INTERNATIONAL INHERITANCE FORUM

REPORT ON BRAZIL

The law of inheritance can be examined through the lens of relatively few categories of enquiry.

Core categories address the following topics: general rules applicable to both legal and testamentary succession (**General Rules**); legal devolution or intestacy (**Intestacy**); wills and testamentary dispositions (**Wills)**; and administration of decedents' property and judicial oversight of that administration (**Administration**). These broad categories are common to—indeed they overarch—all systems in the Western legal tradition.

In some systems, the subject matter of forced heirship (legal or compulsory portion - reserved share - légitime - *portio legitima*) is dealt with as part of the law of wills or, more generally, as part of *mortis causa* donations. In other systems, forced heirship andlike devices are stand-alone institutions of inheritance law. Moreover, some systems empower courts, under various dependants' relief schemes, to vary wills to promote equitable distribution of property. On the whole, however, all these devices can be examined as restraints on freedom of testation and, accordingly, are examined here under the topic of wills (**Wills**).

On another note, some systems may require persons in close personal relationships to elect between their marital property entitlements and their inheritance rights. Other systems consider that property acquired during a marital relationship or rights stemmingfrom a matrimonial regime do not impact spousal inheritance rights whether they be by operation of law or under testamentary dispositions. For this reason, marital property is reviewed as a common inheritance issue (**General Rules**).

One can adopt—and be defeated by—the approach that every system's law of inheritance is incommensurable, or one can proceed, as we intend to, with the convictionthat the law of inheritance may be usefully examined and compared under the following themes: **General Rules**, **Wills**, **Intestacy** and **Administration**.

With thanks for your interest and support.

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1 GENERAL RULES

1.1 Origin and nature of property

Does your law distinguish between the origin or nature of property (real v personal; movable v immovable)? Are there different rules applicable to different classes of property?

Property is the most complete real right. It confers on its holder the powers to use, enjoy and dispose of the thing, as well as to recover it from the power of whoever unjustly possesses or detains it (CC, art. 1,228).

There are different ways of acquiring immovable property:

- Special Adverse Possession - which takes place through prolonged possession over time and other legal requirements;

- Registration – it´s the following act to the legal transfer transactions (such as purchase and sale, donation, etc.), necessary to effectively transfer ownership;

- Accession – occurs with the increase in volume or value of the main thing due to an external element, which can occur due to natural or industrial causes, when there is human participation.

The big difference in the form of acquisition of movable property is the inclusion of tradition (in addition to the possibilities indicated above that refer to immovable property), which consists in the delivery of movable property to its new owner, with the intention of transferring the property. Ownership of things is not transferred by legal transactions before tradition.

1.2 Simultaneous death

Which rules apply in the case of simultaneous death? How is the death of two ormore heirs or testators determined? Are there presumptions?

Art. 8th Brazilian Civil Code “If two or more individuals die on the same occasion, and it cannot be ascertained whether any of the co-parents preceded the others, they will be presumed to be simultaneously dead.”

The precept does not require death to have taken place in the same place, but rather to have taken place at the same time.

It matters when the both individuals are successors to each other, only because between them there is no succession transmission.

COURT CASE: "Unable to state with absolute certainty, in the light of the evidence in the case file, the premorience of one of the victims of an accident in which a vehicle is hit and then explodes, the presumption of comorence must be maintained" - TJMG, Judgment 1.0137.06.900006 -5/001, 5th Civil Chamber, Carlos Chagas, Rep. Des. Cláudio Renato dos Santos Costa, j. 11.09.2006, DJMG 12.1.2006.

1.3 Capacity to inherit

Who is capable of inheriting? For example, can minors, unborn children andabsentees inherit? Are there restrictions based on nationality or domicile?

In Brazil we have the legitimate succession (the express order of the law) and the testamentary succession (they will receive the assets through the manifestation of the last will of the author of the inheritance).

They can be called to succeed through testamentary succession:

- The children, not yet conceived, of persons indicated by the testator, provided that they were already born at the opening of the succession;
- Legal entities;
- Legal entities, whose organization is determined by the testator in the form of a foundation.

In the case of children not yet conceived, this refers only to the children of persons indicated by the testator, provided they are alive at the time of opening the succession.

These cannot be grandchildren or great-grandchildren of people indicated by the testator, only children.

