



## **New Developments in Succession Law: The U.S. Report**

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Succession law in the United States is not a federal issue, but is instead an area of the private law relegated to states. Because of the impossibility in identifying the number of changes in the fifty jurisdictions that compose the United States, this Report is limited to identifying and discussing the major trends and a few key minor currents occurring in succession laws in America over the last ten years.

Methodologically, this Report proceeds by identifying in Part I the recent general changes or tendencies in succession laws within approximately the last ten years. In Part II, this Report assesses and discusses those of the many changes in successions law that can be traced to comparative law scholarship. Finally, Part III of this Report concludes by examining what movements exist toward a supra-national law of succession.

### **I. General Tendencies**

Although technical changes are too numerous to mention, a panoply of fundamental, substantive changes in succession laws have revolutionized this area of law to such an extent that one scholar has commented that the “terrain of estate planning [has changed] so dramatically that it is almost unrecognizable from that of a decade ago.”<sup>1</sup>

#### **I.A. Intestate Distribution Schemes**

##### **I.A.1. Increasing Role of the Surviving Spouse**

###### *I.A.1.a Who Qualifies for “Surviving Spouse” Treatment?*

Debate has raged in the United States as to who may or may not legally marry. Although the law of successions is on the periphery of this issue, the consequences of the resolution of this issue in family law has direct implication for succession laws. If parties are considered married under the applicable family law of a given state, then such parties may also be

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<sup>1</sup> Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 388 (2001).

entitled to succession rights by virtue of their classification of the relationship as one of marriage.<sup>2</sup>

Traditionally, family law (and thus successions law) has limited marriage to individuals of opposite sexes. As a result, homosexual couples, even those in long-term committed relationships, have been denied characterization as surviving spouses under state succession laws.<sup>3</sup> In fact, the overwhelming majority of states have recently prohibited same-sex marriage either by enacting state constitutional amendments that preclude same-sex marriage, adopting statutory provisions to do so, or by judicially or legislatively refusing to recognize same-sex marriages entered into in other jurisdictions on the grounds that recognition would violate state public policy.<sup>4</sup>

A vocal minority of states, however, has taken a different approach. In 2003, the Massachusetts Supreme Judicial Council concluded that precluding homosexuals from marrying violated the equal protection clause of the Massachusetts state constitution.<sup>5</sup> The court gave the legislature one hundred eighty days to respond; the legislature subsequently proposing a constitutional amendment to preclude same-sex marriage, a proposal which must be ratified by the voters in November 2006.<sup>6</sup> Because of the legislature's attempt to thwart the court's order, effective May 17, 2004, Massachusetts began recognizing same-sex marriages. Massachusetts, however, stands alone in its recognition of same-sex marriage.<sup>7</sup> Thirty-nine other states have explicitly rejected the extension of marriage to same-sex couples and limited the availability of marriage to heterosexuals.<sup>8</sup>

Despite refusal to recognize same-sex marriage, several states have acknowledged that the argument for precluding same-sex marriage does not apply with equal force to the granting of spousal-like inheritance rights to same-sex couples. After all, if the laws of intestacy are intended to mirror and enforce the "presumed will" of the decedent, then the "presumed will" of a decedent formerly in a long-term committed homosexual relationship would likely favor his same-sex partner as the recipient of the bulk of his estate, as would occur within a marriage.

Two additional approaches have been adopted by other states. The first approach, pioneered by Vermont, uses a concept known as a "civil union." In 1999, the Vermont Supreme Court found that denying homosexuals the right to marry violated the Common

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<sup>2</sup> For a thorough treatment of the issues discussed in this section, see T.P. Gallanis, Inheritance Rights for Domestic Partners, 79 TUL. L. REV. 55 (2004).

<sup>3</sup> *Scott v. Comm'r*, 226 F.3d 871 (7th Cir. 2000) (including the full value of the deceased's home in the deceased's estate, without consideration for homestead rights ordinarily granted under Illinois law to surviving spouses).

<sup>4</sup> 1 A.L.R. Fed. 2d 1 (2005). Moreover, the federal government has also entered the debate with the passage of the Defense of Marriage Act (DOMA) in 1996, which defines "marriage" for purposes of federal law as "only a legal union between one man and one woman as husband and wife" and has made clear that "the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (1997). In addition, DOMA provides that no state shall be required to recognize marriages between same sex couples entered into in another jurisdiction. 28 U.S.C. § 1738(c) (1997). Although the U.S. Congress voted on an amendment to the U.S. Constitution that would have defined marriage as a union of individuals of opposite sex and would have further cemented the American opposition to same-sex marriages, the bill failed by a vote of 227-186 in the House of Representatives and by 48-50 in the Senate.

<sup>5</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>6</sup> *See id.* at 970.

<sup>7</sup> California has recently become the first state legislatively to recognize same-sex marriages. *See, e.g.*, 2005 Cal. Legis. Serv. (A.B. 849) (2005). Owing to the governor's veto, however, the bill has failed to be enacted into law. *See Schwarzenegger Vetoes California Gay Marriage Bill*, N.Y. TIMES, Sept. 29, 2005, available at <http://www.nytimes.com/reuters/politics/politics-rights-california-gaymarriage.html>.

<sup>8</sup> *See* Gallanis, *supra* note 2, at 70-72.

Benefits Clause of the state constitution.<sup>9</sup> The court mandated that the legislature accord these common benefits to same-sex couples; in 2000, the legislature enacted a civil union statute for homosexuals, which, among other things, treats a same-sex partner as a spouse under Vermont inheritance law.<sup>10</sup> Undoubtedly concerned that the existence of civil unions would detract from traditional marriages, the Vermont legislation explicitly limits the availability of civil unions to those of the “same sex and therefore excluded from the marriage laws of this state.”<sup>11</sup> Registration under Vermont law provides registrants with all the rights and responsibilities that are accorded to spouses,<sup>12</sup> including “descent and distribution [and] intestate successions law.”<sup>13</sup> Additionally, in 2005 Connecticut enacted a same-sex civil union statute aimed at providing parties to the civil union “all the same benefits, protections and responsibilities under law, . . . as are granted to spouses in a marriage, which is defined as the union of one man and one woman.”<sup>14</sup>

The second approach has been to create a new institution of “domestic partner registration” or “reciprocal beneficiary registration.” Hawaii, the first state to recognize reciprocal beneficiary status, created the system in response to a decision of the state Supreme Court declaring that limitation of marriage to heterosexuals violated the state constitution.<sup>15</sup> Rather than allowing homosexual marriage like Massachusetts or enacting a civil union statute like Vermont, the Hawaiian people voted to change their state constitution to limit marriage to heterosexual individuals.<sup>16</sup> Recently, California and Maine enacted domestic partnership registration systems, which allow parties to register and receive inheritance rights and others associated with marriage.<sup>17</sup> Arizona currently has a similar bill under consideration.<sup>18</sup>

The exact causes of these changes are debatable, but public attitudes about whom should be a recipient of an intestate share have certainly played a large role. In 1998, an oft-cited study on this topic demonstrated that despite popular sentiment against same-sex marriage, “[a] substantial majority of respondents . . . preferred the partner to take a share of the decedent’s estate.”<sup>19</sup> Moreover, respondents “consistently preferred same-sex and opposite-sex committed couples to be treated the same.”<sup>20</sup>

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<sup>9</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>10</sup> VT. STAT. ANN. tit. 15 §§ 1201-1207 (2004).

