

Daria Różycka*

TESTAMENTARY FREEDOM AND FAMILY SOLIDARITY IN THE UNITED STATES OF AMERICA. AN ANALYSIS OF THE UNIFORM PROBATE CODE AND THE STATE REGULATIONS IN LOUISIANA AND CALIFORNIA**

Abstract

The primary quandary inherent in the formulation of an inheritance policy pertains to selecting between two conflicting objectives: the preservation of familial cohesion amongst the deceased's dependants, and the adherence to the stipulated wishes of the deceased, as documented in their will. The selection is determined by legal statutes and case law. Frequently, the recognition of the testator's will as a pivotal factor in determining the disposition of their property can result in what might be perceived as an "injustice" towards members of their family, and vice versa. Furthermore, the concept of a family "deserving" protection is subject to variation. The objective of this article is to observe ways of resolving the dilemma of "how much freedom, how much solidarity" in the U.S. model law and in the inheritance law of selected states in the United States. The author has selected the legal systems of Louisiana and California, which are characterized by fundamentally divergent legal traditions. The selection of the Uniform Probate Code (UPC) is predicated on the fact that it has been implemented, to varying degrees, in numerous states. Furthermore, the act represents an endeavour to identify the "golden mean" –

* Assistant Professor, Nicolaus Copernicus University in Toruń (Poland), ORCID: 0000-0003-0497-9765, dgesicka@umk.pl

** This study was prepared as part of a research project funded by the National Science Centre, Poland, under agreement No. 2020/39/B/HS5/01171.

that is, to reconcile differing legal traditions, to address social expectations, and to transform the role of the family.

Keywords

family solidarity; testamentary freedom; inheritance law; Louisiana; California; UPC

INTRODUCTION

In the law of the individual states of the United States of America,¹ testamentary freedom is the overriding and organizing principle of the law of succession.² The emanation of this principle is the specific rules of inheritance law located in the legal systems of each state. This principle is illustrated by the rule that the laws of statutory succession apply only in the absence of a valid will or when some part of the testator's estate is not included in them.

The analysis in the article deals with the ways of resolving conflict between the two norms – testamentary freedom and family solidarity in two states – Louisiana and California, and in the model law – the Uniform Probate Code.³ Louisiana and California were chosen because the states have fundamentally different legal traditions. The article deals also with the UPC since the model law reflects social expectations as to the shape of the inheritance law as well as shifts in the role of family. Section I will overview the origins of the United States testamentary

¹ At the federal level, there is no act devoted comprehensively to the regulation of inheritance law. Therefore, it is not possible to speak of American inheritance law in the sense of referring to a common regulation for all states. Nevertheless, some federal acts influence the shape of inheritance law institutions in state law or regulate the inheritance of certain powers in a residual manner. An example of such regulation is Sections 203 and 304 of the Copyright Act of 1976. According to these provisions, the power to terminate contracts transferring copyrights and licensing agreements entered into during the author's lifetime, after his death passes to his surviving spouse, joint children and, in place of children who died before the author, grandchildren. M. W. Galligan, 'Forced heirship' in the United States of America, with particular reference to New York State, "Trust & Trustees", Issue 1, 2016, p. 103.

² *Succession of Liner*, ref. 19-2011, 320 So.3d 1133, 1137, judgment of 30.06.2021, p. 4.

³ Probate Code (2019) Act – Uniform Law Commission (UPC (2019)), available at: www.uniformlaws.org [last accessed: 2.02.2025].

freedom. Next, Section II will discuss testamentary freedom and family solidarity in jurisprudential practice. Then, Section III will present the role and admissibility of the no-contest clauses. Section IV will describe the rules of succession as stipulated in the UPC. Section V will overview the succession rules in Louisiana. Section VI will depict the inheritance rules in California. I conclude that owing to different legal traditions in Louisiana, family solidarity seems to be the factual organizing principle of the inheritance law, whereas in California testamentary freedom is the overriding norm. The model regulation in the UPC is also based on the assumption that testamentary freedom is the organizing principle of the inheritance law. An analysis of these three legal systems shows that none of the legislators has opted exclusively for one of the norms. Rather, state legislators are trying to find a golden mean – to protect the family's property interests while ensuring that the will is executed in accordance with the testator's wishes.

I. ORIGINS OF U.S. TESTAMENTARY FREEDOM

As a preliminary remark, it should be noted that, in accordance with the legal systems of European countries, U.S. inheritance law differentiates between testate and intestate inheritance. Furthermore, owing to the historical development of American legal solutions within the context of the common law tradition, the inheritance laws of individual states continue to exhibit vestiges of distinct legal regimes for the transfer of ownership of both personal property and real property.⁴

Amongst scholars of the doctrine, there exists no consensus on the provenance of U.S. testamentary freedom. This is owing to the legal separateness of the legal systems in the individual states and the absence of common provisions at the federal law level. Some academics⁵ refer to the principle of protection of private property, reconstructed based on

⁴ J. Halberda, *Recenzja książki A. Dunin-Dudkowskiej, Testament jako zwierciadło kultury*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, Lublin 2014, 349 s., "Kwartalnik Prawa Prywatnego" Issue 5, 2015, p. 483.

