Testamentary Freedom and its Restrictions in Civil and Common Law Jurisdictions

By

Dr Abdulrahman ALRADWAN

Cultural Counselor & Head of the Cultural Office of the State of Kuwait in Paris

Assistant Professor – Private Law Department Faculty of Law University of Kuwait

TESTAMENTARY FREEDOM AND ITS RESTRICTIONS IN CIVIL AND COMMON LAW JURISDICTIONS

1. Introduction

Freedom of testation - which may be defined as the right of the testator to make dispositions of his or her estate as he or she pleases - is considered by many as the most important individual right in the transfer of property *mortis causa*. It is, therefore, not surprising that the question of whether to expand or to limit it has often been at the center of debates and controversies.

This article will examine the scope of testamentary freedom and its restrictions in various jurisdictions (i.e Italy, Germany, France, the United Kingdom and the United States): The big divide lies, in any event, between the model adopted by civil law jurisdictions, which provide for a statutory forced share of the spouse, the dependents and the parents (the so-called *forced heirship* or *compulsory share*), and common law jurisdictions, which contemplate, in certain limited, cases, for provision to be made for the testator's dependents to the extent that the testator has not provided for the latter in his or her will.

Within the civil law systems, in turn, there are essentially two different paradigms: The German model and the French model.

The German model (which is followed in Austria, Finland and Hungary) is characterized by the fact that the so-called

forced heirs are not heirs in the strict sense of the word and do not, as such, participate in the division of the testator's estate. They are, in fact, only creditors of the heirship to the extent of half of what they would have received had there been an intestate succession, and have a right *in personam* against the beneficiaries of testamentary dispositions violating their right to the compulsory share.

The French model (followed in Italy) is, instead, extremely protective of forced heirs, who are considered to be heirs to all intents and purposes since they are actually entitled to a portion of the testator's estate and cannot, as such, be excluded from the testator's estate against their will.

2. Italy

The main limitation to freedom of testation in Italy is posed by the provisions on forced heirship contained in articles 565 to 586 of the Italian Civil Code, according to which a part of the deceased's estate shall be reserved to specifically identified persons, and namely the spouse, natural and legitimate children and legitimate ancestors (the so-called *forced heirs*)[1].

---

1 Forced heirship is a form of testate partible inheritance whereby the estate of a deceased (*de cujus*) is separated into:

1) An indefeasible portion, which is the so-called *forced estate* (in German *Pflichtteil*, in French *réserve*, in Italian *legittima*, in Spanish *legítima*), passing to the deceased's next-of-kin; and

2) A discretionary portion, or *free estate* (in German *frei verfügbare Quote*, in French *quotité disponible*, in Italian *quota disponibile*, in Spanish *tercio de libre disposición*), to be freely disposed of by will.

Forced heirship is generally a feature of civil law jurisdictions, which do not recognize total freedom of testation. Normally, the deceased's estate is in-gathered and wound up without discharging liabilities (which means accepting the estate's assets and liabilities). The forced estate is divided into shares, which include the share of issue (*legitime* or child's share) and the spouse's share. This provides a minimum protection that cannot be defeated by will.

The free estate, on the other hand, is at the discretion of a testator to be distributed by will on death to whomever he or she chooses. Takers in the forced estate are known as forced heirs (in German

The statutory-prescribed shares in favor of the above-identified persons vary, depending on whether the spouse is still living and on the number of children. The estate is determined as the sum of the value of the assets belonging to the deceased at the date of death and the gifts made by the latter during his or her lifetime (article 556 of the Italian Civil Code).

These forced heirs are, therefore, persons whom the testator or donor cannot exclude from the inheritance since they are entitled to fixed shares of the testator's estate that are reserved to them under the law.

The testator is not required, however, to make, in his or her will, testamentary dispositions in favor of the forced heirs provided for under Italian law. Even though the testator may dispose of his property as he deems fit *post-mortem*, the successors preserve, however, their right to succeed *contra*

Pflichtteilserben, *Noterben*, in French *réservataires*, in Italian= =*legittimari*, in Spanish *heredos forzosos*) The expression forced heirship comes from Louisianan legal language and is ultimately borrowed from the Spanish *sucesión forzosa*.

The institution began as a Germanic custom for intestate inheritance (which was the norm) under which all of a deceased's personalty was divided into thirds, and namely the widow's part, the children's part, and the deceased's part - the last of which consisted of clothes, weapons, farm animals and implements that was usually buried with the deceased. With the adoption of Christian funerary practices, it became common practice to gift away the dead's part, and after the revival of the will (and consequently of testation), the dead's part came to be freely disposable.

Women, who on marriage in effect joined another family were accorded very few property rights, whereas widows were universally disinherited (even though they were varyingly entitled to a dower and/or a *terce* - or *courtesy* in the case of widowers, that is to say one third of the heritable marital estate).

Eventually, these elements were all consolidated into the modern form of forced heirship most notably in Revolutionary France, which treated personalty and realty in the same way: Many European countries created or increased the spouse's share to be on par with the share of the issue (*legitime*).

testamentum and contest the gifts made by the testator when he was alive by means of a claw-back action[2].

As stated above, the portions of the testator's estate to be divided among the forced heirs differ depending on the number of such forced heirs and are calculated by uniting all of the assets which are part of the testator's goods, deducting the debts and, finally, calculating all the gifts made by the deceased when he or she was alive[3].

The law reserves, therefore, to certain subjects strictly specified by law the right to a share of the assets of the deceased (i.e. the portion of the estate reserved to the forced heirs), leaving the testator the power to regulate *post-mortem* his or her interests in relation to the remaining part of the testator's estate (the so-called discretionary portion) In this regard, it is important to point out that the forced heirship and the portion of which he can dispose are not abstract portions, but rather measures of value of the testator's estate[4].

---

2 Cfr., for an example of a claw-back action being applied in common= =law jurisdictions (which, as we shall, see, do not usually have provisions on forced heirship), Vogelius v Vogelius, which is an little known English case that exemplifies the utilization of claw-back provisions to the full extent to attack *inter vivos* transactions. The case involved a claim by the forced heirs of the deceased, an Argentine citizen, against other forced heirs, who were children from another marriage, with regards to a portion of the estate that had been settled in an English trust with them as beneficiaries while the testator was still alive. The judge held that the *inter vivos* gifts were subject to claw-back and, as such, would form part of the *réserve héréditaire* to be distributed equally amongst all the forced heirs.

3 Cfr. BARASSI L., *Le successioni per causa di morte*, *Le successioni per causa di morte*, 1947, Milan, page 194 et seq; BUCELLI A., *I legittimari*, 2002, Milan, page 345 et seq.; CALDERONE C. R., *Della successione legittima e dei legittimari*, in *Comm. teorico pratico cod. civ. diretto da V. DE MARTINO, Libro II: Delle successioni. Artt. 536 – 586*, 1976, Novara, page 255 et seq.; CAPOZZI G., *Successioni e donazioni*, 2004, Milan, page 301 et seq.; CATTANEO G., *La vocazione necessaria e la vocazione legittima*, *in Trattato di diritto privato diretto da* RESCIGNO P., Volume 5, *Successioni*, Volume I, 1982, Turin, page 448 et seq..

4 Cfr. ANDRINI M. C., *Legittimari*, in *Enc. giur. Treccani*, XVIII, 1990,

The succession of the forced heirs (called *successione necessaria* or necessary succession), finds its foundation in the protection of the family and the related need for solidarity among the closest relatives. This form of succession is a clear expression of Italian legislative policy, which considers reprehensible, according to the collective consciousness, the sacrifice of family interests. It should be noted that, even though the basis of intestate succession is also the protection of the family, the family unit is protected by the Italian intestacy provisions only indirectly and in a less strong fashion than is the case with forced heirship. This is confirmed by the fact that the interests underlying intestate succession may conflict with the forced heirship and the shares attributed to the intestate successors may, in fact, be reduced if they harm the rights of the forced heirs provided for under article 553 of the Italian Civil Code[5].