<sup>11</sup> *See id.* § 1202.

<sup>12</sup> *See id.* § 1204.

<sup>13</sup> *Id.*

<sup>14</sup> 2005 Conn. Pub. Acts No. 05-10, sec. 14.

<sup>15</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>16</sup> RALPH BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 60, 80-84 (2004); HAW. REV. STAT. ANN. § 572c-2 (2004).

<sup>17</sup> CAL. PROB. CODE § 6401 (West 2002); CAL. FAM. CODE ANN. § 297.5 (West 2004); ME. REV. STAT. ANN. tit. 18-A, §§ 2-102, 2-103 (2003); *See also* CAL. FAM. CODE § 297 (West 2005). *Hennefeld v. Twp. of Montclair*, 22 N. J. Tax 166 (N.J. Tax. Ct. 2005) (according a 100% exemption from property tax due on a house held by both partners in a tenancy by entirety due to the disability of one partner).

<sup>18</sup> H.R. 2710, 47<sup>th</sup> Leg., 1st Reg. Sess. (Ariz. 2005).

<sup>19</sup> Mary Louise Fellows, et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 89 (Winter 1998).

<sup>20</sup> *Id.*

### *I.A.1.b Rights of the “Surviving Spouse”<sup>21</sup>*

Over the last decade, states have taken an increasingly protective role of the surviving spouse through expansion of elective share rights that guarantee a surviving spouse a certain fraction of the decedent’s estate, a testament to the contrary notwithstanding. Although these “elective share” rights are in no sense new, a number of developments have occurred in this area. First, states have begun to realize the importance of providing for financial needy spouses and have thus set a minimum elective share amount, usually \$50,000. This minimum amount is the lowest level awardable to a surviving spouse, even in cases in which the decedent’s assets are insufficient to otherwise satisfy the elective share of the surviving spouse.

Secondly, conceptions of what types of property are included in the elective shares of the surviving spouse have increased over time. After 1969, a large number of states realized the need to prevent fraudulent or illusory transfers from a decedent’s estate and to exempt nonprobate assets and thus enacted statutes that awarded a surviving spouse a fraction of an “augmented estate,” which included many nonprobate assets. Since the mid-1990s, more states have addressed the two problems of overinclusivity and underinclusivity of the original concept of the augmented estate. Underinclusivity existed because significant assets such as insurance, annuities, and pension benefits were excluded from the “augmented estates” and thus property titled in one spouse’s name could still be transferred to excluded assets to frustrate the spouse’s rights. States have dealt with this problem by adopting even broader concepts of the “augmented estate,” which now include insurance, annuity, and pension benefits.<sup>22</sup>

Furthermore, the modern approach also remedies the problem of overinclusivity, which existed because the fraction-of-the-augmented-estate approach applied to anyone defined as a surviving spouse, both those married for one day and those married for fifty years. Such an approach placed a newlywed with significant assets in a precarious position, whereby a large wealth transfer would be made from one spouse to other on death. To address this problem, the elective share is now calculated by multiplying the augmented estate by a percentage number that gradually increases from 3% during the first year of marriage to 50% for marriages lasting fifteen years or more. This accrual approach moves separate property states more towards an outcome similar to community property states where both spouses share equally in the assets accumulated during marriage, with that total amount increasing as property is acquired over a number of years of marriage. Colorado, Hawaii, Kansas, Minnesota, Montana, South Dakota, and West Virginia adhere to this approach.

At first glance, these changes seem to be minor arithmetical changes, but in actuality the changes are motivated by a substantial alteration in the elective share right. By providing a minimum elective share and a gradually escalating elective share that eventually reaches 50% of the marital property, states have consciously chosen to advance two important theories of marriage: the need-based theory that recognizes a duty of a decedent spouse to provide for his surviving spouse and a partnership theory that recognizes marriage as an “economic partnership to which both spouses contribute productive effort.”<sup>23</sup> Moreover, this increased role of the surviving spouse is largely due to empirical studies suggesting that individuals at

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<sup>21</sup> Although same-sex partners are sometimes treated as spouses, other states limit those rights to intestacy and do not extend elective share rights, pretermitted spousal rights, or others to same-sex couples, domestic partners, or reciprocal beneficiaries. *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, §§ 2-102, 2-103.9 (2003).

<sup>22</sup> For further explanation on this point, see Susan N. Gary, *Share and Share Alike? The UPC’s Elective Share*, 12 PROB. & PROP. 18 (1998).

<sup>23</sup> Gary, *supra* note 22, at 20. *See also* UNIF. PROBATE CODE § 2-202 cmt. (amended 1997).

death wish their surviving spouses to receive large portions and in many cases the entirety of their succession.<sup>24</sup> Will studies also indicate this is the preferred disposition of most testators.

## I.A.2. Children and Other Descendants

As with the surviving spouse, both the role and the definition of children have undergone significant alteration over the course of the last decade.

### I.A.2.a Who Qualifies as a Child?<sup>25</sup>

In recent years, a demographic trend has emerged allowing children born as a result of assisted reproduction techniques to inherit under state succession laws. Because of new technological reproductive techniques, such as surrogacy, egg donation, and posthumous conception, a new potential exists in which children may be born from mothers who may or may not be genetically linked to the child and even from parents who have died prior to conception. Although techniques of artificial insemination and issues of posthumous birth have existed for some time, technology has placed a new strain on old laws that allowed a child to inherit from a decedent only if he exists at the time of death or is born within 300 days of death of the father.

A series of cases, most notably ones in New Jersey<sup>26</sup> and Massachusetts<sup>27</sup> have held that a child not only born but *conceived* after death of the father through the use of frozen sperm can be an heir under the intestacy laws of the state. This significantly expands the traditional rule that a child must be in existence at the time of death of the decedent (or at least in utero) to be eligible to inherit.<sup>28</sup> States such as Texas, Delaware, Washington, Wyoming, and Colorado have moved away from the traditional limitation on inheritance and now allow posthumously conceived heirs to inherit from deceased parents, as long as the deceased person consented in writing to the posthumous use of his sperm.<sup>29</sup> Because of technological advances that allow embryos to be frozen for years, other states also provide for inheritance by posthumously conceived heirs, but specify outside limitations on when birth must occur. Louisiana provides that birth must occur within three years of the decedent's death.<sup>30</sup> Idaho is even stricter, requiring birth to occur within ten months from the death of a decedent.<sup>31</sup> In the Idaho legislature's view, "This will allow estates to have certainty in their administration, including being able to close within a reasonable time."<sup>32</sup>

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<sup>24</sup> See, e.g., MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* (1970); Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 355-68.

