CHAPTER 9 Inheritance Law

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However, if the author does not approve of the suggested changes, the change would not be carried out. Please confirm

Ursula ~~C.~~ ~~Cristina~~ Basset

Chapter 9——: Inheritance Law

Ursula ~~C.~~ ~~Cristina~~ Basset~~.~~

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1~~.~~ Inheritance ~~I~~Law in Argentina: ~~m~~Main ~~t~~Traits~~.~~

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Inheritance law covers testate and intestate successions. A succession could be partly testate, partly intestate. However, testamentary successions tend to be rare, and the estate of the deceased is mostly passed by an intestate succession.

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Argentinian Succession law is based upon the obligations towards family, and imposes therefore strict limitations on individual~~'~~'s freedom of testation. Freedom of testation is strongly curtailed, arguably, to protect family members. Argentina has, like France and Spain, a "réserve" ("legítima hereditaria~~,~~"~~,~~ legal portion), this is a portion of the estate of the deceased cannot be disposed of by a will. To protect the legal portion even the gifts advanced to the legal heirs while the defunct was alive must be brought to the inheritance to ensure an equal share of the heirs. Even if in the new Civil and Commercial Code (2015, from now on CCC) has lowered the legal portion for family members, they are still high compared to other similar legal systems. Further, the new ~~Civil and Commercial Code~~CCC ~~(2015, from here on: CCC)~~, has removed the right of the testator to disinherit their heirs.

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Ever since, Argentine inheritance law has adhered to the Roman system, according to which *hereditas personae vicem sustinet.* The inheritance represents the *persona* of the defunct, even if, in a mitigated way. The choice for the "in persona" system implies a distinct set of rules. First~~ly~~, inheritance passes to the heirs at the very instant in which death occurs. It is, undoubtedly, a legal fiction. However, in Argentine inheritance law,

this fiction is so powerful as to cause a vast number of consequences: (a) first~~ly~~, the heirs will occupy the place of the defunct from the very moment of his death for all legal purposes, whether they know of his death or not; (b) second~~ly~~, only those who exist at the moment of the death are capable of receiving the inheritance; (c) third~~ly~~, partition (the division and attribution of the estate to the heirs) will have retroactive effects: for all purposes, heirs will be deemed owners of the part of the estate that is allocated to them from the very moment of the death of the deceased~~,~~; (d) the applicable law to the procedure is the *lex domicilii* at the time of death.

Argentine inheritance law is still attached to ancient traditions, even if the new ~~Civil and Commercial Code~~CCC has tried to modernize it introducing institutions like an agreement *inter vivos* to organize the transmission of a family company ("pacto de herencia futura"), or a special system of protection in case of death for disabled family members, basically, it is still the same system designed by our first Civil Code in 1869.[1]~~.~~

To see the applicable law to probate proceedings see the chapter of international private law.

2~~.~~ Organization of ~~c~~Contents

Inheritance law is regulated in the fifth book of the new ~~Civil and Commercial Code~~CCC of 2015 ("Transmisión de Derechos por Causa de Muerte.")~~.~~ This book has ~~11~~eleven subdivisions, as follows:

~~Title 1. Successions~~
Title 1. Successions
~~Title 2. Acceptance and renounce~~
Title 2. Acceptance and renounce
~~Title 3. Contract of cession of inheritance~~
Title 3. Contract of cession of inheritance
~~Title 4. Petition of inheritance~~
Title 4. Petition of inheritance
Title 5. Liability of heirs and legatees
Title 6. Community of heirs
Title 7. Inheritance proceedings
Title 8. Partition

1~~1~~. For the same reason (the attachment to ancient tradition), inheritance law in Argentina has a vocabulary of its own. Here and there we ~~will~~ the author will be obliged to refer to Spanish terms and try to define them and translate them into English. Common Spanish words may have a specific meaning when applied to inheritance law.

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Title 9. Intestate succession
Title 10. Legal reserve (“*legítima hereditaria*”, “réserve héréditaire”)
Title 11. Testate successions

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3. The ~~o~~Opening of the ~~s~~Succession

Since Argentina adopted the Roman legal system by which heirs take the place of the defunct, the opening of the succession occurs at the exact moment in which the death of the deceased takes place. The estate, by the means of this legal fiction, will have always an owner: before his death, it will be owned by the deceased; after his death, immediately, it is owned by his heirs (automatically, directly, without the mediation of the State, there is not an instant in which the inheritance has not an owner).