⁵ W. Bańczyk, *Freedom of Testamentary Disposition in American Law from the Comparative Perspective*, [in:] M. Urbańczyk, K. Gawel, M. Fatma (eds), *Enlightenment traditions and the legal and political system of the United States of America*, Poznań 2025, p. 243;

the content of the Fifth⁶ and Fourteenth⁷ Amendments to the US Constitution. Conversely, others⁸ have made direct reference to the treatise articulating principles of law – *Restatement of Property, Third, Wills and Other Donative Transfers*,⁹ which, it should be noted, is not a source of generally applicable law, but rather expresses values that are universally recognised by all states. According to this secondary source, owners have an almost unlimited right to dispose of their property.¹⁰ In addition, the notion of legal tradition is invoked by certain scholars.¹¹ This tradition is not uniform from state to state, with some states drawing on the common law tradition and Louisiana on the civil law tradition. This legal tradition has been found to influence the institutions of inheritance law in the legal systems of states included in the first group, with the testamentary freedom being protected to a greater extent. In contrast, in Louisiana the institutions of inheritance law are found to protect the family members of the testator over the testator's wishes. It is evident that the disparities between the solutions adopted in the various states have diminished over time.¹² This development can be attributed to the unification efforts, which have resulted in the creation of the Uni-

R. J. Goralewicz, *Testamentary Freedom: A Constitutional Perspective*, "ACTEC Law Journal", Issue 1, 2024, p. 40.

⁶ It is derived from the amendment's prohibition of deprivation of property without due process of law and the prohibition of expropriation for public use other than with just compensation. Available at: <https://libr.sejm.gov.pl/tek01/txt/konst/usa-am5.html> [last accessed: 30.01.2025].

⁷ The amendment extends the prohibition of deprivation of property without due process of law and the prohibition of expropriation for public use other than with just compensation to state law. Available at: <https://libr.sejm.gov.pl/tek01/txt/konst/usa-am14.html> [last accessed: 30.01.2025].

⁸ P. B. Miller, *Freedom of Testamentary Disposition*, [in:] S. Degeling, J. Hudson, I. Samet (eds), *Philosophical Foundations Of The Law Of Trusts*, Oxford University Press, 2023, p. 176–177.

⁹ *Restatement of Law, Restatement Third of Property*, Westlaw 2022, *Introduction*, paragraph 3.

¹⁰ P. B. Miller, *Freedom of Testamentary Disposition...*, pp. 176–177.

¹¹ R. J. Scalise, *Family Protection in the United States of America*, [in:] K. G. C. Reid, M. J. de Waal and R. Zimmermann (eds), *Comparative Succession Law*, Volume 3, *Mandatory Family Protection*, Oxford University Press 2020, cited after W. Bańczyk, *Freedom of Testamentary Disposition in American Law from the Comparative Perspective...*, p. 245.

¹² M. Reutlinger, *Wills, Trusts, and Estates. Essential Terms and Concepts*, Boston 1993, p. 5.

form Probate Code, a model law developed and subsequently updated by the National Conference of Commissioners on Uniform State Laws.¹³

II. TESTAMENTARY FREEDOM AND FAMILY SOLIDARITY IN JURISPRUDENTIAL PRACTICE

Formally, legislatures in the U.S. give precedence to the wishes of the testator expressed in a will. Although testamentary freedom (or, freedom of testation) is referred to as the organizing principle of American inheritance law¹⁴ and its scope is broader than in civil law, it is subject to the limitations imposed by the right (derived from natural law) to inherit from ancestors.¹⁵ The conflict between the two norms is resolved differently in state law and the jurisprudence of local courts. Since legal precedent is the source of law, the established practice of the courts regarding the evaluation of the validity of a will, especially in terms of formal requirements, is important for the protection of freedom of testament. In most states, the courts take a restrictive attitude in this regard. While it is indicated that the strict assessment of formal requirements is intended to protect the will of the testator, it actually leads to undermining the will and applying the rules of statutory inheritance that protect the testator's family. For example, a testator who left half of his property to his children, half to his lover, and nothing to his spouse, might have his will contested if a signature of a witness is missing. The literature indicates that such a situation occurs most often when – in the opinion of

¹³ See <https://www.uniformlaws.org/committees/community-home?CommunityKey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3#LegBillTrackingAnchor> [last accessed: 12.01.2025].

¹⁴ A. A. Golling-Sledge, *Testamentary Freedom vs The Natural Right to Inherit: The Misuse of No-Contest Clauses as Disinheritance Devices*, "Washington University Jurisprudence Review", Issue 1, Volume 21, 2021, p. 143; A. Buțureanu-Cărpășor, *Legal Regulations Regarding Testamentary Inheritance in the United States of America*, "Journal of Law and Administrative Sciences", Issue 16, 2021, p. 69; O. Henry, *If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom*, "North Western Journal of Law and Social Policy", Issue 1, 2011, p. 215, Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, "Fordham Law Review", Issue 82, 2013, p. 1125.

