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LEGAL REGULATIONS REGARDING TESTAMENTARY INHERITANCE IN THE UNITED STATES OF AMERICA

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Abstract:
In recent years, the approached issues in legal sciences have varied greatly, with a tendency to highlight some aspects regarding contracts' signing. A somewhat smaller number of research have addressed the issue of succession and exponentially less, that of testamentary inheritance. This topic is of particular importance both socially and economically, as the way in which goods and financial means are distributed determine social, as well as legal outcomes altogether. The present paper highlights the legal framework that binds testamentary inheritance in the United States of America, and this approach is deemed as important both for the contextualization of the Romanian legal realities, and for a genuine, empirical definition of the testamentary inheritance today.
Keywords: *testamentary inheritance; wills in the USA; legal regulations of wills*

Introduction

The issue of testamentary inheritances somehow goes unnoticed in comparison with the generous body of literature dedicated to many issues such as the signing and object of contracts. In the issue of successions in particular, the dominant tendency is to highlight the rights of the surviving spouse and the various shares of inheritance. However, the subject itself is much more complex than these aspects. The notion of testamentary freedom is implicit to a concept of family and social relations' democratization, as a whole, and as such, it should be respected and not be expressed in terms of countless limitations that may run counter to the will of the testator. Otherwise, we can no longer speak of testamentary freedom, but of a simple possibility to testate. The aim of this study is to understand how testamentary freedom is currently understood and respected in the United States, as here we will find a very strong testamentary tradition, as well as a very precise institutionalization of wills.

Particularities of wills in the USA

The practice of will- making in the U.S.A. is largely tributary to Anglo-Saxon law. Here, too, we find the establishment of administrators or executors for the management of the inheritance, the payment of credits and the distribution of the estate. However, the status of these individuals is not a result of their potential belonging to a class of inheritors, as in most cases they may not be in any way the beneficiaries of the estate. The administrators are appointed by the court, at the proposal of the family members [1].

The legislative basis from which the laws of some American states start consists in the Wills Act (1837), while others are based on the Statute of Frauds and some combine the landmarks given by both laws. There is a contradiction in the literature regarding the acceptance of oral wills: Ronald J. Scalise Jr. states that they are not accepted in America [1], although judicial practice in 18 states (including New York and Washington) shows that oral wills are still considered valid, but within certain limitations and conditions, as we will show below. Ronald J. Scalise Jr.'s assertion can only be true in the sense that this type of will may not be applicable to all audiences and not in any state. Equally, holographic wills - those written by the testator, with or without witnesses - are not recognized throughout the United States, but their presence is found in several states (in 28 out of 50 existing), although in the United Kingdom they are no longer considered valid.

In most circumstances, US law prohibits the total exclusion of a spouse from the will. As a general rule, in states with community ownership, each spouse will automatically own half of all that the couple earned during their marriage. This means that half will automatically go to the husband, and the remaining part of the estate can be distributed according to the wishes of the testator. The latter can choose to give the rest of the surviving spouse, or share the inheritance of children, grandchildren, friends and other relatives [1].

If the deceased wishes to grant less to the other spouse, there must be a written agreement emphasizing this provision. This automatic right of the surviving spouse to automatically inherit half can also be denied by a prenuptial agreement. In order to avoid confusion and contestation of wills by spouses and family members, it is recommended to expressly specify the testamentary wishes regarding the distribution of the estate.

Theodore Hughes and David Klein make a summary of US law on wills, including oral ones, the conditions of which are set out in the table below [2]:

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
Alaska	18	2	No	Yes	• inheritance is limited to personal property • the testator works in the military service • the oral will must be summarized in writing within 30 days of death • apply for probation within 6 months of death
Alabama	18	2	Yes	No	
Arizona	18	2	Yes	No	
Arkansas	18	2	Yes	No	
California	18	2	Yes	No	
Colorado	18	2	Yes	No	
Connecticut	18	2	No	No	
Delaware	18	2	No	No	
District of Columbia	18	2	No	Yes	• inheritance is limited to personal property