Therefore, determining the time of death becomes a key issue. Time of death will determine who is capable of receiving the inheritance, since the heir must survive the deceased and exist at the time of death. Inheritance can only be accepted or renounced after death, and it is from then on that the closing period to accept is counted. Debts acquired before death (“*deudas*”) have to be paid in a different way then debts contracted after death (“*cargas*”). The first (“*deudas*”) have a privilege over the second (“*cargas*”). Death creates *ipso iure* a form of joint property between the heirs (“*comunidad hereditaria*”). The retroactive effects of partition of this community of heirs will go back to the time of death.

When the ~~Civil and Commercial Code~~CCC refers to the “opening of the succession” (“*apertura de la sucesión*”) it should be distinguished from the opening of the inheritance proceedings. The opening of the succession refers always to the time of death.

4. The ~~m~~Main ~~s~~Subjects: ~~h~~Heir and ~~l~~Legatee

Argentine inheritance law distinguishes between heirs and legatees. A heir is, generally speaking, a person who has a calling (“*vocación hereditaria*”) by a testament or by the law, to occupy and represent the deceased partly or totally. The CCC describes two sorts of heirs: (a) the heir; (b) the heir of a quota.

Heir, in principle, is he who was called to inherit by the law or by a will without any restriction. His call is to the whole of the estate, that he may have to share, eventually, with other heirs. However, the new CCC included a second category of heirs called heir of a quota ("*heredero de cuota*"). The heir of a quota receives a universality, but restricted to the part that was allocated to him by a will. The differences between the simple universal heir and the heir of quota are mainly that the first has no limit to his rights and may expand them if other heirs fall out, whilst the second has a limited heirship, restricted to the quota fixed by the testator in the will.[2]

Heirs can become their heirship by a testament or by law. As for those who become their heirship by law, two types of heirship should be distinguished: a mandatory heirship and a subsidiary heirship: the "*herederos forzosos*" (lit. "compulsory heirs" or "forced heirs," a metaphor, since they can always renounce the inheritance) and the "*herederos legítimos*" ("legal heirs"). The former are mandatory heirs, in the sense that any testament that had excluded them would be invalid as to the exclusion of them (we explain further below). The latter are subsidiary heirs, in the sense that if they had been excluded by a will, that will would be perfectly valid.

Firstly, the "*herederos forzosos*," also called "*herederos legitimarios*." These are the descendants and ascendants of the defunct and the surviving spouse. Law has a special interest in these three orders of successors, since it is understood they are the closest persons to the defunct, and the law presumes that he would not want to disinherit them. As said before, not even the written will of the deceased has the power of cutting them out of the inheritance. Only the other heirs or legatees could claim that they are not worthy to receive the estate if they have committed an offense against the deceased or his close relatives (*see* below "*indignidad*").[3] So, whenever there are a surviving spouse, ascendants or descendants ("*herederos forzosos*"), there will be a "réservereserve," a

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2 Medina, Graciela, Miguez de Bruno, María Soledad, "Principios generales sucesorios y los principios generales de la sucesión intentada en particular", DFuP, p. 109.

3 Rolleri, Gabriel, "La exclusión hereditaria en el nuevo Código Civil: Fortalecimiento de la indignidad y supresión de la desheredación", DFyP 2015, p. 105.

legal portion, that will be protected by several legal means (collation, petition of the inheritance, etc.). A testator cannot skip a legal heir by a will. If a will should omit a legal heir or curtail his rights, the legal heir might be entitled to his rights irrespectively of the contents of the will.

On the other hand, there are the "*herederos legítimos*" (simple legal heirs). In Argentinian law, these are brothers and sisters, uncles, aunts, and nephews. This second category of legal heirs has a subsidiary legal calling to receive the inheritance. This means that if the testator should make a will and exclude them, they would have no claim. The law protects simple legal heirs in a weaker way than the closer family members ("*herederos forzosos*").

Finally, there are the legatees. A legatee does not represent the deceased. He receives because of a disposition in a will, something left by the deceased for him.

The main differences between a heir and a legatee are as follows:

- In principle, the heir has to pay the debts of the deceased, while the legatee is exempted (unless it is a legacy of a universality or he had it imposed as a condition to the will).
- The heir obtains its heirship without any intervention of any judge, and even if he is not aware that he is an heir (because of the system of succession *in persona*). The legatee has to claim for his bequeath.

5. Who Can Succeed the Defunct

In Argentina, only those persons who exist at the time of the death may succeed the defunct (Article 2279 CCC) As in many other compared legal systems, the word "persons" is used in an analogic manner to refer human persons as well as legal persons. Both of them are able to succeed. There are some peculiarities to be attended to. Concerning human persons, Argentinian law is one of those rare systems in which the existence of a human person begins with conception. This means that once a human person is conceived (within the womb of a mother, or by artificial reproductive techniques—ART-), it will be granted all legal rights with the same extent as any person already born. So, persons who have been conceived by the time of death, are considered heirs to the defunct. However, their heirship depends on the fact that they are later born alive. If they do not, another legal fiction takes place: it is as if they never existed.