¹⁵ A. A. Golling-Sledge, *Testamentary Freedom vs The Natural Right to Inherit...*, p. 143.

the court – the will of the testator is unjust.¹⁶ Thus, the courts are guided by an extra-legal criterion, but give it the characteristics of legalism by citing in their justifications the statutory prerequisites for the validity of a will. Most often, a will is considered invalid owing to demonstration of undue influence of a third party on the will of the testator (undue influence), failure to meet formal requirements, or lack of legal capacity on the part of the testator at the time of making the will.¹⁷ Frequent cases of wills being declared invalid make it more common in practice to use legal institutions other than wills to make appropriate dispositions of property upon death. These include family foundations (trusts), death insurance contracts designating certain persons as beneficiaries, and pay-on-death accounts.¹⁸

III. NO-CONTEST CLAUSES IN A WILL

One of the more effective mechanisms to protect testamentary freedom is the permissibility of no-contest clauses in wills.¹⁹ Essentially, it involves the incorporation of a condition within the will, stipulating that the designated heir or legatee shall receive their allocated share of the inheritance unless they challenge the will's validity. Should the validity of the will be challenged, the individual in question will be subject to a private sanction – namely, will be excluded from the inheritance or will receive a share of symbolic value.²⁰

In most states, legal institutions have traditionally acknowledged the validity of such commitments, a sentiment that is also shared by the creators of the model UPC. Nevertheless, the formulation of these requirements varies across different legal jurisdictions, as do the circumstances that result in exclusion from the inheritance (or the grant-

¹⁶ M. B. Leslie, *Myth of Testamentary Freedom*, "Arizona Law Review", Issue 38, 1996, pp. 243–244.

¹⁷ *Ibid.*, p. 243–244.

¹⁸ D. Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, "The Georgetown Law Journal", Volume 103, 2015, p. 608.

¹⁹ This institution bears structural resemblance to the legate or dissolving condition in Polish civil law.

²⁰ *Succession of Scott*, 05-2609, 950 So.2d 846, 848, judgment of 11.03.2006, p. 3.

ing of a “symbolic” share of the inheritance). For instance, in the state of Louisiana, general disclaimers addressed to any or all heirs are permitted.²¹ However, it is crucial to note that these disclaimers must adhere to the overarching principles of civil law. This entails the stipulation that the disclaimers cannot be contrary to law or morality, and furthermore, they cannot contain any conditions that are deemed to be impossible.²² However, it should be noted that dissenting opinions have been expressed by the jurisprudence of Louisiana courts, questioning the effectiveness of this legal instrument as contrary to good morals.²³ The contradiction, as posited by the authors of the dissenting opinions, is said to consist in the prevention of family members – “aggrieved” by the will of the testator – from verifying the validity of his last will. Furthermore, it is asserted that such a provision is ineffectual if it hinders the validity of the will from being contested in good faith or for a justifiable reason.²⁴

In California, on the other hand, no-contest clauses are considered permissible, but they must identify the addressee and specify precisely the content of the obligation imposed. In addition, the private sanction provided for therein has no effect when the person challenging the validity of the will has a probable cause to initiate legal proceedings, or the actions taken by him are not directly aimed at challenging the validity of the will. The jurisprudence also indicates that this institution is intended to protect the testator’s property from seizure by dishonest persons, and is also intended to eliminate costly and time-consuming disputes over the inheritance. At the same time, the courts stipulate that it should not, however, be used to disinherit the testator’s children in the name of testamentary freedom.²⁵ In practice, this is pre-

²¹ “Anyone who questions the validity of a will”.

²² Articles 1519 and 1528 of the Louisiana Civil Code (LA Civ. Code), Laws of 2008, No. 204, §1, as in effect on January 1, 2009.

²³ For example, Judge Hughes’s dissenting opinion, *Succession of Maloney*, 2023-01447 (La. 09/06/24), 392 So. 3d 302., judgment of 6.09.2024, available at: <https://caselaw.findlaw.com/court/la-supreme-court/116552772.html> [last accessed: 15.02.2025].

Succession of Maloney.

²⁴ *Succession of Maloney*.

²⁵ A. Dayan, *The Kids Aren’t Alright: An Examination of Some of the Flaws in American Law Regarding Child Disinheritance, the Reasons that Children Should be Protected, and a Recommendation for the United States to Learn from the Australian Model that Protects Children*

cisely the role of this stipulation – it makes it possible to “disinherit” certain heirs without having to prove that the conditions for disinheritance have been met.²⁶

IV. FEDERAL MODEL LAW – THE UPC

The development of a model regulation for inheritance proceedings commenced as early as the late 1920s. The impetus for this initiative stemmed from three primary factors. Firstly, there was a discernible divergence in the legal solutions pertaining to inheritance law across the individual states.²⁷ Secondly, there was a perceived necessity to streamline the existing rules governing inheritance.²⁸ Thirdly, and perhaps most significantly, there was a prevailing aspiration to unify state law, thereby enhancing its consistency and predictability.²⁹ In 1933, the National Conference of Commissioners on Uniform State Laws concluded that the task before it was impossible to accomplish and abandoned the work. In January 1946, the American Bar Association promulgated the Model Probate Code that it had developed. However, the state legislators did not adopt the document in its entirety. Instead, they selected only a number of the proposed solutions. Consequently, the unifying objective remained unattained.