<sup>25</sup> A number of issues exist under the broad topic of who qualifies as a child for intestacy purposes, (e.g., adopted children, stepchildren, and children born outside of marriage), because of space constraints, only the most recent, that of children born of assisted reproduction, is considered here.

<sup>26</sup> Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

<sup>27</sup> Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002)

<sup>28</sup> THOMAS E. ATKINSON, *THE LAW OF WILLS* 75 (2d ed. 1953).

<sup>29</sup> See generally Susan N. Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to Do About it Now*, 19 PROB. & PROP. 32 (2005); Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL. PROP. PROB. & TR. J. 727 (2004).

<sup>30</sup> LA. REV. STAT. ANN. § 9:391.1 (2003). California has recently adopted a similar statute. 2004 Cal. Stat. 775

<sup>31</sup> 2005 Idaho Sess. Laws 123.

<sup>32</sup> *Id.*

Not all states have considered technological advancements in this area as justifications for statutory modification. Florida,<sup>33</sup> Georgia,<sup>34</sup> and North Dakota<sup>35</sup> have refused to extend their intestacy laws to include special rights for posthumously conceived children. An Arizona court, faced with the same issue as the courts in New Jersey and Massachusetts, refused to create a special exception for posthumously conceived heirs and denied a claim for social security benefits for a child conceived posthumously because the child did not meet the statutory requisite of being “in gestation” at the time of the decedent’s death.<sup>36</sup>

#### *I.A.2.b Role of the Child or Descendant*

Having observed the expansion of the definition of descendant, the role given to the descendant by modern law must be assessed. As might be expected, the increased share given to the surviving spouse has in some cases come at the expense of the decedent’s children. All states uniformly list children as a primary class in their tables of descent and distribution in the absence of a surviving spouse.

However, when a surviving spouse exists and the surviving children are the children of both the decedent and the surviving spouse, a large number of states award one hundred percent of the intestate estate to the surviving spouse. The shift from a direct award to the children to an indirect award to the children through the surviving spouse was partly driven by the belief that a direct award to minor children would involve unnecessary administrative expenses requiring the appointment of a guardian to administer to his interests. In the case of a surviving spouse whose children are also the children of the decedent, these expenses can be avoided by a direct award to the surviving spouse. This approach indirectly awards the children through the surviving spouse’s fulfillment of his moral and legal duty to care for them.

In contrast, when the decedent has children who are not the children of the surviving spouse, the share awarded to the surviving spouse declines markedly to roughly half the estate plus the first \$100,000. This decrease recognizes the possibility that surviving spouses may not minister to the decedent’s children as they would their own. Consequently, the remaining share (approximately one-half of the estate) is awarded directly to the children, and the cost of appointing a guardian is deemed necessary to insure the protection of those children.

The final scenario involves family situations in which there exist both children of the decedent and the surviving spouse, as well as children of the surviving spouse but not of the decedent. In these situations, states are hesitant to award the entire estate to the surviving spouse because this situation presents different issues from those that existed when *all* descendants were children of the decedent and the surviving spouse. The modern tendency is to award the first \$150,000 and half of the remaining estate to the surviving spouse, with remainder being distributed to the decedent’s children. Again, the cost of an administration by a guardian for the children is seen as necessary in this case. Because of the concern that the surviving spouse may use the inheritance to unfairly favor his own children over the children common to the decedent and the surviving spouse, a direct award to the children is proper.

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<sup>33</sup> FLA. STAT. ANN. § 742.17 (West 2005).

<sup>34</sup> GA. CODE ANN. § 52-3-1 (2005).

<sup>35</sup> N.D. CENT. CODE § 14-18-04 (2005).

<sup>36</sup> *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002), *rev’d*, 371 F.3d 593 (9th Cir. 2004).

## **I.B. Wills and Issues of Testate Succession**

### **I.B.1 Liberal Application of Formalities; Will Execution**

A great degree of liberalization has occurred in the formal requirements for an effective will or testament. The trend is decisively toward enforcement of wills that do not comply with the standard form requirements, if the testator's intent can be safely ascertained and no fraudulent activity is suspected. The approaches adopted by courts and legislatures for non-complying wills range from employing the idea of harmless error in wills, granting courts a power to "dispense" with noncompliance, utilizing the doctrine of substantial compliance, and imposition of a constructive trust.<sup>37</sup> The burden of proof that these noncomplying wills are sufficient to be admitted to probate rests on the party seeking to probate the noncomplying will.<sup>38</sup>

Prior to 1990, however, this was not the case. Most courts insisted on strict compliance with the formalities necessary for wills, which included a signed document evidencing testamentary intent attested to by witnesses or, if no attesting witnesses were present, a handwritten and signed will.<sup>39</sup> Since then, legislatures in several states (such as Hawaii, Michigan, Montana, New Jersey, South Dakota, and Utah) have statutorily granted courts a "dispensing power" to excuse errors in the execution of wills, if the document's proponent can establish the harmless nature of the error by clear and convincing evidence.<sup>40</sup>

Montana courts have applied this power by giving effect to a draft of a will that was signed by the decedent and notarized by his attorney. Despite the absence of witnesses, the court found clear and convincing evidence that the decedent had the requisite testamentary intent. The lack of witnesses was classified as harmless error.<sup>41</sup> Similarly, courts have excused the absence of one witness's signature when the will is signed and attested by both another witness and the notary.<sup>42</sup> The exact placement of the signature of the notary, witnesses, and even the testator is likewise an area that no longer requires strict compliance.<sup>43</sup> Courts have allowed the signatures of the testator and the witnesses to appear on separate

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<sup>37</sup> Leigh Shipp, Comment, Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States, 79 TUL. L. REV. 723 (2005). Similarly, many judges also have power to dispense with harmless errors in the revocation, alteration, or revival of a will.

<sup>38</sup> Estate of Brooks, 927 P.2d 1024 (Mont. 1996).

<sup>39</sup> See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS, §§ 3.1 & 3.2 (1999); Lloyd Bonfield, Reforming the Requirement for Due Execution of Wills: Some Guidance from the Past, 70 TUL. L. REV. 1893 (1996) ("At least in America, the widespread adoption by courts of substantial compliance was not to be. In a number of jurisdictions, courts prior to 1990 were invited to apply it, but it has been argued that all courts which considered the Langbein brief ultimately declined.").