1.4 Ownership and vesting of property

Who has the ownership or the legal possession (seisin) of estate property on death? Are the legal or testamentary heirs automatically (by operation of law) vested with the deceased's property rights on death, or are there required judicialor administrative procedures before vesting takes place?

Once the succession is opened, the inheritance is immediately transmitted to the legitimate and testamentary heirs. This would be kind of an institute of legal fiction that gives the heirs the indirect possession of the patrimony left cause of death by the deceased, but which has to be later confirmed by a sentence or by the preparation of the deed of inventory.

1.5 Unworthiness

Are certain persons presumed or deemed unworthy to inherit by operation of law?

Heirs or legatees are excluded from the succession:
I - who have been authors, co-authors or participants in intentional homicide, or an attempt thereof, against the person whose succession is in question, their spouse, partner, ascendant or descendant;
II - who have slandered the author of the inheritance in court or have committed a crime against his honor, or that of his spouse or partner
III - that, by violence or fraudulent means, inhibit or prevent the author of the inheritance from freely disposing of his assets by an act of last will.

EXCLUSION FOR INDIGNITY	DISINHERITANCE
It is requested by interested thir parties, within four years of the opening of the succession, and obtained by a court decision.	It is made by will by the testator himself and with an express statement of cause.
Reaches legitimate heirs (necessary or optional) and wills.	It only reaches the necessary heirs.
The facts are not always prior to the death of the author of the inheritance.	The factual supports predate the death of the author of the inheritance.
The grounds for indignity are valid for disinheritance.	Not all reasons for disinheritance constitute indignity.
Resolves a hereditary vocation existing at the time of opening the succession.	Deprives of a legitimate vocation through the testator imperial will.

1.6 Acceptance

How does an heir accept? Can acceptance be tacit, or must it be express? Is theheir presumed or deemed to have accepted in certain circumstances?

Express or Unspoken

The acceptance of the inheritance, when expressed, is done by written declaration; when tacit, it will only result from acts proper to the quality of heir.

Presumed

The interested party in which the heir declares whether or not he accepts the inheritance, may, twenty days after the succession is opened, request a reasonable period from the judge, no longer than thirty days, for the heir to pronounce in it, under penalty of having the inheritance by accepted.

1.7 Liability for debts

Does acceptance entail liability for the deceased's debts? To what extent are the heirs, who accept an estate, liable for its debts? If they are liable, can they accept under benefit of inventory? In other words, how do heirs accept without incurring personal liability exceeding their benefits under the law or under the will? Are there circumstances in which the heirs forfeit their rights to request an inventory or to accept subject to an inventory?

Article 1.997 of the Civil Code provides that the estate is liable for the payment of the deceased's debts, but, once the apportionment is made, only the heirs are responsible, each in proportion to the part of the inheritance they received.

1.8 Renunciation and disclaimer

When, and how, may an heir expressly renounce to or disclaim an inheritance? Arethere situations in which the law deems that an heir has renounced, e.g., concealment of property? What are the effects of renunciation? Is a person who renounces generally or disclaims deemed never to have been an heir?

It is possible to waive the inheritance. Pursuant to article 1806, renunciation must be expressed through a public deed or court order.

1.9 Marital rights

Are property rights acquired by spouses (howsoever defined) during the course oftheir marital relationship (howsoever defined) considered for purposes of determining a spouse's entitlement to an intestate share or determining a spouse'sentitlement under a testamentary disposition? To what extent, if any, must a spouse elect between his, her or their matrimonial property rights and his, her or their intestate rights or rights under a will? Does a surviving spouse have a prior claim to a family residence or homestead in addition to or as part of any intestate claim or claim under a will?

In Brazilian legislation there is the institute of moiety, which is the part that each spouse or partner is entitled to when the marriage bond is dissolved.
In the universal community of property regime, due to death, the surviving spouse is entitled to receive half of the estate.
In the partial community of property regime, this figure will only appear if the deceased spouse leaves private property.

In the regime of total separation of property, there is no need to speak of moiety because the couple's property does not mix.
In addition to moiety, the surviving spouse may be entitled to share the inheritance with the children. This will always depend on the type of property regime applicable to the couple's marriage.

Another figure identified in the Brazilian civil code is the real right to housing, present in article 1.831, which establishes that whatever the property regime adopted, allows the surviving spouse to remain in the property intended for the family's residence until the moment of his death.

2 INTESTACY

2.1 Declarations of inheritance

Who establishes intestate entitlement? Are judicial, notarial or other formal declarations or certificates required to confirm entitlement?