Consequently, in the 1960s, the National Conference resumed its efforts to formulate a model law that would regulate probate institutions, this time in collaboration with the American Bar Association. The Uniform Probate Code was envisaged as a unifying instrument for state inheritance law, particularly as it relates to the rules of statutory succession and inheritance proceedings. The initial version of the document was promulgated in 1969. Subsequent updates to the document have been made on several occasions in order to adapt the solutions proposed therein to social and structural changes regarding the family and the

Against Disinheritance, “Cardozo Journal of International and Comparative Law”, Issue 2, 2009, pp. 375, 402.

²⁶ Golling-Sledge, *supra* note 15, p. 144.

²⁷ UPC 1-102(b)(5).

²⁸ UPC 1-102(b)(1).

²⁹ UPC 1-102(b)(6).

values recognised in society.³⁰ The unifying goal was achieved only in part. Lawmakers in nineteen states decided to adopt it.³¹ In addition, in some of these states only an older version of the act is in force.³²

One of the transformative parts of the UPC is Article II, devoted to the rules of statutory succession. In the commentary to the original version of the Uniform Probate Code (from 1969), the authors indicated (with regard to the rules of statutory succession) that their intention was to take into account as fully as possible “the normal desire of the owner of the property as to the disposition of it.” Thus, they advocated the execution of the testator’s actual will.

In subsequent versions of the model law, the drafters cited a desire to adapt statutory succession to the changing public interest.³³ As elucidated in the 1990 version, the modifications were implemented in consideration of the evolving nature of the family unit, encompassing the increasingly prevalent phenomenon of the patchwork family.³⁴ The drafters further noted that, considering the principle of testamentary freedom, a negative will must be permitted. The 2008 version was intended to consider the circumstance that children are increasingly born because of medically assisted procreation.³⁵ By contrast, the 2019 version – currently in effect in most states that have chosen to incorporate UPC into their own legal order – took into account the phenomenon of *de facto parentage* and the circumstance that a child can have more than two parents.³⁶

³⁰ M. L. Fellows, Th. P. Gallanis, *The Uniform Probate Code’s New Intestacy and Class Gift Provisions*, “American College of Trust and Estate Counsel (ACTEC) Law Journal”, Issue 2, 2021, p. 128, available at: <https://scholarlycommons.law.hofstra.edu/actec/lj/vol46/iss2/2> [last accessed: 12.02.2025].

³¹ See the current list available at: https://www.law.cornell.edu/wex/uniform_probate_code [last accessed: 12.02.2025].

³² Available at: <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3&LibraryFolderKey=&DefaultView=> [last accessed: 12.02.2025].

³³ A. J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, “Fordham Law Review”, Volume 73, 2004, p. 1036, available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss3/13/> [last accessed: 12.02.2025].

³⁴ M. L. Fellows, Th. P. Gallanis, *The Uniform Probate Code’s New Intestacy and Class Gift Provisions...*, p. 128.

³⁵ UPC (2019) – Final Act, p. 25.

³⁶ UPC (2019) – Final Act, p. 26.

1. THE PRIMACY OF TESTAMENTARY FREEDOM IN THE UPC

The inheritance rules contained in the UPC correspond to the rules adopted in most state inheritance laws and the *common law* tradition they continue. They primarily protect the will of the testator. However, they are not devoid of institutions that provide protection for the testator's family members. This protection, however, mainly applies to the surviving spouse and is intended to enable him or her to function normally especially during the succession proceedings.

In the initial provision concerning inheritance, the drafters of the UPC articulated the principle of testamentary freedom. It was indicated that the rules of statutory succession defined in the UPC should apply in the absence of a testator's will to the contrary, when any part of the testator's estate is not covered by a will.³⁷ The latter part of this provision also confirms the permissibility of a negative will, whereby the testator expressly excludes or limits the right of a particular person or group of persons to inherit the testator's property through statutory succession. This exclusion (or limitation) has been found to have a legally equivalent effect to that of the person concerned having relinquished their right to inherit.³⁸ Moreover, the provisions concerning the form of the will and the liberal interpretation proposed in the commentary also permit the execution of the will in accordance with the intentions of the testator.

The concept of family solidarity in the UPC encompasses the legal principles governing statutory inheritance, elective share, family allowance, homestead allowance, and the provision for an omitted spouse or child. These provisions are designed to provide a safeguard for the surviving spouse of the testator in circumstances where he or she has not been included in the will, or where there is no will. Conversely, the institutions that provide protection to the widow or widower are designed to take into account the testator's will. For instance, the claim for the share of the inheritance of the spouse omitted from the will is not applicable if the circumstances of the case demonstrate that this was the testator's intention. It is further noted that the rationale for enabling

³⁷ UPC (2019) 2-101 (a).

