COMMUNITY AND SEPARATE PROPERTY

Louisiana (also Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington and Wisconsin) is a Community Property state. We are also a civil law jurisdiction (Napoleonic Code) as opposed to common law which the other 49 states use. A single, widowed, or divorced person owns separate property. A married person can own separate property and community property. Separate property of a married person would be property acquired during their marriage through a gift or inheritance, or even a personal injury award. All other property of a married person is community property; such as earnings, interest, dividends - even from separate property. Louisiana law presumes that all assets of a married person are community property, unless conclusively presumed otherwise. A common occurrence is when separate property becomes “commingled” with community property – usually transforming its character into that of community property.

MARRIAGE CONTRACTS (PRENUPTIAL AGREEMENTS)

Before marriage, a couple may enter into an agreement which may sever the Louisiana “community property” regime or the “community of acquets and gains.” There are many issues involved in drafting a solid matrimonial agreement but the two most common ways are: 1) to completely sever the community property system and each of the couple’s respective property will always be separate, e.g. earnings, assets, dividends; or 2) to keep any earnings/dividends, rental income, interest on investments, etc., derived from separate property as a separate asset during the marriage, yet to embrace the community property regime on all other assets acquired during the marriage.

A presently married couple may enter into a contract to terminate the community property regime, but they must first petition the court and have the agreement signed by a judge. A married couple moving into Louisiana has one year to enter into such a contract without having to obtain court approval.

DYING INTESTATE (WITHOUT A WILL) IN LOUISIANA

When a person dies, their estate includes all of their separate property and their undivided one-half interest in their community property. If you do not have a will, the laws of Louisiana will make one for you. This is what is called dying “intestate.” All of the decedent’s share of the community property will go equally to all children, regardless of age, subject to the usufruct (defined below) of the surviving spouse. The usufruct to the surviving spouse over community property will end if the surviving spouse ever remarries. Additionally, the usufructuary (the person to whom the usufruct was granted) does not have the authority to sell, mortgage, or encumber any assets subject to this usufruct.
The decedent’s separate property will go outright and immediately to all children, equally, with no usufruct to the surviving spouse. If the decedent has no children, the separate property would then go to the decedent’s parents (usufruct) with the naked ownership to brothers and sisters, or if deceased, to their children. If there is no one left in the previous classes, then the separate property of the decedent goes to the surviving spouse.

**FULL OWNERSHIP (THE LOUISIANA “BUNDLE OF RIGHTS”)**

In Louisiana full ownership is known as the “Bundle of Rights,” consisting of three components: 1) USUS, 2) FRUCTUS, and 3) ABUSUS. Using a house as an example - the *usus* is the right to use the home and to live in it, the *fructus* is the fruits and income derived from the house (rent), and the *abusus* is the power to dispose, sell, mortgage, or encumber the house. The USUFRUCT is the combination of the first two rights. In our intestate explanation above, the surviving spouse has the usufruct, and the children have the abusus, which we call the NAKED OWNERSHIP. In order for a surviving spouse to be able to sell or refinance the house, they would need the permission of the naked owners (the children.) This can be a real problem if the children are still minors, as the court needs to appoint a “tutor” to sign on behalf of the minor children.

**DYING TESTATE (WITH A WILL)**

There are many reasons to make a will but the most important is usually to grant the surviving spouse with usufruct for life and to give them the power to have full control over the assets subject to this usufruct, including the power to sell or mortgage. This is what we estate planners call the “super-usufruct.” It is relatively new under Louisiana law and many attorneys have no idea that this is even allowable. The second most common reason is to allow the surviving spouse to have a usufruct over the decedent’s separate property. And the third most common reason is usually to allocate the children's inheritance into a testamentary trust whereby the children do not have access to the funds until a specific age or event (for example, age 25 or upon graduation from college).

**FORCED HEIRSHIP (LIMITED)**

Many people are under the impression that Louisiana has abolished the laws of forced heirship. That is not true. What has happened is that forced heirship has been “limited.” Prior to 1996, with some exception, forced heirship was “unlimited,” meaning that the age of your child was irrelevant for inheritance purposes. Unless you met one of the twelve arcane reasons for disinherison, the most common being no communication with a child for two or more years, you had to leave your child a portion of your estate upon your death – no matter what. Where the law stands now is that your child’s age is relevant. If your children have reached their 24th birthday, and are not permanently unable to manage their affairs due to a disability, then you can leave them out of your will. The new law also protects special needs grandchildren, if their parent is deceased. The amount of the forced portion is determined as follows: one forced heir must be left
25% of your estate, two or more forced heirs must be left 50% of your estate. However, this amount may never be more than a “child’s portion.” For example, if you have 10 children and 9 have attained the age of 24 years, then you do not need to leave child #10 25% of your estate, only a child’s portion of 10%.