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
					• the oral will is applicable only in case of terminal illnesses or • the testator works in the military service • the will involves the presence of 2 witnesses • the will must be drafted within 10 days of death
Florida	18	2	No	No	
Georgia	14	2	No	No	
Hawaii	18	2	Yes	No	
Idaho	18	2	Yes	No	
Indiana	18	2	No	Yes	• refers to property worth up to $ 10,000, and personal property • the testator works in the military, but in time of war • the testator awaits his death for objective reasons • The will involves the presence of 2 witnesses • The will must be drawn up within 30 days of the testator's death

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
					• apply for probation within 6 months of death • the oral will cannot be used to revoke an existing written will
Iowa	18	2	No	No	
Kansas	18	2	No	Yes	• refers only to the personal properties of the testator • the oral will is applicable only in the case of terminal illnesses • involves the presence of 2 witnesses • The will must be drawn up within 30 days of the testator's death
Kentucky	18	2	Yes	No	
Louisiana	16	2	Yes	No	
Maine	18	2	Yes	No	
Maryland	18	2	No	No	
Massachusetts	18	2	No	Yes	• refers only to the personal properties of the testator • the testator works in the military service
Michigan	18	2	Yes	No	

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
Minnesota	18	2	No	No	
Mississippi	18	2	Yes	Yes	• the oral will is applicable only in case of terminal illnesses • involves the presence of 2 witnesses • apply for probation within 6 months of death • the testator dies at home or elsewhere
Missouri	18	2	No	Yes	• refers to goods worth up to $ 500, and personal property • the testator awaits his death for objective reasons • the will presupposes the existence of 2 witnesses • The will must be drawn up within 30 days of the testator's death • The oral will is no longer valid 1 n after the testator is released from office • It cannot be used to revoke an existing written will

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
Montana	18	2	Yes	No	
Nebraska	18	2	Yes	No	
Nevada	18	2	Yes	No	
New Hampshire	18	2	No	Yes	• refers to goods worth up to $ 500, and personal property • the testator awaits his death for objective reasons • the will presupposes the existence of 2 witnesses • The will must be drawn up within 30 days of the testator's death • The oral will is no longer valid 1 year after the testator is released from the service • It cannot be used to revoke an existing written will
New Jersey	18	2	Yes	No	
New Mexico	18	2	No	No	
New York	18	2	Yes	Yes	• the testator works in the military, but in time of war

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
					• The oral will is no longer valid 1 year after the testator is released from office
North Carolina	18	2	Yes	Yes	• the oral will is applicable only in the case of terminal illnesses • assumes the existence of 2 witnesses
Dakota de Nord	18	2	Yes	No	
Ohio	18	2	No	Yes	• the oral will is only applicable in the case of terminal illnesses • assumes the existence of 2 witnesses • witnesses must not be beneficiaries of the will • the will must be drawn up within 10 days of the death • applies for probation within 6 months of death
Oklahoma	18	2	Yes	Yes	• refers to goods worth up to $ 1,000 • the testator works in the military

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
					• the testator awaits his death for objective reasons • the testamentary act implies the presence of 2 witnesses
Oregon	18	2	No	No	
Pennsylvania	18	2	Yes	No	
Rhode Island	18	2	No	No	
South Carolina	18	2	No	No	
South Dakota	18	2	Yes	No	
Tennessee	18	2	Yes	Yes	• the will is applicable to property worth up to $ 1,000, and personal property • the testamentary act implies the presence of 2 witnesses • The will must be drawn up within 30 days of the testator's death • applies for probation within 6 months of death

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
Texas	18	2	Yes	Yes	• the oral will is only applicable in the case of terminal illnesses • assumes the existence of 3 witnesses • the testator dies at home or elsewhere • it is no longer valid 1 year after the testator is released from service
Utah	18	2	Yes	No	
Vermont	18	3	No	Yes	• refers to property worth up to $ 100, and to the personal property of the deceased • must be drafted within 6 days of death • applies for probation within 6 months of death
Virginia	18	2	Yes	Yes	• refers to the personal property of the deceased • the testator works in the military
Washington	18	2	No	Yes	• refers to goods worth up to $ 10,000