Rome, page 1 et seq.; AZZARITI G., *Le successioni e le donazioni*,

Diritti dei legittimari e loro tutela, 1975, Padua, page 199 et seq.; BARASSI L., cit., page 187 et seq.; BIANCA C. M., *Diritto civile, 2.= =La famiglia - Le successioni, Diritto civile, 2. La famiglia - Le successioni*, 1989, Milan, page 665 et seq.; CASULLI V. R. *Successioni (diritto civile): successione necessaria*, in *Noviss. Dig. it.*, XVIII, 1971, Turin, page 786 et seq.; CATTANEO G., cit. , page 435 et seq.; CAVALLUCCI F., VANNINI A., *La successione dei legittimari: aggiornato alla Legge n. 80/2005 e alla Legge n. 55/2006 sul "Patto di famiglia"*, 2006, Turin, page 1 et seq.; DELLE MONACHE S., *Successione necessaria e sistema di tutela del legittimario*, 2008, Milan, page 1 et seq.; MENGONI L., *Successioni per causa di morte. Parte speciale. Successione necessaria*, in *Tratt. dir. civ. e comm. diretto da CICU A. e MESSINEO F. e continuato da MENGONI L., Volume XLIII, Volume 2*, 2000, Milan, page 1 et seq.; NAPPA S., *La successione necessaria*, 1999, Padua, page 1 et seq.; PALAZZO A.: *Successione, IV) Successione necessaria*, in *Enc. giur. Treccani*, XXX, 1993, Rome, page 1 et seq.; PINO A., *La tutela del legittimario*, 1954, Padua, page 21 et seq.; PIRAS S., *La successione per causa di morte. Parte generale. La successione necessaria*, in *Tratt. dir. civ. diretto da GROSSO G. and F. SANTORO – PASSARELLI*, 1965, Milan, page 215 et seq.; TAMBURRINO G., *Successione, IV) Successione necessaria, b) Diritto privato*, in *Enc. dir*., XLIII, 1990, Milan, page 1348 et seq..

5 Cfr. AZZARITI G., *Diritti dei legittimari e loro tutela*, 1975, Padua, page 55 et seq.; CALDERONE C. R., cit. page 26 et seq.

Under Italian law, forced heirs are not necessarily heirs: The discipline of forced heirship is, in fact, the result of a compromise between two opposing conceptions: A conception that gives individuals the power to dispose of their assets without limits not only *mortis causa*, but also by way of donation *inter vivos*, and a conception that, conversely, excludes such power, providing that the assets are intended to be used in cases strictly specified for under the law. The Italian legislator, dictating the rules governing the succession of forced heirs, has adopted an intermediate solution, recognizing the freedom to testate and affixing specific limits in order to protect the family of the deceased.

The rules governing forced heirship are, therefore, rules of public policy, which are aimed at protecting the general interest and bind the testator.

One can distinguish, in principle, two forms of inviolability of forced heirship: In a qualitative sense and in a quantitative sense. The first can be understood as the necessity that assets must be of the same nature as those contained in the deceased's estate[6]. Under Italian law, the principle of inviolability of the forced heirship must be understood, instead, in a quantitative sense: The forced heirs can obtain a value equal to the share of the testator's estate to which they are entitled and the testator is free, in the formation of such share, to choose the assets that he or she intends to allocate[7].

Claw-back actions, which allow the heir to recover goods from third party purchasers and which cannot be waived whilst the testator is living, provide a formidable obstacle, for ten years (which is the term provided for under the statute of limitations) after the acceptance of the heirship by the heir, to the circulation of the assets of which the testator disposes[8].

---

6 Cfr. BUCELLI A., *I legittimari,* in *Il Diritto Privato Oggi*, 2002, Milan, page 267 et seq..

7 AZZARITI G., *Le successioni e le donazioni*, cit., page 241 et seq.

8 Cfr. Italian Supreme Court, United Sections, judgment no. 20644 dated October 25, 2004.

The Italian Civil Code also contains a prohibition on agreements as to succession, expressing it more emphatically than under the French Civil Code[9].

In the light of the fact that the rules on forced heirship preclude the possibility of the testator to exclude a forced heir from the heirship, we need to ask what is the fate of a testamentary clause which expressly disinherits a forced heir[10].

Although it is certainly unacceptable in the current legal system to disinherit a forced heir (which will give rise to a claw-back action), it is possible, however, to exclude the latter from the part of the deceased's estate which does not belong to the compulsory share, by making a bequest in lieu of such share (whereby the testator replaces the compulsory share with a bequest that attributes given assets pursuant to article 551 of the Italian Civil Code[11], in respect of which the forced heir can decide whether to keep the bequest or refuse it[12] and bring,

---

9 Cfr. Articles 458, 557 paragraph 2, 561, 563, 589, 590, 653, 1412, 1929, 2355 bis and 2469 of the Italian Civil Code; ZOPPINI A., *Contributo allo studio delle disposizioni testamentarie "in forma indiretta*", in *Studi in onore di P. Rescigno, Diritto privato,* Milan, 1998, page 919 et seq.; M. IEVA, *I fenomeni parasuccessori*, in *Riv. Not.,* 1988, Rome, I, 1139; LENZI R., *Il problema dei patti successori tra diritto vigente e prospettive di riforma*, in *Riv. Not.,* 1988, Rome, I, 1121; ROPPO V., *Per una riforma del divieto dei patti successori*, in *Riv. Dir. Priv*., 1997, Bari, 5; DE GIORGI M. V., *I patti sulle successioni future*, Naples, 1976.

10 Cfr. BERGAMO E., *Brevi cenni su un'ipotesi di diseredazione anomala implicita*, in *Giur. it*., 2000, Milan, 1801 et seq.; COMPORTI M., *Riflessioni in tema di autonomia testamentaria, tutela dei legittimari, indegnità a succedere e diseredazione*, in Familia, 2003, Milan, page 27 et seq.; QUARGNOLO M., *Il problema della diseredazione tra autonomia testamentaria e tutela del legittimario*, in *Familia*, 2004, Milan, I, page 299 et seq.

11 Cfr. BIANCA C. M., cit., page 739.

12 Cfr., on this point, Court of Montepulciano, judgment handed down on January 13, 1960, in *Giur. it*., 1961, I, 2, c. 586 et seq.; Italian Supreme Court judgment no. 1040 dated April 3, 1954,, in *Foro it*., 1954, I, c. 754 et seq. ; TRABUCCHI A., *Forma necessaria per la rinunzia al legato immobiliare e natura della rinunzia al legato sostitutivo*, in *Giur. it*., 1954, Milan, I, 1, c. 911 et seq..

instead, a claw back action in order to obtain his or her compulsory share[13]).

Authoritative Italian legal scholars have remarked that the system of forced heirship appears *now superseded by history* on account of the fact that the reasons underlying it have comes amiss[14].

The family model provided for under articles 536 and ff. of the Italian Civil Code has, in fact, changed and its function is now rather one in which affection and assistance are given, as testified by the fact that children born out of wedlock are now considered equal to legitimate children and the surviving spouse has assumed an ever more important role[15].

In today's society, in which the formation of wealth is more and more frequently the result of individual initiative rather than a result of transmission of wealth from previous generations, the compression of testamentary freedom seems to be excessive to many: We need to ask whether it is appropriate that the legislature, in the future, should sacrifice one of the

---

13 Cfr. Court of Trieste, August 30, 2004, in *Familia*, 2005, page 1193 et seq. and Court of Appeal of Brescia, March 17, 1955, in *Foro pad*., 1955, I, c. 1057 et seq.. The acceptance of a bequest in replacement of a compulsory share does not make donees become forced heirs. The donees becomes an heir only if they waive the bequest and request the compulsory share (cfr. Italian Supreme Court judgment no. 1147 dated May 10, 1963, in *Foro pad*., 1963, I, c. 775 et seq..

14 Cfr. AMADIO G., *La successione necessaria tra proposte di abrogazione e istanze di riforma*, in *Riv. notar*., 2007, Rome, page 803. Cfr. also BONILINI G., *Sulla possibile riforma della successione necessaria*, in *Tratt. dir. succ. e donaz. diretto da G. BONILINI, Volume III: la successione legittima*, Milan, 2009, page 727 et seq.; S. DELLE MONACHE, *Abolizione della successione necessaria?*, in *Riv. notar*., 2007, Rome, page 815 et seq.; F. GAZZONI, *Competitività e dannosità della successione necessaria (a proposito dei novellati art. 561 e 563 c.c.)*, in *Giust. civ*., 2006, II, Milan, page 3 et seq.