Applying the same principle (human life begins with conception within or outside the womb of the mother), there is a second rule, that may sound surprising: those persons conceived by ART, born after the death of the defunct, if legal procedure for ART has been followed, will be their rightful heirs. This article was supposed to deal with post-mortem ART techniques, that were later on excluded from the final text of the CCC. However, the legislator apparently forgot to exclude this reference to the children so conceived. Right now, a literal interpretation of that article could imply that every embryo that is cryopreserved, should he be implanted and later born alive, would be an heir to the defunct.

There are also some particularities to be noted concerning legal persons. Legal persons can be heirs if they exist at the time of death. However, there is one exception. The testator could create a foundation by a will. Only in this case, a non-existent person at the time of death, would, nonetheless, be an heir to the deceased. The defunct would have the power, by law, to engender a legal person after death, and still make it its heir. A beautiful legal fiction, to protect the charitable ends of foundations.

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6. Accept or Refuse an Heirship

An heir (even a “forced heir”) is free to accept or renounce their heirship (Article 2287 CCC). This right (to accept or refuse) is called “*derecho de opción*” (lit. right to opt). The right to decide is transmissible to the heirs of the heirs if it has not been exerted (e.g., if the heir dies before having had the chance to pronounce himself on the matter). Acceptance or refusal are always of the inheritance as a whole. An heir may not accept a part of the estate and refuse another. The act of acceptance or refusal is, therefore, indivisible.

An heirship can be accepted or refused only once it is opened (after the death of the deceased). Heirs have ten years, counted from the moment of death, to accept or refuse the inheritance. If the heir does not exert his right during this period, it will be understood that he refused the inheritance (Article 2288).

The acceptance of a will can be made expressly or implicitly. An express acceptation has no formal requirements, except that it should be written. It is implicit when the heir performs certain acts revealing that he perceives himself as an heir to that estate (e.g., if he sells a good pertaining to the estate, if he transfers his share to the inheritance by a cession).

In Argentina, the acceptance implies always a separation between the estate of the heir and the estate of the defunct. Contrary to what would have naturally followed the succession *in persona* system (acceptance would have implied a confusion of estates), Argentina has had a longstanding tradition to maintain both estates separate.[4] Creditors to the defunct will have no claim on the estate of their heirs. Unless, there is what is called "forced acceptance."

"*Aceptación forzada*" (forced acceptance) occurs as penalty to an heir who behaves dishonestly or fraudulently towards the estate of the defunct. He who hides or robs goods from the estate will turned his acceptance into a unlimited acceptance. Thus, his estate will be confused with that of the defunct, and the creditors of the defunct will have a claim on the whole of the estate of the heir. This fraudulent heir will have no share in the goods he tried to hide or rob.

Finally, the refusal or renouncement of the heirship takes more than the acceptance. There are special formal requirements to refuse: it has to be done by a notarial deed or by a document during the proceedings of the succession. If a heir renounces to the inheritance, it will be understood as if he never existed as heir,[5] in a very peculiar wording (if thought in terms of its deep meaning in family relations).

7. Administration of the eEstate

Once the death of person occurs, its estate passes immediately (according to the succession *in persona* system) to his heirs. However, by the means of this legal fiction, the estate previously owned by one person (the defunct) will now be owned probably by

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4. After a legal reform that took place in 1968 (Law 17.711).
5. Lit. "como si nunca hubiera sido llamado a la herencia."

a plurality of heirs. Heirs will have, from then on and until partition, a sort of co-ownership of the estate (Article~~.~~ 2323 CCC).

This co-ownership is called "*indivisión hereditaria*" (lit. refers to the period of time in which the inheritance remains undivided) or also "*comunidad hereditaria*" (community of heirs, to imply the legal community created by the group of heirs who have ownership rights towards the inheritance) and during the period in which the estate is undivided, heirs, creditors and legatees have a number of rights and obligations to protect their interests.

In the meantime, the estate needs an administrator. The Argentine ~~Civil and Commercial Code~~CCC makes provision for two kinds of administrators: (a) those who administrate beyond the legal procedure, (b) those who are appointed by a legal procedure of succession.

At all events, the faculties of the administrator are fairly limited to take reasonable measures to preserve the estate until partition (Article~~.~~ 2324 CCC). Any ordinary or extraordinary acts of administration (such as renting a building, making an investment) would need a special authorization from the community of heirs or a special mandate (conferred by a power of attorney) expressly including those faculties, the unanimous approval of the community of heirs, or, if the latter could not be obtained, the authorization of a judge (Article~~.~~ 2325 CCC).