³⁸ UPC (2019) 2-101 (b) UPC (2019).

a claim for the share of an omitted widower or widow is the restoration of the testator's will, which did not encompass the spouse owing to the testator's inability to amend it.

2. PROTECTION OF THE TESTATOR'S SURVIVING SPOUSE IN UPC SUCCESSION RULES

The rules of statutory succession proposed in the UPC primarily serve to protect the surviving spouse. This is based on the assumption that individuals who make a will and possess a limited number of assets tend to indicate their surviving spouse as the individual entitled to inherit their entire estate.³⁹ According to the UPC regulations, the surviving spouse is appointed to inherit the inherited estate in its entirety in two situations: if the testator has left no other heirs, or if all the testator's heirs are at the same time heirs of the surviving spouse.⁴⁰ Conversely, the share of the surviving spouse is correspondingly smaller if the testator has left heirs other than joint heirs (parents, siblings, children of the testator from a previous relationship not adopted by the surviving spouse). The UPC also puts forward an alternative provision for states where there is a marital property regime – Section 2-102A of the UPC.⁴¹ In such a case, the surviving spouse is appointed to inherit the entirety of the testator's estate or a correspondingly smaller portion under the same rules as set forth in Section 2-102 of the UPC, with respect to the testator's separate property. With regard to the community property, the surviving spouse is entitled to a half share of this estate.

The circle of those entitled to inherit when the testator is survived by more than just a spouse is defined quite broadly. It includes the testator's descendants (including adopted ones, or from medically assisted procreation, or actual exercise of parental authority⁴²), his parents, descendants of the testator's parents, grandparents, descendants of grandparents, and descendants of the testator's spouse who survived the tes-

³⁹ UPC (2019), p. 32.

⁴⁰ UPC (2019) 2-102 (1).

⁴¹ UPC (2019) 2-102A.

⁴² UPC (2019) 2-107, 2-119, 2-120, 2-121.

tator or as to whom the presumption of surviving the testator applies.⁴³ These heirs are called to inherit in equal shares, with the *per capita* rule applying to each group coming successively to the inheritance. If the testator did not leave behind any of the listed heirs, his estate passes to the state of his last residence.⁴⁴

In exceptional circumstances, the regulations stipulate that parents are disqualified from inheriting from their children, in the interests of the public and in accordance with the presumed wishes of the deceased. This prerogative is invoked in instances where a parent has been permanently deprived of their parental rights, or when the conditions for depriving a parent of parental rights are fulfilled at the time of the death of a child under the age of 18.⁴⁵

An expression of special respect for the will of the testator is the solution proposed in the UPC for crediting donations against the heir's due share. Pursuant to Section 2-109 of the UPC, donations made by the testator to an heir (even if the testator was not an heir at the time the donation was made) are credited against the share due only if the testator declared in writing that they are to be credited, or if the heir confirmed such a will to the testator in writing, or if this is apparent from the testator's letter or the heir's confirmation, respectively.

3. PROTECTION OF THE TESTATOR'S SPOUSE THROUGH ELECTIVE SHARE, FAMILY ALLOWANCE AND HOMESTEAD ALLOWANCE

One of the institutions regulated in the UPC and protecting the surviving spouse at the expense of respecting the will of the testator⁴⁶ is the so-called elective share. The essence of this legal figure is to grant

⁴³ The issue is the 120-hour rule – if a person dies before 120 hours after the death of the testator, he or she is committed – it is presumed that he or she died simultaneously with the testator. Consequently, he is not called to inherit. UPC (2019) 2-104.

⁴⁴ UPC (2019) 2-105.

⁴⁵ UPC (2019) 2-114.

⁴⁶ N. Cahn, *What's Wrong About the Elective Share 'Right'*, "University of California Law Review", Volume 53, 2020, p. 2087.

the widow or widower a claim for half of the share⁴⁷ of the marital estate (earned during the marriage),⁴⁸ even if that spouse is not called to inherit under the will. The surviving spouse's entitlement to family allowance,⁴⁹ homestead allowance⁵⁰ or exempt property⁵¹ is not deducted from this share. Nevertheless, it should be noted that funeral expenses, legal expenses, allowances, and matured claims are deducted.⁵² In calculating the value of the elective share, the net value of the estate subject to probate estate, non-probate transfers of the testator's property (gifts) to persons other than the spouse,⁵³ such transfers of the testator's property to the spouse,⁵⁴ the surviving spouse's estate,⁵⁵ and the

⁴⁷ It is worth pointing out that in the original version of the UPC this share was 1/3. This rule was modified in the 1990 version in accordance with the partnership theory of marriage. Cf. UPC (2019), pp. 70-81.

⁴⁸ UPC (2019) 2-202(a).