15 Cfr. DELLE MONACHE, *Abolizione della successione necessaria?*, cit., page 820.

conflicting interests in its entirety or, rather, should try to reconcile them[16].

As stated above, forced heirship offers stability but hinders the circulation of wealth. In this regard, it should be noted that the exercise of a victorious claw back action renders ineffective the dispositions which are detrimental to the forced heir. This protection, which cannot be waived in advance (article 458 and 557, paragraph 2 of the Italian Civil Code), makes - as stated above - uncertain, for a long period of time, the devolution of the testator's assets, hindering the circulation of the goods thus disposed of.

As can be seen, there are many reasons that suggest the rethinking of the entire discipline of forced heirship. The principle of inviolability of the compulsory share often exacerbates conflicts within the family. The need to ensure equality of treatment among children is likely to conflict with the desire of parents to benefit only those children who are unable to meet their own needs.

It must also be pointed out that, even though a major overhaul of the entire system of succession *mortis causa* may, therefore, be desirable, an outright repeal of the rules on heirs would probably be found to be unconstitutional: Even though the Italian Constitution does not expressly speak of forced heirship, the need to put restrictions on the freedom to testate is clear, in fact, from the reference in article 42, paragraph 4 of the Italian Constitution to the *limits* that need to be put on testamentary succession provided for under the law.

3. Germany

The principle of testamentary freedom - according to which the testator may make dispositions as he pleases in order to replace or alter the legal or statutory succession - is guaranteed by the German constitution (article 14(1) of the German Basic Law).

---

[16] Cfr. L. BARASSI, *Le successioni per causa di morte*, cit., page 190, as well as G. AMADIO, *La successione necessaria tra proposte di abrogazione e istanze di riforma*.

The testator is particularly not forced to treat the heirs equally[17]. The freedom to testate is, in fact, afforded special

[17] Closely connected with the principle of universal succession is the concept of *ipso iure* acquisition. Title to the testator's property passes automatically to the heirs and the heirs become owners at the moment of the testator's death . No further act (for example an agreement) on behalf of the heirs is needed to effect the devolution of the estate. The transfer takes place *ipso iure* (regardless of any knowledge or wishes of the heirs). Consequently, no further acts of transfer are needed (i.e. neither acceptance by the heir nor involvement of any court is required). The automatic transfer, finally, does not oblige to have an administrator or executor involved. The principle of universal succession of the heirs into the entire estate of the testator requires practitioners to know exactly who is an heir and who is merely a legatee. The beneficiary of a specific bequest (legatee) does not automatically become an heir but only acquires a personal claim against the estate (CC § 2174). To fulfil this obligation, the heir must transfer title according to the property law rules.

The big divide, however, lies between the transfer adopted by civil and common law countries: In the latter case, the estate does not pass directly and immediately to the heirs but is transferred through an administrator or executor.

The executor (or administrator) is responsible for the correct administration of the estate as well as the winding up of all outstanding business of the deceased. He enforces, moreover, all outstanding claims and pays all outstanding liabilities and only if after this operation has been completed and the estate has become solvent, do the rules of succession apply.

Common law lawyers praise this system because the heir must not elect between either accepting the benefits of the estate unconditionally (unlimited liability), or demanding an inventory to be drawn up first which would then limit the liability of the heirs. The common law system always provides for a limited liability for the debts of the deceased. This system - with the compulsory involvement of an executor - applies also in Scotland.

Not entirely solved is the question of when property is passed to the heirs: Whereas under the Continental model the heirs become owners of the estate at the moment of death, the common law solution is more complicated and many authors writing on succession law do not deal with this question altogether: What is clear is that property does not pass at the moment of death to the heirs.

If, under English law, the testator has appointed an executor, property vests in the executor. A subsequent grant of probate enables the executor to prove that the vesting has occurred.

Where the testator has not appointed an executor or where a person dies intestate, the property vests in the administrator of the estate. However,=

protection by § 2302 of the *Bürgerliches Gesetzbuch*, which provides that the testator cannot validly obligate himself to make or not to make a disposition.

The principle is limited, in particular, by the statutory forced heirship, since children, parents and the spouse of the testator are in any case entitled to a compulsory share (*Pflichtteil*): If these relatives are excluded from the estate under a testamentary disposition, they are able to demand their compulsory share/ portion[18].

=before the administrator has not been appointed to his office, property does not vest.

There is still controversy as to what happens to the property after the death and before the appointment. To solve this problem, the courts have adopted a doctrine of relation back for the limited purpose of protecting the deceased's estate from wrongful injury in the interval between his death and the appointment of the administrator. It has to be noticed that this relation back applies only in respect of protecting the deceased's estate from wrongful injury during this interval.

The question of who owns the estate after the death of the deceased is thus not entirely clear.

As will be seen below, under Scots law, the executor acquires a real right and the beneficiary acquires a personal right against the executor The heirs have no real right in the estate as they are only creditors of the net result of the succession, only having a claim against the executor to pay out their share.

However, property of the estate cannot pass immediately to the executor because he has to be appointed first. What happens to the property of the deceased at the time of death is, therefore, still an unsolved question.

The German model would seem to be dogmatically more mature than the solution of the English system. On the other hand, the compulsory involvement of an executor has some advantages as well: A solution may be to combine the two models by adopting a system under which the assets are transferred immediately and which requires the compulsory involvement of an executor. What is, in any case. unthinkable for German law is the adoption of a system that does not provide clarity on the question of ownership

[18] This minimum share for close relatives is, as stated above, guaranteed by the German constitution (article 14(1) Basic Law).

In as recently as 2005, the German Constitutional Court clearly stated, in fact, that the concept of *Pflichtteil* - as far as children are concerned - is constitutionally protected and cannot be surrendered[19].

This judgment has been reached despite strong demands among the German legal scholars to restrict the concept of *Pflichtteil* and to enhance the testator's freedom.

The German Constitutional Court has not followed this opinion and has now clearly ruled that, under German law, the freedom of the testator does not prevail over the principle of succession by next of kin. This judgment has already been taken into account by German legislators, who have refrained from reforming the provisions on *Pflichtteil*, despite strong demands to at least reduce the number of persons entitled to a compulsory share[20].

Under German law, those entitled to a compulsory portion are not heirs and do not become owners of assets or the estate, but only have a claim against the heirs based on the law of obligations[21]: The compulsory portion consists of one half of the amount the disinherited relatives would have received on intestacy. The rules on intestate succession form thus the basis on which the compulsory share will be calculated: For example, a spouse who would, according to the rules of intestate succession, inherit one half of the estate (if there are no children) can claim one fourth of the estate as the compulsory share.

As stated above, although criticized by German legal professionals, the concept of forced heirship has been confirmed by the German Constitutional Court[22].

---

19 Bundesverfassungsgericht (Federal Constitutional Court), 19 April 2005 – 1 BvR 1644/00 and 1 BvR 188/0, *BVerfGE* 112, 332, 349.

20 LAGENFELD G., *Das Gesetz zur Änderung des Erb- und Familienrechts*, 2009 *Neue Juristische Wochenschrift* (NJW) 3121.

21 BGB § 2317.

22 A somewhat similar development can be observed in the Netherlands. In the process of drafting the new inheritance provisions, the concept of forced heirship had been controversially discussed. =

4. France

The characteristic features of the inheritance law enshrined in the French Code civil are compulsory shares (articles 913 et seq.), assisted by claw-back actions with a right of sequel, and a prohibition on agreements as to succession (articles 722 , 1130, paragraph two, 791 , 943, 1389 , 1600, 1837)[23].

The French law has, moreover, adopted the model of the immediate transmission of the testator's estate to the heirs through the *saisine*, which involves the investiture of the nearest heirs, without the mediation of any administrative or judicial officer[24].

The vagueness of the French provisions of law has legitimized an extended application by case law[25] of the prohibition of agreements as to succession, which has been construed as a principle of *ordre public* (public policy)[26].

