

Powers of Attorney, Living Wills and Advance Directives, OH MY!

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Schedule time with me: www.calendly.com/smwplc

Many thanks to our Host:



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SMWPLC

Our Learning Objectives

- To *remind us* how lucky we are to be *Civil Law Attorneys* in Louisiana
- To provide an alternative view of implementing basic legal protective measures available under Louisiana law in a time of COVID19, including: Powers of Attorney, Advance Directives, Living Wills, Wills, Disposition of Remains Directives, and Provisional Custody by Mandate
- To *assist lawyers* in *thinking* about these legal measures *in a new way*, so they can advise their clients in extenuating circumstances
- 4. To **bolster cultural competence** through appreciation for social justice, self-determination, and dignity and worth of the person
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About Sheila



- 1. Licensed Attorney
- 2. Licensed Master Social Worker
- 3. Educator
- 4. Business Coach for Creatives & Lawyers
- 5. Certified Ethics Trainer
- 6. Transatlantic: 13+ years
- 7. 50/50: Fees/*Pro Bono*
- 8. Continuing Ed Advocate
- 9. Two goals each day





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Most pressing issues we're seeing right now

- 1. Clients never had legal docs because they never "needed" them
- Clients either need to *update* the docs they have *and cannot* (because they're incapacitated or need a Notary) *or* Clients are *not creating or updating* their docs (because they think they need a lawyer)

docs (because they think they need a lawyer or you've told them you can't help them due to COVID19)

The time to start preparing was yesterday (or at least 10+ weeks ago, pre-Mardi Gras)



Confusion:

- U Wills vs Powers of Attorney
- Advance Directives vs
 Living Wills vs
 Powers of Attorney

Misunderstandings:

- Available vs Appropriate vs Competent Witnesses
- Incapacity in context of Mental & Behavioral Health
- Determinations of incapacity

Overwhelmingly, the docs don't exist, or if they do, they:

- → do not address pandemics
- → were not recorded in medical / financial records
- → may not follow individuals across settings (ERs vs PCP)
- → are not specific enough
- \rightarrow do not dictate a plan
- → leave out important info and/or people
- → haven't been reviewed in years and are outdated



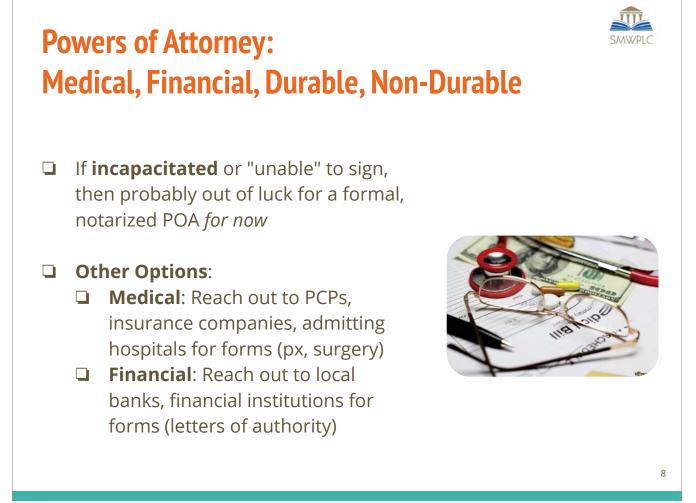


Alternatives + Thinking Outside of the Box

Rule #1: It's better have something in writing than nothing at all.

Rule #2: Document, document, document.

Rule #3: When in doubt, check the Rules and ASK FOR HELP.





- If incapacitated, then probably out of luck for now, as it requires 2 witnesses
 + a mental status examination (which have attestations re current capacity)
- > If **not incapacitated**, then:
 - Forms: LDH, People's Health, Ochsner, 5 Wishes, Local Library
 - If no form available or in a hurry: best for them to write down what they want, in accepted form of an *olographic* testament





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- Document. Document. Document!
- NB: Mental status examination (physician or psychologist) is required for it to be "valid" - Notary not required. Be mindful of those who could/would challenge validity.
- NB: *Revocation* "may" require capacity, but arguably, could occur regardless // *Telehealth is your friend*





Incapable vs Determinations of Incapacity

Incapable

Due to *any* infirmity, person is:

- currently unable
- Let to make *or* communicate
- reasoned decisions
- regarding *behavioral* health treatment

LA RS 28:221(5)

Determination of Incapacity

- 2 physicians, who personally examined, and
- determined incapable and
- signed written certificate and put the certificate
- □ in the *medical record*

LA RS 28:226

Key Term: Not *In*capable



- If incapacitated, then probably out of luck *for now*, as it requires
 2 witnesses - it's a *waiting game*
- If the person is not incapacitated and can communicate IN ANY WAY, SHAPE OR FORM (verbal or nonverbal), then:
 - **Statutory Form:** LA RS 40:1151.2
 - Other Forms: LDH, People's Health, Ochsner, 5 Wishes





