

Beyond DL Wills:¹ Preparing Wills for Domiciliaries of Louisiana, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, and the U.S. Virgin Islands

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I. Introduction

Service regulations authorize military legal assistance attorneys to provide wills and will services to authorized clients.² Attorneys must act competently in advising clients and producing wills.³ Each military service provides its legal assistance attorneys Drafting Libraries (DL) Wills software to aid in drafting wills.⁴ The DL Wills program provides state-specific will templates for most jurisdictions within the United States, assisting an attorney in competently drafting wills for clients hailing from states other than the one in which the attorney is licensed. The DL Wills software is not designed, however, to produce wills for domiciliaries of Louisiana or the various U.S. territories.⁵

This primer provides guidance to military legal assistance attorneys who are advising clients domiciled or with property interests in Louisiana, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, or the U.S. Virgin Islands. Additionally, this primer provides suggestions for preparing simple wills using the DL Wills program for domiciliaries of these U.S. jurisdictions.

This paper surveys the jurisdictions in alphabetical order, introducing each with a short history relevant to its entry into the United States and the formation of its legal system. These introductions also identify each jurisdiction's type of legal system⁶ and any atypical difficulties in researching the applicable law facing the practitioner with access to LexisNexis or Westlaw, but who does not read Spanish.⁷ Discussion follows concerning laws unique to the jurisdiction and relevant to advising will clients.⁸

The introductory section for each jurisdiction closes with a survey of the law, if any, concerning three testamentary instruments a legal assistance attorney may find appropriate for a client. For the jurisdictions that have either the Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA), this section explains whether the law allows

¹ DL Wills refers to the wills drafting software of DL Drafting Libraries, produced by Attorneys' Computer Network, Inc. Version 8.0 was used for this primer.

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² See U.S. DEP'T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS para. 1.4.1 (27 Oct 2003) [hereinafter AFI 51-504]; U.S. DEP'T OF COAST GUARD, COMMANDANT INSTR. 5801.4D, LEGAL ASSISTANCE PROGRAM para. 7(a) (20 Dec. 2002) [hereinafter COMDTINST 5801.4D]; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL'S INSTR. 5801.2, NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM para. 7-2(a) (11 Apr. 1997) [hereinafter JAGINST 5801.2]; U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6(b) (21 Feb. 1996) [hereinafter AR 27-3]; see also U.S. DEP'T OF DEFENSE, DIR. 1350.4, LEGAL ASSISTANCE MATTERS para. 4.1.2 (28 Apr. 2001) (C1, 13 June 2001) [hereinafter DOD DIR. 1350.4].

³ See, e.g., U.S. DEP'T OF ARMY, REG. 27-26, RULES FOR PROFESSIONAL CONDUCT FOR LAWYERS app. B, R. 1.1 (1 May 1992).

⁴ See, e.g., COMDTINST 5801.4D, *supra* note 2, para. 17(a).

⁵ When DL Wills queries the user as to which state's laws are to govern the will, the user may select from among any of the fifty states, Washington D.C., Guam, Puerto Rico, and the Virgin Islands. If the user selects Louisiana, Guam, Puerto Rico, or the Virgin Islands, the next screen prominently displays the following warning, "NOTE: The programs were not designed for the laws of [the jurisdiction selected]." When the user presses the enter key from this warning screen, the software enables the user to prepare a generic will that states the testator is from the jurisdiction selected.

⁶ The different legal systems represented are common law (two jurisdictions), mixed common law and civil law (two), and mixed common law and traditional law (two).

⁷ The ability to read Spanish is relevant to research in Puerto Rican law. See *infra* text accompanying notes 233-236.

⁸ Two examples illustrate types of legal provisions not present here. First, legal assistance attorneys can assume that anti-alienation laws no longer have restrictions based upon the racial designation of the beneficiary to whom a testator may transfer his real property, regardless of the state in which the land is located or the residence of the testator. See *Buchanan v. Warley*, 245 U.S. 60, 70-71, 82 (1917) (holding as unconstitutional a Louisville ordinance forbidding a colored person to purchase residential property in a block inhabited primarily by white persons or a white person to purchase residential property in a block inhabited primarily by colored persons). Thus, this primer does not address race-based anti-alienation laws except for the two jurisdictions in which they remain viable.

Second, because good drafting makes clear the intent of a testator who leaves potential heirs out of the will, precluding inadvertent omissions of potential heirs, this primer does not address pretermitted heir statutes. For similar reasons, this primer does not address provisions concerning ademption and advancement.

for testamentary transfers under the UGMA or UTMA and at what age property under the UGMA or UTMA must be turned over to the minor.⁹ This section also identifies those jurisdictions that allow a testator to transfer property under a tangible personal property memorandum or similar device and any peculiarities of the law concerning these instruments.¹⁰ Although analysis of trust law is beyond the scope of this primer, this section provides citations to the statutory trust provisions of the four jurisdictions that have them.¹¹

For each jurisdiction, this paper addresses rights to property by surviving family members, intestate succession, testamentary capacity and testamentary formalities, guardianship or tutorship, and, finally, guidance for preparing a will using DL Wills. Section A of each jurisdiction surveys the law concerning rights in surviving family members to a decedent's property so the attorney can advise the client about what property comprises the estate, to whom some of the estate must go by law, and what remaining portion of the estate is freely disposable. This section identifies those jurisdictions with a community property regime. Section A and section B of each jurisdiction, which provides intestate succession information, should assist in advising a client about the need for a will. Section C of each jurisdiction describes the testamentary capacity and testamentary formalities required for a valid will; how to make the will self-proving, if possible; and what types of foreign wills the jurisdiction accepts. Though this section references the validity of holographic wills, the requirements for such wills is beyond the scope of this primer. Section D of each jurisdiction provides information about executors and administration and section E of each jurisdiction discusses the law regarding the nomination of guardians or tutors. Both these sections discuss any code provisions that would allow the testator to alleviate some of the burdens typical to these positions, such as providing security, inventory, and accountings. Corporate fiduciaries are not addressed. Finally, for each jurisdiction, section F provides guidance on preparing simple wills for a military legal assistance client domiciled in the jurisdiction using DL Wills software, with reference to the sample will language in the appendices. This guidance addresses jurisdiction-specific wills, military testamentary instruments,¹² and foreign wills.

This article uses gender neutral terms and masculine pronouns in gender neutral situations to highlight those few instances in which the law distinguishes among persons based on gender.

To fully address all available will preparation options, this primer examines federal law concerning the validity and preparation of military testamentary instruments. Before surveying each jurisdiction, a look at the military testamentary instrument statute is in order.

II. Military Testamentary Instruments

Within the National Defense Authorization Act for 2001, Congress created a new type of will—the military testamentary instrument.¹³ Codified at 10 U.S.C. § 1044d, this statute enables the military attorney to provide testamentary instruments that every U.S. jurisdiction must recognize as valid.¹⁴ Furthermore, the statute provides the means to make a

⁹ See generally Major Paul M. Peterson, *The Uniform Transfers to Minors Act: A Practitioner's Guide*, ARMY LAW., May 1995, at 3. Even if the jurisdiction of domicile does not have a UGMA or UTMA, a testator may be able to transfer property under another jurisdiction's UGMA or UTMA. See *id.* at 11.

¹⁰ See generally Major Rick Rousseau, *Preparation of Tangible Personal Property Memorandums: Using Drafting Libraries (DL) Wills Software*, ARMY LAW., July 2000, at 26.

¹¹ For general service policy concerning testamentary trusts, see AFI 51-504, *supra* note 2, para. 1.4.1.1; COMDTINST 5801.4D, *supra* note 2, para. 7(a); JAGINST 5801.2, *supra* note 2, para. 7-2(a)(2), (5); AR 27-3, *supra* note 2, para. 3-6(b).

¹² A military testamentary instrument is a document conforming to the testamentary formalities of 10 U.S.C. § 1044d (2000), which gives such a document the same legal effect of a validly executed will or testament in any U.S. jurisdiction. See Part II below. Regardless of the jurisdiction selected, the DL Wills program allows the practitioner to select whether a military testamentary instrument is prepared. When this option is not selected, DL Wills instead prepares a will with the formalities required by the jurisdiction previously selected.

¹³ Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 § 551, Pub. L. No. 106-398, 114 Stat. 1654, 1654A-123 to -125 (2000) (codified as amended at 10 U.S.C. § 1044d). Congress identified four purposes of this provision: to require all U.S. jurisdictions "to recognize a will prepared for a person eligible to receive legal assistance under section 1044," to ensure such wills "are admissible for state probate proceedings," to "simplify will preparation for eligible personnel," and to provide "greater certainty and security in accomplishing their testamentary intent." H.R. REP. NO. 106-616, at 368 (2000).

¹⁴ See 10 U.S.C. § 1044d(a) (2000) (exempting a military testamentary instrument "from any [U.S. jurisdiction's] requirement of form, formality, or recording before probate" and giving such an instrument the same legal effect of a validly executed will or testament of that jurisdiction). Section 1044d does not affect how a U.S. jurisdiction's law applies to the provisions within the will. See *id.* For example, Puerto Rico must recognize as valid a Puerto Rican testator's military testamentary instrument properly executed in Texas, but will apply Puerto Rico's law of forced heirship to the administration of the testator's estate notwithstanding any provisions to the contrary within the military testamentary instrument.

military testamentary instrument self-proving.¹⁵ While § 1044d has not eliminated the military's practice of preparing state-specific wills, it has provided military attorneys a valuable option in preparing wills for their legal assistance clients.¹⁶

A military testamentary instrument is a document that the testator signs in the presence of the presiding military legal assistance attorney and two disinterested witnesses and that conveys testamentary intent and testamentary dispositions.¹⁷ Department of Defense policy additionally requires a preamble or equivalent statement and a self-proving affidavit (substantially the same "in form and content" as those provided in the instruction providing the policy) to accompany any military testamentary instrument.¹⁸ A properly executed self-proving affidavit under the Department of Defense policy meets the § 1044d requirements to make the military testamentary instrument self-proving. The DL Wills program provides a conforming preamble and self-proving affidavit upon request, regardless of the jurisdiction selected. Thus, a military testamentary instrument prepared using DL Wills is a significant option now available to the legal assistance attorney for any clients domiciled in any of the jurisdictions addressed in the sections to follow.

III. American Samoa

Comprised of seven islands in the South Pacific, American Samoa became a territory of the United States in 1900.¹⁹ Congress has classified American Samoa as an outlying possession of the United States.²⁰ Consequently, a person born in American Samoa acquires status as a noncitizen U.S. national.²¹ Although civil and judicial authority lies with the Secretary of the Interior,²² American Samoa is mostly self-governing.²³ Its constitution establishes an executive branch headed by an

¹⁵ See *id.* § 1044d(d). A will is self-proving if its form and content allow a court to admit the will to probate without the attesting witnesses testifying in court. This is usually accomplished by means of a self-proving affidavit. See BLACK'S LAW DICTIONARY 63, 1630 (8th ed. 2004); see also 10 U.S.C. § 1044d(d)(1) (providing the legal effects of a self-proving military testamentary instrument). A military testamentary instrument is self-proving

if it includes (or has attached to it), in a form and content required under [prescribed regulations], each of the following: (A) A certificate, executed by the testator, that includes the testator's acknowledgment of the testamentary instrument. (B) An affidavit, executed by each witness signing the testamentary instrument, that attests to the circumstances under which the testamentary instrument was executed. (C) A notarization, including a certificate of any administration of an oath required under the regulations, that is signed by the notary or other official administering the oath.

10 U.S.C. § 1044d(d)(2).

¹⁶ See 10 U.S.C. § 1044d(b)(1). Compare AFI 51-504, *supra* note 2, para. 1.4.1.2 (requiring all Air Force wills to be military testamentary instruments), with COMDTINST 5801.4D, *supra* note 2, para. 7(b)(1)(f) (not requiring all Coast Guard wills to be military testamentary instruments). The corresponding Army regulation and Navy instruction predate § 1044d.

Some practitioners may have concern about whether § 1044d would withstand constitutional scrutiny as a legitimate exercise of preemption of a state's authority in the probate process. An additional issue especially relevant to the topic of this primer is whether § 1044d would be constitutional with regard to U.S. territories, even if it were not constitutional with regard to the states. See, e.g., 48 U.S.C. § 1421b(u) (extending some, but not all, of the U.S. Constitution to Guam). This primer assumes the constitutionality of § 1044d, while recognizing that the issue is not definitively resolved.

¹⁷ See 10 U.S.C. § 1044d(b), (c). Alternatively, if the testator is unable to sign the document, he may direct another to sign on his behalf and in his presence. See *id.* § 1044d(c)(1).

¹⁸ DOD DIR. 1350.4, *supra* note 2, para. 4.2; see *id.*, encls. 1 & 2 (pmb. and affidavit). The preamble and affidavit are reproduced at Appendix A.

¹⁹ See Joint Resolution of Feb. 20, 1929, ch. 281, 45 Stat. 1253, 1253 (codified as amended at 48 U.S.C. § 1661(a) (2000)) (accepting, ratifying, and confirming treaties with Samoan chiefs as of 10 April 1900 and 16 July 1904); U.S. CIA, *American Samoa*, in WORLD FACTBOOK (2004), available at <http://www.cia.gov/cia/publications/factbook/index.html>. In 1900, the Senate ratified the 1899 treaty with Great Britain and Germany recognizing U.S. possession of the islands. See Convention to Adjust Amicably the Questions in Respect to the Samoan Group of Islands, Dec., 2, 1899, U.S.-U.K.-Germany, 31 Stat. 1878, 1878-79. Congress annexed Swains Island to American Samoa in 1925. See Joint Resolution of Mar. 4, 1925, ch. 563, 43 Stat. 1357, 1357 (codified as amended at 48 U.S.C. § 1662).

²⁰ See 8 U.S.C.S. § 1101(a)(29) (LEXIS 2005). American Samoa (including Swains Island) is the only outlying possession of the United States. See *id.*; 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 92.04[1][c] (2004).

²¹ See 8 U.S.C. § 1408(1). The person may also acquire citizenship status if one of his parents was a citizen at his birth. See GORDON ET AL., *supra* note 20, § 92.04[7]. A noncitizen national owes allegiance to the United States and enjoys its protection, but has fewer political rights than a citizen does. See 8 U.S.C. § 1101(a)(22); GORDON ET AL., *supra* note 20, § 92.04[1][a].

²² See 48 U.S.C. § 1661(c) (granting such power to whomever the President appoints); GORDON ET AL., *supra* note 20, § 92.04[7]. Amendment of the American Samoa Constitution, however, requires an act of Congress. See 48 U.S.C. § 1662a.

²³ See Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 88-89 (2001).

elected governor, a bicameral legislature, and a judiciary.²⁴ American Samoa is a common law jurisdiction that retains some elements of customary law.²⁵

Legal research may be more difficult regarding the law of American Samoa because neither LexisNexis nor Westlaw currently provide American Samoa legal authorities. The American Samoa Bar Association, however, provides legal resources on its web site, including American Samoan cases, statutes, and court rules.²⁶

Concepts of land ownership unique to American Samoa require the estate planning attorney to inquire into the nature of a testator's interest in any real property located in American Samoa. Land in American Samoa is of three types—communal land, freehold land, and individual land.²⁷ Communal land, which comprises the majority of the land,²⁸ may not be devised or passed intestate.²⁹ Freehold land may be owned by anyone,³⁰ and thus is devisable to anyone.

Individual land can pass only to natives or certain nonnatives.³¹ A native is “a full-blooded Samoan person of Tutuila, Manu’a, Aunu’u, or Swains Island.”³² A nonnative can own individual land only if “he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than [five] years and has officially declared his intention of making American Samoa his home for life.”³³ Notwithstanding, a native can place individual land in trust, by will or deed, for the benefit of a child in a mixed marriage or for the issue of such a marriage.³⁴

American Samoa does not have an UGMA or UTMA.³⁵ The American Samoa Code does not recognize tangible personal property memorandums.³⁶ American Samoa lacks a trust code or similar statutory authority concerning trusts.³⁷

²⁴ See AM. SAMOA CONST. arts. II (legislature), III (judiciary), IV (executive branch). The legislature is called the Fono. Hall, *supra* note 23, at 73. The highest local court is called the High Court. The Secretary of the Interior appoints the Chief Justice and Associate Justices. See AM. SAMOA CONST. art. III, § 3.

²⁵ See AM. SAMOA CODE ANN. §§ 1.0201, .0202 (Supp. 1986). Customary law is subject to positive law and common law. “The customs of the Samoan people not in conflict with the laws of American Samoa or the laws of the United States concerning American Samoa shall be preserved.” *Id.* § 1.0202. Indeed, the American Samoan legislature has a policy to protect Samoan customs. See AM. SAMOA CONST. art. I, § 3.

²⁶ American Samoa Bar Association, Legal Resources, www.asbar.org (last visited Mar. 15, 2005).

²⁷ See *Moon v. Falemalama*, 4 Am. Samoa 836, 839-40 (1975). Communal land is also known as native land. See AM. SAMOA CODE ANN. § 37.0201(d) (www.asbar.org through 2004 Pub. L. No. 28-17). The *Moon* court referred to individual land as “other land,” but the American Samoa High Court usually uses a term similar to “individual land.” See, e.g., *Tuiteleapaga v. King*, 8 Am. Samoa 2d. 49, 50-51 (1988) (referring to “individual property”).

²⁸ See Hall, *supra* note 23, at 72. Over ninety percent of all land in American Samoa is communal land. *Id.*

²⁹ See AM. SAMOA CODE ANN. §§ 40.0106, .0206 (Supp. 1986). Communal land is land held by families and can only be held by full-blooded Samoans. See *Moon*, 4 Am. Samoa at 839. Title is held in trust by the *matāi*, who can alienate it only with the approval of the Governor. See AM. SAMOA CODE ANN. § 37.0204(a) (Supp. 1987). The *matāi* is the head of the familial group owning the land. See Hall, *supra* note 23, at 71. Non-Samoans may have some interest in communal land. The Governor may approve leases on communal land of up to fifty-five years “for any purpose, except for the working of minerals and cutting of timber.” AM. SAMOA CODE ANN. § 37.0221(a).

³⁰ See *Reid v. Tavete*, 1 Am. Samoa 2d 85, 89 n.1 (1983). Freehold land is land in court grants before 1900 that has not reverted to individual land. See AM. SAMOA CODE ANN. § 37.0201(b). Only by election of an owner may freehold land revert to the status of individual land. See *id.*

³¹ See AM. SAMOA CODE ANN. § 37.0204(b). The Governor may also approve conveyance of land “to an authorized, recognized religious society, of sufficient land for erection thereon of a church, or dwelling house for the pastor, or both; provided, that the reconveyance and retransfer of such land shall be to native Samoans only and in the discretion and upon the approval of the Governor.” *Id.* § 37.0204(d).

The restrictions of section 37.0204 apply as well to Swains Island, a later addition to American Samoa that is not under the *matāi* system. See *id.* § 37.0204(e). Notwithstanding, descendants of the 1949 Swains Island record titleholder are deemed eligible to receive title to real property on Swains Island. See *id.*

³² *Id.* § 37.0201(c).

³³ *Id.* § 37.0204(b). “Samoan” is a racial designation and so encompasses Western Samoans. See *Moon*, 4 Am. Samoa at 839. This racially-based system of discrimination has survived a “strictest judicial scrutiny” challenge under the U.S. Constitution. *Craddick v. Territorial Registrar of Am. Sam.*, 1 Am. Samoa 2d 10, 12 (1980).

³⁴ See AM. SAMOA CODE ANN. § 37.0205; *Craddick Dev. Inc. v. Craddick*, 28 Am. Samoa 2d. 117, 122 (1995).

³⁵ See AM. SAMOA CODE ANN. index (www.asbar.org through 2004 Pub. L. No. 28-17).

³⁶ See *id.* tit. 40.

³⁷ See *id.* index. Nonetheless, American Samoa law recognizes trusts. See, e.g., *id.* § 37.0205 (allowing native landowner to place individual land in trust to benefit nonnative progeny); *Beaver v. Craven*, 19 Am. Samoa 2d 14, 18-32 (1991) (interpreting and analyzing the terms of a trust instrument).

