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CLASSES OF HEIRS AND THE INTESTATE SUCCESSION RIGHTS OF THE SURVIVING SPOUSE IN THE EUROPEAN CIVIL LAW TRADITION

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Abstract: *The Roman law heritage is present even today in all legislations which are part of the European civil law system. Since one of the most stable parts of all civil codes is the one concerning the intestate inheritances, in the light of the inheritance rights of the surviving spouse and the classes of heirs, this article attempts to highlight the perpetuation of some characteristics of the intestate succession since the late Roman law till the modern era in France and Germany, without overlooking some aspects of our old legal systems. Our analysis will confirm that some of the principles laid down in Justinian's legislation survived till nowadays.*

Key words: *ab intestate succession, inheritance rights, classes of heirs, surviving spouse.*

1. Introduction

Roman law is perhaps the greatest contribution that Rome, the Eternal City, has made to European civilisation. Even after the fall of the Byzantine Empire in 1453, the Roman law continued to influence the legal traditions of the European states [15].

Since the Roman law heritage is present even today in all legislations which are part of the European civil law system, in what follows we will attempt to highlight the perpetuation of some characteristics of the intestate succession, in the light of the inheritance rights of the surviving spouse and the classes of heirs, focusing on the continued existence of the principles laid down in Justinian's legislation.

We will limit our analysis to the Roman, French and German legal systems at the beginning of the 21th century, systems which are generally regarded as typical within each legal system, in view of the fact that France is an example of the civil law or Roman legal system, subtype of the Napoleonic Code, and Germany is also an example of the civil law or Roman legal system, but subtype of the Germanic system [17].

2. The Late Roman Legal System

2.1. Introductory Considerations

With Justinian (527-565) began a new era in the intestate inheritance. He issued the Novel 118 on the 26th of July 543. According to this Novel the estate should devolve in accordance with the presumed

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affection of the deceased. Thus, the blood relatives and the surviving spouse were called to succession somewhat in the order in which the deceased would have instituted them in his will if he made one [10].

2.2. Classes of Heirs

There were four classes of *ab intestat* heirs, with devolution from degree to degree in each class [1]. If one of the classes failed, the estate devolved upon the next in proximity.

The *first class* comprised all descendants in the male of female line. These shared among themselves *per stirpes* and the nearest of kin in each *stirps* was preferred. We must stress that the descendants beyond the first degree came to inheritance in virtue of their own right (*iure proprio*), not due to the right of another and by representation (*iure alieno et per repraesentationem*), the fiction of representation being unknown in Roman law [10].

To the *second class* belonged all ascendants who, if they were of the same degree, shared *per capita* in the same line, after a preliminary division of the estate in equal shares between the two lines (paternal and maternal). Novel 127 issued on the 1st of September of 547 called to inheritance, along with the ascendants, the brothers and sisters of the whole blood or their children if one of the brothers or sisters was predeceased. Also, as the descendants, these children came to inheritance in virtue of their own right, not due to the right of another and by representation.

The *third class* comprised the preferred collaterals, brothers and sister of the half-blood and their children to the first degree.

To the *fourth class* belonged the ordinary collaterals and the nearer in degree excluded the more remote *ad infinitum*.

2.3. Rights of the Surviving Spouse

In the absence of blood relatives, the surviving spouse enjoyed the *bonorum possession unde vir et uxor*, which was maintained by Justinian for the widow or widower.

Justinian (Novel 53) granted to the destitute spouse a share not exceeding 100 *solidi*. Any legacy received by the spouse was reckoned as part of this share, which could be reduced to an aliquot part (1/4 of the estate in competition with three or less *ab intestat* heirs, a virile part in competition with four or more *ab intestat* heirs) in full ownership, if there were children of a previous marriage, or in usufruct, if there were children by the deceased spouse (according to the 1780 Code of Laws if the spouse had children, the surviving spouse only inherited a right of usufruct over a portion of the inheritance equal to a child's portion [5] and according to the Calimach Code, if the deceased husband left children from another marriage, the destitute widow was entitled in full ownership to either one fourth of the inheritance or a part equal to a child's portion depending on the number of children [2]).