It sometimes happens that before the legal procedure of succession begins or that, spontaneously, one or several heirs take upon themselves the administration of the estate. The CCC has now special rules for this "extrajudicial administration."~~.~~ The extrajudicial administration may have three legal sources: (a) a power of attorney (mandate) given by the community of heirs; (b) a legal provision; (c) de facto legal administration.

Even if it is uncommon, sometimes the heirs may celebrate a contract to provide for the administration of a complex estate. They may designate a legal person (e.g., a company with an expertise in operating a farm enterprise), an heir or one or several third parties to administrate the estate.

Extrajudicial administrators are hinted by the law in the case of "forced undivided wealth or goods" ("*indivisiones forzosas*,", Articles 2330 and ff. CCC, *see below*). In the case that the surviving spouse should or an heir should obtain that a family company or shares remain undivided, he who opposes the division of those goods have a claim to administer the company or decide upon the shares (to see how this works, *see* below).

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Otherwise, an extrajudicial administration is the outcome of a spontaneous decision or the dynamics of certain families in which one of their members is more suited or usually takes it upon himself to administer the wealth of the family. If the other heirs do not oppose to this de facto administration, general rules will apply to it as to any other administration of the estate.

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A judicial administrator maybe a legal or human person, or even several legal or human persons. A legal person needs a special administrative authorization to act as administrator of the inheritance.

There are some rules to appoint a judicial administrator. First of all, the testator may designate them and even plan how they will be substituted. If there were no administrator appointed by the will, the majority of heirs may appoint an administrator and devise rules to substitute him. If the majority of heirs do not reach an agreement, a Judge may appoint him. A judge should appoint preferably the surviving spouse. If the spouse should be found unsuited to perform the administration of the estate, the judge should appoint preferably another heir, unless there are reasons that make it best to appoint a third party.[6]

8. Rights of the eCreditors

To understand the position of creditors towards the succession, some prior clarifications should be made.

As it was explained above, once the death occurs, the estate of the defunct forms an undivided totality. This undivided totality is conceived as a separate patrimony (as a sort

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66. Article 2347.

of patrimony of affectation or as an insolvency estate): it will evolve, grow or decrease, as any other estate would.

As we explained before, except for those cases in which the heir is punished with a "forced acceptance" of the inheritance (*see* above), which would therefore mean a confusion between his own estate and the estate of the defunct, under normal circumstances, the estate of the heirs is separated from the undivided totalitya ("*indivisión hereditaria*") that began at the time of death.

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With this prior clarification, it should be possible to identify several classes of creditors:

- Creditors to the defunct (before his death).
- Creditors to the mass ("*indivisión hereditaria*," the undivided estate created because of the death with the estate of the defunct). Creditors to the mass are those who claim for expenditures made by the administrator in order to pay for the conservation of goods, inheritance proceedings or any other expense derived from the mass or the administration of it.
- Creditors to each heir.
- Creditors to the legatees.

Each of these creditors have a different standing and differentiated rights towards the mass.

First~~ly~~, it should be stated that there is an order of preference between them, as follows:

- First, creditors to the mass.
- Second, creditors to the defunct.

Now, once the passive of the estate has been settled, heirs and legatees have to be paid. To this end, it should be established if heirs are forced heirs or simple legal or testamentary heirs~~.~~:

- If they are forced heirs, they have a right to their legal portion. In that case, the legal portion has to be established, and once it is, legatees and other heirs may be paid from the disposable portion (the remaining of the estate, once the legal portion has been established).[7] If legacies and other bequest exceed the disposable portions, they must be reduced to the disposable portion in a very specific order.[8]

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7. First, according to the will of the defunct if he has established an order of payment in his will. Subsidiarily according to the Art. 2358 CCC.

8. Cfr. Art. 2452 CCC.

If there are no forced heirs, legatees are paid, and the remaining estate is split pro rata between the heirs.

In turn, creditors must file the evidence of their credits into the probate proceedings.

Creditors to the heirs and creditors to the legatees will have to wait until heirs and legatees receive their shares, to be paid. This does not mean that they may not seize the presumable rights of the debtor (heir or legatee), or that they may not surrogate themselves to their rights, However, since the rights of heirs and legatees are not certain until they are allocated to them, which will not occur until the division of the inheritance, they may not be paid until then.[9]

