



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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Our Learning Objectives

1. To **remind us** how lucky we are to be **Civil Law Attorneys** in Louisiana
2. 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
3. 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
2. 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 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)***

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Trends

Confusion:

- 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
- do not dictate a plan
- leave out important info and/or people
- haven't been reviewed in years and are outdated

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Working around issues *for now*

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*.

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Powers of Attorney: Medical, Financial, Durable, Non-Durable

- ❑ If **incapacitated** or "unable" to sign, then probably out of luck for a formal, notarized POA *for now*

- ❑ **Other Options:**
 - ❑ **Medical:** Reach out to PCPs, insurance companies, admitting hospitals for forms (px, surgery)
 - ❑ **Financial:** Reach out to local banks, financial institutions for forms (letters of authority)



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Advance Directives (LA RS 28:224) Mental Health Treatment & Admission to Facility

- 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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Advance Directives (LA RS 28:224) Mental Health Treatment & Admission to Facility

- 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***



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Incapable vs Determinations of Incapacity

Incapable

Due to *any* infirmity, person is:

- ❑ **currently** unable
- ❑ 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 *Incapable***

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

- ❑ 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



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

- ❑ 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**

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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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Let's talk about Wills ...

The Magic Question for Clients:

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




Devolution of Separate & Community Property

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Wills: *The marvelous world of Civil Law*

- ❑ If **incapacitated**, then you're out of luck *for now*
- ❑ If **not incapacitated**, then:
 - ❑ **Olographic Testaments are your friends**
 - ❑ Entirely
 - ❑ written,
 - ❑ signed and
 - ❑ dated
 - ❑ in the handwriting of the testator (no help!)

(LA CC 1575)




they are calling the new county Rhodensia that is from the transoral to the South end of Tanganyika the other name is Zambesia. I find I am humbled and shall like to be living after my death still perhaps if that name is coupled with the

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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 Rhodensia that is from the transvaal to the south end of Tazganaw the other name is Zambona. I find I am humer and shall like to be living after my death still perhaps if that name is coupled with the

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Wills: *The marvelous world of Civil Law*

- ❑ Document. Document. Document!
- ❑ **NB: *Notary and Witnesses not required*** for it to be "valid" - be mindful of those who could/would challenge validity
- ❑ Caution:
Special People = Special Procedures
Notarial Testaments - LA CC 1576, et seq.



they are calling the new county Rhodensia that is from the transvaal to the south end of Tazganaw the other name is Zambona. I find I am humer and shall like to be living after my death still perhaps if that name is coupled with the

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Disposition of Remains Directives

- ❑ 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 ...*"



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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)



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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.*)

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Provisional Custody by Mandate

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

- If **one parent incapacitated**, then if other parent/guardian available: *set it up*
 - If not 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)



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Provisional Custody by Mandate

A provisional custody mandate should be completed for any 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



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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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Nota Bene

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



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Nota Bene

Have Client sign off:

- ❑ understanding this is an *interim* "band-aid" for now
- ❑ they commit to the "proper" legal procedure later on to review & shore up legal docs
- ❑ Opportunity to re-engage & create value long-term!
- ❑ this is a "workaround" and they understand the risk in the event someone challenges



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Nota Bene ... last, but not least

**If you do any legal work
you would not *otherwise* do
as a result of COVID19,
inform your insurer,
lest you get caught without
malpractice coverage**



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Document. Document. *Document!*



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



Feel free to schedule some time with me:
www.calendly.com/smwplc
www.smwplc.com

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



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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: <https://polst.org/programs-in-your-state>
 - b. COVID19-specific Info: <https://polst.org/covid/>

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