A. Rights to Property by Surviving Family Members

The surviving spouse has dower rights to one-third the value of all real and personal property of the decedent.³⁸ These rights are subject to the prohibitions against alienation of real property discussed above.³⁹

B. Intestate Succession

Intestate succession varies depending on whether property is real or personal. For real property, priority of succession is to descendants, to siblings and their descendants, to father, to mother, and finally to surviving spouse.⁴⁰ For personal property, priority of succession is to descendants, to surviving spouse, and finally to next of kin.⁴¹ Distribution to representatives is per stirpes.⁴²

C. Testamentary Capacity and Testamentary Formalities

A person of full age—eighteen years⁴³—and sound mind has testamentary capacity.⁴⁴ A will must be in writing and signed by the testator.⁴⁵ Two competent persons must witness the testator signing the will and attest to his signature by signing the will themselves.⁴⁶

The American Samoa Code does not recognize self-proving affidavits for wills.⁴⁷ Nevertheless, an affidavit that accompanies the will may facilitate probate if the affidavit contains witness testimony concerning the required testamentary formalities.⁴⁸

American Samoa lacks a statutory provision recognizing a foreign will.⁴⁹

D. Executors and Administration

An executor must be twenty-one years old, a resident of American Samoa, and mentally competent.⁵⁰ The Code makes no provisions for a court to waive the requirements of an individual executor to post a bond, to file initial and annual inventories, or to file annual and final accountings.⁵¹

³⁸ See AM. SAMOA CODE ANN. § 40.0103 (Supp. 1986).

³⁹ See *id.*; *supra* notes 27-34 and accompanying text.

⁴⁰ See AM. SAMOA CODE ANN. § 40.0202. Succession of real property is subject to the prohibitions against alienation of real property discussed *supra* notes 27-34 and accompanying text. See AM. SAMOA CODE ANN. § 40.0206.

⁴¹ See AM. SAMOA CODE ANN. § 40.0201. The statute does not elaborate on how to apply the term, “next of kin.” See *In re Estate of Ah Mai*, 14 Am. Samoa 2d 32, 33-34 (1990) (noting a lack of legislative and judicial guidance for interpreting “next of kin” under section 40.0201). Presumably, then, the court would apply the next of kin provision in accordance with English common law. See AM. SAMOA CODE ANN. § 1.0201; *Utu v. Am. Sam. Gov’t*, 20 Am. Samoa 2d 53, 57 (1992) (using the common law rule to determine next of kin in applying the wrongful death statute). The common law rule is that the degree of kinship is the greater of the number of generations from the deceased to the first common ancestor and the number of generations from the relative in question to the ancestor. See *Wetter v. Habersham*, 60 Ga. 193, 199-200 (1878).

⁴² See AM. SAMOA CODE ANN. § 40.0204.

⁴³ See *id.* § 40.0401.

⁴⁴ See *id.* § 40.0101.

⁴⁵ See *id.* § 40.0102. Alternatively, the testator may direct someone to sign on his behalf and in his presence. See *id.* The statute allows for a verbal will if the estate is valued at no more than \$300. See *id.*

⁴⁶ See *id.* If the testator directs someone else to sign for him, then the two witnesses similarly attest to the proxy’s signature. See *id.*

⁴⁷ See AM. SAMOA TRIAL CT. R. PROB. PROC. 11, available at www.asbar.org (last visited Mar. 15, 2005).

⁴⁸ Trial Court Rule of Probate Procedure 11 provides in part: “In the event that neither attesting witness is available, an affidavit may be substituted. If both attesting witnesses are dead or unlocatable, the Court may accept whatever extrinsic evidence as to the validity of the will as the Court deems appropriate.” *Id.* Additionally, providing such an affidavit may serve as self-proving if the will is probated in a different jurisdiction or if American Samoa later adopts a self-proving affidavit provision.

⁴⁹ See AM. SAMOA CODE ANN. tit. 40 (www.asbar.org through 2004 Pub. L. No. 28-17).

⁵⁰ See *id.* § 40.0306 (Supp. 1986).

E. Guardianship

American Samoa authorizes guardianships over a person, an estate, or both.⁵² Jurisdiction for a guardianship requires either the ward to be domiciled or the property to be located in American Samoa.⁵³ A guardian must be twenty-one years old, a resident of American Samoa, and mentally competent.⁵⁴ The Code makes no provisions for the court to waive the requirements of an individual guardian to post a bond or to file annual inventories and accountings.⁵⁵

F. Preparing a Will

Options for preparing a will for an American Samoan include drafting an American Samoa will, drafting a military testamentary instrument, and drafting a will for the jurisdiction of execution. Because the Code does not provide for self-proving wills or foreign wills, a military testamentary instrument is recommended.

To draft an American Samoa will using the DL Wills program, select “Guam” for the state and continue normal will drafting procedures for DL Wills. Once the word processing document is created, replace “Guam” with “American Samoa” throughout the document. To facilitate transfer of any real property in American Samoa, add a statement to the first paragraph of the will concerning Samoan ancestry and, if Samoan, include a place of birth and island of domicile, if applicable, such as “I am a full-blooded Samoan of Manu’a, born in American Samoa” or “I am not of Samoan descent.”

If there is a possibility that the testator will own individual land in American Samoa at his death, consider adding a savings clause, and if the testator is a native Samoan, consider adding a savings clause with trust provision. For any real property in American Samoa the testator presently owns, identify the type of real property owned, *e.g.*, “The real property I presently own in American Samoa [optional: place description here] is individual land and not communal land.” Also, provide sufficient information, if known, to identify the ancestry and birth of any person who may receive individual land in American Samoa under the will.⁵⁶ To the first paragraph of the affidavit, append a comma and the following language: “and that each witness was competent to witness the signing and execution of the attached or foregoing instrument.”

See Appendix B for a sample will with savings clause and affidavit and Appendix C for a sample savings clause and a sample savings clause with trust provision for a full-blooded Samoan testator.

To draft a Military Testamentary Instrument, proceed as above except (1) accept the DL Wills offer to prepare a military testamentary instrument preamble and affidavit and (2) do not amend the language in the affidavit. To prepare a specific will for a state in the United States, prepare a will as if the testator were a resident of that state except, once the document is produced, (1) replace in the first paragraph the name of the state with “American Samoa,” deleting “the State of” or “the Commonwealth of,” and (2) provide language as outlined above concerning Samoan ancestry and real property in American Samoa, as applicable.

IV. Guam

In 1898, Spain ceded the Pacific island of Guam to the United States as a result of the Spanish American War.⁵⁷ Since then, the United States has maintained possession of Guam except for a three-year Japanese occupation during World War II.⁵⁸ Persons born in Guam are U.S. citizens.⁵⁹ Guam’s Organic Act established an executive branch headed by an elected governor, a unicameral legislature, and a judiciary.⁶⁰ Guam lacks its own constitution. Given an opportunity to adopt a

⁵¹ See *id.* §§ 40.0310 (bond), .0321 (inventories and annual accounting), .0331 (final accounting) (Supp. 1983).

⁵² See *id.* § 40.0401 (1981).

⁵³ See *id.* § 40.0402 (Supp. 1983).

⁵⁴ See *id.* § 40.0403.

⁵⁵ See *id.* §§ 40.0404 (bond), .0406 (inventory and annual accounting).

⁵⁶ For an example, see the introductory paragraph in the sample will at Appendix B.

⁵⁷ See Treaty of Peace, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754, 1755; 48 U.S.C. § 1421 (2000); GORDON ET AL., *supra* note 20, § 92.04[6].

⁵⁸ See U.S. CIA, *Guam*, in WORLD FACTBOOK (2004), available at <http://www.cia.gov/cia/publications/factbook/index.html>.

⁵⁹ See 8 U.S.C.S. §§ 1101(a)(38), 1401(a) (LEXIS 2005).

⁶⁰ See 48 U.S.C. §§ 1422 (executive branch), 1423 (legislature), 1424 (judiciary). The highest court of the judicial branch is the Supreme Court of Guam. See 48 U.S.C. § 1424; GUAM CODE ANN. tit. 7, § 3102 (Supp. 1994).

constitution, in 1978 the Guamanians rejected the draft constitution their constitutional convention submitted for approval.⁶¹ Guam is a common law jurisdiction⁶² that has adopted much of its probate code from California.⁶³

Guam's version of a UGMA or UTMA is the Guam UGMA.⁶⁴ "A testator may bequeath securities, money, life or endowment policies, and annuity contracts" under the Guam UGMA.⁶⁵ Custodial property held under the Guam UGMA must be turned over to the minor when he reaches the age of eighteen.⁶⁶

Guam does not have a provision recognizing personal property memorandums.⁶⁷ In addition to other statutory authority for the administration of trusts,⁶⁸ Guam has the Guam Uniform Testamentary Additions to Trusts Act⁶⁹ to facilitate pour-over wills.⁷⁰

A. Rights to Property by Surviving Family Members

The Guam Code recognizes rights in the decedent's family members to community property, homestead property, a family allowance, and exempt property. Like California, Guam is a community property jurisdiction.⁷¹ Upon the death of a married person under Guam's community property scheme, the surviving spouse retains a one-half undivided interest in community property.⁷² A one-half interest in quasi-community property also passes to the surviving spouse.⁷³

A homestead in Guam that has been recorded as such passes free of the decedent's unsecured debts to a surviving spouse or, absent a surviving spouse, to any minor children.⁷⁴ If a homestead has not been recorded, the court, upon petition, will set aside a probate homestead from community property, quasi-community property, or other property the decedent and surviving spouse owned in common.⁷⁵ Such a probate homestead will pass to the surviving spouse and any minor children.⁷⁶

⁶¹ See Act of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899 (amended 1980) (authorizing Guam and U.S. Virgin Islands to enact constitutions); OFF. OF THE ATT'Y GEN., ORGANIC ACT OF GUAM AND RELATED FEDERAL LAWS AFFECTING THE GOVERNMENTAL STRUCTURE OF GUAM 84 note (2001), available at <http://www.guamattorneygeneral.com/pdf/oa2000.pdf#search=ORGANIC%20ACT%20OF%20GUAM%20AND%20RELATED%20FEDERAL%20LAWS> (noting Guamanian disapproval of constitution).

⁶² See GUAM CODE ANN. tit. 1, § 100 (LEXIS 2004) (listing laws applicable in Guam).

⁶³ See, e.g., *id.* tit. 15, § 815 cmt. (1993).

⁶⁴ *Id.* tit. 19, ch. 12.

⁶⁵ *Id.* tit. 15, § 727.

⁶⁶ See *id.* tit. 19, § 12104(d).

⁶⁷ See *id.* tit. 15, div. 1 (1993) (Wills).

⁶⁸ *Id.* ch. 33 (Administration of Trusts).

⁶⁹ *Id.* ch. 7, subch. A.

⁷⁰ See *id.* § 701 cmt. A pour-over will is "[a] will giving money or property to an existing trust." BLACK'S LAW DICTIONARY, *supra* note 15, at 1630.

⁷¹ See GUAM CODE ANN. tit. 19, ch. 6 (Community Property). In general, community property is property acquired by either spouse during the marriage while the spouses live together unless the property is acquired by gift, devise, bequest, or descent. See *id.* § 6101 (defining separate and community property).

⁷² See *id.* tit. 15, § 1001.

⁷³ See *id.* Quasi-community property is "property acquired in a non-community property jurisdiction which would be community property had it been acquired in Guam." *Id.* § 1101 cmt. For a non-domiciliary of Guam who dies leaving real property in Guam that is not community property of the decedent and surviving spouse, Guam grants the same election to the surviving spouse as would the decedent's domicile. See *id.* §§ 1103-05.

⁷⁴ See *id.* §§ 2401, 2405(a), (c); *id.* tit. 21, § 43204. This provision applies to the decedent's separate property only if the decedent himself either designated or joined in the designation of the homestead property. See *id.* tit. 15, § 2401. The homestead can consist of dwelling, outbuildings, and the land thereunder. See *id.* tit. 21, § 43101. The homestead exemption is limited in value. Its limit for a head of family or a person older than sixty-five years is \$40,000 "over and above all liens and encumbrances" and \$25,000 above encumbrances for all other persons. *Id.* § 43123. If the value of the property exceeds the limit of the homestead exemption, then as needed the probate court will order a division of the property or, if such division cannot be done without "material injury" to the property, the court will order a sale and equitable distribution of the proceeds. *Id.* tit. 15, § 2407(c).

⁷⁵ See *id.* tit. 15, § 2409(a)-(b).

⁷⁶ See *id.* § 2409(a); see also *id.* tit. 7, § 23111 (Supp. 1994) (stating that a debtor's homestead is exempt from execution); *id.* tit. 15, § 2409 cmt ("[Probate homestead] exists for precisely the same purposes as the declared homestead."). If both the spouse and minor children survive the decedent, then one-half of the probate homestead passes to the spouse and one-half passes to the minor children. See *id.* § 2411. Otherwise, the entire probate homestead passes to the spouse or the minor children as applicable. See *id.* If no such property exists to comprise a probate homestead, the court can set aside a probate homestead from the decedent's separate property, but can do so for no longer than the lifetime of the spouse or the minority of any minor children. See *id.* § 2409.

A surviving spouse, any minor children, and any adult children dependent on the decedent and unable to earn a living are entitled to a family allowance from the estate during its administration, but limited in duration to one year if the estate is insolvent.⁷⁷ Additionally, the surviving spouse or, absent a surviving spouse, any minor children are entitled to possession of exempt property until the inventory is filed.⁷⁸ Following the filing of the inventory, the court has discretion to award any or all of the exempt property to the surviving spouse or, absent a surviving spouse, to the minor children.⁷⁹

B. Intestate Succession

Intestate succession varies depending on whether property is characterized as separate, community, or quasi-community.⁸⁰ Community property and quasi-community property pass to the surviving spouse.⁸¹

If the decedent leaves a surviving spouse and either only one child or descendants through only one child, then one-half of the separate property passes to the spouse and one-half passes to the child or to the descendants per stirpes.⁸² If the decedent leaves a surviving spouse and more than one child or descendants through more than one child, then one-third of the separate property passes to the spouse and two-thirds pass to the children or to the descendants—equally if in the same degree of kindred, but per stirpes if otherwise.⁸³

If the decedent leaves a surviving spouse with no descendants, then one-half of the separate property passes to the spouse and one-half passes in priority of succession to parents, to parent's descendants per stirpes, and finally to surviving spouse.⁸⁴ If the decedent has descendants but no surviving spouse, the property passes to the descendants, equally if in the same degree of kindred, but per stirpes if otherwise.⁸⁵ If the decedent leaves neither surviving spouse nor descendants, then the property passes in priority of succession to parents, to siblings and their descendants per stirpes, and finally to next of kin.⁸⁶

Intestacy favors whole-blood relatives over half-blood relatives only for property of the decedent received by gift, devise, or descent from a decedent's ancestor not in blood relation to the half-blooded relative.⁸⁷ Guam determines intestate succession concerning illegitimate children and adopted children based on the existence of a recognized parent-child relationship.⁸⁸

C. Testamentary Capacity and Testamentary Formalities

A will must be in writing and subscribed by the testator.⁸⁹ The testator must be of sound mind⁹⁰ and at least eighteen years of age.⁹¹ The testator must either subscribe his will or acknowledge subscription of the will before two witnesses.⁹²

⁷⁷ *See id.* tit. 15, § 2415. If a person otherwise eligible for the family allowance “has a reasonable maintenance derived from other sources,” then the family allowance is set aside only for those eligible and not having such maintenance. *See id.* § 2419.

⁷⁸ *See id.* § 2401. The Code exempts many types of property from execution, many of which the Code expressly limits in value. Examples include necessary furniture; professional libraries of certain professionals limited to \$250 in value; and one cow with suckling, two sows with sucklings, fifteen hens, three roosters, and food for such animals for one month. *See id.* tit. 7, § 23111.

⁷⁹ *See id.* tit. 15, § 2401. The court may also set aside a declared homestead temporarily for the use of other family members in the absence of a surviving spouse. *See* GUAM CODE ANN. tit. 21, § 43204.

⁸⁰ *See id.* tit. 15, §§ 901-1107. For a decedent with property from a predeceased spouse, succession may also depend upon the characterization of the property when it was received from the spouse. *See id.* §§ 917-19.

⁸¹ *See id.* §§ 1001, 1101.

⁸² *See id.* § 903(a).

⁸³ *See id.* § 903(b)-(c).

⁸⁴ *See id.* §§ 907-09.

⁸⁵ *See id.* § 905.

⁸⁶ *See id.* §§ 911-913; *see also id.* §§ 807-17 (determining next of kin). The next of kin are those relatives of nearest degree to the decedent. Guam uses the civil law method of counting degrees of kindred. Each generation counts as one degree. *See id.* § 807. To count the number of degrees between two collateral relatives, add the number of generations from the first relative to the first common ancestor and the number of generations from the common ancestor to the second relative. *See id.* § 811.

⁸⁷ *See id.* § 813.

⁸⁸ *See id.* §§ 815-17. For example, an adopted child does not inherit from or through the natural parent “when the relationship between them has been severed by adoption.” *Id.* § 817.

⁸⁹ *See id.* § 201 (1993). The code also provides for holographic wills. *See id.* § 207.

The testator “must declare to the attesting witnesses that it is his will.”⁹³ The witnesses must sign “at the end of the will, at the testator’s request and in the testator’s presence.”⁹⁴ The witnesses should provide their place of residence.⁹⁵

A self-proving affidavit requires a witness to affirm the facts to which he would be required to testify in a probate proceeding.⁹⁶ A foreign will is valid in Guam if it was executed according to the laws of Guam or of the jurisdiction where it was executed or if it is otherwise valid in the jurisdiction where the testator is domiciled at execution or in the jurisdiction where the testator is domiciled at death.⁹⁷

D. Executors and Administration

An executor must be an adult, a resident of Guam, physically present in Guam, a non-felon, and competent “to execute the duties of the trust.”⁹⁸ An executor may receive letters testamentary without “providing security for the faithful performance of his trust” if the will expresses such intent.⁹⁹ A court may waive the requirement to file an inventory and appraisal if “it appears that none of the heirs, devisees, legatees, or creditors will be prejudiced by such waiver.”¹⁰⁰ The executor must file an accounting within thirty days after the deadline to present a claim against the estate, a final accounting, and any other accounting the court may require.¹⁰¹

E. Guardianship

A parent can appoint a testamentary guardian over the person of his child, the estate of his child, or both.¹⁰² Nevertheless, a child over the age of fourteen who resides in Guam may nominate his own guardian, subject to the court’s approval.¹⁰³ When appointing a guardian, the testator can modify the guardian’s powers and duties from the statutory default rules.¹⁰⁴ Unless the court rules otherwise, a testamentary guardianship requires no bond.¹⁰⁵ In addition to an initial inventory and appraisal, the guardian must file accountings one year after appointment and as often as the court requires thereafter.¹⁰⁶

⁹⁰ See *id.* §§ 101(a), 103.

⁹¹ See *id.* §§ 101(a), 103; *id.* tit. 19, §§ 1101-03 (Supp. 1994).

⁹² See *id.* tit. 15, § 201(a)-(b). Alternatively, the testator may direct someone to subscribe the will on his behalf and in his presence. See *id.* § 201(a). The statute gives no qualifications for the witnesses. See *id.* ch. 2.

⁹³ *Id.* § 201(c).

⁹⁴ See *id.* § 201(d).

⁹⁵ See *id.* Nevertheless, “a failure to do so will not affect the validity of the will.” *Id.*

⁹⁶ See *id.* § 1519(b)(2) (uncontested proceeding). Such an affidavit may be inadmissible in a contested proceeding. See *id.* § 1605.

⁹⁷ See *id.* § 113(a). The foreign jurisdiction must be within the United States. See *id.*

⁹⁸ *Id.* § 1701(c). The court may allow a felon to serve as executor if “satisfied that such person is competent to execute the duties of the trust.” *Id.* § 1701(c)(4). The court can find a person “incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.” *Id.* § 1701(c)(5). Banking and trust institutions operating in Guam may also qualify as executor. See *id.* § 1701(a).

⁹⁹ *Id.* § 2011(c).

¹⁰⁰ *Id.* § 2603.

¹⁰¹ See *id.* §§ 2703-05.

¹⁰² See *id.* §§ 3503-05; *id.* tit. 19, §§ 9106-9107. Similarly, the testator can appoint a guardian of a spouse who is incompetent or insane. See *id.* tit. 15, § 3505; *id.* tit. 19, § 9107.

¹⁰³ See *id.* tit. 15, § 3507.

¹⁰⁴ See *id.* § 4005.

¹⁰⁵ See *id.* § 4006.

¹⁰⁶ See *id.* §§ 4301 (inventory and appraisal), 4304 (account).

F. Preparing a Will

Options for preparing a will for a Guamanian include drafting a Guam will, drafting a military testamentary instrument, and drafting a will for the jurisdiction of execution. Because the Guam Code provides for self-proving wills, a Guam will is slightly preferable to a military testamentary instrument or a foreign will for a simple Guam will.

To draft a Guam will using the DL Wills program, select “Guam” for the state and continue normal will drafting procedures for DL Wills. Once the document is created, amend the affidavit as follows: Following the language in the first paragraph of the affidavit, “signed and executed said instrument as his [or her] last will and testament in the presence and hearing of the witnesses,” insert “and that he [or she] stated that said instrument is his [or her] last will and testament” and a comma. See Appendix D for a sample first paragraph of the affidavit.