= It has been argued, in particular that there is no convincing reason why the testator should not be legally allowed to disinherit persons. However, the concept of forced heirship has not been abolished altogether, but the older Romanistic model has been modified. Unlike under the old law, the disinherited relatives have no property entitlement to the assets of the estate. The disinherited child only has a personal right against the heirs for half of the amount the child would have received on intestacy. Thus, the Dutch claim for the legitimate portion resembles the German concept of *Pflichtteil*. However, the Dutch legislator has restricted the number of persons entitled to a forced share to the descendants of the deceased.

[23] MENGONI L., *Successioni per causa di morte. Parte speciale. Successione necessaria*, IV edition., in *Tratt. Cicu-Messineo* 2000, , Milan, page 36.

[24] VIALLETON H., *La place de la saiosine dans le systéme devolutif français*, in *Mélanges Roubier*, t. II, 1961, page 283.

[25] PONSARD A., *La loi du 3 juillet 1971 sur le rapport à succession, la réduction pour atteinte à la réserve et les partages d'ascendants*, in *Recueil Dalloz*, 1973, Paris, *Chron*., page 37 et seq...

[26] French Supreme Court., January 11, 1933, in *Recueil périodique et critique mensuel Dalloz*, 1933, Paris, 1, 10.

Law 2001-1135 of 3 December 2001 revised the legal status of spouses and natural children by changing the rule (perceived as unfair) that attributed to the surviving spouse, where there were two or more children, only a right of usufruct on a quarter of the testator's estate and assigning a portion of the testator's estate to the spouse, who can opt for a right of usufruct (article 757) or an income from the estate (article 766)[27], as well as being entitled to free use of the property used as the matrimonial home (which shall be subtracted from the latter's compulsory share of the estate in the absence of a contrary testamentary disposition)[28].

Any gift received by the surviving spouse is also imputed to his or her share (article 758 of the French Civil Code)[29].

Law no. 728 dated June 23, 2006 has, with a view to reinforcing the testator's freedom to dispose of his or her estate, introduced the possibility of waiving, before the testator's death, the claw-back action[30], which has been hailed as an epoch-making reform, with the result that the provision on such action is no longer to be considered *d'ordre public*[31].

This reform, which has adopted a solution which is the opposite of that favored by Italian case law, excludes from the calculation of the forced heirship the forced heirs who have

---

27 BELLIVER F., ROCHFELD J., *Droit successoral . Conjoint survivant. Enfant adulterin. Loi 2001-1135 du 3 décembre 2001*, in Rev.trim.dr. civ., 2002, Paris, Chron., 156 et seq.

28 CATALA P., *Proposition de loi relative aux droits du conjoint survivant*, in *Dalloz*, 2001, Paris, *Actual*, 862.

29 GUERCHOUN F., PIEDELIEVRE S., *La réforme des successions et des libéralités par la loi du 23 juin 2006*, in *Gaz. Pal*. 23-24.8.2006, n. 235, 2006, Paris, page 2.

30 MALAURIE P., *Préface*, in FORGERARD M.C., CRONE R., GELOT B., *Lè nouveaun droit des successions et des libéralités. Loi du 23 juin 2006. Commentaire & formules*, Defrenois, 2007, Paris; Id., *Les successions. Les libéralités*, Defrenois, 2006. 97; Id., *La réforme des successions et des libéralités*, in *Defrénois*, Paris, 2006, page1319 et seq.

31 GUERCHOUN F., PIEDELIEVRE S., cit. page 2..

waived their compulsory shares (article 913, second paragraph)[32].

The French legislature, continuing in the trend of widening the margins of private autonomy, has, after having intervened on the question of agreements as to succession, also abolished, in an attempt to find a point of balance between the equality among heirs and the freedom of testation, the compulsory share previously attributed to ascendants[33].

5. The United Kingdom

In the light of the different traditions and legal regimes operating in the two main jurisdiction of the United Kingdom, setting out an overview of their particular rules is essential in trying to make sense of recent and proposed reforms to them.

Describing the background rules will not only enable emerging trends to be identified more clearly, but will also point to whether and how far the two systems may achieve their respective reform objectives within their own, particular traditions and whether, as a matter of wider patterns of development across and between jurisdictions, they may become more closely linked.

The principle of testamentary freedom remains, as a matter of fact the fundamental starting point in the UK jurisdictions.

Testamentary freedom as a concept is itself of fairly recent origin. For example, testamentary dispositions of land were (in theory) impossible in Scotland prior to 1868 and, prior to the Succession (Scotland) Act 1964, surviving spouses (who were not related by blood), could never be classified as an heir to the deceased but only had fixed rights to *terce* or *courtesy*, payable on either death or divorce.

---

[32] French Supreme Court judgment no. 13524 dated June 12, 2006.

[33] Cfr. GRIMALDI M., *Succession et contrat*, in FENOUILLET D., de VAREILLES - SOMMIERES, *La contractualisation de la famille*, Economica, Paris, 2001, page 197.

Similarly in England, testamentary freedom was limited by the rights of *dower* and *courtesy* until abolished by the Administration of Estates Act 1925.[34]

In both England and Scotland, the widespread existence of entailed land (prior to the prohibition on the creation of new entails) meant that such land could not be the subject of a testamentary gift[35].

Further, the use of ante-nuptial contracts prior to the Married Women's Property Acts meant that a testator's freedom to bequeath property to whomever he pleased was limited from the start of the marriage.

In Scotland, testamentary freedom is subjected to the (in reality somewhat limited) right of spouses, civil partners and issue to claim *legal rights* from the movable estate. Scotland is also different from England in that cohabitants have no entitlement in testate succession at all if little or no provision has been made for them.

These differences between the two main UK jurisdictions reflect the fundamental differences between the common law and civil law traditions, with the former preferring a flexible and the latter a more certain approach.

At the same time, the value of a claim made by a spouse or civil partner for a share of the deceased's estate (whether testate or intestate) under English statutory law is potentially limitless, whereas fixed (i.e. *legal*) rights and the absence of a ground for any such legal challenge in testate succession in

---

[34] *Terce* was the widow's right to receive a life rent of one third of the immovable property owned by her husband at his death; *courtesy* was the widower's right to receive a life rent of the whole of the immovable property owned by his wife at her death.

[35] Fee tail or entail was a restriction on the sale or inheritance of an estate in real property, which prevented the property from being sold, devised by will, or otherwise alienated, and instead caused it to pass automatically by operation of law to the property owner's heirs at law upon his or her death.

Scots law means that, although certainty is achieved, it is achieved within a very narrow range of distributive possibilities.

5.1. England

The English law of succession adheres, as stated above, to the principle of absolute freedom of testation since common law systems have been more reluctant in granting compulsory shares contrary to the will of the testator.

A statutory fixed share does not exist, therefore, under the English common law. The system largely determined by the courts can be described as a *discretionary system*.

However, courts may award a so-called *family provision* to those persons whom the deceased was bound legally or morally to support during his lifetime[36].

As a result thereof, even though fixed shares are not available as a matter of right to spouses, civil partners or issue where the deceased has made little or no provision for them by will, the courts have a discretionary power under the Inheritance (Provision for Family and Dependents) Act 1975 to alter the terms of a will where no provision or inadequate provision has been made for certain categories of person, which are not confined to spouses, civil partners or children: A range of persons may apply to the court for a share of the estate.

Those entitled to apply to the court for a share of the estate under he Inheritance (Provisions for Family and Dependents) Act 1975[37] are:

(a) A surviving spouse or civil partner;

(b) A former spouse who has not remarried;

(c) A child of the deceased;

---

[36] See in detail MARTYN J.R., *The modern law of family provision,* 2nd ed., London (1978).

[37] As amended by the Law Reform (Succession) Act 1995 and the Civil Partnership Act 2005.

(d) Any person who was treated by the deceased as a child of the family in relation to a marriage;

(e) Any other person who was maintained wholly or partly by the deceased prior to his or her death;

(f) Any person living in the same household as the deceased as husband or wife or as civil partner during the whole of the two year period preceding the date on which the deceased died, where the deceased died on or after 1 January 1996.

There is a very substantial body of case law relating to applications made under each category of applicants and although general principles have developed over time, applications must be decided on a case by case basis.