⁴⁹ Pursuant to UPC (2019) 2-404 in addition to the right to a *homestead allowance* and *exempt property*, the surviving spouse of the testator and minor children whom the testator was obligated to support, as well as children who were actually supported by the testator, are entitled to a reasonable cash allowance from the estate for their support during the proceedings, but for no more than one year if the estate is insufficient to satisfy the claims. The allowance may be paid in a single payment or in periodic installments. It is payable to the surviving spouse – for the use of the surviving spouse and minor and dependent children, or for the sole use of the surviving spouse if there are no minor or dependent children; or to the children or their guardians. If a minor child or dependent child does not live with the surviving spouse, the allowance may be granted in part to the child or the child's guardian or other person caring for the child, and in part to the spouse, depending on need. The claim for the allowance takes precedence over all claims except the *homestead allowance*.

⁵⁰ According to UPC (2019) 2-402 the surviving spouse of the testator is entitled to an allowance of [\$22,500]. In the absence of a surviving spouse, each minor child and each dependent child of the testator is entitled to an allowance of [\$22,500] divided by the number of minor and dependent children of the testator. The purpose of this allowance is to protect family members against household expenses, including estate taxes or the testator's debts.

⁵¹ UPC (2019) 2-202(c). Pursuant to UPC (2019) 2-403 in addition to the *homestead allowance*, the decedent's surviving spouse is entitled from the estate to a value, not exceeding \$15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value.

⁵² UPC (2019) 2-204.

⁵³ UPC (2019) 2-205.

⁵⁴ UPC (2019) 2-206.

⁵⁵ UPC (2019) 2-207.

transfers of the spouse's property to persons other than the testator⁵⁶ are taken into account. The drafters of the UPC allow states to introduce a "percentage system" in which the share due to the surviving spouse would be a certain percentage of the value so calculated. At the same time, the longer the marriage lasted, the higher the percentage would be. In the case of a relationship of more than 15 years, it would be 100%. Alternatively, the developers of the UPC propose referring to the Model Marital Property Act of 1983 for equalization of inheritance after the cessation of marriage.

The fundamental purpose of the elective share is to equalize the spouses' estate acquired during their matrimony, particularly in circumstances where one spouse has relinquished his or her professional pursuit for the benefit of the community household. Concurrently, the provisions pertaining to this share are designed to ensure the equitable distribution of the inheritance and the protection of the testator's descendants. In this regard, the drafters of the UPC have extended certain benefits to the surviving spouse, particularly in cases where the relationship with the testator has been long-standing and uninterrupted, as opposed to brief or interrupted unions, including subsequent remarriage following a period of widowhood. A spouse may relinquish a claim for an elective share or modify this claim by means of an agreement in writing with the other spouse. This agreement can be executed either before or after the marriage.⁵⁷

The surviving spouse, or in the absence of a spouse, any minor or dependent child of the testator, is also entitled to receive a household allowance,⁵⁸ a family allowance⁵⁹ and certain assets of the testator excluded from inheritance up to the value of \$15,000. These include household furniture, cars, home furnishings, appliances, and personal belongings.⁶⁰

⁵⁶ UPC (2019) 2-203.

⁵⁷ UPC (2019) 2-213(b).

⁵⁸ UPC (2019) 2-402.

⁵⁹ UPC (2019) 2-404.

⁶⁰ UPC (2019) 2-403.

4. PROTECTION OF THE TESTATOR'S FAMILY MEMBERS OMITTED IN THE WILL – OMITTED SPOUSE, OMITTED CHILD

Another expression of respect for the will of the testator is the protection of the testator's spouse or children omitted in the testator's testamentary disposition. This principle finds application in instances where the will was executed prior to the commencement of the marriage. The architects of the UPC, in effect, restore the testator's original intention by recognising that he or she failed to include a spouse or child in the will. In such circumstances, the omitted spouse is entitled to the maximum share to which they would have been entitled in the absence of the will, unless:

- it appears from the contents of the will or other evidence that the testator deliberately excluded the spouse in the light of the new marriage;
- it is evident from the content of the will that the testator intended it to remain valid irrespective of subsequent events; and
- the omitted spouse received a benefit from the testator during his lifetime, which, according to his or her will, was intended to compensate for the omission.⁶¹

In the event of a will being drawn up, a child of the testator who was not included in the document may still be entitled to a share of the inheritance, provided that the child was born after the will was drafted.⁶² However, this entitlement is subject to two conditions: firstly, that the testator did not intentionally omit the child in the will; and secondly, that the child did not receive a benefit from the testator during his or her lifetime, which was specifically intended to compensate for the omission in the will.⁶³

⁶¹ UPC (2019) 2-302.

⁶² UPC (2019) 2-302.

⁶³ UPC (2019) 2-302(b).

5. REDUCED FEDERAL REQUIREMENTS FOR THE FORM OF A WILL

It is not uncommon in the literature to point out that the requirements for the form of a will in the state law and their strict interpretation by the inheritance courts make testamentary freedom only an illusory principle. Non-compliance with these requirements is often a pretext for distribution of the deceased's estate in accordance with the rules of intestacy, which in the opinion of the court are more equitable than the deceased's will.⁶⁴ A solution to this problem could be the introduction of liberal directives for the interpretation of the will⁶⁵ into the text of state laws, or the amendment of the provisions on the form of the will in such a way that they favour the execution of the testator's will. The drafters of the UPC chose both of these solutions.