<sup>40</sup> HAW. REV. STAT. ANN. § 560:2-503 (Michie 1999); MICH. COMP. LAWS § 700.1101 (2001); MONT. CODE ANN. § 72-2-523 (2003); S.D. CODIFIED LAWS § 29A-2-503 (Michie 2004); UTAH CODE ANN. § 75-2-503 (Supp. 2003); 2004 N.J. Laws 132.

<sup>41</sup> In re Estate of Hall, 51 P.3d 1134 (Mont. 2002). But see Estate of Iversen, 150 S.W.3d 824 (Tex. App. 2004) (holding that the absence of attesting signatures by witnesses on a written, nonholographic testament not accompanied by a self-proving affidavit could not be cured by "substantial compliance," despite affidavits claiming to have witnessed the testator's execution of the testament).

<sup>42</sup> In re Freidman, 6 P.3d 473 (Nev. 2000).

<sup>43</sup> Some states require the testator's signature to appear at the end of the testament but have legislatively provided that courts may consider testamentary provisions appearing after a testator's signature. See, e.g., LA. CIV. CODE art. 1575 (2005). Only six states mandate that the signature in a will appear in a certain place on a testament. FLA. STAT. ANN. § 732.502 (West 1995 & Supp. 2002); KAN. STAT. ANN. § 59-606 (1994); N.Y. EST., POWERS & TRUSTS LAW § 3-2.1 (2000); OHIO REV. CODE ANN. § 2107.03 (1994); OKLA. STAT. ANN. tit. 84, § 55 (Supp. 2002); 20 PA. CONS. STAT. § 2502 (1994).

pages;<sup>44</sup> the signature of a testator to appear at the top of the page and that of the witness in the body of the will;<sup>45</sup> and witnesses' signatures to appear on a separate attached self-proving affidavit.<sup>46</sup>

On the other hand, most states consider both the requirements of a writing and a signature<sup>47</sup> of the testator to be sacrosanct because they, unlike the others, serve to evidence both testamentary intent and insurance against fraud.<sup>48</sup> For example, a Louisiana court in Succession of Eddy, invalidated a will in which the dispositive provisions were on the front of a sheet of paper and the signature and attestation on the reverse. The court found this approach to be violative of the statutory requirement that a testator sign each page of his testament.<sup>49</sup>

## **I.B.2 Tension Between Testamentary Freedom and Family Care**

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. For the last several decades, a notable number of scholars have advocated a limitation on testamentary freedom that provides for the protection of and provision for children of a testator.<sup>50</sup> America, 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 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.<sup>51</sup>

### *I.B.2.a Emphasis Toward Testamentary Freedom*

#### *I.B.2.a.1 Forced Heirship*

The response from the courts and the legislatures has seemingly been an overwhelmingly negative one. First, in 1996, Louisiana, the only state in the United States to recognize a concept of forced heirship, moved away from its traditional history and toward an American-style freedom of testation. Prior to 1996, all children were 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]."<sup>52</sup> Since 1996, however, Louisiana's version of forced heirship has been scaled back significantly and now guarantees

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<sup>44</sup> In re Estate of Brannon, 441 S.E.2d 248 (Ga. 1994).

<sup>45</sup> Draper v. Pauley, 480 S.E. 2d 495 (Va. 1997).

<sup>46</sup> Estate of Fordonski, 678 N.W.2d 413 (Iowa 2004).

<sup>47</sup> Allen v. Dalk, 826 So. 2d 245 (Fla. 2002) (holding invalid an unsigned will, despite the signatures of two witnesses and a self-proving affidavit). But see Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct. App. 2003) (finding a computer generated signature to be sufficient to comply with the signature requirement); Hickox v. Wilson, 496 S.E.2d 711 (Ga. 1998) (concluding that a signed self-proving affidavit stapled to will was sufficient to comply with the signature requirement).

<sup>48</sup> UNIF. PROBATE CODE § 2-503, cmt. (amended 1997).

<sup>49</sup> Succession of Eddy, 664 So.2d 853 (La. Ct. App. 1995).

<sup>50</sup> See, e.g., BRASHIER, supra note 16, at 90-120; Ronald Chester, Should American Children Be Protected Against Disinheritance, 32 REAL PROP. PROB. & TR. J. 405, 434 (1997); Ralph Brashier, Protecting the Child: Must Louisiana Stand Alone?, 57 LA. L. REV. 1 (1996); Katherine Shaw Spaht, Forced Heirship Changes: The Regrettable Revolution Completed, 57 LA. L. REV. 55 (1996).

<sup>51</sup> But see L.W.K. v. E.R.C., 735 N.E.2d 359 (Mass 2000) (holding that a child support award is enforceable against a parent's estate); In re Marriage of Perry, 68 Cal. Rptr. 2d 445 (Cal. Ct. App. 1997) (holding that child support payments are enforceable after the death of the decedent, irrespective of whether his assets are transfer into a inter vivos trust before death).

<sup>52</sup> LA. CIV. CODE art. 1493 (1870).

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.<sup>53</sup> 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.

#### *I.B.2.a.2 Negative Wills*

Even outside of Louisiana, a number of courts and legislatures have adopted means to advance the cause of testamentary freedom, such as recognition of negative wills by a testator. Negative wills are provisions in a testament or will that affirmatively disinherit a legatee from receiving anything. 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.<sup>54</sup>

Courts have recently begun to allow the use of negative wills, effectively allowing any property undisposed of by a will to pass to the intestate heirs of the testator with the exclusion of the disinherited heir.<sup>55</sup> Since the 1990s, thirteen states have enacted statutes allowing the use of negative wills.<sup>56</sup> By way of limitation on the doctrine, however, courts have interpreted negative will statutes to allow disinheritance of heirs only if there are other heirs available to succeed to the property of the decedent and thus precluding the state from claiming the estate escheats to it.<sup>57</sup> Although the recognition of this doctrine is increasing, a small minority of states have addressed this issue recently in court decisions and explicitly rejected it.<sup>58</sup>

#### *I.B.2.b Movement Away from Testamentary Freedom*

In response to the increasing emphasis on testamentary freedom, the law has begun to accommodate an increasing number of will contests and claims for undue influence. If testamentary freedom is unfettered, will contests and claims of undue influence become the only effective ways to ensure competent testamentary intent, to fulfill familial obligations, and to protect against a testator's poor judgment. As one scholar has noted, "although courts steadfastly proclaim their adherence to the concept of testamentary freedom, their reasoning quite often betrays a primary loyalty to other competing principles[:] first, testators have a duty premised on moral obligation to distribute their estate to family members; second, testators need protection from their own . . . immoral instincts."<sup>59</sup>

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<sup>53</sup> LA. CIV. CODE art. 1493 (2000).

<sup>54</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.7, Rptr. Note (1999)

<sup>55</sup> *See id.* § 2.7; UNIF. PROBATE CODE § 2-201 (amended 1997).