In practice, however, the Act gives rise to relatively few claims, partly because of the expense of litigation but possibly because persons who would be entitled to apply have in fact been provided for adequately by the testator.[38]

Section 2 of the Law Reform (Succession) Act 1995 amended the Inheritance (Provision for Family and Dependents) Act 1975 and inserted a new s.1(1)(ba) into the 1975 Act by providing that in addition to the persons already entitled, s.1(1) would be extended to give *any person living in the same household as the deceased as husband or wife or civil partner during the whole of the two year period preceding the date on which the deceased died*[39].

In considering an application by a cohabitant, it further provides that the court shall have regard in making an order to:

---

[38] There were 73 claims in 2002 and 83 claims in 2003 relating to testate succession, but no figures are available for claims made in relation to intestacy (Judicial Statistics 2002, and 2003).

[39] Section 2 of the Law Reform (Succession) Act 1995 Act inserted a new s.3A into the Inheritance (Provision for Family and Dependents) Act 1975.

(a) The age of the applicant and the length of the period during which he or she lived as husband or wife of the deceased and in the same household as the deceased; and

(b) The contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family[40].

Prior to the 1995 Act, a cohabitant might have been able to establish a claim under s.1(1)(e) based on financial dependence on the deceased, but the effect of the 1995 reform has been to emphasize that a claim to a share of the deceased's estate is to be based on the nature of the relationship with the deceased. Not only is this relationship not to be placed within the same category as any other dependents, but is not necessarily based on financial factors at all. The main difference from marriage (or civil partnership) is that the partnership basis of the relationship must be demonstrated rather than, as in marriage, be presumed.

It is not necessary that the relationship be sexual but that it resembles a marital relationship more generally [41]. Given that the 1975 Act applies not only in testate succession but may also be the basis of an action seeking to alter the rules of intestate succession set out in the Administration of Estates Act 1925, this reform can be seen as broadly equalizing the positions of the married and the non-married in relation to succession. These provisions have been extended to same-sex cohabitants by the Civil Partnership Act 2004.[42]

Although there have been other, more minor, changes to the law of succession in England, by far the most significant have, in fact, been in relation to partners in intimate domestic relationships. These reforms are the direct result of a very clear shift in policy. The general trend has been towards enlarging the

---

40 The same provision was added in relation to same-sex cohabitants under the Civil Partnership Act 2004.

41 Re Watson [1999] 1 FLR 878.

42 Schedule 4 Part 2 s.15(5).

rights or claims of adult partners of the deceased and reducing those of children (the rationale being that adult partners require increased protection from disinheritance while the welfare of children is primarily the responsibility of their surviving parent or carer).

This is, in general, justified on the basis that this is how most adults would wish their estates to be distributed given changing family patterns and changing expectations and ideas of entitlement following termination of the relationship.

Extending rights in succession to a wider range of partners in marital-type relationships has, in fact, had two main consequences: First, it has reduced the scope of the principle of testamentary freedom and secondly, it has shifted the balance of entitlement away from children and towards those of intimate relationships.

This has taken place not only by widening the range of entitled or potentially entitled persons but also by increasing the size or value of the share to which they are entitled.

However, it is not only or even primarily the case that by widening the range of potential claimants to an estate to same-sex and cohabiting relationships that the principle of testamentary freedom is eroded.

Current work on law reform in England can be seen as being aimed at achieving the second means by which the further extension of the rights of surviving partners is to be achieved: that is, by increasing the value of the claims that may be made by an enlarged category of entitled or potentially entitled persons.

In England, it seems likely, therefore, that, after the framework of entitlement, has been established by previous reforms, further reform will be aimed towards increasing the value of claims.

It is clear that the main developmental trend of the law of succession within the UK, in terms of both enacted legislation and current law reform projects, follows what Sjef van Erp,

citing Puelinckx-Coene,[43] refers to in his General Report on New Developments in Succession Law[44] as a shift from the *logic of blood* to the *logic of affection*.

Leaving aside, however, the question of whether blood and affection are mutually exclusive categories of connectedness, it cannot be said that the shift has taken place in a linear manner nor been without tensions internal to the legal system.

5.2. Scotland

In contrast to the discretionary system of the English common law, the Scots system is based on entitlements to fixed portions and thus resembles the civil law model of forced heirship.

Scottish *legal rights* may be claimed by the descendants and the surviving spouse. However, these legal rights can only be claimed from the net movable estate (i.e., after payment of debts and satisfaction of any other *prior rights*, which are the assets payable to the spouse in case of intestacy).

At common law (that is, the law as developed by custom and by judicial decisions rather than common law in the Anglo-American sense), the deceased has an absolute right to dispose

---

[43] Cfr. M PUELINCKX-COENE, *General Report, 6th European Conference on Family Law*.

Puelinckx-Coene points to the contraction of family ties, resulting in enhanced solidarity between spouses (or other partners) and thus to the demise of an adult partner being treated as a *stranger*. Equally, however, the shift in the legal framework could be thought of as emphasizing the ideal of personal choice (or presumed choice): One cannot choose one's children but one can choose whether or not to live with one's partner until death and one ought to be able to choose in whom to invest and whom to reward. To a greater or lesser degree, depending on the jurisdiction, however, one can no longer choose to conduct that relationship outside the framework of legal recognition altogether as long as it involves cohabitation (however defined).

[44] S VAN ERP, *General Report New Developments in Succession Law, XVIIth Congress of the International Academy of Comparative Law*, 2006.

of only one third to one half of his or her movable estate[45]. Legal rights (which may be exercised in relation to the movable estate only) are available to spouses or civil partners and to issue (including by way of representation) in both testate and intestate succession.

Where the deceased is survived by both a spouse or civil partner and issue, the movable estate is divided into three parts, with the spouse or civil partner receiving one third, the issue one third and the remaining third falling to the free estate. Where he or she is survived only by a spouse or civil partner or only by issue, it is divided into two parts with the spouse or civil partner or the children receiving half. The remaining half falls to the free estate.

The free estate is available to fulfil the purposes of the will. Where the deceased died testate, legal rights may not be claimed in addition to a legacy and the claimant must elect whether to take his or her testamentary provision or to discharge the claim to legal rights.

Neither statute nor judicial discretion permits the courts to alter the terms of a will where either no provision or little provision has been made for a surviving spouse or civil partner or children and *legal rights* are all that may be claimed in these circumstances: The only ground on which a will may be challenged is that it is invalid, either formally (i.e. there is a fatal defect in the execution of the deed) or essentially (i.e. the provisions of the will were not made freely by the deceased because of, for example, a weakness of mind).

The consequence of any such invalidity will be that the will is reduced (wholly or partially) and the estate falls into

[45] This common law right was extended to civil partners by the Civil Partnership Act 2004 (cfr. s.131). The Civil Partnership Act 2004 applies to the UK as a whole and came into force on 5 December 2005. It sets out the legal rules for the constitution and dissolution of civil partnerships but the greater part of the Act functions as an almost comprehensive series of amendments and repeals to existing legislation, in order to confer legal recognition of civil partnerships through creating an identity with the position of spouses.

intestacy (total or partial): It will then be distributed according to the rules of intestacy set out in the Succession (Scotland) Act 1964 (see below).

Legal rights provide a surviving spouse and any children of the deceased, irrespective of legitimacy, with an automatic claim on part of the deceased's movable estate and can be likened to a narrower kind of forced heirship as seen in many civil law systems. Unlike many common law jurisdictions (including England), however, an application to the court need not be made for these rights to be available[46].

Legal rights, therefore, operate as a limit to testamentary freedom in that the testator is, in actual fact, only free to make provision over the testator's part of the movable estate comprising the remaining third (or half), of movables[47].

It should be noted, however, that as a limit to testamentary freedom, legal rights are not insurmountable. It is possible, in fact, for a person to manage his estate in such a way as to ensure that legal rights cannot be claimed from it after his death. Indeed, it has been noted that, as regards the legal rights of children, *(…) legitim is a right in succession which a father may lawfully and effectually defeat if he takes the right way of doing so*[48].

Despite the legislative changes to the law since this statement was made in 1916, this is still the case and means that a claim to legal rights can be prevented. Such is the situation due to the fact that legal rights are, by their nature, going to be

---

[46] MACDONALD D., *Succession* (3rd edn, W Green 2001). Legal rights cover two thirds of the deceased's movable estate, provided he is survived by spouse and issue, and one half if only survived by one of these classes of people. While the exact origin of legal rights is unclear, they cannot be defeated by a will (cfr. GARDNER D.J., *The Origin and Nature of Legal Rights of Spouses and Children in the Scottish Law of Succession*, 1928).