To draft a Military Testamentary Instrument using the DL Wills program, select “Guam” for the state and continue normal will drafting procedures for DL Wills, accepting the DL Wills offer to prepare a military testamentary instrument preamble and affidavit. To prepare a specific will for a state in the United States, prepare a will as if the testator were a resident of that state except, once the Word document is produced, in the first paragraph replace the name of the state with “Guam,” deleting “the State of” or “the Commonwealth of.”

V. Louisiana

Louisiana’s unique legal system is a product of its history. Though Spain discovered Louisiana in the sixteenth century, France was the first European nation to claim the territory in 1682.¹⁰⁷ In 1762, France ceded Louisiana to Spain, who ceded Louisiana back to France in 1800.¹⁰⁸ When the United States purchased Louisiana in 1803, it intended to change the legal system to a common law system, but for the most part Louisianans successfully resisted the change.¹⁰⁹ As a result, Louisiana produced its first Civil Code in 1808, with revised civil codes in 1825 and 1870.¹¹⁰ Modeled on the Napoleonic Code, the Louisiana Civil Code of 1870 has roots to prior civil codes from Louisiana, France, Spain, and Justinian Rome.¹¹¹ While portions of the 1870 civil code remain in force, the legislature has been revising much of the code piecemeal since 1976.¹¹²

Louisiana’s legal system is a mixture of common law and civil law.¹¹³ Like typical civil law jurisdictions, Louisiana gives binding effect only to legislation and custom.¹¹⁴ Jurisprudence joins doctrine, conventional usage, and equity as persuasive sources.¹¹⁵ Thus, though not authoritative in themselves, prior court opinions provide persuasive guidance for interpreting legislation and custom.¹¹⁶

The Louisiana legislature enacted the Louisiana UTMA in 1987.¹¹⁷ Under the Louisiana UTMA, a testator may establish a UTMA by will.¹¹⁸ The custodian must turn over the custodial property to the minor upon the earlier of the minor reaching the age of eighteen years or receiving judicial emancipation.¹¹⁹

¹⁰⁷ See A.N. Yiannopoulos, *An Introduction to the Louisiana Civil Code*, in 1 LOUISIANA CIVIL CODE, at XV (West 1999).

¹⁰⁸ See *id.* at XVI-XVII.

¹⁰⁹ See *id.* at XVII-XIX.

¹¹⁰ See *id.* at XIX-XXIII.

¹¹¹ See *id.* at XXV.

¹¹² See *id.* at XXVIII-XXX.

¹¹³ See Christopher Osakwe, *Introduction—Louisiana Civil Law: The Cinderella of American Law*, 60 TUL. L. REV. 1105, 1105-06 (1986) (describing Louisiana as “the only mixed jurisdiction among the fifty states”).

¹¹⁴ See LA. CIV. CODE ANN. art. 1 (1999) (“The sources of law are legislation and custom.”); Yiannopoulos, *supra* note 107, at XXXIII. Legislation has priority over custom. See LA. CIV. CODE ANN. art. 3 (“Custom may not abrogate legislation.”).

¹¹⁵ See Yiannopoulos, *supra* note 107, at XXXIII; see also LA. CIV. CODE ANN. art. 4 (“When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”).

¹¹⁶ See Yiannopoulos, *supra* note 107, at XXXIV.

¹¹⁷ See LA. REV. STAT. ANN. §§ 9:751-:773 (2000).

¹¹⁸ See *id.* §§ 9:755(A).

¹¹⁹ See *id.* §§ 9:770.

The Louisiana legislature has also provided the Louisiana Trust Code.¹²⁰ Conversely, Louisiana does not have a provision recognizing personal property memorandums.¹²¹

A. Rights to Property by Surviving Family Members

Louisiana provides rights to the decedent's property for surviving family members through community property, marital portion, and forced heirship. Louisiana is a community property state.¹²² Under Louisiana's community property system, the surviving spouse owns an "undivided one-half interest in the community property."¹²³

"[T]he surviving spouse is entitled to claim the marital portion" if the decedent "die[d] rich in comparison with the surviving spouse."¹²⁴ The marital portion is a one-fourth share of the estate if no children survive the decedent, a one-fourth share in usufruct for life if three or fewer children survive, or a child's share in usufruct for life if more than three children survive.¹²⁵

Louisiana requires forced heirship to the decedent's children under twenty-four years of age, to children physically or mentally unable to care for themselves, to the representatives of any deceased child if such child would have been under twenty-four if still alive, and to any deceased child's representatives who are physically or mentally unable to care for themselves.¹²⁶ The forced portion is one-quarter of the estate if the decedent has one forced heir and one-half if he has more than one forced heir, except that an heir's forced portion cannot exceed his intestate portion.¹²⁷ The testator may disinherit a forced heir only for just cause, as defined by the legislature.¹²⁸ The testator may be able to limit an heir's enjoyment of the forced portion by placing it in trust or by giving the surviving spouse a usufruct in the forced portion.¹²⁹

¹²⁰ See *id.* §§ 9:1721--2252 (1991 & Supp. 2005) (Louisiana Trust Code).

¹²¹ See LA. CIV. CODE ANN. arts. 1570-1626 (2000 & Supp. 2005) (Dispositions Mortis Causa); LA. REV. STAT. ANN. arts. 2401-2450 (Donations Mortis Causa).

¹²² See, e.g., LA. CIV. CODE ANN. art. 2335 (Supp. 2005). In general, community property is property acquired "through the effort, skill, or industry of either spouse" during the marriage and property acquired with community property. *Id.* art. 2338 (defining community property); *cf. id.* art. 2341 (defining separate property).

¹²³ LA. CIV. CODE ANN. art. 2336 (1985); see LA. CODE CIV. PROC. ANN. art. 3061 (2003).

¹²⁴ LA. CIV. CODE ANN. art. 2432. "While there is not a definitive test to determine when a spouse is entitled to the marital portion, the marital portion will usually be awarded when the comparison of assets show a ratio of one to five or more in favor of the deceased spouse." Succession of Adams, 02-0005 (La. App. 3 Cir. 05/08/02), 816 So. 2d 988, 990; see also LA. CIV. CODE ANN. art. 2432 cmt. (c).

¹²⁵ See LA. CIV. CODE ANN. art. 2434 (Supp. 2005). The marital portion has a limit of one million dollars. See *id.* A usufruct is an ownership or servitude in property limited in duration. See *id.* art. 535 (1980); N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265, 1294 (1994) (defining "usufruct"); see also *infra* note 266 (providing Puerto Rico's Civil Code definition of usufruct). A usufruct for life would be equivalent to a life estate under common law. See Kinsella, *supra*, at 1294.

¹²⁶ See LA. CIV. CODE ANN. art. 1493 (2000); see also LA. CONST. art. XII, § 5 (requiring legislative forced heirship provisions). The inability to care for one's self must be of a permanent nature. See LA. CIV. CODE ANN. art. 1493(A).

¹²⁷ See LA. CIV. CODE ANN. art. 1495; LAURA J. CARMAN, *LOUISIANA SUCCESSIONS* § 2:52 (2d ed. 2004). An heir's forced portion is called the legitime. See LA. CIV. CODE ANN. art. 1494. The remaining portion is called the disposable portion. See *id.* art. 1495.

¹²⁸ See LA. CIV. CODE ANN. arts. 1494, 1620 (Supp. 2005). Disinherison is Louisiana's civil law term corresponding to disinheritance. See Kinsella, *supra* note 125, at 1274 (defining "disinherison").

A parent has just cause to disinherit a child if: (1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient. (2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury. (3) The child has attempted to take the life of a parent. (4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death. (5) The child has used any act of violence or coercion to hinder a parent from making a testament. (6) The child, being a minor, has married without the consent of the parent. (7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death. (8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time.

LA. CIV. CODE ANN. art. 1621(A). "A grandparent may disinherit his grandchild for any of the causes, other than the sixth, expressed in the preceding Article, whenever the offending act has been committed against a parent or a grandparent. He may also disinherit the grandchild for the seventh cause expressed in the preceding Article." *Id.* art. 1622. To disinherit someone requires testamentary formality and clear identification in the instrument of the person disinherited. See *id.* arts. 1618, 1619. The testator must also express in the instrument "the reason, facts, or circumstances" constituting the just cause relied upon for disinherison. *Id.* art. 1624. The facts expressed in the instrument carry a rebuttable presumption that they are true. See *id.*

¹²⁹ See LA. CIV. CODE ANN. art. 1496 (2000); see also LA. REV. STAT. ANN. §§ 9:1841-1847 (1991 & Supp. 2005) (Trust Code provisions concerning placing the legitime in trust).

B. Intestate Succession

In Louisiana, intestate succession favors a decedent's descendants. If the decedent leaves descendants, property passes intestate to his descendants.¹³⁰ The decedent's one-half interest in any community property, however, passes to the descendants with the surviving spouse retaining a usufruct that terminates upon remarriage or death.¹³¹

If the decedent does not leave descendants, community property passes to the surviving spouse.¹³² For separate property generally, when the decedent does not leave descendants, priority of succession is to siblings and their descendants, to parents, to spouse unless judicially separated, to ascendants, and finally to collateral heirs.¹³³ Separate property passing to siblings is subject to a "joint and successive" usufruct in the parents.¹³⁴ As an exception to the above, if a decedent without descendants has real property that is separate property he received as a gift from a surviving ascendant, then such property passes to that ascendant, however it may be encumbered.¹³⁵

C. Testamentary Capacity and Testamentary Formalities

In Louisiana, a person has testamentary capacity at age sixteen.¹³⁶ A testator "must also be able to comprehend generally the nature and consequences of the disposition that he is making."¹³⁷

Testamentary formalities require the testator to declare to two witnesses and a notary that his testament is his testament and then to sign each page of the dated testament.¹³⁸ Each witness must be at least sixteen years of age, sane, not blind, and able to sign his name.¹³⁹ The notary and the witnesses must sign a declaration "[i]n the presence of the testator and each other" acknowledging that they witnessed the testator's declaration and signature.¹⁴⁰ To be valid, a testament executed

¹³⁰ See LA. CIV. CODE ANN. art. 888. Succession to heirs is stirpital, though the Civil Code uses the term "representation" rather than "per stirpes." See *id.* arts. 881-88.

¹³¹ See *id.* art. 890.

¹³² See *id.* art. 889.

¹³³ See *id.* arts. 891-896 (2000 & Supp. 2005). If siblings are born of different parents and siblings are in both of decedent's paternal and maternal lines, then separate property is divided equally into paternal and maternal lines and distributed. See *id.* art. 893 (2000). Separate property passes to ascendants only to the nearest degree, being split equally into paternal and maternal lines when such ascendants are in both lines. See *id.* art. 895. Separate property passes to collaterals only to the nearest degree per stirpes. See *id.* art. 896. Louisiana determines degrees of kindred using the civil law method. See *id.* arts. 899-901 (defining nearest in degree), see also *supra* note 83 (describing civil law method of determining degrees of collaterals).

¹³⁴ *Id.* art. 891 (Supp. 2005).

¹³⁵ See *id.* arts. 897-898 (2000). The code uses the civil law term "immovables" rather than "real property"; "movables" is the term that corresponds to personal property. See Kinsella, *supra* note 125, at 1277 (defining immovables); see also LA. CIV. CODE ANN. arts. 462-470 (1980 & Supp. 2005) (Immovables).

¹³⁶ See LA. CIV. CODE ANN. art. 1476 (2000).

¹³⁷ *Id.* art. 1477.

¹³⁸ See *id.* art. 1577 (Supp. 2005) (providing formalities for a notarial testament). Within the notarial form of testament, the code provides other formalities for testators who are blind, deaf, unable to read, or unable to sign the testament. See *id.* arts. 1578-80.1 (2000).

Louisiana recognizes two types of testaments: olographic and notarial. See *id.* art. 1574. Before 1999, Louisiana recognized five different types of testaments to include the two remaining types. See Max Nathan, Jr., *Commentary: Introduction to the New Louisiana Law of Successions*, in 5 LOUISIANA STATUTES ANNOTATED: CIVIL CODE 212-14 (West 2000). Notarial testaments were then known as statutory testaments. See *id.* at 213-14. A sixth type, the maritime and military testament, no longer exists. See *id.* at 213.

In civil law jurisdictions, a notary often serves in a capacity beyond that of the notary public familiar to common law practitioners. See, e.g., LA. CODE CIV. PROC. ANN. art. 3131 (2003) (directing the court to appoint a notary to take the inventory of the decedent's estate); *infra* notes 237-247 and accompanying text (introducing Puerto Rico's notarial practice). Nevertheless, Louisiana expressly recognizes acts of military notaries and of notaries public from other U.S. jurisdictions. See LA. REV. STAT. ANN. §§ 35:5-:7 (1985 & Supp. 2005).

¹³⁹ See LA. CIV. CODE ANN. art. 1581.

¹⁴⁰ *Id.* art. 1577(2) (Supp. 2005). The acknowledgment should substantially say the following:

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 _____, _____.

Id.

outside Louisiana must comply with the law of either Louisiana, the jurisdiction where executed, or the jurisdiction where the testator is domiciled at execution.¹⁴¹ A notarial testament is self-proving.¹⁴²

D. Executors and Administration

An executor must be a non-felon, eighteen years of age or older, and a resident of Louisiana or willing to appoint a resident agent.¹⁴³ Additionally, a person must not be mentally incompetent or “proved to be unfit for appointment because of bad moral character.”¹⁴⁴ An executor named by the testator need not provide security unless required by the testament or compelled by a surviving spouse, forced heir, or creditor.¹⁴⁵ An executor may file a detailed descriptive list of estate property in lieu of a public inventory of the estate property.¹⁴⁶ An executor must file an annual accounting, a final accounting, and any other accounting the court may require.¹⁴⁷

A testator may provide in the testament for independent administration of his estate.¹⁴⁸ Independent administration allows an executor to administer the estate with minimal court participation and oversight.¹⁴⁹

E. Tutorship

In Louisiana, tutorship corresponds to guardianship in common law jurisdictions.¹⁵⁰ A judge must appoint the tutor that the testator nominates unless doing so would not be in the best interest of the child.¹⁵¹ The judge will require the tutor to provide security and either an inventory and appraisal or a descriptive list of the minor’s property.¹⁵² The Code also requires the tutor to provide an annual accounting and a final accounting.¹⁵³

F. Preparing a Testament

The Fort Polk Legal Assistance Office will draft a Louisiana testament for military legal assistance attorneys preparing a testament for a Louisiana domiciliary.¹⁵⁴ Other options for preparing a testament include drafting a Louisiana testament,

¹⁴¹ See LA. REV. STAT. ANN. § 9:2401 (1991); see also LA. CODE CIV. PROC. ANN. art. 2888 (requiring the same production of evidence to probate a foreign testament as required in the jurisdiction under which the form of execution is recognized).

¹⁴² See LA. CODE CIV. PROC. ANN. art. 2891 (“A notarial testament . . . do[es] not need to be proved. Upon production of the testament, the court shall order it filed and executed and this order shall have the effect of probate.”). Thus, a self-proving affidavit is unnecessary for a notarial testament.

¹⁴³ See *id.* art. 3097(A)(1), (3), (4).

¹⁴⁴ *Id.* art. 3097(A)(2), (6).

¹⁴⁵ See *id.* arts. 3153-3155. The phrase “executor named by the testator” distinguishes this type of “succession representative” from a dative testamentary executor—a succession representative named in a testate proceeding who is not named as executor in the testament. See *id.* art. 3083 (providing for appointment of dative testamentary executor).

¹⁴⁶ See *id.* art. 3136.

¹⁴⁷ See *id.* arts. 3331, 3332, 3391. The code uses the term “account” instead of “accounting” except in the newer provisions for independent administration. See *id.* art. 3396.17. The heirs may waive the requirement of a final account. See *id.* art. 3391.

¹⁴⁸ See *id.* art. 3396.2. Conversely, the testator may foreclose the possibility of the legatees compelling an independent administration by prohibiting an independent administration in the testament. See *id.* art. 3396.13.

¹⁴⁹ See *id.* art. 3396.15. Annual accountings are required only if an appropriate interested person demands them. See *id.* art. 3396.17.

¹⁵⁰ See Kinsella, *supra* note 125, at 1293 (defining tutorship); see also LA. CODE CIV. PROC. arts. 4261-4262 (1998) (setting forth general duties of tutor).

¹⁵¹ See LA. CODE CIV. PROC. art. 4062. A tutorship so formed is a tutorship by will. See LA. CIV. CODE ANN. art. 257 (1993); see also *id.* art. 258 (providing the right of appointment when the parents are divorced or judicially separated). Louisiana defines its other three types of tutorship—natural tutorship, legal tutorship, and dative tutorship—based upon the nature of any pre-existing relationship between minor and tutor. See *id.* arts. 247, 250, 263, 270 (listing tutorship types and providing nature of each). Of course, a minor’s surviving natural parent, unless otherwise disqualified, would take priority as a natural tutor over a tutor named in the decedent parent’s testament. See *id.* arts. 250, 257.

¹⁵² See LA. CODE CIV. PROC. arts. 4062 (bond), 4101(A); see also *id.* art. 4131 (determining amount of bond and allowing judge to reduce bond).

¹⁵³ See LA. CODE CIV. PROC. arts. 4391-4392.

¹⁵⁴ See Major Fenton, *Help With Preparing Wills for Louisiana Domiciliaries*, in *TJAGSA Practice Note: Wills and Professional Responsibility Notes*, ARMY LAW., July 1999, at 30, 31; Telephone Interview with Louis L. Sherman, Jr., Chief of Legal Assistance, in Fort Polk, Louisiana (Feb. 1, 2005) [hereinafter Sherman Interview].

drafting a military testamentary instrument, and drafting a will for the jurisdiction of execution. A Fort Polk Louisiana testament is preferable because the form, being familiar to Louisiana lawyers and judges, invites less scrutiny and is more readily recognized as valid. Otherwise, if the will may be probated in a jurisdiction other than Louisiana, a military testamentary instrument as outlined below is preferable to a Louisiana testament because it uses a recognized self-proving affidavit.

To obtain a Louisiana testament from Fort Polk, the military legal assistance attorney must complete Fort Polk's Louisiana Last Will and Testament Questionnaire for the Louisiana client and send it to the Fort Polk Legal Assistance Office.¹⁵⁵ While the legal assistance attorney should receive the drafted testament via e-mail within three duty days, turnaround time is often as early as the next day.¹⁵⁶ Only in compelling circumstances should the non-Louisiana attorney forego this valuable service of the Fort Polk Legal Assistance Office. A copy of the Last Will and Testament Questionnaire from Fort Polk is at Appendix D. A sample testament prepared by the Fort Polk Legal Assistance Office is at Appendix E.

If the legal assistance attorney does not obtain a Louisiana testament from Fort Polk, a similar Louisiana testament can be drafted using DL Wills. To draft a Louisiana testament using the DL Wills program, select "Louisiana" for the state and continue normal will drafting procedures for DL Wills, disposing of property as if the entire estate were freely disposable. Once the document is created, amend the document as follows: Ensure the testator's marital status, name of spouse, if any, and names of children are included in the first paragraph of the testament. In the paragraph immediately preceding the testator's signature line, the time entry "at _____" may be omitted. In the paragraph immediately following the testator's signature line, insert the words "at the end and on each separate page" after the word "signed." Delete the heading, "AFFIDAVIT." Delete all lines between the lines "WITH THE UNITED STATES ARMED FORCES AT _____" and the notary's signature line. Move the lines "WITH THE UNITED STATES ARMED FORCES AT _____" to immediately follow the testator's signature line. The result should be substantially similar to that of the Fort Polk testament at Appendix F.

For a testator with children or who would like the contingency of having children in the future, amend the gift portion of the testament as follows: Before the language giving property, insert a paragraph or subparagraph that gives the forced portion to any children that are forced heirs at the testator's death. If desired, give the forced portion subject to a testamentary usufruct for the spouse. If a specific bequest is to be made to someone other than the spouse, make any testamentary usufruct subject to the specific bequest.¹⁵⁷ Provide instruction as to the limits of the usufruct—ordinarily, if the testator desires to leave a usufruct to the spouse, then the usufruct will have few restraints.¹⁵⁸ Provide the following statement: "If I have no forced heirs at the time of my death, then all of my property shall be treated as freely disposable property."¹⁵⁹ In the remaining gift portion of the testament, replace the phrase "rest, residue and remainder" with the phrase "freely disposable property," ensuring that "property" is not used redundantly in the sentence. Similarly, any fractional portion of the estate should generally be expressed in terms of a fractional portion of the freely disposable property of the estate.