Living Wills (Form: LA RS 40:1151.2) SMORE TRANSFORMED SMORE TRANS

- If no form available or in a hurry, if they can, then they should write down what they want, in the accepted form of an olographic testament
- If they *cannot write*, they can either verbalize their decision or they can communicate their decision in another way (one blink, raise a pinkie)
 Record this interaction

Best case scenario: Written + 2 Witnesses



Living Wills (Form: LA RS 40:1151.2) Declarations Concerning Life-Sustaining Procedures

- Inception & Revocation
 Presumption is they're *always* capable
- Document. Document. Document!
- NB: Notary not required for Living Will to be "valid" - be mindful of those who could/would challenge validity





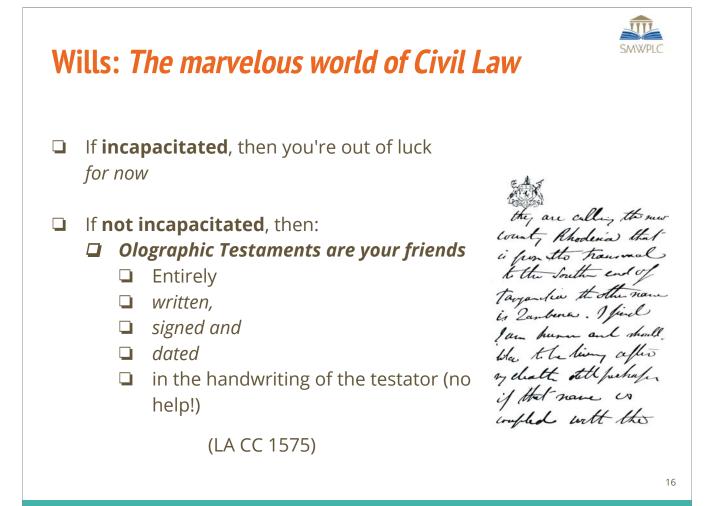
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The Magic Question for Clients:

Do you *really* care if the default rules kick in if you die?

Devolution of Separate & Community Property





Wills: *The marvelous world of Civil Law*

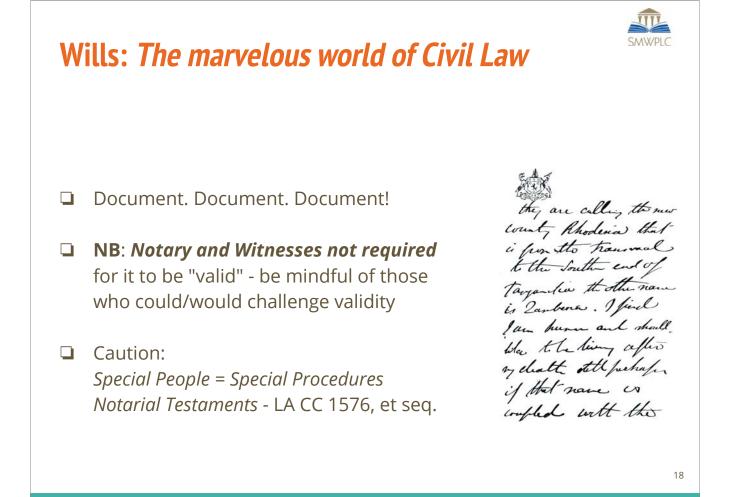
 Yes ... Clients *can* copy your soon-to-be-final-but-still-a-*draft* Notarial Testament word-for-word

- Still do intake & planning
- Still discuss by voice, preferably video conference
- Consider *recording* your sessions

Admit we're not magicians

- □ Tell the truth: no magic words
- □ "When I die, I want ..."

they are calling the new county Rhoderica that is from the housed Tayantia the other name is Zambera . I find Jan human and should bla the timy after my death still pechaper if that name is coupled with the





If **incapacitated**, then you're out of luck for now (Default Rules)

If **not incapacitated**, then:

- Follow normal rules (LA RS 8:655), or
- □ If cannot follow the normal rules, have Client write down what they want in the form of an *olographic* testament
 - Entirely written, signed and dated in the *handwriting* of the testator



Admit we're not magicians

Tell the truth: no magic words "When I die, I want ..."