The Brazilian legislation provides two manners for execution of a succession.

Judicial, or extrajudicial, the latter applicable to situations where all parties are of legal age and capable and where all are equally in consensus (agreement).

2.2 Relationship

Who is entitled to inherit? Is relationship based solely on blood? Do adopted children inherit their adopting parents' estates? Is the surviving spouse an intestateheir? For purposes of intestacy, who is a spouse?

The call for succession is based on the provisions of article 1.829 of the Civil Code, where the necessary heirs are indicated first and who have the privilege of not being subject to exclusion from the testamentary succession. These are: descendants, ascendants, and spouses.

The necessary heirs being there, only 50% of the estate can be disposed of in a will (see answer to question 17). The author of the inheritance / testator may dispose of the rest as they see fit. In this sense, those included in the will must also attend.

If there are collateral relatives, they can also be called upon as legitimate heirs (but, then, they are not classified as necessary heirs). This collateral class consists of the deceased's brothers, uncles, nephews, and cousins.

Thus, there is coexistence of the legitimate succession, established in the order and parameters of the law, and the testamentary succession, according to the will of the author of the inheritance.

2.3 Order of preference

What is the order of preference? Is inheritance based on degrees of relationship?What are the proportionate interests of descendants, ascendants and collaterals?

First, the necessary heirs, which are the descendants (children, grandchildren, great-grandchildren, etc.); ascendants (parents, grandparents, etc.), and spouse/partner of the deceased, pursuant to Articles 1845 et seq. of the Civil Code, and, in sequence, the collateral heirs (Article 1.829 IV of the Civil Code).

In legitimate succession, which operates in observance of the express order of the law, the necessary heirs cannot be removed from the succession (unless they are declared unworthy or disinherited). To these, a part of

the inheritance shall be reserved, that is, the testator, even if they wants to, cannot bequeath it to someone else. And that is termed legitimate.

In the case of testamentary succession, they will receive the assets through the manifestation of the last will of the author of the inheritance; the testamentary succession is limited, as it must respect the legitimate, the portion the necessary heirs are entitled to.

3 WILLS

3.1 Formalities

How many types of wills are there? What are their formal requirements?

There are 3 types of ordinary wills: public, private, and closed, and 3 types of special wills: maritime, aeronautical, and military (provided for in articles 1862 and 1886, and items of the Civil Code).

3.2 Revocation and revival

Is it possible to revoke a will, and how may it be revoked? Can a revoked will berevived, and how may it be revived?

A will can be altered and revoked at any time by the testator, under article 1858 of the Civil Code.

3.3 Recognition, publication and probate

Describe your system's extrajudicial or judicial procedures, if any, for recognition and publication of a will. Which authority (judicial, notarial or other) determines whether a will has been validly executed in compliance with formal requirements?

Once the succession is opened, the will must be presented to the competent judge for carrying out the inventory, which will confirm the fulfillment of the respective formalities.

3.4 Curing formal deficiencies and rectification

Can your courts save, cure or validate testamentary paper that does not comply with formal requirements?

Where a will contains errors, slips or omissions or where a will fails to carry out the testator's instructions, do your courts have a power to rectify the will?

What remedial powers, if any, can your courts exercise in order to secure thetestator's true intentions?

The testament will be null when it is not covered by the form prescribed by law (art. 166, IV, Civil Code), and the nullity may be decreed ex officio by the judge (art. 168, sole paragraph, CC).

However, there is jurisprudence of the Federal Supreme Court that has already decided in the sense that: 'The judge cannot dispense with the formalities required for the will, but he can interpret them with breadth.'

Therefore, if there is a divergence between the strict formality provided for by law and the testator's real will, a different interpretation will have to be discussed in court.

3.5 Pacts and agreements as to future successions

Does your law permit parties to enter into covenants, pacts or agreements withrespect to future successions?

In the case of asset interest available (without mandatory intervention of the State for any reason), after the opening of succession, whenever capable individuals and of legal age are involved, it is possible that inheritance rights be assigned (art. 1.793 of the Civil Code) or that inheritance be waived (Article 1.806 of the Civil Code).

3.6 Forced, reserved and elective shares and other legal rights

Are there portions of an estate that are reserved for certain individuals (forced heirs)? Who qualify as forced heirs? What portion of an estate is reserved for these heirs (portio legitima) and what portion is freely disposable under a will?
How is the quantum of the forced share calculated? Are lifetime gifts (gifts inter vivos) taken into consideration and, if so, are these lifetime gifts reduced if estate assets are insufficient to satisfy claims of forced heirs?