If an independent administration is desired, add the following statement: "I expressly provide that my Executor may serve as an Independent Executor, with all of the rights, powers and authority of an Independent Executor as provided by Louisiana law."¹⁶⁰ If the testator wants to disinherit an heir, then provide the legal basis to do so.¹⁶¹

To draft a Military Testamentary Instrument, proceed as above except (1) accept the DL Wills offer to prepare a military testamentary instrument preamble and affidavit, (2) do not amend the affidavit, (3) copy the lines "WITH THE UNITED STATES ARMED FORCES AT _____" and paste them immediately following the testator's signature line, and (4) copy the notary's signature block and paste it immediately preceding the self-proving affidavit.

¹⁵⁵ The questionnaire is available electronically to those with access to JAGCNet at www.jagcnet.army.mil on the LAAWS XXI Legal Assistance Database under the category Estate Planning,Wills/SGLI. Completed questionnaires should be sent to either or both of the following e-mail addresses: shermanl@polk-emh2.army.mil and lenzp@polk-emh2.army.mil. See Sherman Interview, *supra* note 154. Legal assistance attorneys can also send any questions about this service to these e-mail addresses.

¹⁵⁶ See Fenton, *supra* note 154, at 31; Sherman Interview, *supra* note 154.

¹⁵⁷ For an example, see Louis L. Sherman, Jr., Sample Testament: Louisiana para. seventh (second subparagraph) (Jan. 11, 2005) (unpublished testament, reproduced at Appendix F).

¹⁵⁸ For an example with few restraints and much authority, see *id.* para. seventh (fourth subparagraph).

¹⁵⁹ *Id.* para. seventh (fifth subparagraph).

¹⁶⁰ *Id.* para. third.

¹⁶¹ See *supra* note 128 and accompanying text.

To prepare a specific will for a state in the United States, prepare a will as if the testator were a resident of that state except, once the document is produced, (1) replace in the first paragraph the name of the state with “Louisiana,” replacing “Commonwealth” with “State,” if applicable; and (2) amend the will as outlined above concerning marital status, spouse, children, forced heirship, usufruct, and independent administration, as applicable.

VI. Northern Mariana Islands

The Northern Mariana Islands were among several German islands in the Pacific Ocean north of Guam that were mandated to Japan following World War I.¹⁶² In 1947, following World War II, the United Nations placed these islands under the United States as a trust territory—the Trust Territory of the Pacific Islands.¹⁶³ In 1986, the Northern Mariana Islands, as one group of islands in the trust territory, became a commonwealth under the sovereignty of the United States, thus leaving its relationship as part of the trust territory.¹⁶⁴ Since 1986, Northern Mariana Islanders have been citizens of the United States.¹⁶⁵ The commonwealth constitution establishes an executive branch headed by an elected governor, a bicameral legislature, and a judiciary.¹⁶⁶ The commonwealth is a common law jurisdiction that retains some elements of customary law.¹⁶⁷

Research into Northern Mariana Islands law can be difficult because LexisNexis and Westlaw do not carry the Northern Mariana Islands Constitution and Commonwealth Code.

The Northern Mariana Islands Constitution restricts alienation of land, allowing only persons of at least one-quarter Northern Marianas descent to acquire “permanent and long-term interests in real property within the Commonwealth.”¹⁶⁸ An exception allows a spouse to inherit real property if the decedent leaves no issue “eligible to own land in the Northern Mariana Islands.”¹⁶⁹ A “person not of Northern Marianas descent” can receive by devise or descent “the maximum allowable legal interest in . . . real property” with any remaining interest passing to the next closest heirs or devisees eligible to own land in the Northern Mariana Islands.¹⁷⁰

¹⁶² See Trusteeship Agreement for the Former Japanese Mandated Islands, pmbL., Apr. 2-July 18, 1947, U.S.-U.N., 61 Stat. 3301, 3301; U.S. CIA, *Northern Mariana Islands*, in WORLD FACTBOOK (2004), available at <http://www.cia.gov/cia/publications/factbook/index.html>.

¹⁶³ See Trusteeship Agreement for the Former Japanese Mandated Islands, *supra* note 162, arts. 1-2. Although as trustee the United States held considerable governmental power over the trust territory, the United States was not the sovereign. See *Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984).

¹⁶⁴ See Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 7, 1986). The other islands in the trust territory—Palau, the Marshall Islands, and the Federated States of Micronesia—chose instead to become independent nations having free association with the United States. See *id.*; Proclamation No. 6726, 59 Fed. Reg. 49,777 (Sept. 27, 1994).

¹⁶⁵ See Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 7, 1986); GORDON ET AL., *supra* note 20, § 92.04[9].

¹⁶⁶ See N. MAR. I. CONST. arts. II (legislature), III (executive branch), IV (judiciary).

¹⁶⁷ See 7 N. MAR. I. CODE § 3401 (2004). For civil matters,

the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary.

Id. Nevertheless, when positive law and customary law are inapplicable, a court may look to a majority view from the United States, rather than to common law. See *Ada v. Sablan*, 1 N. Mar. I. 415, 425-29 (1990) (holding that a marital property regime exists in the commonwealth because as to property of a marriage, the common law, which is largely inapplicable in the several states, has principles contrary to the commonwealth constitution).

¹⁶⁸ N. MAR. I. CONST. art. XII, § 1; see *id.* § 4. “The term permanent and long-term interests in real property . . . includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building.” *Id.* § 3. A person is of Northern Marianas descent if “a citizen or national of the United States and . . . at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof” or if adopted before the age of eighteen by a person of Northern Marianas descent. *Id.* § 4. For determining descent, the constitution considers a person “to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if . . . born or domiciled in the Northern Mariana Islands by 1950 and . . . a citizen of the Trust Territory of the Pacific Islands before [November 3, 1986].” *Id.*; see Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 7, 1986) (establishing end date of trusteeship). A corporation is eligible to own land only if “it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors one-hundred percent of whom are persons of Northern Marianas descent and has voting shares . . . one-hundred percent of which are actually owned by persons of Northern Marianas descent.” N. MAR. I. CONST. art. XII, § 5. Article XII’s alienation restrictions “are not subject to equal protection analysis” under the U.S. Constitution. *Wabol v. Villacrusis*, 958 F.2d 1450, 1463 (9th Cir. 1990).

¹⁶⁹ N. MAR. I. CONST. art. XII, § 2.

¹⁷⁰ 8 N. MAR. I. CODE § 2411.

Land can be of different types depending on whether it is held under Chamorro custom or Carolinian custom. Under the Chamorro custom, intestate succession differs for land if it is ancestors' land.¹⁷¹ The Commonwealth Code defines ancestors' land as "land acquired . . . from one or more of [the owner's] Chamorro ancestors of Northern Marianas descent."¹⁷²

For Carolinian land ownership, property is held either in one's individual capacity or as family land.¹⁷³ The Commonwealth Code recognizes family land as land acquired "from one or more Carolinian ancestors, and held by the person as customary trustee for the use of the family members."¹⁷⁴ Family land is held by a customary trustee for the equal enjoyment of all descendants of the original land owner.¹⁷⁵ Any alienation of the land, erection of a permanent structure on the land, or occupation of a permanent structure requires the consent of the family, which is determined by majority vote of the customary trustee and his siblings.¹⁷⁶ Thus, family land loses its nature as such only with family consent.¹⁷⁷ A court will presume land held by a Carolinian to be family land unless the original owner showed clear intent to hold it otherwise.¹⁷⁸

Marital homestead property is a special type of homestead land that may confront an estate planning attorney. In general, homestead land is public land conveyed to individuals who had been homesteading on the land and meet certain statutory requirements.¹⁷⁹ Marital homestead property is homestead land conferred under the Marital Homestead Family Act¹⁸⁰ when marriage occurs before the required homestead term expires.¹⁸¹ Significant for the estate planning attorney is that homestead marital property is held in joint tenancy with right of survivorship.¹⁸²

The Commonwealth Code does not have an UGMA or UTMA.¹⁸³ It also lacks a trust code or similar statutory authority concerning trusts.¹⁸⁴

The Commonwealth Code recognizes personal property memorandums as a means to convey tangible personal property not specifically bequeathed in a will.¹⁸⁵ For a court to give effect to such a memorandum, the memorandum must be expressly referenced in the will, in the handwriting of the testator or signed by the testator, and "describe the items and the devisees with reasonable certainty."¹⁸⁶ The memorandum need not be in existence at the time of will execution.¹⁸⁷

¹⁷¹ See *id.* §§ 2902-2903; *In re Estate of Deleon Guerrero*, 1 N. Mar. I. 301, 306 (1990) (applying pre-code intestacy law under Chamorro custom).

¹⁷² 8 N. MAR. I. CODE § 2107(a). This section states the acquisition can be "in any manner," but then restricts the manner of acquisition by saying "whether by inheritance, gift, will, or family agreement." *Id.*

¹⁷³ See *In re Estate of Rangamar*, 4 N. Mar. I. 72, 76-77 (1993). Carolinians of the Northern Mariana Islands are also called Refaluwasch. See *In re Estate of Amires*, 1997 MP 8, 5 N. Mar. I. 70, 71 n.1.

¹⁷⁴ 8 N. MAR. I. CODE § 2107(l). The acquisition can be "by law or decision of the family or by inheritance." *Id.* The commonwealth considers as family land any land passing to the heirs of a Carolinian or of a person following the Carolinian custom. See *id.*

¹⁷⁵ See *id.* §§ 2904(b), 2910. Historically, Carolinian family land was matrilineal in that it was held collectively by the females in the family, with title in the oldest female for administrative purposes. See *In re Estate of Rangamar*, 4 N. Mar. I. at 76-77 (describing Carolinian land custom in the Northern Mariana Islands).

¹⁷⁶ See 8 N. MAR. I. CODE §§ 2904(c), 2907, 2909. This relationship applies "[u]nless the family consents or agrees otherwise." *Id.* § 2909. For deceased siblings with descendants, the descendants may vote by representation. See *id.*

¹⁷⁷ See *id.* § 2904. But see *Tarope v. Igisaiar*, 3 N. Mar. I. Commw. Rptr. 112, 117 (N. Mar. I. Commw. Trial Ct. 1987) (holding that family land can lose its nature as such if the family acts inconsistently with family land ownership).

¹⁷⁸ See *In re Estate of Lairopi*, 2002 MP 10, ¶ 12, 2002 N. Mar. I. LEXIS 9, 4.

¹⁷⁹ See 2 N. MAR. I. CODE §§ 4301-14 (general provisions for homestead land).

¹⁸⁰ *Id.* §§ 4341-47.

¹⁸¹ See *id.* § 4341(g). The Act requires a certificate of title or deed of conveyance for land to qualify as marital homestead property. See *id.*

¹⁸² See *id.* §§ 4343-44; *Estate of Faisao v. Tenorio*, 4 N. Mar. I. 260, 267 (1995) (holding that marital homestead property passes non-probate even if the surviving spouse is not named on the title). The grantee may file to have it titled as joint tenancy with right of survivorship. See 2 N. MAR. I. CODE § 4346.

¹⁸³ See N. MAR. I. CODE index.

¹⁸⁴ See *id.*; see also *Aldan-Pierce v. Mafnas*, 2 N. Mar. I. 122, 148-59 (1991) (analyzing a resulting trust case using restatements and case law from various states).

¹⁸⁵ See 8 N. MAR. I. CODE § 2313. This section explicitly excludes bequeathing in this manner "money, evidences of indebtedness, documents of title, and securities, and property used in trade or business." *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *id.*

A. Rights to Property by Surviving Family Members

The Commonwealth Code recognizes rights in the decedent's family members to marital property, exempt property, a homestead allowance, and a family allowance. The commonwealth is a community property jurisdiction.¹⁸⁸ Under the commonwealth's community property system, the surviving spouse retains his one-half undivided interest in marital property, subject to the constitutional alienation restrictions.¹⁸⁹

A surviving spouse has rights to exempt property of the decedent's estate consisting of "the primary family home and lot, household furniture, one automobile, furnishings, appliances, and personal effects."¹⁹⁰ Such a spouse also has the right to a homestead allowance from the estate of \$5000.¹⁹¹ If the decedent does not leave a surviving spouse, then exempt property passes jointly to the decedent's children and the homestead allowance passes to the decedent's minor and dependent children.¹⁹²

In addition to exempt property and a homestead allowance, the decedent's surviving spouse and minor and dependent children are entitled to a family allowance from the decedent's estate during administration of the estate, but limited to two years in duration if the estate is insolvent.¹⁹³ The amount of the family allowance is to be "reasonable" for purposes of maintenance and is set at \$500 per month unless the probate court orders otherwise.¹⁹⁴

Rights to exempt property, homestead allowance, and family allowance have priority over any claim on the estate and "override any provision in the will of the decedent to the contrary unless . . . the will expressly provides an adequate substitute for the loss of these rights."¹⁹⁵ Unless a will provides adequate substitution for these rights, they are in addition to any benefit conferred by will or intestate succession.¹⁹⁶

B. Intestate Succession

Intestate succession varies depending on whether the decedent was Chamorro, Carolinian, or neither. Under Chamorro custom, a life estate in ancestors' land passes to the surviving spouse with priority of succession for the remainder to descendants and then to siblings and their descendants.¹⁹⁷ If the decedent does not have a surviving spouse, then priority of succession for ancestors' land is to descendants and then to siblings and their descendants.¹⁹⁸ For all other property under Chamorro custom, one-half passes to the surviving spouse and one-half passes to the descendants, but if the decedent does not have a surviving spouse, then all such property passes in priority of succession to descendants, to parents, and then to siblings and their descendants.¹⁹⁹

¹⁸⁸ See Commonwealth Marital Property Act of 1990, 8 N. MAR. I. CODE §§ 1811-1834 (establishing community property regime in terms of "marital property" and "individual property"); *In re Estate of Aldan*, 1997 MP 3, ¶ 16, 5 N. Mar. I. 50, 52. The commonwealth's community property regime is based on the Uniform Marital Property Act. See *Reyes v. Reyes*, 2004 MP 1, ¶ 27, 2004 N. Mar. I. LEXIS 2, 18; 8 N. MAR. I. CODE § 1811 cmt. The Commonwealth Marital Property Act of 1990 took effect in 1991. 8 N. MAR. I. CODE § 1811 cmt. Marital property rights existed in the commonwealth prior to the Marital Property Act. *Ada v. Sablan*, 1 N. Mar. I. 415, 429 (1990) (deciding a dispute in a Chamorro custom case).

¹⁸⁹ See 8 N. MAR. I. CODE § 1820(c). In general, marital property is property acquired by either spouse during the marriage except for property received by gift, devise, or descent to one spouse alone or for property traceable to one spouse's individual property. See *id.* § 1820.

¹⁹⁰ *Id.* § 2601. This applies only to a decedent domiciled in the Northern Mariana Islands. See *id.*

¹⁹¹ See *id.* § 2602. This applies only to a decedent domiciled in the Northern Mariana Islands. See *id.*

¹⁹² See *id.* §§ 2601-02.

¹⁹³ *Id.* § 2603. The children entitled to share in the allowance are the "minor children whom the decedent was obligated to support and children who were in fact being supported by him." *Id.*

¹⁹⁴ *Id.* § 2603; see *id.* § 2604. The family allowance can be paid in a lump sum. See *id.* § 2604. The death of a person terminates his right to any unpaid family allowance. See *id.* § 2603.

¹⁹⁵ *Id.* § 2601; see *id.* §§ 2602-03.

¹⁹⁶ See *id.* §§ 2601-03.

¹⁹⁷ See *id.* § 2902(a), (c). Succession to heirs is stirpital, though the Commonwealth Code uses the term "representation" rather than "per stirpes." See *id.* § 2915.

¹⁹⁸ See *id.* § 2902(b), (d).

¹⁹⁹ See *id.* § 2903. As written, the Commonwealth Code would permit one-half of property other than ancestors' land to escheat to the commonwealth if the decedent had a surviving spouse but no descendants. See *id.* §§ 2903, 2914 (escheat provision).

Under Carolinian custom, intestate succession depends upon whether property is family land, other real property, or personal property, but the statutory intestate succession scheme is subject to change upon family agreement.²⁰⁰ For family land when the decedent was the customary trustee, “[u]nless the family consents or agrees otherwise,” another family member will become the customary trustee and the land will retain its nature as family land.²⁰¹ For other land, “[u]nless the family consents or agrees otherwise,” if the decedent dies with a surviving spouse and no descendants, then the land passes to the surviving spouse, otherwise the land becomes family land and a customary trustee will be determined according to the Commonwealth Code.²⁰²

Personal property passes under Carolinian custom by a regime subject to change upon family agreement.²⁰³ Personal property passes to a wife who survives the decedent.²⁰⁴ When the decedent predeceases her husband, a life estate in the personal property passes to the husband with priority of succession to the remainder to her descendants and then to her siblings and their descendants.²⁰⁵ For a decedent without surviving spouse or descendants, priority of succession of personal property is to parents and then to siblings and their descendants.²⁰⁶

For decedents not of Northern Marianas Chamorro or Carolinian descent, the first \$50,000 of the estate and one-half of the residue passes to the surviving spouse; priority of succession for the other one-half of the residue is to descendants and then to parents, but if no descendants or parents survive decedent, then all property passes to the surviving spouse.²⁰⁷ If the decedent does not have a surviving spouse, then priority of succession is to descendants, to parents, and finally to siblings and their descendants.²⁰⁸

In the Northern Mariana Islands, intestate succession treats half-blood relations as whole blood relations.²⁰⁹ Intestate succession treats illegitimate children and adopted children as legitimate, natural children.²¹⁰ The exception to this rule is that in the Carolinian custom, the family can agree to treat an adopted child as not belonging to the family for purposes of

²⁰⁰ These rules are malleable; all sections in the Commonwealth Code concerning Carolinian probate custom contain the phrase: “[u]nless the family consents or agrees otherwise.” *See id.* §§ 2904-11.

²⁰¹ *Id.* § 2904 (a). Priority of succession to customary trustee is to oldest surviving sister, to oldest surviving brother, to oldest surviving daughter of decedent and his siblings, to oldest surviving son of decedent and his siblings, to decedent’s oldest surviving granddaughter, and finally to decedent’s oldest surviving grandson. *See id.* If none of these survive, the court will select a customary trustee according to Carolinian custom if the family does not agree on a choice. *See id.* § 2904(a)(6).

²⁰² *Id.* § 2905. Because the Commonwealth Code in section 2905 refers in terms to a father predeceasing a mother or vice versa, rather than in terms of a surviving spouse, a strict reading of the Commonwealth Code would fail to apply this section when a decedent leaves a surviving spouse and never had children, thus leaving the land to escheat to the Commonwealth. *See id.* §§ 2905, 2914 (escheat provision). If the land becomes family land under section 2905, a surviving spouse retains a life estate as customary trustee. *Id.* § 2905(a). Priority of succession for the remainder interest as customary trustee, or as customary trustee if no spouse survives, is to oldest daughter, to oldest son, to oldest granddaughter, to oldest grandson, to any descendant, to oldest sister, to oldest brother, to oldest daughter of siblings, and finally to oldest son of siblings. *Id.* § 2905(a)-(c).

²⁰³ *See id.* § 2906. Section 2906 begins, “Unless the family consents or agrees otherwise.” *Id.* Because the Commonwealth Code in section 2906 refers in terms to a father predeceasing a mother or vice versa, rather than in terms of a surviving spouse, a strict reading of the Commonwealth Code would fail to apply this section when a decedent leaves a surviving spouse and never had children, thus leaving personal property to escheat to the Commonwealth. *See id.* §§ 2906, 2914 (escheat provision). Additionally, because section 2906 does not address a decedent without a surviving spouse but with surviving descendants, a strict reading of the Commonwealth Code would have the personal property of such a decedent escheat to the Commonwealth. *See id.*

²⁰⁴ *See id.* § 2906(a). *But see supra* note 203 (questioning applicability of section 2906 if spouses never had children).

²⁰⁵ *See* 8 N. MAR. I. CODE § 2906(b). *But see supra* note 203 (questioning applicability of section 2906 if spouses never had children). In distributing the remainder to the children, “preference [is to be] given to daughters and sons for those items normally passed to them under custom.” *See* 8 N. MAR. I. CODE § 2906(b)(1).

²⁰⁶ *See id.* § 2906(c).

²⁰⁷ *See id.* § 2912(a)-(c).

²⁰⁸ *See id.* § 2912(d)-(e).

²⁰⁹ *See id.* § 2916.