<sup>56</sup> *See, e.g.*, ALASKA STAT. § 13.12.101 (Michie 1996); ARIZ. REV. STAT. ANN. § 14-2101 (West 1994); COLO. REV. STAT. § 15-11-101 (West 2005); HAW. REV. STAT. ANN. § 560:2-101 (Michie 1997); MINN. STAT. ANN. § 524.2-101 (West 2002); MONT. CODE ANN. § 72-2-111 (1993); N.M. STAT. ANN. § 45-2-101 (Michie 1993); N.D. CENT. CODE § 30.1-04-01 (1995); 20 PA. CONS. STAT. ANN. § 2101 (West 2005); S.D. CODIFIED LAWS § 29A-2-101 (Michie 1995); W.V. CODE § 42-1-2 (1992).

<sup>57</sup> *In re* Estate of Jetter, 570 N.W.2d 26 (S.D. 1997).

<sup>58</sup> *See* Cook v. Estate of Seeman, 858 S.W.2d 114 (Ark. 1993); *In re* Estate of Hunt, 842 P.2d 872 (Utah 1992).

<sup>59</sup> Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

### *I.B.2.b.1 No Contest Clauses*

One way in which disappointed heirs are protected against the unbridled discretion of a testator is through the ability to initiate a will contest—even sometimes in the presence of a testamentary provision forbidding such a challenge. That is, despite the existence of no contest or in terrorem clauses, most courts have allowed maximum flexibility to potential beneficiaries and have construed the ambit and force of such clauses often very strictly. An increasing number of states allow beneficiaries to challenge a will, in spite of an in terrorem clause, if there is “probable cause” to believe the will is invalid<sup>60</sup> and the challenger does so in “good faith.”<sup>61</sup> Attempts by a testator in a will to preclude such good faith challenges for which probable cause exists are usually ineffective.<sup>62</sup> Some courts have allowed a potential beneficiary to seek construction of the clause to determine its breadth and applicability without invoking its punitive effect. Other courts have permitted the filing of suits to remove co-executors<sup>63</sup> and to ascertain the correctness of a particular distribution of property,<sup>64</sup> again, without invoking the punitive nature of an in terrorem or no-contest clause of a will.

### *I.B.2.b.2 Undue Influence*

The second mode of protection for excluded heirs is the ability to raise a claim for undue influence. Undue influence is generally defined as the exercise of such influence over the donor as to overcome the donor’s free will and cause him to make a transfer he would not have otherwise made.<sup>65</sup> Some courts hold that “undue influence” is presumed in the context of certain confidential relationships and can only be rebutted upon proof that the influencing party acted in “good faith” and the testator acted “freely, intelligently, and voluntarily.”<sup>66</sup> A minority of courts also have recently found that when the circumstances surrounding the execution of a will are suspicious, a presumption of undue influence arises.<sup>67</sup> The situation is often characterized as a burden shifting one. If a testator was of weakened intellect or the drafter of the will maintained a confidential relationship with the beneficiary who receives a substantial benefit under the will,<sup>68</sup> the burden to rebut undue influence shifts to the party seeking to probate the will.

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<sup>60</sup> UNIF. PROBATE CODE § 3-905 (amended 1997). The following states have adopted good faith, probable cause exceptions (or similar exceptions) in recent years: HAW. REV. STAT. ANN. § 560:3-905 (Michie 1997); MD. CODE ANN., EST. & TRUSTS § 4-413 (1991); MINN. STAT. ANN. § 524.2-517 (West Supp. 1997); MONT. CODE ANN. § 72-2-537 (1997); NEB. REV. STAT. § 30-24,103 (1995); N.D. CENT. CODE § 30.1-20-05 (1996); UTAH CODE ANN. § 75-3-905 (1993). See generally Gerry Beyer et al., The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses, 51 SMU L. REV. 225, n.153 (1998).

<sup>61</sup> See also Estate of Schumway, 9 P.3d 1062 (Ariz. 2000) (defining probable cause as anything that would lead a properly and advised reasonable person to believe there is a substantial likelihood of success in a will contest); Hannam v. Brown, 956 P.2d 794 (Nev. 1998) (finding good faith and probable cause satisfied by, among other things, medical evidence).

<sup>62</sup> Willingham v. Willingham, 966 S.W.2d 48 (Tenn. 1998).

<sup>63</sup> Preuss v. Stokes-Preuss, 569 S.E.2d 857 (Ga. 2002).

<sup>64</sup> Kershaw v. Kershaw, 848 So.2d 942 (Ala. 2002).

<sup>65</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (2003); Jackson v. Schrader, 676 N.W.2d 599 (Iowa 2004).

<sup>66</sup> Id.

<sup>67</sup> See, e.g., Ramsey v. Taylor, 999 P.2d 1178 (Or. Ct. App. 2000); Logan v. Logan, 937 P.2d 967 (Kan. Ct. App. 1997); Duvall v. Brenizer, 818 S.W.2d 332 (Mo. Ct. App. 1991).

<sup>68</sup> UNIF. PROBATE CODE § 3-407 (amended 1997); Will of Melson v. Melson, 711 A.2d 783 (Del. 1998).

This concept has become more prevalently used in recent years<sup>69</sup> and has been expanded from the basic idea of influencing a testator to make testamentary dispositions in one's favor. Courts now recognize that one can influence a testator in favor of another party with whom the influencer is closely aligned. For example, undue influence can result from a confidential relationship between a testator and a church pastor who unduly influences a congregant to bequeath the bulk of her estate to the church.<sup>70</sup> As a matter of law, one court has held that in the marital context, the activities of one spouse, although not himself in a confidential relationship with the testator, will be imputed to the other spouse who maintains such a relationship with the testator. This allows a claim of undue influence against one spouse if the other maintains the confidential relationship with the testator.<sup>71</sup>

### **I.B.3. Construction and Interpretation of Wills**

In order to effectuate testamentary intent, courts have recently begun interpreting and construing the language of wills liberally. Aside from the basic rule that extrinsic evidence can be admitted to clarify an ambiguity or contradiction,<sup>72</sup> some courts have allowed evidence of a drafting error to show a testamentary intent contrary to the indication of otherwise clear language.<sup>73</sup> Moreover, others courts have similarly interpreted clear testaments loosely to achieve the desired result of the testator. For example, in *Estate of Peterson v. Peterson*, a North Dakota court held that, despite a provision in a will directing the residue of an estate to be divided equally among nine beneficiaries, the residue should be divided unequally to effectuate testamentary intent and to offset the inability to divide equally certain nonprobate accounts.<sup>74</sup> This loosened approach to interpretation, however, does not mean that all courts will admit extrinsic evidence to vary the contents of a will in the absence of any discrepancy. Idle suggestions of a testator's mistake are insufficient to vary testamentary language,<sup>75</sup> as are contentions contrary to testamentary provision that are unsupported by language in a will and unsupported by extrinsic evidence.<sup>76</sup>

### **I.B.4. Post-Execution Events Affecting Wills**

In accord with the liberal methods of interpretation employed to achieve a testator's intent, courts have also applied similar rationales when addressing events that occur after the execution of a will and which ordinarily can effect testamentary devises.