The UPC stipulates that a valid will can be drawn up as a witnessed will or a holographic will. In order for a witnessed will to be valid, it is necessary that the last will be in writing, signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction, and certified in the manner prescribed by law.⁶⁶ This certification can be done by:

- at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgement of the will; or
- the testator in the presence of a notary public or other person authorized to take acknowledgements.⁶⁷ This option was added to the UPC in 2008 owing to its popularity.⁶⁸

It is worth noting that in the commentary on the witnessed form of a will, the drafters of the UPC clearly advocate a liberal interpretation of the formal requirements. The first manifestation of this approach is the requirement that in a situation where the signature on the will is af-

⁶⁴ Leslie, *supra* note 17, p. 243-244.

⁶⁵ For example, a *harmless error* (*harmless error*) or substantial compliance (*substantial compliance*) directive.

⁶⁶ UPC (2019) 2-502(a)(1-3).

⁶⁷ UPC (2019) 2-502(a)(3).

⁶⁸ UPC (2019), p. 141.

fixed by a person other than the testator, it must be made in the state of the so-called conscious presence of the testator. This concept should be understood broadly, namely the presence can be established by any of the testator's senses, not just sight.⁶⁹

Another manifestation of the freedom of the testator is broad interpretation of the signature requirement. This may be fulfilled with the testator's name, nickname, distinctive symbol or initials.

Another expression of particular respect for testamentary freedom is the adoption of the interpretation that the testator's signature need not be at the end of the body of the will. It may be placed in the body of the will, but it is then necessary to determine whether it was the testator's intention that such a designation should constitute his signature.⁷⁰ As for the attestation of the will by witnesses, the UPC requires that this be done within a reasonable time after the will is made or the testator's signature is attested. At the same time, as the authors of the UPC point out, this can also take place after the death of the testator.⁷¹

Also, in the case of written wills acknowledged by a notary public, the creators of the UPC opted for freedom of testament by reducing the formal requirements to a minimum and bringing them in line with the prevailing public perception of these requirements. First, they do not require witnesses to acknowledge the will. This is important because the most common formal deficiency in notarized wills leading to a challenge to their validity is the absence of the signature of one of the witnesses⁷² due to an oversight by the notary during the deed. The lack of a requirement for witnesses to sign such a will is also consistent with the common perception of formal requirements.⁷³

Finally, if the will does not meet the requirements provided for the form of a witnessed will, the drafters of the UPC provide for a convalidation by indicating that the last will remains valid despite the absence

⁶⁹ UPC (2019), p. 140.

⁷⁰ An identical interpretation is adopted in the general signature rules in the model deed Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmts. j & k (1999).

⁷¹ UPC (2019), p. 141.

⁷² This was the case in *Dalk v. Allen*, 774 So.2d 787, judgment of 29.08.2002, and *Sisson v. Park Street Baptist Church*, 24 E.T.R.2d 18, judgment of 22.05.1998.

⁷³ UPC (2019), p. 142 and state court decisions cited therein.

of witnesses as a holographic will, as long as the will (its material part) and the signature of the testator are in his or her own hand.⁷⁴

V. LOUISIANA

The state of Louisiana – which is the only state that draws on a civil law tradition⁷⁵ – is the only U.S. state in whose law the institution of forced heirship limiting the testamentary freedom in favour of protecting the testator's descendants has “survived”. Forced heirship originates from French law (pre-codification and the Napoleonic Code) and Spanish law.⁷⁶ Until 1996 in Louisiana, all children of the testator were entitled to inherit, regardless of their age at the time of the inheritance, and against testator's will. Currently, the group of eligible persons is significantly reduced; nevertheless, Louisiana is the only U.S. state that also protects the now-adult children of the testator from being deprived of the right to the inheritance of a deceased parent. At the same time, interestingly, the entitlement from the reserve is not strictly correlated with the maintenance obligation⁷⁷ of the parents.⁷⁸ In addition to children who are not independent owing to physical or intellectual immaturity, children who are physically and intellectually mature, without the right to allowance, but who continue their education and are therefore financially dependent, are also covered by the forced heirship. This corresponds to the fact that in American society it is common for the parents to support their adult children if the children continue their educational path.

A distinctive feature of the Louisiana legal tradition, which differs from the rest of the states, is the form of a will – notarized will. For such a will to be considered valid, it is essential that the testator's declaration of intent is made in the presence of a notary public and two witnesses,

⁷⁴ UPC (2019) 2-502(b).

⁷⁵ Owing to its history. Ch. Osakwe, *Introduction – Louisiana Civil Law: The Cinderella of American Law*, “Tulane Law Review”, Issue 6, 1986, p. 1105.