²¹⁰ *See id.* § 2918. The courts will recognize the Carolinian custom of mwei-mwei as a valid adoption. *See In re Estate of Rofag*, 2 N. Mar. I. 18, 31-32 (1991) (affirming heredity through mwei-mwei). Mwei-mwei occurs when a single adult or a married couple choose to raise a child as if it were the natural child of the adopting party with the consent of the natural parent or parents. The child is usually taken in as a baby and is usually a relative of the adopting party. *In re Estate of Amires*, 1997 MP 8, ¶¶ 19-21, 5 N. Mar. I. 70, 73 (affirming lower court’s finding that mwei-mwei had not occurred). The courts will also recognize as a valid legal adoption the Chamorro custom of poksai when the pineksai (the child under poksai) is raised as the natural and legitimate child of the adopting party. *See In re Macaranas*, 2003 MP 11, ¶¶ 13, 16, 17, 2003 N. Mar. I. LEXIS 10, 8-11 (summarizing supreme court law concerning poksai).

family land rights and intestate succession.²¹¹ Adopted children inherit through their natural relations.²¹² A father inherits through his child only if he “has openly treated the child as his and has not refused to support the child.”²¹³

C. Testamentary Capacity and Testamentary Formalities

Testamentary capacity requires the testator to be at least eighteen years old and of sound mind.²¹⁴

A will must be in writing and signed by the testator.²¹⁵ The testator must either sign the will or acknowledge his signature before two witnesses.²¹⁶ The witnesses must sign the will having witnessed either the signing of the will or the testator’s acknowledgment of the signing.²¹⁷ The only standard for witnesses is that they be competent.²¹⁸ The Commonwealth Code does not provide for a self-proving affidavit for wills.²¹⁹

For a will executed outside the commonwealth to be valid, it must comply with the law of either the Northern Mariana Islands, the jurisdiction where executed, or the jurisdiction where the testator is domiciled.²²⁰

D. Executors and Administration

The Commonwealth Code does not address qualifications of an executor.²²¹ An executor must file an inventory and a final accounting.²²² The court will set a bond if it “deems this necessary.”²²³

E. Guardianship

The Commonwealth Code provides little guidance for guardianship proceedings.²²⁴ While the Commonwealth Code recognizes some right in the testator to name a guardian for children and other dependents in defining a guardian, the rules for probate procedure do not discuss what weight such a nomination should carry.²²⁵ The guardianship court must determine the need for a guardian to post bond or other security.²²⁶

²¹¹ See 8 N. MAR. I. CODE § 2908.

²¹² See *id.* § 2918(a)(2).

²¹³ *Id.* § 2918(b)(2).

²¹⁴ See *id.* § 2301.

²¹⁵ See *id.* § 2303(b). In addition to wills under this section, the Commonwealth Code recognizes wills under customary law, partidas, holographic wills, and oral wills. See *id.* §§ 2302 (customary will and partida), 2304 (holographic will), 2305 (oral will). A partida is an oral division of property a father makes among his children, often made in a family meeting. See *In re Estate of Barcinas*, 4 N. Mar. I. 149, 152 n.4 (1994).

²¹⁶ See 8 N. MAR. I. CODE § 2303(b). Alternatively, the testator may direct someone to sign the will in his name, by his direction, and in his presence. See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.* § 2306(a). Presumably, competency requires a person to be of age. A person reaches majority at eighteen years of age. See *id.* § 1106.

²¹⁹ See *id.* div. 2, ch. 3 (Wills).

²²⁰ See *id.* § 2307.

²²¹ See *id.* div. 2 (Probate Law and Procedure).

²²² See N. MAR. I.R. PROB. PROC. 9, 12.

²²³ N. MAR. I.R. PROB. PROC. 8.

²²⁴ See 8 N. MAR. I. CODE ANN. § 2107(n) (defining “Guardian” under the general definitions section of the Commonwealth Code division for probate law and procedure); N. MAR. I. CODE index (providing no Commonwealth Code listing for “Guardian” or “Guardianship”).

²²⁵ See 8 N. MAR. I. CODE ANN. § 2107(n) (defining “Guardian” as “a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem”); N. MAR. I.R. PROB. PROC. 26d (“the court will be guided by . . . best interest of the child and if the child is of sufficient age to form an intelligent preference, the court may consider that preference”).

²²⁶ See N. MAR. I. R. PROB. PROC. 26d.

F. Preparing a Will

Options for preparing a will for a domiciliary of the Northern Mariana Islands include drafting a Northern Mariana Islands will, drafting a military testamentary instrument, and drafting a will for the jurisdiction of execution. Because the Commonwealth Code does not provide for self-proving wills, a military testamentary instrument is recommended.

To draft a Northern Mariana Islands will using the DL Wills program, select “Guam” for the state and continue normal will drafting procedures for DL Wills. Once the document is created, replace “Guam” with “the Northern Mariana Islands” throughout. Add a statement to the first paragraph of the will concerning ancestry, such as “I am of Chamorro descent,” “I am of Carolinian descent,” or “I am not of Chamorro or Carolinian descent.” Provide sufficient information, if known, to identify the ancestry of any persons who may receive Northern Mariana Islands real property under the will. For any real property in the Northern Mariana Islands the testator presently owns, identify the type of real property owned, *e.g.*, “The real property I presently own in the Northern Mariana Islands [optional: place description here] is individual land and not family land.” If any real property in the Northern Mariana Islands may pass under the will to a person who is not of Northern Mariana Islands descent, add a savings clause. See Appendix G for a sample savings clause.

To draft a Military Testamentary Instrument, proceed as above except (1) accept the DL Wills offer to prepare a military testamentary instrument preamble and affidavit and (2) do not amend the language in the affidavit. To prepare a specific will for a state in the United States, prepare a will as if the testator were a resident of that state except once the document is produced, (1) in the first paragraph replace the name of the state with “the Northern Mariana Islands,” and if applicable, replacing “the State of” with “the Commonwealth of,” and (2) provide language as outlined above concerning Northern Mariana Islands ancestry and real property as applicable.

VII. Puerto Rico

Like Guam, Puerto Rico became a territory of the United States in 1898 as a result of the Spanish American War.²²⁷ Persons born in Puerto Rico are U.S. citizens.²²⁸ The Puerto Rican constitution establishes an executive branch headed by an elected governor, a bicameral legislature, and a judiciary.²²⁹ Like Louisiana, Puerto Rico has a civil law tradition.²³⁰

Puerto Rico is similar to Louisiana in that its legal system combines elements of its civil law tradition with the common law system.²³¹ Legal assistance practitioners, however, should not assume the two jurisdictions have combined the civil law and common law similarly. One important distinction is that unlike Louisiana, Puerto Rico recognizes precedential value in case law.²³²

Research of Puerto Rican law can be difficult for non-Spanish speakers. The predominant language of Puerto Rico is Spanish; only about a quarter of the population speaks English fluently.²³³ While Spanish and English are the two official languages of Puerto Rico,²³⁴ Puerto Rican court proceedings are conducted in Spanish.²³⁵ The systematic translation of court proceedings into English ended in 1972 and updated text of legislation in English generally lags a couple years.²³⁶

²²⁷ See Treaty of Peace, *supra* note 57, at 1755; GORDON ET AL., *supra* note 20, § 92.04[4]. Puerto Rico came into the United States known as Porto Rico. See Treaty of Peace, *supra* note 57, at 1755. Congress officially recognized its name as Puerto Rico in 1932. See 48 U.S.C. § 731a (2000); Joint Resolution of May 17, 1932, ch. 190, 47 Stat. 158, 158-59. The territory of Puerto Rico includes not only the island of Puerto Rico, but also all of the islands adjacent to the island of Puerto Rico that belong to the United States. See P.R. CONST. art. I, § 3; 48 U.S.C. § 731.

²²⁸ See 8 U.S.C. §§ 1101(a)(38), 1401(a) (LEXIS 2005).

²²⁹ P.R. CONST. arts. III (legislature), IV (executive branch), V (judiciary). The high court is the Supreme Court. See *id.* art. V, § 1.

²³⁰ See P.R. LAWS ANN. tit. 31, § 1 (1993).

²³¹ See, *e.g.*, José Trías Monge, *Legal Methodology in Some Mixed Jurisdictions*, 78 TUL. L. REV. 333, 333-34 (2003).

²³² See *Ocasio v. Díaz*, 88 P.R. 658, 736 (1963) (Negrón Fernández, C.J., concurring) (stating that the precedential value of *stare decisis* necessarily depends upon the soundness of the prior legal opinions consulted); Monge, *supra* note 231, at 338-40.

²³³ See José J. Alvarez-González, *Law, Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 LAW & INEQ. 359, 367 (1999). Over ninety-eight percent of the population speaks Spanish. See *id.*

²³⁴ See P.R. LAWS ANN. tit. 1, § 59 (1999). If a discrepancy exists between the Spanish text and the English text of a Puerto Rican statute, then the Spanish text controls unless the statute’s origin was in English. See *id.* tit. 31, § 13 (1993). For example, if the legislature passed a statute in Spanish that was an adaptation of a Florida statute, then the English text would have preference. See *id.* § 13(a). Citations within this primer are to the English version unless noted parenthetically.

²³⁵ Alvarez-González, *supra* note 233, at 368. Federal court proceedings in Puerto Rico are conducted in English. See *id.* at 373.

²³⁶ See *id.* at 378.

Furthermore, LexisNexis does not carry the Puerto Rican cases that have been translated into English. Westlaw carries Puerto Rico Supreme Court cases since December 1986 that have been translated into English. Not all cases, however, have been translated into English. Both Westlaw and LexisNexis carry all Puerto Rican cases in Spanish.

One area of the law relevant to will preparation that sets Puerto Rico apart from other U.S. jurisdictions is its notarial practice. Puerto Rico only allows attorneys to become notaries.²³⁷ Yet the notary's duties lie with the public trust rather than with the parties involved.²³⁸

A notary's main responsibilities concern affidavits, acts, and deeds.²³⁹ The notary maintains records of all affidavits in a Registry of Affidavits.²⁴⁰ Unlike affidavits, acts and deeds are considered public documents.²⁴¹ As such, acts and deeds are admissible as evidence in Puerto Rican courts.²⁴² The notary maintains all acts and deeds in a protocol, a collection of documents kept by the notary, but belonging to the commonwealth.²⁴³ A will entered into a protocol, being by nature a deed, has the status in Puerto Rico of a probated will in common law jurisdictions upon the death of the will's testator.²⁴⁴

Notaries must send monthly indices of their notarial activities to the Office of the Director of Notarial Inspection of Puerto Rico.²⁴⁵ Within twenty-four hours of executing a will, the notary must send an act certifying the execution to the Director of Notarial Inspection, who maintains the certification in a registry of wills.²⁴⁶ Additionally, notaries are entrusted with some functions concurrent with a court, to include conducting testate and intestate proceedings and issuing letters testamentary.²⁴⁷

The Civil Code has a chapter concerning trusts,²⁴⁸ but Puerto Rico does not have an UGMA or UTMA.²⁴⁹ The Civil Code allows for a tangible personal property memorandum to have effect only if the memorandum fulfills the requirements as a holographic will.²⁵⁰ Nonetheless, this provision is more expansive than typical tangible personal property memorandum provisions in that it allows the memorandum to convey any bequest or legacy.²⁵¹

²³⁷ See P.R. LAWS ANN. tit. 4, § 2011 (2002).

²³⁸ See *id.* § 2002; Pedro A. Malavet, *The Non-Adversarial, Extra-Judicial Search for Legality and Truth: Foreign Notarial Transactions as an Inexpensive and Reliable Model for a Market-Driven System of Informed Contracting and Fact-Determination*, 16 WIS. INT'L L.J. 1, 32-35 (1997); see also P.R.R. EVID. 25(C)(4) (denying attorney-client privilege for issues concerning acts and deeds the attorney has prepared as a notary).

²³⁹ See Malavet, *supra* note 238, at 7-8. Under the civil law system, affidavits are "simple documents in which [the notary] only certifies the identity of the party or parties signing it [or another document]"; acts are "public documents certifying facts that the notary has personally witnessed or otherwise ascertained"; deeds are "public documents in which the notary [formats, authenticates, and memorializes] an agreement reached by the parties." *Id.* at 8. Acts are also called certificates in the Puerto Rico Civil Code. See P.R. LAWS ANN. tit. 4, § 2048; Malavet, *supra* note 238, at 15 n.75.

²⁴⁰ See P.R. LAWS ANN. tit. 4, § 2094.

²⁴¹ See *id.* §§ 2031, 2071; Malavet, *supra* note 238, at 8-9, 12. Even so, the protocol is considered secret and must generally remain at the notary's office. See P.R. LAWS ANN. tit. 4, §§ 2071, 2077.

²⁴² See P.R.R. EVID. 65(H) (exception to hearsay rule for public records), 79(B) (self-authentication of public records), 79(E) (self-authentication of certified copies); Malavet, *supra* note 238, at 20.

²⁴³ See P.R. LAWS ANN. tit. 4, §§ 2071, 2072; Malavet, *supra* note 238, at 10 n.34. The notary may charge up to a certain amount for his notarial services and collects and remits a stamp tax on deeds, acts, affidavits, and certified copies of each. See P.R. LAWS ANN. tit. 4, §§ 851, 896, 2021, 2131, 2132.

²⁴⁴ See P.R. LAWS ANN. tit. 31, § 2517 (1993) (recognizing an executor's implied acceptance of office upon receiving the notice of testator's death and executor's appointment in the will); *id.* tit. 32, § 2571 (2004) (entitling an executor under a will to letters testamentary upon formally accepting office); *Andino Flores v. Andino Flores*, 83 P.R. 134, 136-37 (1961) (approving an executor's exercise of office without prior court recognition); McConnell Valdés, *Puerto Rico Law Digest*, in MARTINDALE-HUBBELL LAW DIG. PR-1, PR-25 (2003) ("Concept of probate does not exist [in Puerto Rico].").

²⁴⁵ See P.R. LAWS ANN. tit. 4, § 2023 (2002).

²⁴⁶ See *id.* §§ 2123, 2124 (2002). A notary has a similar seventy-two hour requirement for powers of attorney. See *id.* § 922. A court will require a petitioner for a declaration of heirship to file a certification from the Office of Notarial Inspection showing that office has no record of the decedent having executed a will. See *id.* §§ 2124, 2125.

²⁴⁷ See *id.* §§ 2155, 2156 (Supp. 2003). Notarial action in these matters assumes a presumption of correctness, but does not become *res judicata*. See *id.* § 2162.

²⁴⁸ See *id.* tit. 31, §§ 2541-81 (1993). Section 2542 recognizes testamentary trusts.

²⁴⁹ See *id.* INDEX (1974 & Supp. 2003).

²⁵⁰ See *id.* tit. 31, § 2126 (1993); see also *infra* note 283 (providing requirements for a holographic will). In effect, such a memorandum is a codicil anticipated in the will.

²⁵¹ See *id.* tit. 31, § 2126.

A. Rights to Property by Surviving Family Members

Puerto Rico provides rights to the decedent's property for surviving family members in conjugal property, homestead, and forced heirship. Puerto Rico is a community property jurisdiction.²⁵² Under the commonwealth's community property system, the surviving spouse has a right to an undivided one-half interest in the property of the conjugal partnership.²⁵³

A head of a family is entitled to own a homestead valued at no more than \$15,000.²⁵⁴ In general, homestead property is exempt from execution or encumbrance.²⁵⁵ Following the death of the head of the family, homestead rights exist in the spouse as long as he continues occupancy, or, if there is no surviving spouse, in the remaining dependent family members until the youngest reaches majority.²⁵⁶

Puerto Rico sets aside a portion of a decedent's estate, called the legal portion, to the decedent's forced heirs.²⁵⁷ The forced heirs are the decedent's descendants, ascendants in the absence of descendants, and the surviving spouse.²⁵⁸

The legal portion set aside for descendants as forced heirs is two-thirds of the estate, subject to a usufruct in the spouse.²⁵⁹ Of this two-thirds, one-half (*i.e.*, one-third of the estate) must pass according to intestate succession; the testator may dispose of the other one-half (*i.e.*, one-third of the estate) to any of his descendants.²⁶⁰ The second one-third "is called an advantage or extra portion."²⁶¹

In the absence of descendants, the legal portion set aside for ascendants is one-half, subject to a usufruct in the spouse.²⁶² The legal portion passes to the ascendants of the nearest degree, divided equally between paternal and maternal lines if applicable.²⁶³ Furthermore, in the absence of descendants of the decedent, any ascendant succeeds to specific property the ascendant gave to the decedent or to the proceeds of the property if it has been alienated.²⁶⁴ Such an ascendant succeeds to the property "to the exclusion of all other persons."²⁶⁵

As a forced heir, a surviving spouse is entitled to a portion of the estate in usufruct.²⁶⁶ If the decedent leaves descendants, the spouse is entitled to a fractional share of the estate in usufruct corresponding to the fractional share of a descendant forced heir not favored in the extra portion or one-third if only one such forced heir survives the decedent.²⁶⁷ The

²⁵² See *id.* §§ 3621-3701 (1991 and Supp. 2003) ("Conjugal Partnership"). In general, property of the conjugal partnership, *i.e.*, community property, is property acquired by either spouse during the marriage except for property received by gift, legacy, or descent to one spouse alone and property traceable to one spouse's separate property. Compare *id.* § 3641 (1991) (defining conjugal property), with *id.* § 3631 (defining separate property).

²⁵³ See *id.* § 3697 (1991).

²⁵⁴ See *id.* § 1851 (LEXIS through 2003 legislation) (Spanish). The homestead is real property used as a residence. See *id.* Head of family status requires some family member to be dependent upon the person claiming the status. *Masa v. Registrar of Caguas*, 30 P.R. 88, 91 (1922).

²⁵⁵ See P.R. LAWS ANN. tit. 31, § 1852 (1993). Notable exceptions include liens for the purchase price of the property or for improvements on the homestead property. See *id.*; see also *id.* § 1851 (listing other exceptions).

²⁵⁶ See *id.* tit. 31, § 1853 (1993). The age of majority is twenty-one. See *id.* § 971. Family members who could qualify as dependents under this section include ascendants or descendants to the fourth degree and foster parents or children. See *id.* § 1853.

²⁵⁷ See *id.* § 2361.

²⁵⁸ See *id.* § 2362. Section 2362, last amended in 1947, is written in terms of legitimate relations. In 1952, the Puerto Rican constitution eliminated legal discrimination based upon birth and subsequent legislation afforded equality of rights between legitimate and illegitimate children, entitling "all children to the full rights of inheritance." *Vega ex rel. Morales v. Bowen*, 664 F. Supp. 659, 662 (D.P.R. 1987); see P.R. CONST. art. II, § 1; P.R. LAWS ANN. tit. 31, § 441 (1993); *Ocasio v. Díaz*, 88 P.R. 658, 731-32 (1963).

²⁵⁹ See P.R. LAWS ANN. tit. 31, §§ 2363, 2411-2416 (1993 & Supp. 2003).

²⁶⁰ See *id.* §§ 2363, 2391 (1993); *Díaz Lamoutte v. Luciano Maldonado*, 85 P.R. 804, 819 (1962) (stating that the testator could have given the second one-third to his grandchildren even if his son—the grandchildren's father—survived the testator).

²⁶¹ P.R. LAWS ANN. tit. 31, § 2391.

²⁶² See *id.* §§ 2364, 2411-16 (1993 & Supp. 2003).

²⁶³ See *id.* § 2365 (1993).

²⁶⁴ See *id.* § 2366. If the property has "been alienated, [then the ascendant] shall succeed to all the actions which the [decedent] may have with regard to [the property], and to the value should [the property] have been sold, or to [other] property by which [the property was] substituted if [it were] bartered or exchanged." *Id.*

²⁶⁵ *Id.*

²⁶⁶ "Usufruct is the right to enjoy a thing owned by another person and to receive all the products, utilities and advantages produced thereby, under the obligation of preserving its form and substance, unless the deed constituting such usufruct or the law otherwise decree." *Id.* § 1501. See generally *id.* §§ 1501-80 (usufruct).

²⁶⁷ See *id.* § 2411 (Supp. 2003).

usufruct is taken from the advantages portion of the legal portion unless the decedent leaves children of multiple marriages, in which case the usufruct is taken from the free third of the estate.²⁶⁸ If the decedent leaves ascendants and no descendants, then the spouse is entitled to one-third of the estate in usufruct, taken from the free half of the estate.²⁶⁹ If the decedent leaves neither descendants nor ascendants, the spouse is entitled to one-half of the estate in usufruct.²⁷⁰

A forced heir could lose his inheritance if found unworthy to succeed to a portion of the estate or if the testator disinherits him. Puerto Rico has an expansive list of persons not qualified to succeed to property by devise or descent because of their conduct-based unworthiness. Some acts that would disqualify a person as being unworthy include attempting to kill the decedent or certain of his family members, attempting to treacherously influence the decedent's making of will, or abandoning or attempting to sexually exploit one's child.²⁷¹ The testator may also disinherit a forced heir, but only for just cause as defined in the Civil Code.²⁷² Reconciliation between the testator and the heir negates the effect of disinheritance.²⁷³

A testator may devise a minor heir's legal portion in trust to the minor. Nevertheless, such a trust is null if "constituted to the detriment or impairment of the rights of heirs at law."²⁷⁴

B. Intestate Succession

Subject to forced heirship requirements, priority of succession is to descendants, to ascendants, to siblings and their children, to surviving spouse, and finally to collaterals in the closest degree not exceeding the sixth degree.²⁷⁵

²⁶⁸ See *id.* §§ 2412, 2416 (1993). The free third is the one-third remaining after the legal portion is allotted and is otherwise at the free disposal of the decedent. See *id.*

²⁶⁹ See *id.* § 2413. The free half is the half remaining after the legal portion is allotted and is otherwise at the free disposal of the decedent. See *id.*

²⁷⁰ See *id.* § 2414.