#### *I.B.4.a Ademption*

The doctrine of ademption holds that if property left by legacy is not in the testator's estate at his death, the legacy fails. Courts and legislatures have slowly begun to move away from the "identity" theory, under which ignores the testator's intent is ignored and a legacy fails if the property is not found in the testator's estate, and towards the "intent" theory, under which a legacy fails in the absence of the property in the testator's estate, unless it can be shown that

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<sup>69</sup> Undue influence was officially recognized under Louisiana law in 1991. See LA. CIV. CODE ANN. art 1483.

<sup>70</sup> *Estate of Maheras v. Cook*, 897 P.2d 268 (Okla. 1995).

<sup>71</sup> *Estate of Gerard v. Gerard*, 911 P.2d 266 (Okla. 1995).

<sup>72</sup> See, e.g., In re Estate of Cole, 621 N.W.2d 816 (Minn. Ct. App. 2001) (allowing scrivener's testimony to clarify a contradiction or discrepancy between written words (i.e., a legacy of "two hundred thousand dollars") and a numeric designation (i.e., "\$25,000.")).

<sup>73</sup> *Erickson v. Erickson*, 716 A.2d 92 (Conn. 1998).

<sup>74</sup> *Estate of Peterson v. Peterson*, 561 N.W.2d 618 (N.D. 1997). See also *Estate of Kirk*, 907 P.2d 794 (Idaho 1995).

<sup>75</sup> *Estate of Smith v. Smith*, 71 Cal. Rptr. 2d 424 (Cal. Ct. App. 1998).

<sup>76</sup> *Flannery v. McNamara*, 738 N.E.2d 739 (Mass. 2000).

such would be contrary to the testator's intent.<sup>77</sup> Many states now prevent legacies from adeeming and allow substituted or replacement property acquired by the decedent and still in the estate to form the object of the legacy, even though the original object of the legacy no longer forms a part of the decedent's estate.<sup>78</sup>

In addition, court cases in several states demonstrate a judicial desire to allow testamentary intent to govern over the strict formalities of a situation. For instance, in In re Will of Redditt, a court held that the sale of a family farm in return for stock in a family corporation did not cause an ademption because the transfer was only one of form.<sup>79</sup> Similarly, in Parker v. Bozian, the Alabama Supreme Court, after noting that "the intention of the testator is always the polestar in the construction of wills," held that a legacy of a specifically numbered and identified Certificate of Deposit held by a local bank did not adeem when it was cashed out and reinvested in two longer-term, higher-interest CDs because the proceeds were directly traceable to the original CD.<sup>80</sup>

#### *I.B.4.b Anti-Lapse*

Antilapse statutes, which redirect legacies to certain specified individuals in the event that the original legatee predeceases the testator,<sup>81</sup> also have undergone some recent modification. Since the rules on when a legacy lapses and accretes to another are modeled on the presumed intent of a testator, courts tend to require a clear indication either in a will or through proof by extrinsic evidence of a testator's intent to deviate from the statutory scheme before it displaces operation of the antilapse statutes.<sup>82</sup>

For instance, merely leaving the residue of the estate to named individuals "to the express exclusion of any other person or persons" does not override the anti-lapse statute<sup>83</sup> nor does basic language in a will indicating that two heirs were to receive a legacy "share and share alike."<sup>84</sup> On the other hand, specific provisions in wills that "all lapsed legacies and devises" accrue to the residuary legatee<sup>85</sup> or that the legacy is to be distributed only to members of a class who are "living"<sup>86</sup> or "equally share and share alike ... or to the survivors thereof"<sup>87</sup> is sufficient to override the antilapse rules and to govern how the legacy would devolve.

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<sup>77</sup> UNIF. PROBATE CODE § 2-606, cmt. (amended 1997); RESTATEMENT (THIRD) PROP.: WILLS & OTHER DONATIVE TRANSFERS, § 5.2, cmt. b. (1999).

<sup>78</sup> See, e.g., ALA. CODE § 43-8-227; COLO. REV. STAT. § 15-11-608 (2005); MICH. COMP. LAWS § 700.2606 (2002); MONT. CODE ANN. § 72-2-616 (1997); UTAH CODE ANN. § 752-606 (1993).

<sup>79</sup> 820 So. 2d 782 (Miss. Ct. App. 2002). But see Succession of Huguot, 708 So. 2d 1302 (La. Ct. App. 1998) (holding that a bequest of real estate to grandson adeemed when a testator, prior to death, transferred the property in exchange for an interest in an entity, a partnership, formed under Louisiana law).

<sup>80</sup> 859 So. 2d 427 (Ala. 2003). But see Church v. Morgan, 685 N.E.2d 809 (Ohio Ct. App. 1996).

<sup>81</sup> See RESTATEMENT (THIRD) PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmts. b, c, and d.

<sup>82</sup> See id. § 5.5 cmt. f. See also Edward C. Hallbach, Jr. & Lawrence W. Waggoner, The UPC's New Survivorship and Antilapse Provisions, 55 ALB. L. REV. 1091, 1099 (1992) ("Antilapse provisions serve an extremely important function in the law, for they give effect to strong human impulses in same cases and, in others, to what are perceived as highly probably intentions.")

<sup>83</sup> Kubiczky v. Wesbanco Bank, 541 S.E.2d 334 (W. Va. 2000).

<sup>84</sup> Martin v. Summers, 655 N.E.2d 424 (Ohio Ct. App. 1995).

<sup>85</sup> Colombo v. Stenvenson, 563 S.E.2d 591 (N.C. Ct. App. 2002).

<sup>86</sup> Allen v. Talley, 949 S.W.2d 59 (Tex. App. 1997).

<sup>87</sup> Polen v. Baker, 752 N.E.2d 258 (Ohio 2001).

## **I.C. Non-Succession Law Matters**

Finally, a number of other changes in the laws outside of the succession context have significantly affected the way in which wealth is transmitted at death. Because of space constraints, only one can be briefly discussed.

### **I.C.1. The Rule Against Perpetuities**

Both in and out of trusts (but primarily in), states have recently made it easier for individuals to leave property to succeeding generations, even those not yet in being. Previously, the rule against perpetuities established the outside limit on how long a “dead hand” could control the distribution of property. In classic formulation, the rule was cryptically expressed in the following manner: “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”<sup>88</sup> The two-fold purpose is to prevent dead-hand control of property and to prevent decedents from keeping property out of commerce.