State	Minimum age for will - making	Required number of witnesses for the will	Recognition of holographic wills	Recognition of oral wills	Conditions for oral wills (if applicable)
					• does not set limits on the value of the inheritance if the testator works in the military, so it also refers to the personal property of the deceased • is applicable only in the case of terminal illnesses • involves the presence of 2 witnesses • must be drafted within 30 days of the testator's death • applies for probation within 6 months of death
West Virginia	18	2	Yes	Yes	• refers to the personal property of the deceased • the testator works in the military
Wisconsin	18	2	No	No	
Wyoming	18	2	Yes	No [2]	

Trust institutions are common in the American area, and there is a common practice among families with a prosperous material status of the summer mandate of these institutions for testamentary beneficiaries.

The rules of intestate inheritance vary widely from state to state, are constantly changing, and considerable efforts have been made to harmonize U.S. federal law in the

form of Uniform Probate Code [2]. For example, Florida Statutes allows the surviving spouse's heirs access to the inheritance mass, if the deceased has no other heirs- a fact which is not found in the laws of other states.

In the United States there has been a trend towards liberalization in terms of formal requirements for the validity of a will. The tendency is to accept wills that do not meet the standard requirements, if the testator's intent can be established and no fraudulent activity is suspected. The approaches adopted by courts and legislators for nonconforming wills range from the use of the idea of harmless error in wills - giving courts the power to dispense of nonconformities - to the doctrine of substantial compliance and the imposition of a constructive trust [2].

This trend did not exist before 1990. Most courts insisted on strict compliance with the necessary formalities for wills, which included a signed document attesting to the testamentary intent attested by witnesses or, if no witnesses were present, a handwritten will signed by testator. Since then, legislatures in several states (Hawaii, Michigan, Montana, New Jersey, South Dakota and Utah) have given courts a "dispensation" power to excuse errors in the execution of wills, if the proponent of the document can establish the harmless nature of the error by clear and convincing evidence [2].

Montana courts applied this power by validating a will signed by the deceased and notarized by his lawyer. Despite the absence of witnesses, the court received clear and convincing evidence that the deceased had the necessary testamentary intent. The lack of witnesses was considered a harmless error. Similarly, the courts excused the absence of the signature of a witness when the will was signed and attested by another witness and a notary. The exact placement of the signature of the notary, the witnesses and even the testator is also an area that no longer requires strict compliance. Many judges also have the opportunity to mobilize the principle of harmless error in revoking, amending, or reinstating a will [2].

Some US courts have allowed the signatures of the testator and of the witnesses to appear on separate pages: the testator's signature to appear at the top of the page, that of a witness in the body of the will, and all witnesses' signatures to appear in a separate affidavit, separate and attached [4].

On the other hand, most states consider that both the requirements of the writing and the signature of the testator are sacrosanct, because, unlike the others, they serve to prove both the testamentary intent and the insurance against fraud. For example, a Louisiana court in the Eddy Succession invalidated a will in which the testamentary dispositions were on one side of a sheet of paper and the signature and attestation on the back. The court held that this approach violated the statutory requirement that a testator should sign every page of his will [4].

In addition to the flexible ways in which testators can express their intentions for succession, it is believed that US states give people almost unlimited power to dispose of all their property and property. However, in recent decades, some researchers have considered a restriction on probate, which provides for the protection and insurance of a testator's children. However, America has generated a type of testamentary freedom, which is wider than almost any other country. One of the hallmarks of American probate is that while parents maintain their child support obligations to support their children while they are alive, the same duties, even if recognized by the courts in providing financial assistance to children, cannot be imposed. succession after the death of the parents than in certain special situations [4].

In this sense, one of the concepts of succession in the US is that of "forced heir", to which many legislatures and courts have had negative reactions [4].

In 1996, Louisiana, the only state in the United States that recognized this concept, chose to move away from its traditional history and take a step toward a certain type of American testamentary freedom. Prior to 1996, all children were considered forced heirs of a deceased parent and, as a result, were entitled to a certain share or part of the fortune and could only be disinherited in very rare cases [5].

Since 1996, however, the Louisiana version of forced inheritance guarantees a mandatory quota only to those children up to the age of 23 (including those of this age) and those who are permanently unable to care for or manage their children wealth [4].