²⁷¹ See *id.* § 2261 (Supp. 2003).

The following are disqualified to succeed by reason of unworthiness: (1) Parents who have abandoned their children or prostituted their daughters or made attempts against their chastity. (2) He who has been sentenced in a trial for having made attempts against the life of the testator, his spouse, descendants or ascendants. (3) He who has accused the testator of a crime for which the law imposes an exemplary punishment, when the accusation is declared libelous. (4) The heir of age who, knowing of the violent death of the testator, has not denounced it to the courts within one month, unless the latter had already acted *ex officio*. (5) A person sentenced at a trial for adultery with the wife of the testator. (6) He who, by threats, fraud, or violence, forces the testator to make a will or to change it. (7) He who, by the same means, prevents another from making a will or from revoking one already made, or who forges, conceals, or changes a subsequent one.

Id.

²⁷² See *id.* §§ 2455-58 (1993 & Supp. 2003). A person may only disinherit an heir in a will, wherein he must mention the legal cause of the disinheritance. See *id.* § 2452 (1993). The other heirs must prove the grounds for disinheritance if the disinherited heir denies them. See *id.* § 2453. In addition to certain causes for unworthiness enumerated in section 2261 (reproduced *supra* note 271), the testator can disinherit a descendant for the following causes:

(1) To have refused without lawful reason, support to the father or ancestor that disinherits him. (2) To have abused him by acts or grievously by words. (3) To have delivered over a daughter or granddaughter to prostitution. (4) When the child has accused his/her father or mother of a crime, except for high treason. (5) When the child has refused to post bond to free his/her father or mother who have been imprisoned, when able to do so. (6) When the son or daughter has married without the consent of his/her father, mother or guardian, [when consent is required due to the age of the child]. (7) When the child or descendant has been negligent in caring for the testator who is ill.

Id. § 2456 (Supp. 2003). In addition to certain section 2261 causes for unworthiness, the testator can disinherit an ascendant for the following causes:

(1) To have lost the paternal power. (2) To have refused support to his children or descendants without legal reason. (3) For the father or mother or ancestor to have accused the child or descendant of a capital crime except the crime of high treason. (4) For the father, mother or ancestor to have been careless in taking under his care the child or issue who finds himself sick. (5) To have refused to furnish bail for the release of the child or issue from jail when it could be done. (6) For one of the parents to have attempted the life of the other in which case the child or issue shall have the right to disinherit the one of the two spouses who has committed the attempt.

Id. § 2457 (1993). In addition to certain of the section 2261 causes for unworthiness, the testator can disinherit a spouse for the following causes: "(1) Those that afford ground for divorce. (2) Those that afford ground for the loss of the paternal power. (3) To have refused support to the children or to the other spouse. (4) To have made an attempt upon the life of the testator if there has been no reconciliation." *Id.* § 2458. For a cause under (1) to be a ground for disinheritance, the spouses cannot "live under the same roof." *Id.*

²⁷³ See *id.* § 2459.

²⁷⁴ *Id.* § 2553; see *id.* § 2367.

Illegitimate children and adopted children inherit as if they were legitimate, natural children of the decedent.²⁷⁶ A parent inherits through an illegitimate child only if he has acknowledged the child as his.²⁷⁷ When siblings or their children succeed to property, whole-bloods succeed to twice the amount as half-bloods.²⁷⁸ In all other situations, whole-bloods and half-bloods are treated equally.²⁷⁹

C. Testamentary Capacity and Testamentary Formalities

A person has testamentary capacity if at least fourteen years old and of sound mind.²⁸⁰

The Civil Code recognizes six types of wills—holographic, open, closed, military, maritime, and foreign.²⁸¹ Because preparing any of the first five types of wills is generally incompatible with standard military legal assistance practice outside of Puerto Rico,²⁸² military practitioners outside Puerto Rico should prepare wills for Puerto Rican domiciliaries either as military testamentary instruments or as foreign wills.²⁸³ Puerto Rico recognizes wills by its citizens executed abroad if done in conformity to the formality of “the laws of the country in which they are sojourning.”²⁸⁴ Puerto Rican courts apply the rule

²⁷⁵ See *id.* §§ 2641-79. Succession to descendants is per stirpes. See *id.* §§ 2623, 2643-45. Property passing to ascendants passes to the ascendants of the nearest degree, divided equally between paternal and maternal lines if division is necessary. See *id.* § 2653. Succession to nephews and nieces is by representation if any of the decedent’s siblings survive, but per capita if otherwise. See *id.* § 2624. Succession to collaterals of the nearest degree (other than siblings and their children) is per capita. See *id.* § 2678. Degrees for collaterals are calculated under the civil law method by counting generations from the decedent to the common ancestor and then from the common ancestor to the collateral. See *id.* § 2604.

The English translation of some of these sections is deficient by inadvertently excluding females. *Hermanos* is sometimes translated as “brothers” rather than “brothers or sisters” or “siblings,” *sobrinos* as “nephews” rather than “nephews or nieces,” and *tios* as “uncles” rather than “uncles or aunts.” See, e.g., *id.* §§ 2624 (translating *hermanos* as “brothers or sisters,” but *tios* as “uncles”), 2677 (translating *hermanos* as “brothers” in one place and “sisters” in another) (1993) (English) (LEXIS through 2003 legislation) (Spanish). Practitioners should understand these provisions as not favoring anyone based on gender.

²⁷⁶ See P.R. CONST. art. II, § 1; P.R. LAWS ANN. tit. 31, §§ 441 (illegitimate children), 538 (adopted children) (1993 & Supp. 2003); *Vega ex rel. Morales v. Bowen*, 664 F. Supp. 659, 662 (D.P.R. 1987); *Ocasio v. Díaz*, 88 P.R.658, 731-32 (1963).

²⁷⁷ See P.R. LAWS ANN. tit. 31, §§ 2652-53 (1993).

²⁷⁸ See *id.* § 2674.

²⁷⁹ See *id.* § 2678.

²⁸⁰ See *id.* §§ 2111-12. A testator must be at least eighteen to make a holographic will. See *id.* § 2161.

²⁸¹ See *id.* §§ 2141-42. The Code of Civil Procedure also recognizes nuncupative wills. See *id.* tit. 32, §§ 2241- 48 (2004) (Recording of Oral Wills and Codicils).

²⁸² Many of the requirements for these wills differ significantly from those of other U.S. jurisdictions. For example, if the notary and two of the attesting witnesses are not acquainted with the testator and two non-attesting witnesses cannot be found who are acquainted with the testator, the notary, and two of the attesting witnesses, then the notary or witnesses must describe in an act the testator, the circumstances, and the documents relied upon to establish identity. See *id.* tit. 31, §§ 2150, 2151 (1993).

Moreover, many of the requirements for specific types of will are beyond the ability of the typical military practice. A closed will requires the testator to place the will in a sealed envelope; a notary and five witnesses to witness the execution; the notary to wrap the envelope with a memorandum he has drafted describing the marks of the seal and the formalities of the execution signed by the notary, the testator, and the witnesses; and the notary to keep a certified copy of the memorandum in his protocol. See *id.* §§ 2202, 2205. For an open will, the will is read aloud and the notary informs the testator and three witnesses of their right to read the will themselves. See *id.* §§ 2181, 2182. Unlike the closed will, the executed open will must enter the notary’s protocol. Compare *id.* tit. 4, § 2071 (2002) (“[t]he protocol is the orderly collection of original deeds and acts executed during a calendar year by the notary”), with *id.* tit. 31, § 2206 (1993) (“[t]he testator may keep the closed will in his possession”).

A military will requires a judge advocate to file a certified copy of the executed will in an office designated to keep copies of military wills and powers of attorney, and upon the activation or mobilization of the testator, to send certified copies of the will and the orders of activation or mobilization to the Director of the Office of Notarial Inspection of Puerto Rico (the Director). See *id.* tit. 25, §§ 2904, 2905 (1999). Additionally, before authenticating a Puerto Rican military will, a Judge Advocate must present his credentials to the Director. See *id.* § 2903.

²⁸³ Because of an inability to provide a Puerto Rico-specific will, some legal assistance offices routinely assist Puerto Rican clients in preparing holographic wills. See Telephone Interview with Captain Javier E. Calderón, Acting Chief of Legal Assistance, in Fort Buchanan, Puerto Rico (Feb. 4, 2005) [hereinafter CPT Calderón Interview] (describing legal assistance practice at Fort Buchanan); Sherman Interview, *supra* note 154 (describing legal assistance practice at Fort Polk). Holographic wills are not uncommon in Puerto Rico. Captain Calderón Interview, *supra*. To be valid, a holographic will must be entirely in the testator’s hand, signed, and dated with year, month, and day. See P.R. LAWS ANN. tit. 31, § 2161 (Supp 2003). The testator must note under his signature any corrections such as cross outs or insertions. See *id.* The testator for a holographic will must be at least eighteen years of age. See *id.*

²⁸⁴ P.R. LAWS ANN. tit. 31, § 2221 (1993); see *id.* § 11. The court will then apply Puerto Rican law to the will as to substantive matters within the jurisdiction of Puerto Rico. See *id.* § 11 (stating that “[t]he forms and solemnities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed,” but the law of said jurisdiction will not invalidate Puerto Rican “prohibitory laws relating to persons, their acts or property, and those which relate to public order and to good morals”); see, e.g., § 2222 (declaring mutual wills for Puerto Ricans invalid even if such a will would be valid in the jurisdiction of will execution).

for foreign wills to wills executed within the United States.²⁸⁵ Such a will becomes valid as a Puerto Rican public document upon protocolization in Puerto Rico.²⁸⁶

A military practitioner practicing within the United States can prepare a will for Puerto Rican domiciliaries according to the testamentary formalities of the jurisdiction in which the will is to be executed. If the attorney is preparing the will for execution outside the United States, the will should meet the requirements for a military testamentary instrument. The practitioner should advise the testator of the necessity to protocolize the will and may want to refer the testator to a legal assistance office in Puerto Rico when he next returns to the island.

D. Executors and Administration

An executor must be at least twenty-one years of age and mentally competent.²⁸⁷ The Civil Code does not require an executor to provide security.²⁸⁸ An executor provides an accounting to the heirs and, if necessary, to the court.²⁸⁹ The executor must file an inventory, quarterly statements of account, and a final account.²⁹⁰ The duration of administration of an estate may not exceed one year unless extended by a court or by the heirs and legatees.²⁹¹ The Code of Civil Procedure declares, however, that “[a]ll directions of the testator as to the administration of his property shall be followed,” apparently authorizing the testator to relieve the executor of any of these requirements.²⁹² A person named as executor “who does not accept the office, or renounces it without sufficient cause,” loses any benefit of the will beyond his rights, if any, to the legal portion.²⁹³

E. Tutorship

In Puerto Rico, tutorship corresponds to guardianship in other U.S. jurisdictions.²⁹⁴ A testator may appoint a tutor for a minor child in his will.²⁹⁵ To qualify, a tutor must be a resident of Puerto Rico.²⁹⁶ The Civil Code requires the tutor to provide a bond, but the testator can relieve the tutor of this requirement in his will.²⁹⁷ The tutor must provide annual accounts and a final account of the tutorship.²⁹⁸

²⁸⁵ See *Quiñones Arroyo v. Escalera Irizarry*, 99 P.R. 933, 937 (holding a will purporting to convey property in Puerto Rico void because the will did not comply with Texas law); *Armstrong v. Armstrong del Valle*, 85 P.R. 387, 388, 391-92 (1962) (upholding a New York will conveying property in Puerto Rico).

²⁸⁶ See P.R. LAWS ANN. tit. 4, § 2056 (2002). To protocolize a document is to have it entered into a notary’s protocol. Protocolization need not occur before the death of the testator, but a notary would naturally be less hesitant to protocolize a foreign will the testator presents rather than one the heirs present.

²⁸⁷ See *id.* tit. 31, §§ 971, 2512, 3402 (1993 & Supp. 2003).

²⁸⁸ See *id.* §§ 2511-30 (1993).

²⁸⁹ See *id.* § 2526. The executor provides an accounting to the court if “appointed, not in order to deliver the property to determined heirs, but to invest or distribute the same in the manner ordered by the testator.” *Id.*

²⁹⁰ See *id.* tit. 32, §§ 2401-03 (inventory), 2511 (quarterly statements), 2512 (final account) (2004).

²⁹¹ See *id.* tit. 31, §§ 2523-25 (1993).

²⁹² *Id.* tit. 32, § 2442 (2004); see *id.* tit. 31 § 2520 (1993).

²⁹³ *Id.* tit. 31, § 2519 (1993).

²⁹⁴ See *id.* § 783 (setting forth general duties of tutor).

²⁹⁵ *Id.* § 681. The age of majority is twenty-one. See *id.* § 971. When the child turns eighteen, the parents or the court may emancipate the child. See *id.* § 911 (parents), 912 (court), 951, 953 (orphans).

²⁹⁶ See *id.* § 741(11) (listing grounds for disqualification). Among others disqualified include felons, “[b]ankrupts and insolvents not rehabilitated,” and “[p]ersons of bad conduct who have no visible means of support.” *Id.* § 741(2), (5), (6).

²⁹⁷ See *id.* §§ 761, 764, 767.

²⁹⁸ See *id.* §§ 801, 803. The requirement to provide an account does not lie with a tutor to whom the will has granted “an allowance from the proceeds [of the tutorship] for maintenance.” *Id.* § 801.

F. Preparing a Will

Options for preparing a will for a Puerto Rican include drafting a military testamentary instrument and drafting a will for the jurisdiction of execution. Because a Puerto Rican notary or court would more readily recognize the self-proving nature of a military testamentary instrument, such an instrument is preferable to a foreign will.

To draft a military testamentary instrument using the DL Wills program, select “Puerto Rico” for the state and continue normal will drafting procedures for DL Wills as if the entire estate were disposable, accepting the DL Wills offer to prepare a military testamentary instrument preamble and affidavit. In the first paragraph, include the marital status of the testator and insert the name and relationship to the testator of each potential forced heir—all living ascendants and descendants and the spouse, if married. For a testator with forced heirs, amend the gift portion of the will by using language similar to that provided in Appendix H. If the testator wants to disinherit an heir, then provide the legal basis for disinheritance.²⁹⁹ Consider releasing the executor from statutory obligations that could burden him by default, such as the requirement to provide bond or security or to provide quarterly, annual, or other accountings.

To prepare a specific will for a state in the United States, prepare a will as if the testator were a resident of that state except once the document is produced, (1) replace in the first paragraph the name of the state with “Puerto Rico,” deleting “the State of” with “the Commonwealth of” as applicable; and (2) amend the will as outlined above by adding information concerning marital status, identity of forced heirs, gifts considering forced heirship, and executors, as applicable.

VIII. U.S. Virgin Islands³⁰⁰

Formerly known as the Danish West Indies, the Virgin Islands became a territory of the United States in 1916.³⁰¹ Denmark ceded these islands lying just east of Puerto Rico for \$25 million and the United States not objecting to Denmark extending sovereignty over all of Greenland.³⁰² Persons born in the Virgin Islands are U.S. citizens.³⁰³ The Virgin Islands does not have its own constitution.³⁰⁴ Its organic act establishes an executive branch headed by an elected governor, a unicameral legislature, and a judiciary.³⁰⁵

The Virgin Islands is a common law jurisdiction relying on U.S. common law.³⁰⁶ The Virgin Islands Code took effect in 1957.³⁰⁷ The Code chapters covering wills and intestate succession derive from the New York Decedent Estate Law existing in 1957.³⁰⁸ Virgin Islands courts, therefore, often look for guidance to state case law from the United States and to New York case law, in particular, to interpret portions of the probate code similar to that of New York.³⁰⁹

²⁹⁹ See *supra* note 272 and accompanying text.

³⁰⁰ Hereinafter “Virgin Islands.” This term excludes the British Virgin Islands.

³⁰¹ See Convention for Cession of the Danish West Indies, Aug. 4, 1916, U.S.-Den., 39 Stat. 1706, 1706; GORDON ET AL., *supra* note 20, § 92.04[5]. The Virgin Islands consists of “the Islands of Saint Thomas, Saint John and Saint Croix together with the adjacent islands and rocks.” Convention for Cession of the Danish West Indies, *supra*, at 1706; see 48 U.S.C. § 1541(a) (2000).

³⁰² See Convention for Cession of the Danish West Indies, 39 Stat. at 1711, 1715; U.S. CIA, *Virgin Islands*, in WORLD FACTBOOK (2004), available at <http://www.cia.gov/cia/publications/factbook/index.html>.

³⁰³ See 8 U.S.C.S. §§ 1101(a)(38), 1401(a), 1406 (LEXIS 2005).

³⁰⁴ See *Gov’t of the Virgin Islands v. Rivera*, 333 F.3d 143, 145 (3d Cir. 2003), *cert. denied*, 540 U.S. 1161 (2004). Congress has authorized the Virgin Islands to enact its own constitution. See Act of Oct. 21, 1976, *supra* note 61, at 2899-900.

³⁰⁵ See 48 U.S.C. §§ 1571(a) (legislature), 1591 (executive branch), 1611 (judiciary) (2000). For most local matters, the U.S. District Court of the Virgin Islands shares concurrent original jurisdiction with the Territorial Court of the Virgin Islands. See *id.* § 1612; V.I. CODE ANN. tit. 4, §§ 32, 75, 76 (1997); *Rivera*, 333 F.3d at 145-46 (describing the Virgin Islands court system). Appeals from the Territorial Court will be heard in the Appellate Division of the U.S. District Court until the Virgin Islands legislature establishes an appellate court. See 48 U.S.C. § 1613a(a); V.I. CODE ANN. tit. 4, § 33; *Rivera*, 333 F.3d at 146.

³⁰⁶ See V.I. CODE ANN. tit. 1, § 4 (1995). “[I]n the absence of local laws to the contrary,” the rules of decision in Virgin Islands courts are “[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States.” *Id.*

³⁰⁷ See *id.* § 3. The Legislature repealed all former laws concerning matters addressed in the Code. See *id.* § 5.

³⁰⁸ See *id.* tit. 15, § 1 preceding rev. note (1996).

³⁰⁹ See *In re Estate of Buckley*, 536 F.2d 580, 582 (3d Cir. 1976) (assuming the Virgin Islands legislature adopted then-existing New York case law interpreting certain statutes by adopting the New York statutes verbatim); *Estate of Georg v. Congregacion Religiosa Hermanas Mercedarias de la Caridad Incorporada*, 7 V.I. 298, 303-304 (D.V.I. 1969) (analyzing New York law interpreting a statute similar to the case at bar and regarding it as “highly persuasive”); *Masonry Prods., Inc. v. Tees*, 6 V.I. 108, 111-13 (D.V.I. 1968) (determining the nature of tenancy by the entirety according to the majority rule in the United States); *In re Estate of Walters*, 38 V.I. 14, 21-23 (V.I. Terr. Ct. 1997) (analyzing New York case law concerning undue influence in the making of a will because “the Virgin Island probate code is modeled closely after New York’s Estate, Powers, and Trusts Law”).

Real property owned by more than one person can be held as tenants in common, joint tenants, or tenants by the entirety.³¹⁰ A transfer of real property to both spouses in a marriage creates a tenancy by the entirety, unless the deed or will provide otherwise.³¹¹ A transfer of real property to multiple persons in other cases creates a tenancy in common unless the deed or will expressly states “that the grantees or devisees shall take the land as joint tenants.”³¹²

A tenancy by the entirety is held by the marriage as a single entity and is not subject to the claims upon only one of the spouses.³¹³ Upon termination of the marriage by divorce, the property vests in the former spouses as tenants in common.³¹⁴ Upon termination of the marriage by death, the property vests in the survivor free of the debts of the decedent.³¹⁵

The Virgin Islands established the Virgin Islands UTMA in 2001.³¹⁶ Under the Virgin Islands UTMA, a testator may establish a UTMA relationship by will.³¹⁷ The custodian must turn the custodial property over to the minor once the minor reaches the age of eighteen.³¹⁸

The Code has a chapter concerning trusts applicable to testamentary trusts that is based on the Uniform Trusts Act of 1937.³¹⁹ The Virgin Islands does not have a provision recognizing personal property memorandums.³²⁰

A. Rights to Property by Surviving Family Members

The surviving spouse has election rights to take under intestacy up to one-half of the estate.³²¹ Some testators can limit the enjoyment of such an election by providing in trust the spouse’s share with the spouse owning the income for life.³²² Neither a person who had abandoned his decedent spouse nor a “husband who ha[d] neglected or refused to provide for his [decedent] wife” has the right of spousal election.³²³

A surviving widow has the right for one year to remain in the decedent’s dwelling rent-free and to receive “reasonable sustenance out of the estate.”³²⁴ Additionally, a surviving widow has a right to property exempt from execution, to be used for the maintenance of herself and any minor children of the decedent.³²⁵ If there is no surviving widow, any minor children

³¹⁰ See V.I. CODE ANN. tit. 28, § 7.