Later on, Justinian (Novel 117) abolished the inheritance right of the surviving husband and the surviving wife was entitled to receive ¼ of the estate in competition with three or less lawful children or a virile part in competition with four or more lawful children but *only* in usufruct (the naked property belonged to the children). Only in the absence of children the inheritance right of the surviving wife was in full property [12].

Emperor Leon the Sage (886-912) went even further and gave to the surviving spouse of a childless deceased one third of the estate [16].

We must mention that at the end of the 19th century Justinian's intestate inheritance law on the surviving spouse was still applied [9], as well as in Basarabia [4].

3. The French Legal System

3.1. Introductory Considerations

The Napoleonic Code, originally named *Code civil des Français* [14], was enacted in 1804 in order to reform the French legal system in accordance with the ideas of the French Revolution. This code was spread throughout Europe as a result of the French conquests, thus becoming a model for numerous other countries [8].

3.2. Classes of Heirs

Nowadays, in the absence of a spouse entitled to inherit, relatives are called to succeed as follows:

The *first class* of heirs comprises the children and their descendants. Children or their descendants succeed to their father and mother or other ascendants, without distinction of sex or primogeniture, even where born of different marriages.

To the *second class* of heirs belong the father and mother, brothers and sisters and the descendants of the latter. When a deceased leaves neither descendants, nor brother or sister, or descendants of the latter, his father and mother inherit from him, each one taking one half. When the father and mother have died before the deceased and the latter leaves no descendants, the brothers and sisters of the deceased or their descendants inherit from him, excluding the other relatives, ascendants or collaterals. When the father and mother outlive the deceased and the latter has no descendants, but brothers and sisters or descendants of the latter, one-quarter of the succession devolves to each one of the father and mother, and the remaining half to the brothers and sisters or to their descendants. When only one of the father or mother survives: one-quarter of the succession devolves to the latter, and three-quarters to the brothers and sisters or to their descendants.

The *third class* of heirs comprises the ascendants, other than the father and mother. When succession devolves to ascendants, it is divided in halves between those of the paternal branch and those of the maternal branch. In each branch, the ascendant who is in the nearest degree inherits, to the exclusion of all others. The ascendants in the same degree inherit by heads. Failing an ascendant in a branch, the ascendants of the other branch shall take the whole succession.

To the *fourth class* of heirs belong the collaterals other than brothers and sisters and the descendants of the latter. When succession devolves to collaterals other than brothers and sisters and their descendants, it is divided in halves between those of the paternal branch and those of the maternal branch. In each branch, the collateral who is in the nearest degree inherits, to the exclusion of all others. The collaterals in the same degree inherit by heads. Collateral relatives may not inherit beyond the sixth degree.

Each of these four categories constitutes an order of heirs which excludes the following.

3.3. Rights of the Surviving Spouse

The surviving non-divorced,spouse against whom there does not exist an order of judicial separation having force of *res judicata* is a spouse entitled to inherit. The spouse entitled to inherit is called to a succession either alone, or in competition with the relatives of a deceased.

When a predeceased spouse leaves children or descendants, the surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses and the ownership of the quarter in the presence of one or

several children who are not born from both spouses.

When, in the absence of children or descendants, a deceased leaves his father and mother, the surviving spouse shall take one half of the property. The other half devolves for one quarter to the father and for one quarter to the mother.

When the father or the mother is predeceased, the share which he would have taken devolves to the surviving spouse.

In the absence of children or descendants of the deceased or of his father and mother, the surviving spouse shall take the whole succession.

4. The German Legal System

4.1. Introductory Considerations

The current corner stone of the German civil law is the Civil Code in the version promulgated on 2 January 2002, last amended by the statute of 28 September 2009.