Even outside of Louisiana, a number of courts and legislatures have adopted means to advance the cause of probate, such as the recognition of negative wills [6].

Negative wills are testamentary dispositions that explicitly exclude certain individuals from the estate. Although succession laws in the United States have generally

allowed testators total authority to disinherit any person, legal issues arise when the excluded person is a legal heir - a situation that occurs when the will does not approach the entire estate. In such a situation, the courts have traditionally held that the part of the inheritance that was not mentioned in the will passes to the legal heirs, including the disinherited person [6].

Courts have recently begun to accept and respect the use of negative wills, excluding the disinherited individual. Since the 1990s, thirteen states have adopted statutes that allow the use of the negative will. However, by limiting the doctrine, the courts have interpreted negative wills to allow the disinheritance of individuals only if there are other heirs available. Although the recognition of this doctrine is growing, some states have recently addressed this issue in court decisions and have explicitly rejected it [4].

In response to the growing emphasis on testamentary freedom, US law has begun to give rise to a growing number of testamentary appeals and claims for undue influence. Based on the principle of unlimited probate, appeals and claims of undue influence are the only effective ways to ensure competent testamentary intent, to fulfill family obligations, and to protect against the weak judgment of a testator. As one researcher pointed out, although courts strongly proclaim their adherence to the concept of probate, their reasoning often betrays a primary loyalty to other competing principles: first, testators have a moral obligation to distribute their family members' wealth; second, testators need protection against their own immoral instincts [7].

One way in which heirs can be protected by the unlimited power of a testator is by the ability to initiate the challenge of a will, sometimes even in the presence of a testamentary provision prohibiting such measures. That is, despite the existence of a clause in terrorem, many courts have allowed maximum flexibility to potential beneficiaries and have often interpreted the scope and force of these clauses very restrictively. An increasing number of states allow beneficiaries to challenge wills if there is a probable reason to believe that the will is not invalid and the appellant is acting in "good faith". Any attempt by a testator to rule out such objections is usually ineffective [7].

Another way of protection for excluded heirs is the ability to claim the existence of unjustified or inappropriate influence. Unjustified influence is generally defined as the exercise of such influence over the testator, in order to violate his free will and to cause

him to carry out an action that he would not otherwise have done. Some courts consider that unjustified influence may be implicit in certain confidential relationships and may be ruled out only on the basis of evidence that the influencing party acted in good faith and the testator acted freely, voluntarily and knowingly. Recently, a small number of courts have also found that when the circumstances surrounding the enforcement of a will are suspicious, a presumption of unjustified influence arises. If a testator had a weak intellect or the testator maintained a confidential relationship with the beneficiary who receives a significant part of the estate, the burden of claiming unjustified influence falls, of course, on those who consider themselves unjust and want to apply for probation [8].

In recent years, there has been a demographic trend that allows children born as a result of assisted reproduction techniques to inherit in accordance with the laws of state succession. Thanks to new technological reproduction techniques, such as surrogacy, egg and sperm donation, new circumstances arise in which children can be born from mothers who may or may not be genetically related to the child and even from parents who died before conception. Although artificial insemination techniques have existed for a long time, there is recent pressure on the old laws, which allowed a child to inherit from a deceased person only if it existed at the time of death or was born within 300 days of the father's death [8].

States such as Texas, Delaware, Washington, Wyoming and Colorado have moved away from the traditional limitations of inheritance and now allow individuals conceived after the death of their biological parents to inherit from deceased parents as long as the deceased has consented in writing to the use of his or her genetic material.

Louisiana stipulates that the birth must take place within three years of the deceased's death. Idaho has slightly stricter rules, specifying that the birth of the child must take place within ten months of the biological parent's death in order for that child to be considered an heir [8].

However, not all US states have taken technological advances into account to give this new category of heirs a chance. Florida, Georgia and North Dakota have refused to extend their ab intestate inheritance laws. Courts in Arizona, New Jersey and Massachusetts have refused to create special exceptions for heirs conceived after the death of their parents and denied applications for social security benefits for children

conceived posthumously because they did not meet the legal requirements to be "pending birth" at the time of their parents' death [8].