³¹¹ See *id.* § 7(c); *Modeste v. Benjamin*, 18 V.I. 619, 622 (D.V.I. 1981); *Masonry Prods., Inc. v. Tees*, 6 V.I. at 110-11. Tenancy by the entirety was unknown in the Virgin Islands before the enactment of the Code and section 7 in 1957. See *Masonry Prods., Inc.*, 6 V.I. at 113. Section 7 addresses real property only. V.I. CODE ANN. tit. 28, § 7. Thus, neither the possibility that spouses can hold personal property as tenants by the entirety nor the presumption that personal property transferred to spouses is held as tenants by the entirety necessarily follows.

³¹² V.I. CODE ANN. tit. 28, § 7(b).

³¹³ See *Masonry Prods., Inc.*, 6 V.I. at 114. This is the majority rule. See *id.*

³¹⁴ See V.I. CODE ANN. tit. 28, § 7(d); *Modeste v. Benjamin*, 18 V.I. at 622.

³¹⁵ See *Masonry Prods., Inc.*, 6 V.I. at 112-13. This is the majority rule. See *id.*

³¹⁶ See V.I. CODE ANN. tit. 15, §§ 1251a-1251x (Supp. 2004). The Virgin Island formerly had the Virgin Islands UGMA. See *id.* §§ 1241-1250 (1996) (repealed 2001).

³¹⁷ See *id.* § 1251f(a).

³¹⁸ See *id.* §§ 1251u.

³¹⁹ See *id.* § 1091 preceding rev. note (1996) (preceding chapter 57, Trusts and Trustees).

³²⁰ See *id.* ch. 1 (Wills).

³²¹ See *id.* § 10(a)(1).

³²² See *id.* § 10(a)(2)-(7). Using the spousal election, if the testator devises or bequeaths some or all of the spousal election amount in trust with the income payable to the surviving spouse, the spouse is entitled to a maximum of \$2500 outright. See *id.* Thus, the amount that the testator can keep from the spouse by making it the principal of the trust is the excess of the spousal election amount over \$2500. See *id.* This allows a testator to minimize the value of the spousal election to little more than \$2500 regardless of the size of the estate by funding the spousal trust with property designed to produce little income. Partly for this reason, New York abandoned a similar spousal election provision in 1992. See Margaret V. Turano, *Practice Commentaries*, in 17B N.Y. EST. POWERS & TRUSTS LAW 193, 193-94 (McKinney 1999) (commenting on section 5-1.1-A).

³²³ V.I. CODE ANN. tit. 15, § 10(d)-(e).

³²⁴ *Id.* § 356.

³²⁵ See *id.* § 352.

have the right to the exempt property.³²⁶ Exempt property includes a homestead or its proceeds;³²⁷ necessary clothing; necessary tools of a trade or occupation; and household goods, utensils, and furniture not exceeding \$3000 in value.³²⁸

B. Intestate Succession

The intestate share of a surviving spouse depends on the relationship of the decedent to the other heirs. Notwithstanding any share of a surviving spouse, priority of succession is to descendants, parents, siblings and their descendants, and if there is no surviving spouse, then to next of kin.³²⁹ The share of the surviving spouse is the following: if any descendant survives, one-third of the estate; otherwise, if any parent survives, \$5000 plus one-half of the residue of the estate; otherwise, if any siblings or any sibling's child survives, \$10,000 plus one-half of the residue of the estate; otherwise, the whole estate.³³⁰

Intestate succession in the Virgin Islands treats half-blood relations as whole blood relations.³³¹ The Virgin Islands Code treats illegitimate children as legitimate in intestacy except that the maternal relatives of a decedent who was illegitimate have priority in succession over paternal relatives.³³² The Code treats adopted children as natural children in intestacy except that they cannot succeed to property by right of representation of an adoptive parent.³³³

Neither a person who had abandoned his decedent spouse nor "a husband who ha[d] neglected or refused to provide for his [decedent] wife" can inherit through intestacy.³³⁴ A parent who had abandoned or "who ha[d] neglected or refused to provide for" an infant child cannot inherit from the child by intestacy "unless the parental relationship and duties [had] resumed and continue[d] until the death of the child."³³⁵

C. Testamentary Capacity and Testamentary Formalities

For the testator to have testamentary capacity, he must be at least eighteen years old and of sound mind.³³⁶ A testator having a surviving spouse, descendant, or parent may devise or bequeath no more than one-half his estate to a charity.³³⁷

A testator must subscribe his will or acknowledge subscription of the will before two witnesses and declare to them that it is "his last will and testament."³³⁸ The witnesses must subscribe the will at the testator's request.³³⁹ Each witness must provide his place of residence next to his name.³⁴⁰ A self-proving affidavit requires a witness to affirm those facts to which

³²⁶ See *id.*

³²⁷ See *id.* tit. 5, § 478(a) (1997). A "homestead must be the actual abode of and owned by such family or some members thereof." *Id.* The homestead cannot exceed \$30,000 in value, nor can it exceed five acres or, if located in a town divided into lots or blocks, one-fourth an acre. See *id.*

³²⁸ See *id.* § 479(a). Necessary clothing excludes jewelry. See *id.* § 479(a)(1). Tools of a trade or occupation refer to "[t]he tools, implements, apparatus or library necessary to enable any artisan, mechanic or professional person to carry on the trade, occupation or profession by which such person habitually earns his living." *Id.* § 479(a)(2).

³²⁹ See *id.* tit. 15, § 84(1)-(6) (1996). Any distribution to representatives is stirpital. See *id.* § 84(1), (4)-(6), (9). Determination of next of kin among collaterals is by the civil law method, which counts generations from the decedent to the first ancestor common with the collateral relative and then from the common ancestor to the relative. See *id.* tit. 1, § 41 & note (1995) (defining "kin" and "kindred" based on Delaware statute); *In re Cavender's Estate*, 130 A. 746, 747 (Del. Ch. 1925) (describing civil law method). Nevertheless, "collateral kindred claiming though a nearer common ancestor shall be preferred to those claiming though a more remote common ancestor." V.I. CODE ANN. tit. 1, § 41.

³³⁰ See V.I. CODE ANN. tit. 15, § 84(1)-(4).

³³¹ See *id.* § 84(11).

³³² See *id.* § 84(7), (13).

³³³ See *id.* tit. 16, § 146(a).

³³⁴ *Id.* tit. 15, § 87(3), (4).

³³⁵ *Id.* § 87(5).

³³⁶ See *id.* §§ 2, 7.

³³⁷ See *id.* § 9. Only a surviving spouse, descendant, or parent has standing to challenge a will in violation of section nine. See *id.*

³³⁸ See *id.* § 13. As an exception, the Code recognizes nuncupative and holographic wills for mariners at sea and Soldiers and Sailors "while in actual military or naval service," but the effectiveness of such wills for a service member expires one year following discharge from military service if the service member then has testamentary capacity. *Id.* § 8.

³³⁹ See *id.* § 13(4).

³⁴⁰ See *id.* § 14. Failure to do so, however, does not invalidate the will. See *id.*

he would be required to testify in a probate proceeding.³⁴¹ To be valid, a will executed outside the Islands must comply with the law of either the Virgin Islands, the jurisdiction where executed, or the jurisdiction where the testator is domiciled.³⁴²

D. Executors and Administration

An executor must be of sound mind, above the age of eighteen, domiciled in the Virgin Islands, and neither a misdemeanant of a crime of moral turpitude nor a felon.³⁴³ The court, however, may appoint a non-domiciliary who appoints a Virgin Islands agent or attorney to receive service of any papers for the administration.³⁴⁴ The executor must provide a bond unless the will “expressly declares that no bond shall be required of [the testator’s] executor.”³⁴⁵ The executor must conduct an appraisal and file an inventory, quarterly accounts, and a final account.³⁴⁶

E. Guardianship

A testator can appoint a guardian for his minor child and the child’s estate subject to the rights of a competent surviving parent.³⁴⁷ The guardian must file bond equal to the value of the ward’s estate and estimated annual income.³⁴⁸ The guardian must also conduct an appraisal and file an inventory, annual accounts, and a final account.³⁴⁹

F. Preparing a Will

Options for preparing a will for a Virgin Islander include drafting a Virgin Islands will, drafting a military testamentary instrument, and drafting a will for the jurisdiction of execution. Because the Code provides for self-proving wills, a Virgin Islands will is slightly preferable to a military testamentary instrument and a foreign will for a simple will.

To draft a Virgin Islands will using the DL Wills program, select “Virgin Islands” for the state and continue normal will drafting procedures for DL Wills. Once the document is created, in the first paragraph, insert “U.S.” before “Virgin Islands.” Amend the affidavit as follows: Following the language in the first paragraph of the affidavit, “signed and executed said instrument as his [or her] last will and testament in the presence and hearing of the witnesses,” insert “and that he [or she] stated that said instrument is his [or her] last will and testament” and a comma. See Appendix D for a sample first paragraph of the affidavit.

To draft a Military Testamentary Instrument using the DL Wills program, select “Virgin Islands” for the state and continue normal will drafting procedures for DL Wills, accepting the DL Wills offer to prepare a military testamentary instrument preamble and affidavit. In the first paragraph, insert “U.S.” before “Virgin Islands.” To prepare a specific will for a state in the United States, prepare a will as if the testator were a resident of that state except, once the document is produced, in the first paragraph replace the name of the state with “the U.S. Virgin Islands,” deleting “the State of” or “the Commonwealth of.”

³⁴¹ See *id.* § 22; V.I. TERR. CT. R. 194(a) (recognizing the admissibility of such an affidavit).

³⁴² See V.I. CODE ANN. tit. 15, §§ 15, 16. Such a will must be written and subscribed by the testator. See *id.*

³⁴³ See *id.* § 235(a); *id.* tit. 16, § 261 (declaring the age of majority to be eighteen); *In re Estate of Vose*, 276 F.2d 424, 427 (3d Cir. 1960) (holding that section 235’s residency requirement refers to domicile).

³⁴⁴ See V.I. CODE ANN. tit. 15, § 235(b), (c).

³⁴⁵ *Id.* § 239(a); see V.I. TERR. CT. R. 194(b) (“Bond will be waived only when a testator has so directed.”).

³⁴⁶ See V.I. CODE ANN. tit. 15, §§ 312 (inventory), 314 (appraisal), 561 (quarterly accounts), 564 (final account).

³⁴⁷ See *id.* § 826. If both parents have died, then a father who had not lost custody of his child by a divorce decree has priority over the mother in appointing a testamentary guardian. See *id.* § 826. The Code does not grant a testator authority to appoint a guardian for incompetent dependents. See *id.* §§ 841-44 (Insane Persons, Idiots, Etc.).

³⁴⁸ See *id.* § 881(b)(1).

³⁴⁹ See *id.* §§ 564 (requiring final account of executors), 825 (inventory), 882 (requiring of guardians appraisal and accounts “in like manner as” of executors) (1996); V.I. TERR. CT. R. 208 (requiring annual accounting of guardians). But see V.I. CODE ANN. tit. 15, § 561 (requiring quarterly accounts of executors).

IX. Conclusion

Military legal assistance attorneys can go beyond the limits of DL Wills to provide competent will preparation services for domiciliaries of Louisiana and the U.S. territories. With the advent of the military testamentary instrument, military attorneys can be confident the wills they draft are legally valid throughout the United States, including its territories.

The two civil law jurisdictions surveyed provide striking contrasts in how military practitioners are able to serve will clients. Because of Fort Polk's initiative to prepare Louisiana wills for other legal assistance offices, Louisiana wills should be the least worrisome of wills for the non-Louisiana attorney. Even in compelling circumstances, an attorney can provide a legally-sufficient testament using DL Wills software and some careful drafting concerning Louisiana's forced heirship provisions. Puerto Rico poses a different situation. To produce a valid Puerto Rico will is beyond the reach of most legal assistance offices outside of Puerto Rico. Within their capabilities, however, is a military testamentary instrument produced using DL Wills and careful drafting concerning Puerto Rico's forced heirship provisions.

Of the other jurisdiction surveyed, the two territories that rely most exclusively on U.S. common law principles, Guam and the Virgin Islands, pose little difficulty in preparing valid wills using DL Wills software. Both require only one adjustment—the same additional clause in the self-proving affidavit. The two jurisdictions that have mixed common law and traditional law principles, American Samoa and the Northern Mariana Islands, present little more difficulty. The attorney must consider land ownership principles as they relate to the local race classifications of the testator and possible devisees under the will. Otherwise, minor adjustments to a DL Wills-drafted instrument produce a valid will for either jurisdiction.

Appendix A

Military Testamentary Instrument Preamble and Self-Proving Affidavit³⁵⁰

This is a MILITARY TESTAMENTARY INSTRUMENT prepared pursuant to section 1044d of title 10, U.S. Code, and executed by a person authorized to receive legal assistance from the Military Services. Federal law exempts this document from any requirement of form, formality, or recording that is provided for testamentary instruments under the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate. It shall remain valid unless and until the testator revokes it.

AFFIDAVIT

WITH THE ARMED FORCES
AT _____

We, the testator/testatrix and the witnesses, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that in the presence of a military legal assistance counsel and the witnesses the testator/testatrix signed and executed the instrument as the testator/testatrix military testamentary instrument and that [he][she] had signed willingly (or willingly directed another to sign for [him][her], and that [he][she] executed it as [his][her] free and voluntary act for the purposes therein expressed. It is further declared that each of the witnesses, in the presence and hearing of the testator/testatrix and a military legal assistance counsel, signed the military testamentary instrument as witness and that to the best of [his][her] knowledge the testator/testatrix was at that time eighteen years of age or older or emancipated, of sound mind, and under no constraint or undue influence.

Testator/Testatrix

Print Name

Witness Signature

Print Name

Witness Signature

Print Name

Subscribed, sworn to and acknowledged before me by the testator/testatrix, and subscribed and sworn to before me by the witnesses, this date _____.

(Signed)

(Official Capacity of Person Administering the Oath)

³⁵⁰ DOD DIR. 1350.4, *supra* note 2, encls. 1 & 2. For discussion, see *supra* Part II.

Appendix B

Sample Will: American Samoa³⁵¹

LAST WILL AND TESTAMENT OF JOE Q. SNUFFY

I, **JOE Q. SNUFFY**, a resident of *American Samoa*, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me. I am in the military service of the United States, currently stationed at FORT SWAMPY. My father JOSEPH P. SNUFFY, deceased, was one-half Samoan, born in Hawai'i. My mother JOSEPHINE O. SNUFFY of Tutuila is full-blooded Samoan, born in American Samoa on Tutuila. They are the natural parents of my brother JOHN SNUFFY, my sister JANET SISTRE, and me, all born in American Samoa on Tutuila. My wife JANE SNUFFY is three-quarters Samoan, born in American Samoa on Manu'a. She is the mother of my two children, JACK SNUFFY, born in American Samoa on Tutuila, and JILL SNUFFY, born in Germany while I was stationed there in the military service of the United States.

FIRST: I direct that the expenses of my last illness and funeral, the expenses of the administration of my estate, and all estate, inheritance and similar taxes payable with respect to property included in my estate, whether or not passing under this will, and any interest or penalties thereon, shall be paid out of my residuary estate, without apportionment and with no right of reimbursement from any recipient of any such property.

SECOND: I give all real estate owned by me at the time of my death, and all rights that I have under any related insurance policies, to my wife JANE SNUFFY, if she survives me.

THIRD: I give all tangible personal property owned by me at the time of my death, including without limitation personal effects, clothing, jewelry, furniture, furnishings, household goods, automobiles and other vehicles, together with all insurance policies relating thereto, to my wife JANE SNUFFY, if she survives me, or if she does not survive me, to those of my children (JACK SNUFFY and JILL SNUFFY and any other children which I hereafter may have) who survive me, in substantially equal shares, to be divided among them as they shall agree, or if they cannot agree, or if any of them shall be under the age of twenty-one (21) years, as my Executor shall determine.

FOURTH: I give all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

- (a) If my wife JANE SNUFFY survives me, to my wife outright.
- (b) If my wife does not survive me, then to those of my children who survive me and to the issue who survive me of those of my children who shall not survive me, per stirpes.
- (c) If my wife does not survive me and there shall be no issue of mine then living, my residuary estate shall be paid and distributed to my siblings who shall survive me and the then living issue of any siblings who predecease me per stirpes.
- (d) If none of the beneficiaries described above shall survive me, then I give my residuary estate to those who would take from me as if I were then to die without a will, unmarried and the absolute owner of my residuary estate, and a resident of *American Samoa*.

³⁵¹ For discussion, see *supra* Part III.F.

FIFTH: If any property of my estate vests in absolute ownership in a minor or incompetent, my Executor, at any time and without court authorization, may: distribute the whole or any part of such property to the beneficiary; or use the whole or any part for the health, education, maintenance and support of the beneficiary; or distribute the whole or any part to a guardian, committee or other legal representative of the beneficiary, or to a custodian for the beneficiary under any gifts to minors or transfers to minors act, or to the person or persons with whom the beneficiary resides. Evidence of any such distribution or the receipt therefor executed by the person to whom the distribution is made shall be a full discharge of my Executor from any liability with respect thereto, even though my Executor may be such person. If such beneficiary is a minor, my Executor may defer the distribution of the whole or any part of such property until the beneficiary attains the age of twenty-one (21) years, and may hold the same as a separate fund for the beneficiary with all of the powers described in Article SEVENTH hereof. If the beneficiary dies before attaining said age, any balance shall be paid and distributed to the estate of the beneficiary.

SIXTH: I appoint my wife JANE SNUFFY to be my Executor. If my wife does not survive me, or shall fail to qualify for any reason as my Executor, or having qualified shall die, resign or cease to act for any reason as my Executor, I appoint my sister JULIE SISTRE as my Executor. I direct that no Executor shall be required to file or furnish any bond, surety or other security in any jurisdiction.

SEVENTH: I grant to my Executor all powers conferred upon executors wherever my Executor may act. I also grant to my Executor power to retain, sell at public or private sale, exchange, grant options on, invest and reinvest, and otherwise deal with any kind of property, real or personal, for cash or on credit; to borrow money and encumber or pledge any property to secure loans; to exercise all powers of an absolute owner of property; to compromise and release claims with or without consideration; and to employ attorneys, accountants and other persons for services or advice. The term "Executor" wherever used herein shall mean the executors, executor, executrix or administrator in office from time to time.

EIGHTH: I direct that for purposes of this will a beneficiary shall be deemed to predecease me unless such beneficiary survives me by more than thirty days. The terms "child" and "children" as used in this will include not only the child and children (whether now or hereafter born) of the person designated, but also the legally adopted child and children of such person. The term "issue" includes not only the children and other issue (whether now or hereafter born) of the person designated, but also the legally adopted children and issue of such person.

NINTH: If my wife shall not survive me or is adjudged to be incapacitated, I appoint my sister JULIE SISTRE to be the Guardian of the person and property of any children of mine who have not attained the age of majority. No Guardian of the person shall be required to file or furnish any bond, surety or other security in any jurisdiction.

TENTH: I have served in the Armed Forces of the United States. I therefore request that my Executor make appropriate inquiries to ascertain whether there are any benefits to which I, my dependents or my heirs may be entitled by virtue of any military affiliation. I specifically request that my Executor consult with a retired affairs officer at the nearest military installation, the Department of Veterans Affairs, and the Social Security Administration.

IN WITNESS WHEREOF, I, JOE Q. SNUFFY, sign my name and publish and declare this instrument as my last will and testament this ____ day of _____, 2005.

