has to appear before a judge to present all of the required documents to open a succession. The Judgment can be presented to a judge and signed on the same day that the succession documents are filed.

If the succession included immovable property, a certified copy of the signed Judgment of Possession must be recorded in the Conveyance Office in the parish where the immovable property is located. If the Judgment contains properties in different parishes, it must be recorded in each one. Judgments obtained in Orleans Parish must also be recorded with the Notarial Archives and a copy of the judgment of possession must also be sent to the board of assessors. La. R.S. 9: 1425. This must be done within 15 days of the judgment of possession under penalty of fine. Most Conveyance Offices automatically send each judgment to the Assessor, but it is best to follow up anyway, and to advise your client to check with the Assessor to make sure that he has the names and addresses of the new owners.

Advise the clients as to their possible rights to the \$75,000 homestead exemption from real estate and the procedures for applying for the same. Currently, any heir who occupies the home is entitled to a pro rata share of the homestead exemption. See La. Const. art. 7, § 20(A)(6). For example, if 2 of the 3 heirs live in the home, they would be entitled to two-thirds of the \$75,000 homestead exemption from real estate taxation. A surviving spouse, who is the owner of any interest or a usufructuary, is entitled to a full homestead exemption. See La. Const. art. 7, § 20(A)(2).

Legatees should be entitled to the homestead exemption from the decedent's death. La. Atty. Gen. Op. 91-262. Some assessors wrongly deny the homestead exemption until there is a judgment of possession. This error should be correctable by negotiation or lawsuit.

8. ADMINISTERED SUCCESSIONS

If there are immediate debts, legal proceedings, or other financial matters to attend to at the time of death, it may be advisable to open a succession and have one person appointed as an administrator of the succession. The law on succession representatives is derived mostly from statute, particularly from the Louisiana Code of Civil Procedure, articles 3081 *et al.* Successions for low income persons with relatively small estates do not usually require administration, so this topic will not be explored in depth. The following is a short summary of the relevant statutes.

A Succession representative that has been named in the decedent's testament is called an executor (male) or executrix (female). In a will, the testator may appoint the succession representative, but if he or she does not do so or if the named representative refuses to serve, the court will pick the representative from among the heirs or legatees, according to law. An Independent Administrator is empowered to sell, lease, mortgage, transfer, and otherwise deal with immovable property just as an owner would, without leave of court. This would be the cheapest method of estate administration since the administrator does not have to file motions for court approval for such transactions. This can be done in testate successions if the will provides for independent administration or if all the legatees agree to allow the appointment of an independent administrator. In intestate successions, consent of all heirs is required for independent administration.

The succession representative will be responsible for collecting all of the assets of the decedent, determining what debts are owed by the succession and seeing that they are paid, and initiating the court proceedings to resolve any questions that brought about the need for an administration. The succession representative is a fiduciary to the succession. Lastly, a succession administrator is responsible for ultimately closing the succession and putting the successors in possession of their property. The Succession Administrator will have to provide an accounting of the administration, unless this requirement is waived by all the successors. Note that time periods for opposing proposed actions by a Succession Administrator are generally very short. See e.g., La. Code Civ. art. 3335 (ten days to oppose homologation of account).

9. INHERITANCE TAXES

9.1 STATE INHERITANCE TAXES

The State of Louisiana previously taxed the decedent's estate and the Inheritance Tax return had to be submitted to the Louisiana Department of Revenue (LDR) along with any tax due before a succession could be filed in court. The LDR would issue a certificate which had to be attached to the petition for possession.

Recent legislative changes have mostly done away with the Louisiana inheritance tax. Act No. 822 of 2008 repealed the state inheritance tax laws previously provided by La. R.S. 47:2401-2426 effective January 1, 2010. The Act also provided that the inheritances taxes due to the state for deaths occurring before July 1, 2004 shall be considered due on January 1, 2008 if no inheritance tax return was filed before January 1, 2008. Furthermore, all inheritance taxes shall prescribe three years from December 31st of the year they were due as provided by the Louisiana Constitution, Article 7, Section 16. The result of all these legislative changes is that on December 31, 2011, all previously due inheritance taxes will prescribe. Therefore, in most situations, it will no longer be necessary to file an Inheritance Tax Form or obtain a certificate from the LDR. The only exception would be for extremely old successions, where the decedent died before July 1, 1969. In this situation, you must file a contradictory rule against the LDR and prove that the inheritance taxes have prescribed.

9.2 ESTATE TRANSFER TAXES

Previously, La. R.S. 47: 2436 required that an estate transfer tax return be filed by or on behalf of the heirs or legatees in every case where the value of the deceased's **net** estate was \$60,000 or greater. Internal Revenue Service Rule 2011 determined the calculation of the estate transfer tax, which involved the calculation of the assets attributable to Louisiana in relation to the total federal estate. Federal Legislation called The Economic Growth and Tax Relief Reconciliation Act of 2001, however, phased out the state estate tax credit between 2002 and 2005 and replaced the credit with a deduction for state estate taxes for deaths that occur after December 31, 2004. Because La. R.S. 47: 2432 only imposes the estate transfer tax if a state death tax credit is allowed against the federal estate tax, no state estate transfer tax is due for deaths after December 31, 2004. The Economic Growth and Tax Relief Reconciliation Act of 2001 was originally set to sunset on January 1, 2011, but has since then been extended to January 1, 2013.