4.2. Classes of Heirs

The *first class* of heirs comprises the descendants of the deceased. A descendant living at the time of the devolution of an inheritance excludes the descendants related to the deceased through himself from the succession. If a descendant is no longer living at the time of the devolution of an inheritance, the descendants related to the deceased through him take his place (succession *per stirpes*). Children inherit in equal shares.

To the *second class* of heirs belong the parents of the deceased and their descendants. If the parents are living at the time of the devolution of an inheritance, they inherit alone and in equal shares. If at the time of the devolution of an inheritance the father or the mother is no longer living, the place of the deceased parent is taken by his descendants under the provisions governing succession by heirs of the first degree. If there are no descendants, the surviving parent inherits alone.

The *third class* of heirs comprises the grandparents of the deceased and their descendants. If the grandparents are living at the time of the devolution of an inheritance, they inherit alone and in equal shares. If the grandfather or the grandmother of one set of grandparents is no longer living at the time of the devolution of an inheritance, the place of the deceased grandparent is taken by his descendants. When there are no descendants, the share of the deceased grandparent falls to the other grandparent . If the other grandparent is no longer living, the share of the deceased grandparent falls to the other grandparent's descendants. If one set of grandparents are no longer living at the time of the devolution of an inheritance and there are no descendants of the deceased grandparents, the other grandparents or their descendants inherit alone.

To the *fourth class* of heirs belong the great-grandparents of the deceased and their descendants. If great-grandparents are living at the time of the devolution of an inheritance, they inherit alone; more than one inherit in equal shares, irrespective of whether they belong to the same line or different lines. If great-grandparents are no longer living at the time of the devolution of an inheritance, the one of their descendants who is most closely related to the deceased by degree inherits; more than one equally closely related descendant inherit in equal shares.

4.3. Rights of the Surviving Spouse

The surviving spouse of the deceased as an heir on intestacy is entitled to one quarter of the inheritance together with relatives of the first degree, and to one half of the inheritance together with relatives of the second degree or together with grandparents. If there are relatives neither of the first nor of the second degree nor

grandparents living, the surviving spouse receives the whole inheritance.

Also, If the surviving spouse is an heir on intestacy together with relatives of the second degree or together with grandparents, the spouse has a right, in addition to the shares of the inheritance, to the objects belonging to the marital household, to the extent that these are not accessories to a plot of land, and to the wedding presents, as a preferential benefit. If the surviving spouse is an heir on intestacy together with relatives of the first degree, the spouse has a right to these objects to the extent that he needs them to maintain a reasonable household.

The Romanian surviving spouse according to the Law No. 319 of 10th June 1944 also enjoys a similar right: a special inheritance right over the furniture and objects belonging to the household and over the wedding gifts. Thus, article 5 of Law No. 319 of 10th June 1944 provides that: "apart from his or her succession portion, the surviving spouse will inherit the furniture and objects belonging to the household and the wedding gifts". In the presence of descendant heirs, the surviving spouse no longer enjoys this special inheritance right: the above mentioned goods will enter the estate and will be divided between the heirs together with the surviving spouse [6]. Before this law was enacted the Romanian surviving spouse was rather at a disadvantage compared to the blood relatives of the deceased and to the Hungarian surviving spouse [13].

5. Instead of a Conclusion

The distribution of the *ab intestat* heirs in four classes, which later passed in our legislation [3], goes back till Justinian's time. Even if the *Isaurian Ecloga* tried to introduce five classes of heirs, this initiative hasn't stood the test of time [15].

In accordance with the presumed affection of the deceased, the descendants, without limitation of degree, always belong to the first class of heirs. Also, in the studied cases, the fourth class usually comprises the ordinary collateral heirs (in the German civil code to the *fourth class* of heirs belong the great-grandparents of the deceased and their descendants). The rest of the heirs belong either in the second or in the third class of heirs.

The inheritance rights of the surviving spouse had a sinuous evolution [7] but nowadays the surviving spouse enjoys, as the Roman one did, a part of the estate either in full ownership or in usufruct when in competition with any heirs.

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