As regards the role of the descendants in general in the intestate succession, in general, the share granted to the surviving spouse has in some cases become to the detriment of the children of the deceased. All states uniformly present children as a primary class in their offspring and distribution tables in the absence of a surviving spouse [9].

However, when there is a surviving spouse and the children are his and the deceased spouse's, a large number of states give the surviving spouse one hundred percent of the estate. The shift from direct to indirect granting of property and property to children through the surviving spouse was partly driven by the idea that passing on the inheritance directly to minor children would involve unnecessary administrative costs involving the appointment of a guardian to manage the interests and assets. In the case of a surviving spouse whose children are also those of the deceased, these expenses can be avoided by granting the inheritance only to the surviving spouse [9].

On the other hand, when the deceased has children who are not the surviving spouse's, the share given to the surviving spouse decreases considerably to almost half of the fortune, plus $ 100,000. Consequently, the remaining share (approximately half of the fortune) is given directly to the children, and the cost of appointing a guardian is considered necessary to ensure the protection of the children [9].

Another scenario involves family situations in which there are both children from the family of the deceased and the surviving spouse, as well as children only of the surviving spouse, but not of the deceased. In these situations, states are reluctant to give the entire estate to the surviving spouse, and the tendency is to give $ 150,000 and a half of the fortune to the surviving spouse, and the other half of the fortune is distributed to the children of the deceased. The reason behind this distribution is that the surviving spouse can use the inheritance to unfairly favor his own children to the detriment of the children with the deceased and, therefore, the direct transmission of the inheritance to the latter can prevent this. Again, the cost of administration by a guardian for children is considered necessary and implicit in this case [9].

As of January 1, 2018, 32 states have ceased to levy inheritance taxes: Alabama, Alaska, Arizona, Arkansas California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana , Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming [10].

Conclusions

The American space enshrines different understandings of testamentary inheritance depending on the legislatures and the courts. While some go beyond certain formal elements of making a will, others emphasize them, but in any case there is a dominant tendency to protect descendants who may be omitted or excluded from the will. As a novelty, some of the American states recognize the status of posthumous heirs - conceived after the testator's death. It is also worth noting the institution of the trust, an institution that could be successfully implemented in the Romanian legislation and succession practices.

References:

[1]. Yvonne Pitts, *Family, Law, and Inheritance in America: A Social and Legal History of Nineteenth-Century Kentucky,* New York: Cambridge University Press, 2013
[2]. Theodore E. Hughes and David Klein, *The Executor's Handbook (third edition), A Step-by-Step Guide to Settling an Estate for Executors, Administrators, and Beneficiaries*, New York: Facts On File, 2007.
[3]. National conference of Commissioners on Uniform State Laws, “Amendments to Uniform Probate”, 2008. www.uniformlaws.org/shared/docs/probate%20code/upcamends_final_08.pdf.
[4]. Robert H. Sitkoff, Jesse Dukeminier, *Wills, Trusts and Estates* (10th edition), New York: Wolters Kluwer, 2017.
[5]. Timothy Hanson and Barbara Corbett, „*Forced Heirship – Trusts and other problems”, JGLR, 13(2), 2009, pp. 174-185.*
[6]. William P. LaPianna, *Inside Wills and Trusts: What Matters and Why*, New York: Wolters Kluwer, 2012.
[7]. Melanie B. Leslie, “The Myth of Testamentary Freedom”, *Arizona Law Review*, 38, 1996, pp. 235-290.
[8]. Susanna L. Blumenthal, *Law and the Modern Mind. Consciousness and Responsibility in American Legal Culture*, Harvard: Harvard University Press, 2016.
[9]. Ronald Chester, „Posthumously Conceived Heirs Under a Revised Uniform Probate Code”, *Real Property, Probate and Trust Law Journal*, 38, 2004, pp. 727-744.
[10]. Julie Garber, “States Without an Estate Tax or an Inheritance Tax”, *The Balance*, 2019, available at https://www.thebalance.com/states-without-estate-tax-3505467, accessed November 1st, 2021.