Although about twenty states have adopted a 90 year wait-and-see period as the measuring time under the Rule Against Perpetuities (RAP),<sup>89</sup> over approximately the last twenty years, almost one-half of all the states have abolished or severely limited the application of the RAP<sup>90</sup> in one form or another.<sup>91</sup> This movement has taken many forms and has only increased over the last ten years.<sup>92</sup> Some states have abolished the rule outright. Other states have abolished it only for property held in trust. Still other states have extended the measuring time to 360 or 1000 years, effectively abolishing the RAP, but without doing so explicitly. Finally, some states have allowed trust settlors to opt out of the RAP and thus apply it only in the absence of a statement to that effect. Thus, in the words of one scholar, “[T]he common law Rule Against Perpetuities is going the way of the dinosaur in a number of American jurisdictions.”<sup>93</sup>

### **I.C.2. Other Matters**

Significant changes have also occurred in trust law, tax law, tort law, and federal pension law. Trust law now provides trustees with greater flexibility in trust asset management by allowing them to maximize total return for the trust and granting them the authority to adjust between principal and income between beneficiaries.<sup>94</sup> In addition, the recent revision to the estate tax law has created an enormous impact in successions law and a new ability of decedents to pass on increasingly large amounts of wealth tax free.<sup>95</sup> Federal pension law is now also playing a more active role in preempting state laws that purport to dispose of federally governed

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<sup>88</sup> JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (4th ed. 1942).

<sup>89</sup> Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 U.C.L.A. L. REV. 1303 (2003).

<sup>90</sup> See, e.g., 2003 Del. Laws 102 (abolishing both the rule against perpetuities and the rule against accumulations); 2003 N.H. Laws 143 (eliminating the rule against perpetuities to instruments providing safeguards relative to continued alienation of property); 2000 Fla. Sess. Law Serv. 00-245 (West) (extending the measuring time to 360 years). See also Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trusts Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L. J. \_\_\_\_ (2005) (forthcoming).

<sup>91</sup> See Robert Sitkoff, *The Lurking Rule Against Accumulation of Income*, 100 NW. U. L. REV. \_\_\_\_ (forthcoming).

<sup>92</sup> See Sitkoff & Schanzenbach, *supra* note 90, at Table 5.

<sup>93</sup> Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588 (2003)

<sup>94</sup> For further discussion on some of the other important developments, see John Langbein, *Mandatory Rules In the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004); Edward C. Hallbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877 (2000).

<sup>95</sup> 115 Stat. 38 (2001); I.R.C. §§ 2210, 2264. See also Dukeminier & Krier, *supra* note 89.

pension and life insurance programs after the death of a decedent.<sup>96</sup> Lastly, state tort law governing attorney malpractice now frequently allows suits by beneficiaries or potential beneficiaries who are not clients of the negligent lawyer.<sup>97</sup> All of these changes are outside the pure succession context but have fundamentally altered the way in which wealth is transmitted at death.

## II. Comparative Legal Analysis

Most of the changes or trends in modern succession laws have not resulted from comparative legal analysis of other systems and jurisdictions outside the United States. Many changes respond to preexisting modern societal practices while others respond to changes in the composition of the society governed by those laws. Several intestate law alterations appropriately illustrate this explanation. For example, the increased share left to the surviving spouse was adopted in response to empirical surveys about the intent of ordinary individuals and the existing practice among testators.<sup>98</sup> In 1978, the American Bar Foundation sponsored a study on the public attitudes about property distribution at death. The study concluded that “[b]ased on the findings of this study and prior studies, . . . a modern intestacy statute should provide [that] . . . the surviving spouse inherit the entire estate in preference to the decedent’s children who are also natural or adopted children of the spouse.”<sup>99</sup> Similarly, the increased distinctions made regarding the portion left to children who either are or are not children of the decedent and the surviving spouse are the result, at least in part, of the “advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages . . .”<sup>100</sup>

Moreover, the revisions to the surviving spouse’s elective share result from the recognition of the “contemporary view of marriage as an economic partnership,” whereby the gains and losses of marriage are shared equally by both spouses.<sup>101</sup> The idea of “keeping apace with modern societal developments and expectations” has been a strong force in the revisions of modern intestacy law, and has prompted a leading scholar in this area to call for further revision of the elective share system to create a “more direct form . . . [of the] approximation system, one that would make the system more transparent and therefore more understandable.”<sup>102</sup> Still other changes, such as the increased extension of intestacy laws to children of assisted reproduction, correspond to the ever changing technology that pervades society.

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<sup>96</sup> See Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2000); see also *Boggs v. Boggs*, 117 S. Ct. 1754 (1997); T.P. Gallanis, *ERISA and the Law of Successions*, 65 OHIO ST. L.J. 185 (2004).

<sup>97</sup> *Watkins Trust v. Lacosta*, 92 P.3d 620 (Mont. 2004); *McCarthy v. Landry*, 678 N.E.2d 172 (Mass. Ct. App. 1997). See also Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN L. REV. 101 (“Perhaps the two leading developments in the law of wills and trusts over the last thirty years have been the vast increase in the number of lawsuits alleging legal malpractice in an estate planning context and the development of the Uniform Probate Code (UPC).”)

<sup>98</sup> See, e.g., Fellows et al., *supra* note 24; SUSSMAN ET AL., *supra* note 24.

<sup>99</sup> Fellows, *supra* note 24, at 386 (1978).

<sup>100</sup> UNIF. PROBATE CODE Art. II, Prefatory Note, at 41 (as amended 1993). This phenomenon was discussed and documented in Lawrence W. Waggoner, *The Multiple-Marriage Society and the Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991).

<sup>101</sup> UNIF. PROBATE CODE Art. II, Pt. 2, Refs & Annos. (“The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership.”)

<sup>102</sup> Lawrence W. Waggoner, *The Uniform Probate Code’s Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 9 (2003).