To grant their credits, obligees are provided with a number of rights: (a) they may summon the heirs to accept or refuse the heirship (Article 2288 CCC), if the heir does not pronounce himself within three month, he will be held as acceptant, (b) He may also initiate probate proceedings (after he summoned the heirs to accept or refuse, and a waiting period established by local civil procedures codes has passed); (c) they may obtain a declaration of "*legítimo abono*" (rightful payment, Article 2357 CCC), by which their credits are recognized by the heirs; (d) they may claim the payment of their debts against directly against the heirs (Articles 2277, 2280 CCC); (e) they may seize the goods of the inheritance, even those forcedly undivided (Article 2330/2333 CCC), (f) they may claim that before partition, a share of the good is set apart in order to settle their credits; (g) they may request the bankruptcy of the inheritance (Article 2360, Articles 80 and 83, Law 24.522), (h) they may request the administrator to provide an accounting; (i) they may request the administrator to provide adequate assurances or even to demand the removal of the administrator (Articles 2350, 2351 CCC); (j) undertake administration and liquidation of the inheritance in case that the heirs abandon or repudiate the inheritance.[10]

9. Hereditary Partition

[9] Ferrer, Francisco A.-M., *Comunidad hereditaria e indivisión postganancial*, Santa Fe, Rubinzal Culzoni, 2017, pp. 350–351.

[10] Ferrer, Francisco A.-M., *Comunidad hereditaria e indivisión postganancial*, Santa Fe, Rubinzal Culzoni, 2017, p. 376.

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The distribution of the estate of the defunct is called partition ("*partición*").[11] Partition provides an end to the hereditary mass ("*indivisión hereditaria*"). Partition may be requested by heirs, assignees, creditors and legatees or bequeaths. It can be requested at any time. Nonetheless, any rightsholder who has a share in the hereditary mass may ask to postpone partition, in case it would turn out to be inconvenient at that time.

Partition can be partial or total (of all the goods, or some goods). I may also be provisional or final. It is provisional if only the right of use has been divided, but the ownership remains undivided (Article 2370).

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Partition may be made by fathers and mothers and other ascendants, as they may make a distribution of their property among their children and legitimate descendants, either by the designation of the quantum of the parts which they assign to each of them, or in designating the property that shall compose their respective lots. These partitions may be made inter vivos or by testament, if they respect the legal portion of each heir (Articles 2411 and ff).

It is private when it is reached by an agreement of all parties. However, if there are minors or persons with disabilities, or if creditors do not approve of the agreement of the parties, then the partition will have to be made within the probate proceedings.

If a partition takes place within probate proceedings, the judge will have to appoint an expert or several experts to divide the inheritance (Article 2373). Co-owners may appoint him by a unanimous agreement. Otherwise, he will be appointed by the Judge.

There are two general principles governing partition: partition should be made preferably in kind and even if the property could be divided, it should not be done if this division is uneconomic.

The estate to be divided is composed by the property that the defunct had at the time of death, the property that substituted the property of the defunct during proceedings, and

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11. Article 2363 CCC and ff.

any rents that may have come from them. To this mass, heirs are obliged to collate the value of the property they received during the life of the deceased (Article~~.~~ 2385 CCC). Once that the debts are settled, and legacies are paid, the expert in partition will divide the lots allocating them to the heirs according to their share.

The Argentine ~~Civil and Commercial Code~~CCC has devised several legal instruments so that the heirs may be allocated a specific piece of property of the estate of the defunct:

(a) Call for bids ("licitación"): any of the joint owners of the hereditary mass may call for bids for any property he is interested in. (*See* Article~~.~~ 2372).

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(b) Preferential allocation for the surviving spouse ("*atribución preferencial*"): the surviving spouse may ask to be allocated the agricultural, commercial, or any other enterprise forming an economic unit, if he helped to build it up (Article~~.~~ 2380). The same applies to the shares of the defunct in such enterprises. If the allocation would exceed his share in the inheritance, he must pay the remainder in cash. The surviving spouse may also ask for the right to continue the lease, or be allocated the property of the place where spouses resided together before death. He may also ask for the allocation of the place the surviving spouse uses to develop their professional activities or just the sum of movable property that the surviving spouse might need to exploit the rural property.

(c) Preferential allocation by co-owners of the hereditary mass: Any co-owner, or several co-owners may ask to be allocated a specific property of the inheritance (Article~~.~~ 2382).

Partition has a retroactive effect to the time of death. It means that the heir will substitute the defunct only to the extent of the property he receives upon partition. This means that for the law it will be as from the very moment of the death of the defunct, the heir were the owner of each piece of property he received upon partition.

10~~.~~ Right to ~~i~~Impose ~~t~~That the ~~w~~Whole ~~e~~Estate or S~~s~~ome ~~g~~Goods ~~r~~Remain ~~t~~Temporarily ~~u~~Undivided

The "*indivisión forzosa*" (forced undivided wealth or goods) is an institution ruled in our ~~Civil and Commercial Code~~CCC (Article~~.~~s 2330 and ff), By the means of a forced imposition, some of the goods or even the whole estate may remain undivided for a period of time that may go from ~~10~~ten years to even the death of some rightsholders. They are usually devised to protect a source of income of one or several heirs, their housing or even the continuity of a commercial company (and thus protect the source of income of the workers of such company). Such imposition implies indeed a grievance for

the other heirs or creditors. In order to mitigate this grievance, the legislation provides safeguards for creditors and other heirs, as we will *see* below.