[47] Succession (Scotland) Act 1964 (n 42) and Civil Partnership Act 2004 (n 42).

[48] Hutton's Trustees v Hutton's Trustees 1916 SC 860 (IH) 881 (Lord Skerrington).

limited since they apply only to movables. In the main, the most valuable property a person may own will be immovable property. Moreover, legal rights only apply to a proportion of the movables, meaning that their value may be very small. This value can, in theory, be reduced to nothing through the medium of *inter vivos* transactions disposing of movable property (if there is no movable estate on death, then legal rights cannot be claimed)[49].

Similarly, the movable estate from which legal rights fall due to be paid may be reduced by debt accumulated in the testator's lifetime. This is because legal rights are paid after ordinary debts but before other rights in succession. Despite this, it would be a very unusual situation in which a deceased left no movable property at all. Therefore, legal rights operate, if only to a very limited extent in some cases, as a restriction on testamentary freedom.

As stated above, there are three situations in which descendants and spouses may claim *legal rights*:

(1) Where the testator has left nothing to a surviving spouse/civil partner/children;

(2) Where the value of the legacy is less that the value of the legal rights to which they are entitled; and

(3) Where a person has died intestate and movable estate remains after the payment of prior rights.

The last major reform of the law of succession was the Succession (Scotland) Act 1964, the most important provisions of which were the assimilation of movable and immovable property (with both vesting in the executor), the abolition of primogeniture, the introduction of fixed (and more extensive) rights for surviving spouses in intestacy and the inclusion of surviving spouses in the ranking of persons entitled to succeed to an intestate estate.

[49] Agnew v Agnew (1775) M 8210; Hogg v Lashely (1772) 2 ER 1278.

In 1990, the Scottish Law Commission produced its *Report on Succession*[50], together with a draft Succession Bill.

One of its purposes was to make technical alterations to the rules of testate succession, but its main purpose was to substitute for legal rights a new right of legal shares, available in testate succession only.

Both proposals for reform were aimed at further shifting the balance between the rights of surviving spouses and the rights of issue and other relatives towards those of spouses. The 1990 recommendations relating to the rights of a surviving spouse can be summarized as follows.

1. Surviving spouses and children should remain entitled to fixed shares from the estate of the deceased rather having to rely on discretionary provisions;
2. Movable and immovable property should be fully assimilated in order that legal shares could be demanded from the whole net estate of the deceased
3. The surviving spouse's legal share should be 30% of the first £200,000 of the net estate and 10% of any excess over £200,000[51];
4. Where there is no surviving spouse, the issue's legal share should be 30% of the first £200,000 of the net estate and 10% of any excess over £200,000;
5. Where there is a surviving spouse and issue, the issue's legal share should be 15% of the first £200,000 of the net estate and 5% of any excess over £200,000, but the estate subject to the issue's legal share should not include the first £100,000 of any estate to the fee (or absolute right) to which the surviving spouse succeeds (otherwise than by virtue of a claim for legal share)

---

50 Scot Law Com No 124 1990.

51 These figures would be increased from time to time by the Secretary of State.

Unlike the current position, where legal rights may be claimed from both testate and intestate estates (so that a surviving spouse is entitled to claim both prior rights and legal rights), the Scottish Law Commission proposals would require a claimant for legal shares to forfeit all other rights in succession, including rights on intestacy.

In effect, the proposed reforms would have introduced a greater similarity with the law in England.

In relation to testate succession, a greater part of the estate available to a surviving spouse would be *ringfenced*, albeit in the form of fixed rather than discretionary provision.

The overall effect would have been to give the surviving spouse a claim to a greater proportion, if not all of, an estate, whether testate or intestate.

However, no legislative program followed on the draft Bill and the recommendations of the Scottish Law Commission were never enacted. This was partly for lack of legislative time but mainly because of opposition from farmers and landowners, whose objections were based on the fact that assimilating movable and immovable property in order to pay increased legal shares to surviving spouses would break up landholdings into unviable economic units and prevent a single successor assuming management of the land. In addition, it seems likely that its recommendations, particularly the shift in preference from children to spouses, were too controversial to be enacted with public support at that time.

Following devolution and the creation of the Scottish Parliament in 1999, interest in and momentum towards its reform was revived and the Scottish Law Commission included the law of succession within its Seventh Program of Law Reform that commenced in January 2005.

Its justification for returning to law of succession is that *the law no longer reflects current social attitudes nor does it cater adequately for the range of family relationships that are common today*. More specifically, it lists these social changes as including:

i) Increased incidence of cohabitation (either in same-sex or opposite-sex relationships);

ii) Increased longevity, with the consequence that children are older when their parents die;

iii) Increased distribution of wealth and particularly increased ownership of immovable property;

iv) Increased incidence of divorce and of step-families.

Although the position of spouses and civil partners in Scotland remains radically uneven today, it seems likely that their positions may be strengthened considerably, in testate and intestate succession respectively, if current proposals by Scottish Law Commission and Department for Constitutional Affairs are enacted[52].

If so, it looks like a case of *back to the future*, with provision on termination of a relationship by death becoming re-integrated within provision on separation and divorce (within a framework that gives priority to the claims of a partner over those of children).

The factors giving rise to this situation cited in a number of other National Reports accord exactly with the reasons given by the Law Commission of Scotland and England, and namely:

i) An aging population where children tend to inherit long past the age of dependence on their parents;

ii) The prevalence of multiple marriages; and the range of relationship types (legal recognition of the consequences of social change in general and intimate relationships in particular is by far the most prominent and pressing development).

It follows therefrom that increased provision for surviving partners must mean decreased provision for children.

---

[52] See Scottish Law Commission *Seventh Programme of Law Reform* (Scot Law Com No 198); Department for Constitutional Affairs *Administration of Estates – Review of the Statutory Legacy* CP 11/05.

6. The United States of America.

Succession law in the United States is a not a federal issue, but is, instead, an area of the private law provided for under state law.

Because of the impossibility in identifying the number of changes in the fifty jurisdictions that compose the United States, we shall limit ourselves to identifying and discussing the major trends and a few key minor current issues occurring in succession laws in America over the last ten years.

The organizing principle of American succession law is the *freedom of disposition* or *testamentary freedom*[53].

Testamentary freedom is *the idea that a person has the right to choose who will succeed to things of value left behind at death*[54]. It is a characteristically modern idea and is the leading principle in the United States.

While different countries have embraced different conceptions of testamentary freedom, succession law in the United States gives donors a *nearly unrestricted right to dispose of their property as they please*[55].

American succession law privileges *donor's intention* as the *controlling consideration* in determining the meaning of a donative document.

---

53 RESTATEMENT (THIRD) OF PROPAGE: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003); *see also* SITKOFF *R.* H., *Trusts and Estates: Implementing Freedom of Disposition*, 2014, 58 ST. LOUIS U. L.J., St. Louis (MO), USA.

54 Cfr. FRIEDMAN L.M., *The Law of Succession in Social Perspective*, *in Death, Taxes and Family Property*, 1977, Eagan (MN), USA, pages 9 and 12, according to whom testamentary freedom (i.e., a donor's right to select beneficiaries) is technically distinct from the freedom of inheritance (i.e., a donee's right to receive property or a donor's right to avoid confiscation).

55 RESTATEMENT (THIRD) OF PROPAGE: WILLS AND OTHER DONATIVE TRANSFERS § 10.1cmt. a. 41. *Id*

As the *Restatement (Third) of Property: Wills and Other Donative Transfers* emphasizes, the *law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property* The function of succession law is to *facilitate rather than regulate*.

Similarly, the *Uniform Probate Code* (UPC) provides that one of the Code's *underlying purposes and policies is to discover and make effective the intent of a decedent in the distribution of his property*[56].

The idea of testamentary freedom is central not only in wills but also in trusts.

Many courts emphasize that, just as the court's role in interpreting a will is to facilitate a testator's intent, the role of the courts in construing a trust is to effectuate the settlor's intent. Historically, donative intent has been a *defining force in trust law* (the *polestar* which guided all aspects of trust administration). Thus, for both wills and trusts, the freedom of testation - *the dead hand's right to decide how property will be handled after a person dies* - is the *basic principle* of succession law[57].