Some scholarship on comparative intestacy law, however, has begun to emerge. In a recent law review article, Professor Lawrence Waggoner has argued for a draft intestacy statute that would allow domestic partners to share in the intestate estate of another partner in a manner similar to spouses.<sup>103</sup> In doing so, Professor Waggoner candidly admits that in fashioning the model statute, “I have drawn upon a similar proposal put forward by the Queensland Law Reform Commission” which provided a definition of “de facto partner” granting inheritance rights to person, who, among other things, “lived with the intestate as a member of a couple on a genuine domestic basis for a period of ... at least 5 years.”<sup>104</sup> In addition, Professor Waggoner admits to drawing on recent scholarship in this area on Swedish law, which not only explained the recent Swedish law granting limited inheritance rights to same-sex partners, but which also sought to highlight similarities in Swedish and American culture for purposes of assessing the susceptibility of American law to a limited reception of Swedish legal concepts.<sup>105</sup> American law has also been informed by scholarship on the recent Property (Relationships) Act in New Zealand, which accords unmarried couples to the “same property division regimes as married couples.”<sup>106</sup>

Comparative legal scholarship has also had a significant influence in the area of testaments, specifically in regard to the “dispensing power” granted to courts to excuse harmless error regarding the formalities for executing, revoking, or modifying wills. This change arose at the impetus of Professor John Langbein. In the 1970s, Professor Langbein advocated that only “substantial compliance” with the will formalities should be required. His advocacy, however, received a cool reception from courts and legislatures, causing him to revise his approach. In 1987, Professor Langbein published an article entitled, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*. This article examined recent changes in Australian law regarding a court’s authority to dispense with will formalities and surveyed ten years of court experiences with the new “dispensing power.” After modifying the standard of proof required to demonstrate that a decedent intended a document to serve as his will, Professor Langbein advocated that American courts reduce their reliance on will formalities as well.<sup>107</sup> Langbein’s work influenced the drafters of the Uniform Probate Code (a model legislative proposal) and the Restatement of Wills and Other Donative Transfers to adopt this approach.<sup>108</sup> In turn, the legislatures and the courts of several states have followed the proposal.

Although the above analysis illustrates a successful application of comparative law in the United States, the fate of the discipline in the succession context has not always been so grand. As discussed above, there has been an ongoing tension between the competing values of testamentary freedom and fulfillment of familial obligations. Without much success, academics have advocated change to a European-type system or at least to a system in which

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<sup>103</sup> Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 79 (1994).

<sup>104</sup> *Id.*, at n. 141.

<sup>105</sup> Matthew Fawcett, *Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants*, 24 FAM. L. Q. 179 (1990).

<sup>106</sup> See Virginia Grainer, *What’s Yours is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand*, 11 PAC. RIM L. & POL’Y J. 285 (2002).

<sup>107</sup> John Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987). At least one scholar has cautioned against a greater move toward an English-style discretionary distribution system in American succession law. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Successions Law*, 60 TUL. L. REV. 1165 (1986).

<sup>108</sup> RESTATEMENT (THIRD) PROP: WILLS & OTHER DONATIVE TRANSFERS § 3.3, cmt. C, Statutory Notes (1999). In fact, the comment to the Restatement provision promulgating this idea explicitly notes the comparative treatment of this doctrine and acknowledges reliance not only upon Langbein and his sources, but also upon legislation in force in Manitoba, certain Australian jurisdictions, and Israel. See *id.*

testamentary freedom is tempered with the responsibilities of familial obligations.<sup>109</sup> Despite the admonition that “the American parent’s ability to disinherit his children is unimaginable to most people of the world,”<sup>110</sup> the cause of testamentary freedom has marched on and, indeed, marched further, with Louisiana—a state with a strong civilian heritage—all but abandoning its civilian style of forced heirship.<sup>111</sup> This movement toward an American-style unrestrained testamentary freedom has led a new group of scholars to examine the feasibility of adopting a concept of the French notaire, partially in an effort to help reign in otherwise open-ended litigation regarding a testator’s capacity and claims of undue influence.<sup>112</sup> Thus far, there is no legislative development in this direction, but only time will prove determinative.

### III. Impact of Economic Integration

Given the purview of succession law in the United States vis-à-vis that of most of the rest of the world, it would be true, but misleading, to state that there is not a movement towards drafting supra-national laws of succession in the United States. This statement is true in that there has been little initiative to harmonize American succession law with the laws of Europe, South America, Africa, or any other countries. At the same time, this statement is misleading because, as mentioned above, succession law is not a primary concern of national or federal law. Instead, it is within the domain of each of the fifty American states. To the extent a parallel can be drawn between American states and European countries, a supra-national (or the in the case of the United States, a supra-state) succession law has begun to emerge.

As has been observed, however, this cause of unification is only a feasible goal when cultural and economic integration already exists.<sup>113</sup> To that extent, economic integration of the fifty state economies into one American economy has served as the foundation upon which two further unification projects, the Uniform Probate Code and Restatement of Wills and Other Donative Transfers, have built. Although the goals of these two projects are similar, their approaches are different. First, the Uniform Probate Code (and other uniform acts and laws) is produced by a specially formed committee from the National Conference of Commissioners on Uniform State Laws (NCCUSL). The NCCUSL is a non-profit organization composed of commissioners sent from every state who meet for a sole purpose “—to study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.”<sup>114</sup> The job of the NCCUSL, however, is strictly an unofficial advisory one. The proposed uniform “laws” or “codes” constructed by the NCCUSL have no effect until they are enacted by a state legislature.

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<sup>109</sup> See sources cited *supra* note 50.

<sup>110</sup> BRASHIER, *supra* note 16, at 91.

<sup>111</sup> See LA. CIV. CODE ART. 1493 (2000).

<sup>112</sup> Bonfield, *supra* note 39, at 1918-20; Nicole M. Reina, Comment, *Protecting Testamentary Freedom in the United States by Introducing Into Law the Concept of the French Notaire*, 46 N.Y.L. SCH. L. REV. 797 (2002-2003).

<sup>113</sup> Jan Smits, *Scotland as a Mixed Jurisdiction and the Development of European Private Law: Is There Something to Learn from Evolutionary Theory?*, 7.5 ELEC. J. COMP. L. (December 2003), <<http://www.ejcl.org/ejcl/75/art75-1.html>>.

<sup>114</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited Aug. 30, 2005).

In contrast, Restatements are produced by the American Law Institute (ALI) and “purport to state an authoritative or recommended view of current American common law.”<sup>115</sup> The stated goal of the ALI is an “educational” one “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>116</sup> These Restatements have no binding force, but are frequently consulted by courts and legislatures in formulating governing rules. As with the Uniform Probate Code, the Restatement of Wills & Other Donative Transfers, the Restatement of Trusts, and the new Uniform Trust Code have been very influential in prompting the changes described in this Report. These two sources, the Uniform Laws and the Restatements, more than any other sources, have bolstered the cause of pan-American unification in the succession area.

If a truly supra-national law of succession is ever to evolve, the American experience may serve as a model. Integration of cultures and economies will likely precede legal unification. Legal unification most easily succeeds in the presence of the free flow of knowledge about various legal solutions in different jurisdictions. The Restatement and the Uniform Laws projects have served as precisely those sorts of educative tools on the supra-state level in America, as has comparative legal scholarship on the larger supra-national level. Given the high degree of domestic economic integration in America, domestic legal integration has unsurprisingly been relatively successful. As the global economy develops, comparative analysis and education may very well serve as the tools to successful global legal integration.

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<sup>115</sup> Hallbach, *supra* note 94, at 1881.

<sup>116</sup> A.L.I., bylaws (amended 2005).