To begin with, let us list the cases in which this imposition may proceed:

(a) The testator has a right to decide upon the living, that the whole of the estate or certain goods will or all goods[12] are not to be divided by a certain period of time;[13]~~;~~
(b) The surviving spouse has the right:

(i) to impose on other heirs the house in which both spouses had their habitual residence before the death[14] remain undivided until his own death;

(ii) or to demand that the enterprise or shares of a society remain undivided if he had partly bought or formed, or from which he has his incomes, and unless they can be allocated to his share for a period of ten years to be counted after the death of the deceased or, if he claims for it, until his own death~~;~~.
(c) The heirs may:
(i) Celebrate a pact of “indivisión” (Article~~.~~ 2331). The heirs may celebrate a pact to impose on themselves that the whole estate or a part of the estate remain undivided for ten years, which may be extended for another ten years.
(ii) Any of the heirs may oppose the division of the estate in the same circumstances as the surviving spouse (*see supra*).[15]~~.~~

The heirs who suffer a grievance by these impositions, may claim its total or partial termination, if they can proof “grave circumstances or reasons of evident utility;”[16]~~;~~ or, in the case of the pact between heirs, just “justified causes.”[17]~~.~~ In the case of the house for the surviving spouse, if the other heirs may proof that the spouse has enough means to provide himself housing (in which case, the special protection for housing loses its meaning).

The legislator has provided some safeguards for the creditors. First of all, an imposition not to divide a registrable immovable to be effective against third parties

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12~~12.~~ Article~~.~~ 2330 stipulates precisely which goods may remain undivided: (a) a specific good; (b) a commercial, industrial, agricultural or mining enterprise that constitutes “an economical unit~~”;~~”; (c) shares in a society in which the testator was a main share-holder.
13~~13.~~ A maximum of ~~10~~ten years, which could be extended to the coming off age of minor heirs if there were such (Art.~~.~~ 2330).
14~~14.~~ Only if it was build or bought with common funds under the community of property regime, and unless it cannot be allocated to his share in the inheritance by the time of partition. Movables within the house are included. If the spouse has means to provide himself housing, the other heirs may demand the partition, since there is no longer ground for sustaining it (Art.~~.~~ 2332).
15~~15.~~ Article~~.~~ 2333.
16~~16.~~ Article~~.~~s 2330, 2332.
17~~17.~~ Article~~.~~ 2331.

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should be registered at the Property Register. Else, there is a double regime, according if the creditor is creditor to the heir or creditor to the defunct. Creditors to the heirs may not execute the goods subject to these impositions, but they may collect credits from the earnings these goods produce (e.g., from a rental income). Unlike the latter, creditors to the defunct have full access to undivided goods: they may collect their debts even from such goods.[18] They may as well seize or foreclose them.

11. Intestate sSuccession

In Argentina, the most common way to pass the wealth in the case of death are intestate successions. It is a cultural matter. An intestate succession may co-exist with a testamentary one.

Before entering into the main principles of intestate succession, there is a matter of language that should be clarified to understand mandatory and non-mandatory heirship. Argentine CCC refers to "*órdenes (de preferencia)"* (lit. order of preference), and "*grados (de parentesco*)" (lit. degree of kinship).

An order is a class of heirs used by the legislator to establish a hierarchy. There are four orders of heirs: the descendants, the ascendants, the surviving spouse, and relatives in collateral line. The law establishes a hierarchy between these orders, according to the value allocated to each family relation. Descendants are overall preferred. They constitute the first order. Next, ascendants. The surviving spouse comes third, has nevertheless a greater share in the wealth of his deceased spouse. Collateral relations are not mandatory heirs, as seen before, but they are still legal heirs (subsidiary).

Within the orders, preference is established according the degree of kinship. The closest degree has preference over the more remote family relations.

There is still a third rule to learn (beside those of order and degree). Orders may concur between them or displace each other. Two orders may coincide when they share a part

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[18] Article 2334.