Disposition of Remains Directives

- Document. Document. Document!
- NB: Form requires *either* form of Notarial Testament **or** written **and** notarized to be "valid" - be mindful of those who could/would challenge validity
- NB: **Hierarchy** of who makes the decision if nothing in writing (LA RS 8:655)









Disposition of Remains Directives Hierarchy // Who Makes the Call? (LA RS 8:655)

So long as the death is not:

- 1. a death in armed forces in line of duty with a valid DD Form 93 (PADD) *or*
- 2. by hand of someone with a warrant or a judicial determination of probable cause for a homicide issued for arrest

Then remains can be decided/delivered to:

- 1. Person designated by decedent
- 2. Surviving Spouse, if no pending petition
- 3. Majority surviving adult children
- 4. Majority surviving adult grandchildren
- 5. Surviving parents
- 6. Majority surviving adult siblings
- 7. Majority surviving adult next of kin (CC 880 et seq.)





Provisional Custody by Mandate

A provisional custody mandate should be completed for <u>any</u> client with minor children right now.

- □ If **one parent incapacitated**, then if other parent/guardian available: *set it up*
 - If <u>not</u> together or there's a non-legal/domiciliary parent - *look to court documents*

□ If **not incapacitated**, then:

- **Statutory Form**: LA RS 9:954
- Other Forms: LSBA (Access to Justice)







A provisional custody mandate should be completed for <u>any</u> client with minor children right now.

Document. Document. Document!

- NB: Notary + 2 witnesses required to be "valid"
 - Be mindful of those who could/would challenge validity



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Important Steps to Take

Any temporary workarounds can & *should* say:

- authority is specific to COVID19
- authority is limited for duration of pandemic
- only to be used when *medically* necessary with *proof* of medical necessity and incapacity





Important Steps to Take Once forms completed, SHOULD: photograph/scan/email to self, lawyer, PCP, institutions (medical/financial) & others put in a "safe" place (fire box in house, waterproof bag, safe deposit box if accessible) record in all medical and financial records be brought with individual to every appointment/visit



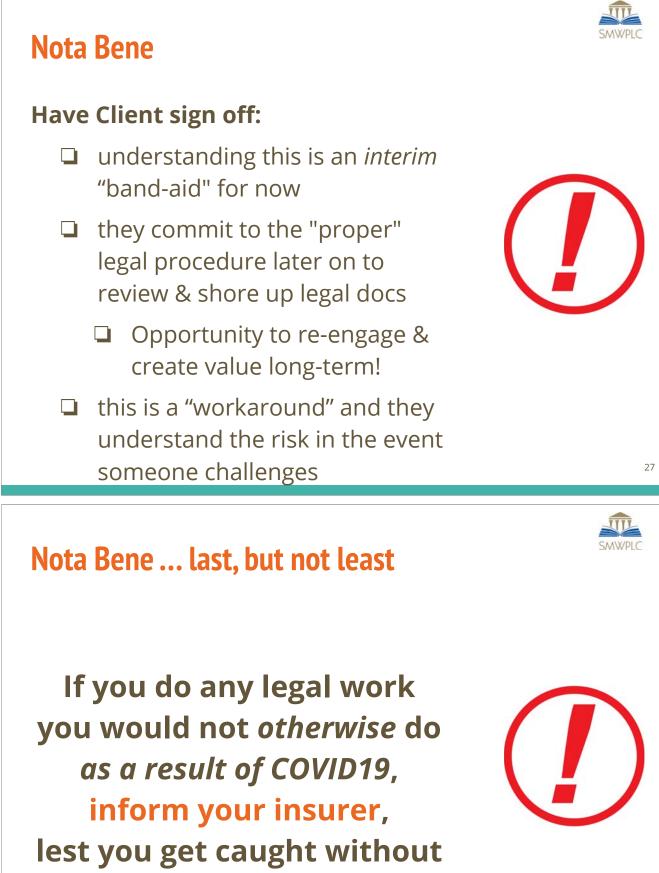
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Advise Clients:

- □ these are *extenuating* circumstances
- this "workaround" is potentially not
 100% (just as nothing is anything
 can be challenged) and
- you are acting with your
 "reasonable lawyer" hat on, based
 on all of the information available





malpractice coverage



Better to have something in writing, than nothing at all.



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Next CLE on Wednesday 3/6 @ 9:45 am "Now, More Than Ever: Building a Balanced, Healthy Life during COVID" and beyond!



Follow-up to Question during Q&A

Question:

"Can someone do a POLST at the same time as an Advance Directive or Living Will?"

Answer:

The more documentation you have, the better off you'll be.

POLST stands for: Physician Order for Scope of Treatment From POLST National Website:

POLST = Portable Medical Orders. POLST forms are medical orders that travel with the patient.

- 1. Louisiana *is* a POLST-endorsed State
- 2. Law + Form: LA RS 40:1155.1, et seq.
- 3. More info here:
 - a. General Info: <u>https://polst.org/progra</u> <u>ms-in-your-state</u>
 - b. COVID19-specific Info: https://polst.org/covid/

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