Most American legal scholars today emphasize a view of testamentary freedom that is rooted in positive law and justified by functional considerations[58]. This functional perspective emphasizes the *social welfare* of the parties and seeks to determine how the law can create the best incentives for the

---

[56] UNIF. PROBATE CODE § 1-102(b)(2), 8 U.L.A. pt. I, at 26 (2010); LANBEIN J. H., WAGGONER L. W., *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874–75 (1992), Albany (NY), USA.

[57] FRIEDMAN L.M, *supra* note 1, at 19; MONOPOLI P.A., *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 University of Michigan Law Review, 995, 1010 n. 94 (2012), Ann Arbor (MI), USA.

[58] Cfr. CHAMPINE P. R., *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 Nebraska Law Review 387, 432 (2001), Lincoln (NE), USA.

donor, donee and other parties that a donor's disposition of property may affect[59].

Under this economic or functional approach, there are several justifications for privileging testamentary freedom[60].

First, the freedom of testation maximizes donor satisfaction.

Second, testamentary freedom promotes capital accumulation: It has been observed that *a person will not work as hard to accumulate property if he cannot then bequeath it as he pleases* [61]. Thus, if a donor may dispose of property at death, the donor's incentive to work, save, and invest converges with the optimal result. For this reason, it has been contended that the principal argument for inheritance is the conservation of capital[62].

Third, compared to legislatures or courts, donors may possess better information about the circumstances of family members and other donees[63].

This informational advantage may allow donors to select the highest-valued donee (e.g., a gifted or disabled child).

By contrast, legislatures must rely on general rules governing the succession of property (e.g., the first child inherits everything or each child receives an equal share), which can be over-inclusive, under-inclusive, or both. Typically, courts have neither the time nor the institutional capacity to investigate the

---

59 HIRSCH A. J., *Bequests for Purposes: A Unified Theory*, 56 Washington & Lee Law Review 33, 51 (1999), Lexington (VI), USA.

60 A. J. HIRSCH, cit. .

61 SHAVELL S., *Foundations of Economic Analysis of Law*, 71 (2004). page 65.

62 TULLOCK G., *Inheritance Justified*, 14 J.L. & ECON. 465, 474 (1971), Chicago (IL), USA.

63 HIRSCH A.J., WANG, W. K..S. *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 5–18 (1992), Bloomington (IN), USA.

circumstances of each decedent to determine the optimal distribution[64].

Fourth, freedom of testation may strengthen family relationships. It has been argued that *this freedom supports . . . a market for the provision of social services* and *encourages . . . beneficiaries to provide . . . care and comfort - services that add to the total economic pie*[65].

Some parents may use the threat of disinheritance to control the behavior of their children, for example, by inducing them to provide greater care for them as they grow older. Testamentary freedom may also provide parents with greater control over their children and encourage children to care for their parents[66].

As the *Restatement (Third) of Property: Wills and Other Donative Transfers* points out, *American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law*[67].

The *Restatement (Third) of Property* provides, however, for a non-exhaustive list of situations in which the law curtails testamentary freedom:

Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spouses' rights:

---

64 Cfr. MONOPOLI P.A., *Deadbeat Dads: Should Support and Inheritance Be Linked?*, 49 U. Miami L. Rev. 257, 297 (1994), Miami (FL), USA, according to whom *American inheritance law has been relatively less concerned with 'fair' reallocation of property at death, giving instead extensive freedom of testation and minimal forced heirship*.

65 HIRSCH A.J. & WANG W.K.S., cit..

66 BRENNER G. A., *Why Did Inheritance Laws Change?*, 5 *International Law Review. Law & Economics*. 91 (1985).

67 RESTATEMENT (THIRD) OF PROPAGE: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003)

i) Creditors' rights;

ii) Unreasonable restraints on alienation or marriage;

iii) Provisions promoting separation or divorce; impermissible racial or other categorical restrictions;

iv) Provisions encouraging illegal activity; and

v) Rules against perpetuities and accumulations.

In each of these situations, there is, ostensibly, a countervailing policy for not carrying out the donor's *ex ante* wishes.

Similarly, the Uniform Probate Code qualifies the freedom of testation in several situations, including the elective share for surviving spouses, rule against perpetuities and rights of creditors[68].

Given that, in addition to the liberalized forms in which testators may express their intent, States grant individuals almost unrestricted authority to dispose all of their property, legal scholars have advocated a limitation on testamentary freedom that provides for the protection of and provision for children of a testator.

The United States, however, has endorsed a type of testamentary freedom that is more extensive than almost any other country. Scholars have noted that one of the odd characteristics of American testamentary freedom is, in fact, that although parents maintain alimentary obligations to support children while they are alive, these same duties, even if recognized in child support awards granted by courts, are ordinarily unenforceable against a parent's estate after he dies.

It is in the light of this that, in the United States, the compulsory share is still a hot topic.

The starting point is the inexistence of the compulsory share in favor of the descendants, with the only exception of

[68] UNIF. PROBATE CODE §§ 2-201 to -207, 8 U.L.A. pt. I, at 101–21 (2010).

Louisiana: Although the general Hispano-French compulsory share has been abolished in that state, descendants who are under 24 years of age or suffering mental incapacity or physical infirmity are entitled to a share of the testator's estate.

Before 1996, Louisiana was the only state in the United States to recognize a concept of forced heirship, even though it moved away from its traditional history in 1996 and towards an American-style freedom of testation. Prior to 1996, all children were, in fact, considered forced heirs of a deceased parent and were accordingly entitled to a certain share or fraction of the estate and could only be disinherited for one of twelve particular *just cause[s]* [69].

In Louisiana, Civil Code article 1493 dictates that *Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent*.

The compulsory share of the estate is equal to 25% of the patrimony (if one forced heir); or 50% (if more than one); and each forced heir will receive the lesser of an equal proportion of the compulsory share or what they would have received through intestacy (LCC Article 1495).

If a person who would have otherwise qualified as a forced heir dies before the parent, rights to that share may pass to that person's children, although how that share is distributed among them if one or more is an interdict remains unsettled law.

Forced heirs may demand collation, whereby certain gifts received by any successor in the three years before the death of the parent may be subtracted from their share.

Louisiana does not have a forced heirship provision for spouses, even though, at death, the spouse's interest in

[69] SHAVELL S., cit., page 65.

any community property is converted to his or her separate property and a usufruct is granted over the remaining community (with the forced heirs as naked owners of their respective shares). That usufruct terminates at death or remarriage.

As seen above, Louisiana's version of forced heirship has been scaled back significantly since 1996 and now guarantees a forced share only to those children twenty-three years old or younger and those who are permanently incapable of taking care of their person or administering their estate.

Thus, the rationale for forced heirship has changed from one guaranteeing all children a part of the familial wealth to an alimentary one emphasizing testamentary freedom and guaranteeing a fraction or share of the estate only to those who threaten to become a financial burden on the state as a result of an infirmity - be it a physical one, a mental one, or one of minority.

While succession laws in the United States have generally allowed testators total discretion to disinherit anyone else, a problem arises when the party disinherited is an intestate heir and the will disinheriting the legatee does not dispose of the testator's entire estate.

In such a situation, courts have traditionally held that the part of the estate not disposed of by the will passes to the heirs in intestacy - including the disinherited heir[70].

7. Conclusions

The main objective of this article has been to provide readers with a brief analysis of the legal issues connected with testamentary freedom.

As we have seen above, even though civil and common law jurisdictions depart from radically different starting points, both set of legal systems feel the need to provide some sort of

[70] RESTATEMENT (THIRD) OF PROPAGE: WILLS & OTHER DONATIVE TRANSFERS § 2.7, Rptr. Note (1999).

financial assistance to the testator's family once he or she has deceased, either in the form of mandatory provisions on forced heirship provided for under the law (as is the case with the civil law jurisdictions) or in the form of a discretionary set of remedies afforded by the courts should the testator fail to provide for his immediate family - including spouses and co-habitants (as is the case with common law jurisdictions).