(equal or unequal) in the wealth of the defunct. An order displaces another~~, :~~ ~~when~~ if there are members of the family of a privileged order, the members of a less important order lose their ability to inherit. ~~Let us explain:~~As follows:

(a) If there are descendants (daughters, sons, grandchildren, etc), they will exclude any ascendant (grandparents) of the estate of the defunct. Ascendants have no right to succeed if the concur with descendants. That is how Argentinian law privileges the place of the offspring.
(b) If there are descendants and they concur with the surviving spouse, the law will place the surviving spouse in equal standing as the offspring. Each of the children will have an equal share with the spouse. For example,~~E. g.~~ if there are three children and a spouse, each will receive ¼ of the inheritance.
(c) If there are ascendants and a spouse, the spouse will receive half of the inheritance. The other half will be split amongst ascendants.
(d) Collaterals are excluded by any of the former. They inherit only if there are no descendants, ascendants, or spouse.

12~~.~~ The ~~s~~Special ~~p~~Position of the ~~s~~Surviving ~~s~~Spouse in Argentinian CCC

The rights of the surviving spouse strike as a surprise, if compared with other legal systems. Ever since the first Civil Code, the surviving spouse has received a special consideration from the legislator, who felt (probably inspired by an indissoluble marriage) that after having shared a long life together, the grieved surviving spouse should deserve at least a number of safeguards. Even if the legislator did not refer to wives, protection of female widows might have been a significant driving force.

As it is, Argentinian ~~Civil and Commercial Code~~CCC gives the surviving spouse the following advantages:

If he lived under the common property matrimonial regime, he or she will be able to receive his share (not by right of inheritance, but as spouse). The division of common property occurs before the partition of the estate of the deceased.

The surviving spouse is heir to the deceased spouse, and he will inherit no matter what other orders of heirs will eventually share the inheritance with him or her. If there are children, his share will equal that of the children (plus what he received as a spouse if he lived under common property regime during marriage). If there are ascendants, he will receive a half of the inheritance (plus what he received as a spouse, if they lived under common property regime), and the other half will be split between the ascendants.

The surviving spouse has a “réserve” of his own: he is entitled to a half of the estate (*see* below).

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- The surviving spouse has a right (in rem) of habitation in the house in which both spouses live together. The surviving spouse does not need to claim for this right, he is automatically entitled to dwell in the house, even if it were exclusive property of the defunct. This right is for life and free of any dues.
- The surviving spouse may oppose to the division of the common house in which he spent the live in common with the spouse of the deceased, or the division of the company both spouses founded together or ran together, or similar venture.
- The surviving spouse may claim that the house in which both spouses lived in common be allocated to him at the time of partition.
- The surviving spouse has a privilege right to be appointed by the judge as administrator to the estate, in case that the heirs did not agree on any other appointment.

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To counterbalance, such privileged position is only attained in case that, at the time of death, spouses lived together, shared their residency, and their marriage was not broken. The mere separation at the time of death, even if it is because a judicial measure, even if it is for the protection of the surviving spouse from his maybe aggressive other spouse, will terminate his heirship. A spouse is only an heir if his marriage is at its peak at the time of death.

13. The Legal Portion ("Legítima")

As explained above, Argentina strongly protects family relations from the individual and autonomous decisions that could be reached by the deceased. One of these strong safeguards is the "réserve" ("*legítima hereditaria*," legal portion). The legal portion is a portion or share of the estate of the deceased that cannot be disposed by a will. The legal portion varies according to the intensity of the protection allocated by the legislator to family members: the weaker the position is judged by the legislator, the higher the legal portion. The amounts of the legal portion in the new CCC are as follows:

- Descendants: 2/3.
- Ascendants: ½.
- Surviving spouse ½.

The legislator has provided heirs with several devices to protect the legal portion from testamentary dispositions eventually made by the deceased.

Firstly, if a testator should infringe the legal portion, this clause of the testament would produce no effect, it will be as if he had not written it. The testator has the right to request that the legal portion to which he is entitled, is accorded to him (Article 2450, "*acción de entrega de la legítima*").

Second~~ly~~, the heirs have a claim to ask the reduction of heirships of ~~aliquota~~ share (herederos de cuota) or legacies made in his testament if they exceed the disposable portion (Article~~.~~ 2452, "*acción de reducción*"). The same would apply to gifts *inter vivos* that would exceed the disposable portion (Article~~.~~ 2453).

Third~~ly~~, heirs have a claim to supplement their portion (Article~~.~~ 2451, "*acción de complemento*"), in case it is less than the "reserve" they have a right to receive.

14~~.~~ A ~~s~~Special ~~p~~Provision for ~~h~~Handicapped ~~h~~Heirs

Article~~.~~ 2448 allows a person to use a portion otherwise reserved to family members to improve the situation of a handicapped ascendants or descendants. The spouse has been sadly excluded from this benefit. The defunct might also establish a trust, but according to actual regulation of trusts, the amount that can be passed by the trust is very restricted (the rules of the "réserve" apply, and according to the new wording, only the disposable portion could be passed by a trust).