JOE Q. SNUFFY

The foregoing instrument was signed, published and declared by JOE Q. SNUFFY, the above-named Testator, to be his last will and testament in our presence, all being present at the same time, and we, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses on the date above written.

having an address at

having an address at

AFFIDAVIT

WITH THE UNITED STATES ARMED FORCES
AT FORT SWAMPY

We, the Testator and the witnesses, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator, JOE Q. SNUFFY, signed and executed said instrument as his last will and testament in the presence and hearing of the witnesses, and that he had signed willingly, and that he executed it as his free and voluntary act and deed for the purposes therein expressed, and that each of the witnesses at the request of the Testator, in the presence and hearing of the Testator and each other, signed the will as witness, and that to the best of his or her knowledge the Testator was at the time at least eighteen years of age or emancipated, of sound mind and under no constraint, duress, fraud or undue influence, and that each witness was competent to witness the signing and execution of the attached or foregoing instrument.

JOE Q. SNUFFY
Testator

print:
Witness

print:
Witness

Subscribed, sworn to and acknowledged before me by the said JOE Q. SNUFFY, Testator, and subscribed and sworn to before me by the above-named witnesses, this ____ day of _____, 2005.

I, the undersigned officer, do hereby certify that I am, on the date of this certificate, a person with the power described in Title 10 U.S.C. 1044a of the grade, branch of service, and organization stated below in the active service of the United States Armed Forces, and that by statute no seal is required on this certificate, under authority granted to me by Title 10 U.S.C. 1044a.

Name of Officer and Position: _____
Grade and Branch of Service:
Command or Organization:

Language that is italicized and underlined in the will and affidavit above is additional to that produced by DL Wills in a Guam will. See Appendix C for a sample savings clause that could be appropriate in the Fourth paragraph in the will above as subparagraph (e).

Appendix C

Sample Savings Clauses, American Samoa³⁵²

If any gift of property to a beneficiary under this will is invalid under applicable law, then I direct that for purposes of determining the recipient of that property alone the beneficiary shall be deemed to predecease me and if said beneficiary is within a class of beneficiaries under this will, then I direct my Executor to distribute my estate in a manner so as to effect the distribution as detailed above as close as is prudently possible.

Savings clause: for use when testator may own individual land in American Samoa. This would be appropriate for use in the Fourth paragraph of the sample will in Appendix B.

If any gift of property to a beneficiary under this will is invalid under applicable law, then I direct that said gift be given to <IDENTIFY TRUSTEE HERE> in trust for the benefit of said beneficiary for the life of the beneficiary or until said property and property of a similar nature is no longer in the trust, at which time the proceeds of said trust shall be distributed to the beneficiary or beneficiaries in the manner as other property would be distributed to the beneficiary or beneficiaries under this will. If such a gift of property to a beneficiary in trust is valid under applicable law, then I direct that any remaining interest in the beneficiary's portion of the property pass under the terms of this will as if the beneficiary had predeceased me. Nevertheless, if such a gift of property to a beneficiary in trust is invalid under applicable law, then I direct that for purposes of determining the recipient of that property alone the beneficiary shall be deemed to predecease me and if said beneficiary is within a class of beneficiaries under this will, then I direct my Executor to distribute my estate in a manner so as to effect the distribution as detailed above as close as is prudently possible.

Savings clause with trust provision: for use when testator is a native Samoan, may own individual land in American Samoa, and beneficiaries may include descendants that are not native Samoans. Trust provisions should be provided elsewhere in the will.

³⁵² For discussion, see *supra* Part III.F.

Appendix D

Sample Self-Proving Affidavit, First Paragraph: Guam, Virgin Islands³⁵³

We, the Testator and the witnesses, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator, JOE Q. SNUFFY, signed and executed said instrument as his last will and testament in the presence and hearing of the witnesses, *and that he stated that said instrument is his last will and testament*, and that he had signed willingly, and that he executed it as his free and voluntary act and deed for the purposes therein expressed, and that each of the witnesses at the request of the Testator, in the presence and hearing of the Testator and each other, signed the will as witness, and that to the best of his or her knowledge the Testator was at the time at least eighteen years of age or emancipated, of sound mind and under no constraint, duress, fraud or undue influence.

Language that is italicized and underlined is additional to that produced by DL Wills in a Guam will or a Virgin Islands will.

³⁵³ For discussion, see *supra* Parts IV.F, VIII.F.

Appendix E

Fort Polk's Last Will and Testament Questionnaire³⁵⁴

Last Will and Testament Questionnaire

Office of the Staff Judge Advocate

Privacy Act Statement

AUTHORITY: 5 U.S.C. 301; 10 USC 3012

PRINCIPAL PURPOSE: To indicate a Legal Assistance Division client's desires in the disposition of his or her estate.

ROUTINE USES: Information provided in the questionnaire is used to aid the Legal Assistance Division, Office of the Staff Judge Advocate, in the preparation of wills. Upon completion of processing a will, this questionnaire is destroyed.

EFFECT OF NON-DISCLOSURE: Failure to provide the requested information will preclude the Legal Assistance Division from preparation of legal documents desired by the client.

SECTION I - CLIENT'S INFORMATION

FULL NAME: FIRST MIDDLE LAST (MAIDEN) SSN:

Permanent Residence: (City, County/Parish, State) LA residents must also complete Section IV of this form.

Current Mailing Address: City State Zip Code

Status: AD/Family member Rank: Marital Status: Married Single RET/Family member Rank: Divorced Widow/er

UNIT: Spouse's name: First Middle Last

Full names of children: Age Child Stepchild Disabled (LA only)

SECTION II - PERSONAL REPRESENTATIVES

Whom do you wish to appoint as the Executor/Executrix of your estate and what is their relationship to you? The person to carry out the terms and provisions of your Will Relationship City/State of Residence Primary: Alternate:

Whom do you wish to appoint as Guardian(s) of your minor children, if you should die with or after your spouse? Primary: Alternate:

354 Courtesy Fort Polk Legal Assistance Office (reformatted for this appendix). For discussion, see supra Part V.F.

Last Will and Testament Questionnaire
Office of the Staff Judge Advocate

*****SECTION III - PROPERTY DISPOSITION*****

When you die, to whom do you wish to leave your possessions and what is their relationship to you?

A. _____

If you die with or after the person in Line A above, to whom do you wish to leave your possessions?

B. _____

If you die with or after all of the persons in Line A or B above, to whom do you wish to leave your possessions?

C. _____

Do you have any specific bequests you would like to make? _____

*****SECTION IV - LOUISIANA RESIDENTS ONLY*****

Louisiana residents are required to provide additional information concerning their marital status. If you have ever been married, you must provide the requested information below. If you have never been married, check the "Never Married" box and complete sections I, II, and III.

Marital Status: Married Never Married Married, now divorced/widow(er)

Date/Place of Marriage

Name of Spouse
(include Maiden Name)

How terminated/Date

First Marriage: _____

Second Marriage: _____

Third Marriage: _____

Subsequent Marriages: _____

Appendix F

Sample Testament: Louisiana³⁵⁵

LAST WILL AND TESTAMENT OF JOE Q. SNUFFY

I, **JOE Q. SNUFFY**, a legal resident of the City of Leesville, Parish of Vernon, and State of Louisiana, being of sound and disposing mind and memory, and, not under restraint and realizing the uncertainties of life, do hereby make my LAST WILL AND TESTAMENT, expressly revoking all prior wills and codicils that I have made heretofore.

FIRST: I have been married twice, first to JANET ABLE on June 6, 1990 at Leesville, Louisiana, which marriage was dissolved by divorce on June 7, 1991, second to JANE BAKER on June 8, 1993 at Hometown, Georgia, with whom I am presently living.

SECOND: Of the above marriage(s) the following children were born, namely JACK SNUFFY presently eight years old, and JILL SNUFFY presently six years old. I have no other children nor have I adopted anyone to date.

THIRD: I appoint my spouse, JANE B. SNUFFY, Executor, of this, my LAST WILL AND TESTAMENT, with full seizin and without bond. In the event she is unable to perform her duties as Executor, if she predeceases me, or fails to qualify, or after qualifying, dies, resigns, or ceases to act as Executor for any reason, I nominate my sister, JULIE SISTRE, as Substitute Executor of this, my LAST WILL AND TESTAMENT, with full seizin and without bond. In the event my Executor or Substitute Executor is a nonresident of the State of Louisiana, or is an absentee at the time of my death, I hereby consent to the appointment of an agent by the probate court for the sole purpose of receiving service of process for the named Executor or Substitute Executor in matters pertaining to the probate hereof. I expressly provide that my Executor may serve as an Independent Executor, with all of the rights, powers and authority of an Independent Executor as provided by Louisiana law.

FOURTH: While acting as Executor, any person appointed by me or designated in the manner provided above, shall have, with respect to everything subject to the Executor's administration, whether under the laws of the State of Louisiana, or elsewhere, all the power, and authority given by me in this Will to the full extent permitted by the laws applicable to it, except where contrary to some provisions of this Will, no Executor shall ever be required either in the State of Louisiana or elsewhere to furnish bond or other security for the faithful performance of the Executor's duties. I do hereby expressly delegate to my Executor, under the provisions of Louisiana Civil Code Article 1302, the authority to assign and allocate the specific assets necessary to satisfy the legitime of my forced heirs.

FIFTH: I direct the attention of my Executor to such burial allowances and related benefits to which my family and my estate may be entitled by reason of my active service in the Armed Forces of the United States.

SIXTH: I direct my Executor to pay all just debts, including taxes and penalties and interest thereon, all expenses of my last illness, funeral and interment and all expenses of the probate of my Will and the administration of my succession, but nothing herein shall be deemed to require the prepayment or acceleration of maturity of any debts owed by me at the time of my death, nor shall my Executor be required hereby to discharge any encumbrance which may affect the property specifically bequeathed herein, unless there is a special fund to pay off those encumbrances.

³⁵⁵ Louis L. Sherman, Jr. (Jan. 11, 2005) (unpublished testament).

SEVENTH: I confirm the one-half interest of my spouse in our community property.

I give and bequeath the forced portion of my property of whatever nature and wheresoever situated to my forced heirs JACK SNUFFY and JILL SNUFFY if they are forced heirs at my death, subject to a testamentary usufruct for life in favor of my spouse JANE B. SNUFFY. In addition to the above testamentary usufruct, without bond, I give and bequeath the disposable portion of my said property to my spouse subject to the following specific bequest. It is my intention to give and bequeath as much as legally allowable to my spouse subject to this specific bequest.

I specifically bequeath my 1960 Ford Mustang to my brother JOHN SNUFFY of Alexandria, Louisiana.

If I have forced heirs at the time of my death, then I grant my spouse a usufruct over all of my separate and community property which is received by my forced heirs. This usufruct is for the remainder of my spouse's life, even though my spouse may remarry. This usufruct shall be treated as a legal usufruct, not as an impingement upon the legitime of my forced heirs. My spouse shall enjoy this usufruct in any way my spouse shall desire, and shall never require the consent or concurrence of any other person or persons for the enjoyment thereof. To the extent that this usufruct applies to nonconsumables, I expressly grant to my spouse the right to sell, donate, or otherwise dispose of or encumber such nonconsumables as my spouse may see fit, in accordance with Louisiana Civil Code Article 568. No bond or other security shall ever be required for the enjoyment of this usufruct, nor should my spouse ever be required to make any investments other than as my spouse may choose, nor shall an inventory ever be required.

If I have no forced heirs at the time of my death, then all of my property shall be treated as freely disposable property.

I give, devise and bequeath all of the disposable portion of my property of whatever nature and wheresoever situated to my spouse JANE B. SNUFFY.

If my spouse does not survive me, then I give, devise and bequeath all of my disposable property, in equal shares, to my children, or their descendants, by representation. In the event that I do not have surviving descendants, then I give, devise and bequeath my distributable estate, in equal shares, to my siblings JULIE SISTRE and JOHN SNUFFY, or to their descendants, by representation.

EIGHTH: If devolution of my property depends on priority of death and there is not sufficient evidence that the persons have died otherwise than simultaneously, my property shall be disposed of as if I had survived them.

NINTH: If any beneficiary to any share of my estate which is not subject to the provisions of any trust which may be created by this will is at the time of distribution of his or her share, a minor under the laws of his or her domicile, I direct that the minor's share be converted into qualifying property and delivered to the minor's Guardian as Custodian for the minor under the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act as may then be in effect in either the state in which the beneficiary or the Custodian resides, or any other state of competent jurisdiction.

a. The Uniform Gifts to Minors Act or The Uniform Transfers to Minors Act, as may then be in effect in the state concerned, is hereby incorporated by reference. The property affected by the Act shall be managed, held, and distributed in accordance with the provisions of the Act.

b. The financial custodian will serve without bond or surety and without intervention of any court, except as required by law.

c. The receipt by the Custodian, for the minor, of any principal or income transferred pursuant to this paragraph shall be a full acquittance and discharge of my Personal Representative or Trustee, as applicable, from liability with respect to such transfer and from further accountability for the principal or income so transferred.

TENTH: In the event my spouse does not survive me, I direct that my sister, JULIE SISTRE, be appointed the legal Tutors of the persons and estate of my minor children who survive me. If they are unable to act as the legal Tutors, I hereby desire that my parents-in-law, WALTER and ANNA BAKER, be appointed the legal Tutor of my minor children.

ELEVENTH: I hereby dispense all of my forced heirs from collating any gift or donation received from me, whether during my lifetime or by reason of my death, and direct that any gift or donation received from me was intended as an advantage or extra portion to the recipient heir.

TWELFTH: Pursuant to the provisions of Article 1705 of the Louisiana Civil Code, I direct that this, my LAST WILL AND TESTAMENT, shall not be revoked by the subsequent births, legitimation, or adoption of any child of mine.

THIRTEENTH: If any bequest or paragraph of this my LAST WILL AND TESTAMENT should be invalid for any reason, it shall be disregarded and the remainder of my will shall remain in force.

IN WITNESS WHEREOF, I have signed this, my LAST WILL AND TESTAMENT, in the presence of the witnesses hereinafter named and undersigned, this _____ day of _____, A.D. _____.

JOE Q. SNUFFY, TESTATOR

WITH THE UNITED STATES ARMED FORCES

AT _____

The Testator has signed this Will at the end and on each other separate page, and has declared or signified in our presence that it is his LAST WILL AND TESTAMENT, and in the presence of the Testator and each other, we have hereunto subscribed our names this _____ day of _____, _____.

WITNESSES:

PRINTED NAME _____

JOE Q. SNUFFY, TESTATOR

PRINTED NAME _____

NOTARY PUBLIC
NAME/RANK _____
TITLE _____

Appendix G

Sample Savings Clause, Northern Mariana Islands³⁵⁶

If any gift of real property to a beneficiary under this will is invalid under applicable law because the beneficiary is not of Northern Mariana Islands descent as defined in the Northern Mariana Islands Commonwealth Code, then I give the beneficiary the maximum allowable legal interest in the beneficiary's portion of the property with any remaining interest passing under the terms of the will as if the beneficiary and all other persons not eligible to own land in the Northern Mariana Islands had predeceased me.

Savings clause: for use when testator may own land in the Northern Mariana Islands.

³⁵⁶ For discussion, see *supra* Part VI.F.

Appendix H

Sample Gift Clauses: Puerto Rico³⁵⁷

Three gift schemes with Puerto Rican forced heirship follow: Married with Descendants, Unmarried Without Descendants, and Unmarried with Descendants.

Gift with Forced Heirship: Testator Married with Descendants.

(a) If I have descendants who survive me, then I give, devise, and bequeath the following portion of my property and estate of whatever nature and wheresoever situated as follows:

(1) One-half of the forced portion *<two-thirds>* of my property I give in equal shares to those of my children who survive me and to the issue who survive me of those of my children who shall not survive me, per stirpes.

(2) The other one-half of the forced portion *<two-thirds>* of my property I give as an extra portion to my descendants and in the manner described as follows: *<Here distribute the extra portion to any or all descendants as testator desires. Distribution can be as in subparagraph (a)(1) above, but this should still be a distinct subparagraph.>*

(3) If my spouse shall survive me, then a fractional portion of the extra portion *<or “free portion” if the surviving descendants are issue of different marriages>* equal to the smallest fractional share of a child not receiving an extra portion shall be subject to a usufruct in my spouse. *<Optional: Add, “The part of the extra portion that shall be subject to this spousal usufruct is <describe beneficiary and property here>”>*.

(b) If I do not have any descendants survive me, but I have ancestors that survive me, then I give, devise, and bequeath the following portion of my property and estate of whatever nature and wheresoever situated as follows:

(1) I give the forced portion *<one-half>* of my property to my parents in equal shares, or to one parent if the other shall not survive me, but if neither parent survives me, then to my surviving ancestors of nearest degree equally except that should all such ancestors not be ancestors of one of my parents, then I direct the forced portion be divided equally between my mother’s surviving ancestors and my father’s surviving ancestors. *<Tailor this subparagraph based on surviving ancestors—the fewer surviving, the simpler this can be.>*

(2) I direct that two-thirds of the free portion of my estate be subject to a usufruct in my spouse if my spouse shall survive me.

(3) *<If applicable, add:>* Notwithstanding subparagraph (b)(1), I give, devise, and bequeath the following specific property that I had received by gift, devise, or descent, or the proceeds of such property, or the property exchanged for such property, to my ancestor(s) that previously owned such property. I direct any gifts under this subparagraph be taken as far as possible from the forced portion of my estate. *<Identify all such property and appropriate ancestor(s) here.>*

(c) If I have neither descendants nor ancestors survive me, then I direct that one-half of my estate be subject to a usufruct in my spouse if my spouse shall survive me.

(d) I give, devise, and bequeath the following specific property. Unless required to comply with the law or unless otherwise indicated, such gifts are not subject to any usufruct in my spouse. *<List specific*

³⁵⁷ For discussion, see *supra* Part VII.F.

bequests. *If the recipient may be a forced heir, add "If feasible, this gift should come from the forced/free portion of my estate."*>

(e) I give, devise, and bequeath the rest, residue, and remainder . . .

Gift with Forced Heirship: Testator Unmarried and Without Descendants.

(a) If I have ancestors that survive me, then I give, devise, and bequeath the following portion of my property and estate of whatever nature and wheresoever situated as follows:

(1) I give the forced portion *<one-half>* of my property to my parents in equal shares, or to one parent if the other shall not survive me, but if neither parent survives me, then to my surviving ancestors of nearest degree equally except that should all such ancestors not be ancestors of one of my parents, then I direct the forced portion be divided equally between my mother's surviving ancestors and my father's surviving ancestors. *<Tailor this subparagraph based on surviving ancestors—the fewer surviving, the simpler this can be.>*

(2) *<If applicable, add:>* Notwithstanding subparagraph (b)(1), I give, devise, and bequeath the following specific property that I had received by gift, devise, or descent, or the proceeds of such property, or the property exchanged for such property, to my ancestor(s) that previously owned such property. I direct any gifts under this subparagraph be taken as far as possible from the forced portion of my estate. *<Identify all such property and appropriate ancestor(s) here.>*

(b) I give, devise, and bequeath the following specific property. *<List specific bequests. If the recipient may be a forced heir, add "If feasible, this gift should come from the forced/free portion of my estate.">*

(c) I give, devise, and bequeath the rest, residue, and remainder . . .

Gift with Forced Heirship: Testator Unmarried and Has Descendants.

(a) If I have descendants who survive me, then I give, devise, and bequeath the following portion of my property and estate of whatever nature and wheresoever situated as follows:

(1) One-half of the forced portion *<two-thirds>* of my property I give in equal shares to those of my children who survive me and to the issue who survive me of those of my children who shall not survive me, per stirpes.

(2) The other one-half of the forced portion *<two-thirds>* of my property I give as an extra portion to my descendants and in the manner described as follows: *<Here distribute the extra portion to any or all descendants as testator desires. Distribution can be as in subparagraph (a)(1) above, but this should still be a distinct subparagraph.>*

(b) If I do not have any descendants survive me, but I have ancestors that survive me, then I give, devise, and bequeath the following portion of my property and estate of whatever nature and wheresoever situated as follows:

(1) I give the forced portion *<one-half>* of my property to my parents in equal shares, or to one parent if the other shall not survive me, but if neither parent survives me, then to my surviving ancestors of nearest degree equally except that should all such ancestors not be ancestors of one of my parents, then I direct the forced portion be divided equally between my mother's surviving ancestors and my father's surviving ancestors. *<Tailor this subparagraph based on surviving ancestors—the fewer surviving, the simpler this can be.>*

(2) *<If applicable, add:>* Notwithstanding subparagraph (b)(1), I give, devise, and bequeath the following specific property that I had received by gift, devise, or descent, or the proceeds of such property, or the property exchanged for such property, to my ancestor(s) that previously owned such property. I direct any gifts under this subparagraph be taken as far as possible from the forced portion of my estate. *<Identify all such property and appropriate ancestor(s) here.>*

(c) I give, devise, and bequeath the following specific property. *<List specific bequests. If the recipient may be a forced heir, add "If feasible, this gift should come from the forced/free portion of my estate.">*

(d) I give, devise, and bequeath the rest, residue, and remainder . . .