We have seen that facilitating donor intent is often consistent with maximizing social welfare, but the two are not coextensive.

As a result, a perennial issue is determining the circumstances in which the legal system should intervene to alter or modify a donor's wishes on behalf of the donees (i.e., when should the lives of the living trump the wishes of the dead).

There are several economic justifications for restricting the freedom of testation, including imperfect information, negative externalities, and intergenerational equity.

Given a donor's limited ability to foresee future events and the costs of specifying even foreseeable contingencies, courts may intercede to alter or interpret a gift due to unforeseen or unprovided for events.

Finally, if the present generation is transferring property in a way that neglects the utility of future generations, perhaps intergenerational equity also serves as a sufficient justification for restricting testamentary freedom.

However, having a court or a provision of law disregard a donor's intent in order to maximize the donees' *ex post* interests (which is an increasingly common reason for restricting testamentary freedom) is problematic: It may be argued that doing so ignores, in fact, a donor's incentive to work, save, and invest, the structure and timing of gifts, and other *ex ante* considerations.

BIBLIOGRAPHY

- AMADIO G., *La successione necessaria tra proposte di abrogazione e istanze di riforma*, in Riv. notar., 2007, Rome
- ANDRINI M. C., *Legittimari*, in Enc. giur. Treccani, XVIII, 1990, Rome
- AZZARITI G., *Diritti dei legittimari e loro tutela*, 1975, Padua,
- BARASSI L., *Le successioni per causa di morte*, 1947, Milan,
- BELLIVER F., ROCHFELD J., *Droit successoral . Conjoint survivant. Enfant adulterin. Loi 2001-1135 du 3 décembre 2001*, in Rev.trim.dr. civ., 2002, Paris,
- BERGAMO E., *Brevi cenni su un'ipotesi di diseredazione anomala implicita*, in Giur. it., 2000, c. 1801 ss., 2000, Milan
- BIANCA C. M., *Diritto civile, 2. La famiglia – Le successioni*, 1989, Milan
- BONILINI G., *Diritto delle successioni*, 2009, Milan
- BONILINI G., *Sulla possibile riforma della successione necessaria*, in *Tratt. dir. succ. e donaz. diretto da BONILINI G., Volume III: la successione legittima*, 2009, Milan
- BRENNER G. A., *Why Did Inheritance Laws Change?*, 5 International Law Review. Law & Economics, page 91, Philadelphia (PA), U.S.A., 1985.
- BUCELLI A., *I legittimari*, 2002, Milan
- CATALA P., *Proposition de loi relative aux droits du conjoint survivant*, in Dalloz, 2001, Paris.
- CALDERONE C. R., *Della successione legittima e dei legittimari*, in *Comm. teorico pratico cod. civ.* directed by V. DE MARTINO, *Libro II: Delle successioni. Artt. 536 – 586*, 1976, Novara.

- CAPOZZI G., *Successioni e donazioni*, 2004, Milan
- CASULLI, V. R. *Successioni (diritto civile): successione necessaria*, in Noviss. Dig. it., XVIII, 1971, Turin
- CATTANEO G., *La vocazione necessaria e la vocazione legittima, in Trattato di diritto privato diretto da* RESCIGNO P., vol. 5, *Successioni*, Volume I, 1982, Turin
- CAVALLUCCI F. –VANNINI A., *La successione dei legittimari: aggiornato alla Legge n. 80/2005 e alla Legge n. 55/2006 sul "Patto di famiglia"*, 2006, Turin
- CHAMPINE P. R., *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 Nebraska Law Review 387, 432, 2001, Lincoln (NE), U.S.A.
- COMPORTI M., *Riflessioni in tema di autonomia testamentaria, tutela dei legittimari, indegnità a succedere e diseredazione*, in Familia, 2003, Milan
- DE GIORGI M. V., *I patti sulle successioni future*, 1976, Naples
- DELLE MONACHE S., *Successione necessaria e sistema di tutela del legittimario*, 2008, Milan
- DELLE MONACHE S., *Abolizione della successione necessaria?,* in Riv. notar., 2007, Milan
- FRIEDMAN L.M., *The Law of Succession in Social Perspective, in* Death, Taxes and Family Property, 1977, Eagan (MN), USA
- GAZZONI F., *Competitività e dannosità della successione necessaria (a proposito dei novellati art. 561 e 563 c.c.)*, in Giust. civ., 2006, Milan
- GRIMALDI M., *Succession et contrat*, in FENOUILLET D. e de VAREILLES - SOMMIERES, *La contractualisation de la famille*, Economica, 2001, Paris

- GUERCHOUN F., PIEDELIEVRE S., *La réforme des successions et des libéralités par la loi du 23 juin 2006*, in Gaz. Pal. 23-24.8.2006, n. 235, 2006, Paris
- HIRSCH A. J., *Bequests for Purposes: A Unified Theory*, 56 Washington & Lee Law Review 33, 51 (1999), Lexington (VI), USA
- HIRSCH A.J., WANG W.K.S., *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 5–18 (1992), Bloomington (IN), USA
- IEVA M., *I fenomeni parasuccessori*, in Riv. Not., 1988, Rome
- LANBEIN J. H., WAGGONER L. W., *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874–75 (1992), Albany (NY), USA
- LAGENFELD G., *Das Gesetz zur Änderung des Erb- und Familienrechts*, *Neue Juristische Wochenschrift* (NJW), 2009, Munich
- LENZI R., *Il problema dei patti successori tra diritto vigente e prospettive di riforma*, in Riv. Not., 1988, Rome
- MARTYN J.R., *The modern law of family provision*, 2nd ed., 1978, London
- MALAURIE, *Préface*, in FORGERARD M.C., CRONE R., GELOT B., *Le nouveau droit des successions et des libéralités. Loi du 23 juin 2006. Commentaire & formules*, Defrenois, 2007, Paris
- MENGONI L., *Successioni per causa di morte. Parte speciale. Successione necessaria*, in *Tratt. dir. civ. e comm. diretto da* CICU A. e MESSINEO F. *e continuato da* L. MENGONI, Volume XLIII, Volume 2, 2000, Milan
- MONOPOLI P.A., *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 University of Michigan Law Review, 995, 1010 n. 94, Ann Arbor (MI), USA

- MONOPOLI P. A., *Deadbeat Dads: Should Support and Inheritance Be Linked?*, 49 U. Miami L. Rev. 257, 297 (1994); Miami (FL), USA
- NAPPA S., *La successione necessaria*, 1999, Padua
- PALAZZO A.: *Successione, IV) Successione necessaria*, in *Enc. giur. Treccani*, XXX, 1993, Rome
- PINO A., *La tutela del legittimario*, 1954, Padua
- PIRAS S., *La successione per causa di morte. Parte generale. La successione necessaria, in Tratt. dir. civ. diretto da G. GROSSO e F. SANTORO – PASSARELLI*, 1965, Milan
- PONSARD A., *La loi du 3 juillet 1971 sur le rapport à succession, la réduction pour atteinte à la réserve et les partages d'ascendants*, in Recueil Dalloz, 1973, Paris
- QUARGNOLO M., *Il problema della diseredazione tra autonomia testamentaria e tutela del legittimario*, in Familia, 2004, Milan
- ROPPO V., *Per una riforma del divieto dei patti successori*, in Riv. Dir. Priv., 1997, Bari
- SHAVELL S., *Foundations of Economic Analysis of Law*, 71 (2004), Cambridge (MA), USA
- SITKOFF R. H., *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J., 2014, St. Louis (MO), USA
- TAMBURRINO G., *Successione, IV) Successione necessaria, b) Diritto privato*, in Enc. dir., XLIII, 1990, Milan
- TRABUCCHI A., *Forma necessaria per la rinunzia al legato immobiliare e natura della rinunzia al legato sostitutivo*, in Giur. it., 1954, Milan
- TULLOCK G., *Inheritance Justified*, 14 J.L. & ECON. 465, 474 (1971), Chicago (IL), USA

- VIALLETON H., *La place de la salsine dans le systéme devolutif français*, in *Mélanges Roubier*, t. II, 1961, Paris
- ZOPPINI A., *Contributo allo studio delle disposizioni testamentarie "in forma indiretta"*, in *Studi in onore di P. Rescigno, Diritto privato*, Milan, 1998