Are there limits (monetary or otherwise) when calculating the forced shares?

Do the forced shares constitute ownership claims on estate property (real rights or rights in rem), or are they expressed as monetary claims? Can the forced shares be satisfied by a life interest or enjoyment (usufruct), an interest in trust or any other proprietary entitlement less than full ownership?

As between forced heirs, e.g., siblings, are there mechanisms to secure equal treatment?

Some systems have laws entitling certain persons, notably a spouse, to elect toreceive a portion of a decedent's assets instead of benefits under a will. If this applies to your system, describe the applicable law.

It belongs to the necessary heirs, as of right, half of the assets of the inheritance, constituting the legitimate one. So, if there are necessary heirs (descedants, ascendants and spouse), the deceased can only dispose of half of the estate in the will.

3.7 Disinheritance

Does your system permit disinheritance (disherison, exheredation)? On whatgrounds can forced heirs be disinherited?

NECESSARY HEIRS MAY BE DEPRIVED OF THEIR LEGITIMATE, OR DISINHERITED, IN ALL CASES WHERE THEY MAY BE EXCLUDED FROM THE SUCCESSION.

Authorize the disinheritance of descendants by their ancestors

I - physical offense
II - serious injury;
III - illicit relations with the stepmother or stepfather
IV - helplessness of the ascendant in mental alienation or serious illness

Authorize the disinheritance of ascendants by descendants

I - physical offense
II - serious injury;
III - illicit relations with the wife or partner of the son or grandson, or with the husband or partner of the daughter or granddaughter
IV - helplessness of the child or grandchild with mental deficiency or serious illness

Only with an express statement of cause can disinheritance be ordered in a will.

The instituted heir, or the one who takes advantage of the disinheritance, is responsible for proving the veracity of the cause alleged by the testator.

The right to prove the cause of disinheritance expires within a period of four years, counting from the date of opening of the will.

3.8 Dependants' relief or maintenance

If your system provides for dependants' relief or maintenance, who is entitled to claim?

Does your system provide a mechanism for dependants, who are not forced heirs, to make an alimentary or maintenance claim? If so, on what grounds can they make a claim? Are there limits to these maintenance claims? Can forced heirs submit a maintenance claim, in addition to their forced share, against the disposable portion of the estate?

If your system does not have forced, reserved or elective shares, can a claim be made against the estate by dependants and, if so, who may make such a claim and on what grounds?

In general, describe who may make a claim for maintenance where a will has not made adequate provision. Must a maintenance claim be made within a certain time?

Besides formalization of the probate or succession, if there is an emergency situation with the probability of danger, damage to the heirs or property, it is possible to petition for urgent guardianship, so the judge decides immediately on a specific point (article 301 of the Code of Civil Procedure).

3.9 Restraints on freedom of testation

Are there restraints on freedom of testation, other than the issues outlined under 3.5 and 3.6?

The legitim of the heirs (50% of the total estate) cannot be included in the will.

4. ADMINISTRATION

4.1 Intestate administration

Who administers an intestate estate? Is there a requirement to appoint an administrator? Do the heirs agree on the administrator and on the terms ofadministration, or does a court or other authority appoint an administrator?

Describe the administration of intestate estates.

The inheritance must be administered by the executor. The law states that the administration of the inheritance must be performed by the spouse or partner; by the heir who is in possession and administration of the assets, if there is more than one in these conditions, the eldest; by the executor; or in the absence of these, or for serious reasons, by a person trusted by the judge.

4.2 Testamentary administration

Who administers a testamentary estate? If an executor or administrator has beennamed under the will, is there a requirement for the appointment to be confirmedby a court or other authority?

Describe the administration of testate estates.

In testamentary administration we also have the figure of the executor (testamenteiro), who is in charge of enforcing the last wishes of the author of the inheritance.

4.3 Management and control

To what extent, if any, is the management and control of an intestate or testate estate, by the heirs, by a court-appointed administrator or by the executor under awill, supervised by a court or subject to judicial oversight?

For example, are administration fees subject to court review? Must administratorspublicly file accounts?

Describe the administration process.

The executor, always with authorization from the judge, will administrate the inheritance and must render an account of their acts in court.