15~~.~~ Right of ~~r~~Representation

Heirship might come by own right of the heir or by representation (Article~~.~~s 2426 and ff.). Heirship by representation takes place when the descendants of an heir who is unworthy or renounces to the heirship, inherit taking his place in the inheritance (per stirpes). Descendants that have equal standing inherit by number of people. ~~E.g.~~For example if a father of three children, son the defunct would die before the defunct or repudiate the inheritance, their three children would inherit the share that the father would have received in the succession of their grandfather.

The right of representation only works within intestate succession.

16~~.~~ Testamentary ~~s~~Succession

A person may decide to pass with wealth to the living by making a will. Since this testament will become effective only upon death, when the testator will no longer there to explain himself, as it usually happens in comparative legal systems, a will must be clothed in certain solemnities, and will be interpreted under strict rules. Because it is a will, freedom and full capacity of the testator are required. Since it is the last will the law is interested in, wills may be revoked any time before death.

In Argentina, the right to dispose of wealth by a testament is restricted to the disposable portion. To grant free will, joint reciprocal testaments are forbidden.

Testaments must be written, solemn (according to the formalities determined by the law, Article~~-s~~ 2477, 2479, defects will imply the nullity of the testament), it is revocable, it is a personal an individual act, and it the document in which it is written is auto-sufficient (it may not be completed with external documents or proof).[19]~~.~~

A testament may not only contain the disposal of the wealth, it may also contain a clause of recognition of a child or other dispositions of spiritual, personal or medical nature, such as decisions on how the testator wants to be buried, if he wants to be an organ donor, he may appoint an executor to the will, or revoke a previous will.

Interpretation of wills will be based on the determination of the real will of the testator. Words will be understood preferably in their current use, unless the testator had a special qualification. The rules or interpretation of contracts apply subsidiari~~i~~ly.

Any person can make a will, if they have come off age and they are mentally able. A person is not able to testate if he is unable to communicate his will or express it in any way. This is the case of a person who cannot communicate themselves in oral or written manner.

A testament is a juridical act. So, if it was made without willfulness, because of an error, fraud or deceit or violence. It is also void if it does not have the required formalities.

19~~19~~ Medina~~MEDINA~~, Graciela, Rolleri~~ROLLERI~~, Gabriel, *Derecho de sucesiones,* Buenos Aires, La Ley, 2017.

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There are two kinds of testaments are admitted. The holographic will and will by a public deed. Holographic testament is the testament that has been entirely written, dated and signed by the testator. A testament by a notary act is a testament made before a notary and two witnesses (Article 2479).

Testaments may be revoked at any time. A revocation of a testament maybe express or implicit. If the testator marries after the testament, it is understood that the former testament is no longer valid, unless he appointed as universal inheritor the person he later married.

17. Probate Proceedings

Probate proceedings are meant to identify successors, to determine the contents of the heirship, settle the debts and pay legacies and bequeaths.

The jurisdiction is determined according to the last domicile of the defunct. The same judge has jurisdiction on the petition of the inheritance, administration, partition, administration, etc.

When filing the proceeding, the plaintiff has to state the name of the defunct, with the death record, the last domicile of the defunct (which will establish the jurisdiction), indicate who the presumptive heirs are, with their domicile if possible, and whatever other circumstance relevant to the case.

The judge will usually request to service the process to the other heirs. It will usually ask for a service of process by publication of one or two days in a newspaper. A judicial request will be made to the registry of testaments to find out if the defunct had left any wills. Another judicial request will be made to the registry of universal proceedings, to find out if any other probate proceeding concerning the same party is going in another jurisdiction. Once all these tasks are completed, and if there are no other heirs, the judge

will dictate the “declaration of heirship.”. From then on the proceedings in order to achieve partition will start.

If there were a will, the judge will have to open the testament, if it were a holographic testament and see that the writing corresponds to that of the testator. A list of assets and an appraisal of those assets takes place. The heirs or the judge appoint an administrator of the inheritance. In turn, an expert will be appointed to perform the division of the heirship.

Short list of publicationsFurther Reading

CordobaCORDOBA, Marcos M., FerrerFERRER, Francisco M., *Manual de Sucesiones*, Buenos Aires, Eudeba, 2016.

CordobaCORDOBA, Marcos M., FerrerFERRER, Francisco M., *Práctica de derecho sucesorio,* Buenos Aires, Astrea, 2016.

MedinaMEDINA, Graciela M., RolleriROLLERI, Gabriel, *Derecho sucesorio,* Buenos Aires, Abeledo Perrot, 2017.

FerrerFERRER, Francisco M. In AlteriniALTERINI, Jorge H., *Código Civil y Comercial Comentado. Tratado Exegético. Volume XI.* Buenos Aires, La Ley, 2016.

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