

## Living Will

A living will or declaration concerning life-sustaining procedures is effective only when a patient is diagnosed with a terminal and irreversible condition. In effect, the living will can prevent the maintenance of a person on a respirator, etc. The living will is effective at a time when the person is physically (medically) alive but cannot survive without extraordinary medical procedures.

## Last Will and Testament

A will is not effective until death; generally, the last one written by date is the one which will control, so it is usually a good idea that the last will made revoke all prior wills. It is not possible to make either an oral will or a will with someone else. A will may be olographic, which means entirely written, dated and signed in the testator's handwriting; or it can be statutory, which means it is executed with certain formalities in the presence of a notary public and two witnesses. A will controls all the property (assets and liabilities) owned at the time of death, whatever and wherever, except for property that generally passes by beneficiary designation such as life insurance, annuities, IRAs and pension benefits. The estate of one spouse cannot be controlled by the will of the other spouse. Wills also can address estate or inheritance tax matters as well as many others beyond the scope of this brochure.

DO I NEED  
A WILL?

*Your Estate and  
Louisiana Law*



For further information, call or write to:

**Louisiana State Bar Association**

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## Estate

The estate is the property owned by each person that can be passed at death. A person can pass on property by will (called dying “testate”) or under Louisiana intestacy laws (called dying “intestate”). It is possible for someone to pass on an estate in part by will and in part via intestacy. The estate consists of all separate property of the decedent and 50 percent of community property, if married.

Separate property is property owned prior to the marriage and includes property which is inherited or gifted to the person individually (assets and liabilities) during a marriage, as well as property which results from reinvestment of separate property.

Community property is property acquired during the marriage in either spouse’s name unless the spouses have elected out of the community property regime (before or during the marriage) or have partitioned (divided) some or all of the community property, thereby transforming it into separate property. All property owned is presumed to be community property, so proof that property is separate is important.

## Forced Heirship

Contrary to popular belief, forced heirship DOES NOT restrict or limit a person’s right to make out a will. Forced heirship is a personal right held by certain classes of heirs to claim a portion of an estate if they so choose, despite what the decedent’s will provides. Forced heirship rights are not mandatory on the forced heir, either. Since 1995, all children ARE NOT automatically forced heirs. In fact, the vast majority of children are no longer forced heirs. Since 1995, forced heirs solely consist of:

- ▶ Any child, including an adopted child, of the decedent who is under the age of 24 when the decedent dies;
- ▶ Any child, including an adopted child, of the decedent, who is permanently unable to take care of himself/herself or of handling his/her affairs due to a permanent mental incapacity or physical infirmity;
- ▶ Any grandchild of the decedent if the grandchild’s parent died before the decedent and that parent would have been younger than 24 at the time of the decedent’s death; and

- ▶ Any grandchild of the decedent if the grandchild’s parent died before the decedent and the grandchild is permanently unable to take care of himself/herself or of handling his/her affairs due to a permanent mental incapacity or physical infirmity.

Generally, the forced portion (the minimum amount that forced heirs have the right to claim) is one-fourth (1/4) for one forced heir and one-half (1/2) for two or more forced heirs.

There are no restrictions on the remaining estate (the “disposable portion”). If there are no forced heirs, there are no forced heirship restrictions on any transfer of the estate.

## At Death, Without a Will

All of the estate goes to the children. If the children are deceased, the estate goes to the grandchildren. Both conditions are subject to the usufruct of the surviving spouse over the community property (but the spouse gets no usufruct over separate property, such as the home in which the surviving spouse and the decedent were living).

The usufruct that a surviving spouse gets over community property where the decedent dies intestate terminates at the earlier of remarriage or the death of that spouse.

If there are no children, all community property goes to the surviving spouse and any separate property goes to the brothers and sisters in naked ownership with the surviving parents of the decedent having a lifetime usufruct on the property. When the usufruct ends at the death of the last surviving parents, the brothers or sisters get full ownership.

## At Death, With a Will

The decedent’s will governs passage of the estate. It is important that a will clearly reflect the person’s intentions and cover all reasonably foreseeable future events, such as people dying in different orders, the naming of executors, trustees and tutors (guardians). The surviving spouse is not a forced heir. The decedent may specifically deprive the surviving spouse of the usufruct in a will. The decedent can extend or shorten the usufruct to the surviving spouse, i.e., to include separate property, a portion of community property, or for a number of years.

The property also may be placed in a trust created in a will to provide restrictions on use, delay in vesting until a certain age, etc.

## Usufruct

Usufruct is the right to use the property of another, including money, land, houses, furniture, vehicles, etc. Usufruct may be created by a will, a contract or by operation of law if a person dies without a will.

If the decedent dies without a will, the surviving spouse by law has usufruct over the decedent’s share of the community (but not separate) property. With a will, the terms of usufruct are determined by the will.

## Property Power of Attorney

Mathematically, it is more likely that a person will lack the physical or mental ability to take care of himself/herself. This state, often referred to as “incapacity,” usually is much more difficult to deal with than death unless proper contingency plans are made because life continues. Similar to “probate” for the deceased, the law provides court-supervised protection in a procedure called “interdiction” in Louisiana for those who lack capacity and who made no alternate plans. While necessary for some, for the vast majority of people, this court procedure is cumbersome and expensive. It may be thought of as “lifetime probate.” A property power of attorney can help minimize the hassles of “lifetime probate” by allowing a person to appoint a friend or loved one as a “representative” to continue business and personal affairs. Property powers of attorney, which are not perfect but do help a lot of people, can be made valid and enforceable until death.

## Health Care Power of Attorney

A general power of attorney may not be sufficient to authorize the agent to make major health care decisions, such as surgery, nursing home/specialized care decisions and/or medication. The durable health care power of attorney or specific health care language is needed in a power of attorney to encompass these contingencies. A durable health care power of attorney does not allow for decisions concerning life-sustaining procedures, which can only be addressed by the “living will” or court order. While often separate documents, the property and health care powers of attorney can be in one document.