⁷⁶ J. Rudnicki, *Wymiar Praktyczny Tradycji Prawnej: Ewolucja Rezerwy w Prawie Luizjany w Kontekście Pytań w Przyszłość Zachowku w Polsce*, “Transformacje Prawa Prywatnego”, Issue 4, 2020, pp. 203–204.

⁷⁷ Parents' obligation to support their children.

⁷⁸ Louisiana Revised Statutes Tit. 9, § 315.22.

whereas in other states the presence of two witnesses is satisfactory. It is imperative that both the notary and the witnesses are present concurrently and that they make the requisite statements as per the will. The stringent requirements for the form of a will, which deviates from the prevailing common perception, often result in the invalidity of the will. This phenomenon can be attributed to the conceptualization of the notary's role, which has been modelled on the civil legal tradition.⁷⁹

1. THE PRINCIPLE OF TESTAMENTARY FREEDOM IN LOUISIANA AND ITS CLASH WITH MECHANISMS THAT ARE AN EXPRESSION OF FAMILY SOLIDARITY

Although, as in other states, in Louisiana testamentary freedom is the organizing principle of inheritance law, in the legal system of this very state there are numerous manifestations of family solidarity. They limit the testator's freedom to primarily safeguard the economic interests of the testator's nuclear family (descendants in the first degree and the surviving spouse). This is in line with the social sense of justice and also protects the family from poverty in the event of the loss of the breadwinner. The protection of the nuclear family is provided mainly by the forced heirship – an institution known in the U.S. only in that state's legal system. Protection of the testator's family is also provided by 1) statutory lifetime right to use real estate from the spouses' community property, 2) a contractual right to use real or movable property specified by the testator vested in the surviving spouse, and 3) the so-called marital share.⁸⁰ Moreover, Louisiana law provides for the protection of members of the extended family. The primary mechanism for this is the rules of statutory succession, applicable in the absence of a valid will or the rejection of the inheritance by all the heirs appointed in the will.

It is worth signaling in this context that in the state of Louisiana the courts adopted a model of very liberal interpretation of the will, according to which substantial compliance with the statutory requirements

⁷⁹ A. Dunin-Dudkowska, *Testament jako zwierciadło kultur. Polsko-amerykańskie studium komparatystyczne*, Lublin 2014, pp. 200–202.

⁸⁰ LA Civ. Code, Article 2432.

prescribed for this type of disposition is sufficient for the validity of the will.⁸¹ As a result, in the state of Louisiana, cases where a will is declared invalid for failure to meet formal requirements will not be as frequent as in other states, so more often than not, the will of the testator will be executed in accordance with the contents of the will.⁸²

2. RULES OF STATUTORY SUCCESSION IN LOUISIANA AS A GUARANTEE TO PROTECT THE INTERESTS PRIMARILY OF THE TESTATOR'S IMMEDIATE FAMILY

Family solidarity is also reflected in the different rules of statutory inheritance with regard to the community property and the testator's separate property. The role of the community estate is to secure the material situation of the "small family" (i.e., the surviving spouse and descendants).⁸³ Separate property also secures mainly the economic interests of descendants, but in their absence it serves to meet the needs of further family members – relatives or affinities in accordance with the principle of successive groups of inheritance.⁸⁴

It is worth pointing out that Louisiana is one of nine states,⁸⁵ in which community property is a default regime between spouses during marriage, unless the spouses decide otherwise in a contract.⁸⁶ In five states, community property is one of the contractual marital property arrangements available between spouses.⁸⁷ In the others, in accordance

⁸¹ *Succession of Holbrook*, 13-1181, 144 So.3d 845, judgment of 28.01.2014 (La.). Also, *succession of Guezuraga*, 512 So. 2d 366 (La. 1987), para. 368.

⁸² G. Holmes, *Testamentary Formalism in Louisiana: Curing Notarial Will Defects Through a Likelihood-of-Fraud Analysis*, "Louisiana Law Review", Volume 75, 2014, pp. 511-514, available at: <https://digitalcommons.law.lsu.edu/lalrev/vol75/iss2/10> [last accessed: 14.02.2025].

⁸³ LA Civ. Code, Article 880.

⁸⁴ LA Civ. Code, Article 880.

⁸⁵ The states included in this group in 2024 were: Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington, and Wisconsin. At that, in three states: Arizona, California, and Washington, community of property also arises between partners in a registered partnership.

⁸⁶ Anonymous, *Community Property States 2024*, available at: <https://worldpopulationreview.com/state-rankings/community-property-states> [last accessed: 14.02.2025].

⁸⁷ In 2024 these were: Florida, Tennessee, Alaska, Kentucky, and South Dakota.

with the common law tradition, the property accumulated during the marriage by each spouse is his or her separate property. In a small number of states in the common law tradition, the surviving spouse retains entitlement to a portion of the deceased spouse's separate property (this institution operates under the name of dowery for the widow and curtesy for the widower).⁸⁸

In Louisiana, in the case of community property, if the testator left behind a spouse and descendants, the share of the testator's spouse in such inheritance is half. By virtue of law, it becomes part of his personal estate. The remainder of the community property is subject to distribution among the descendants. At the same time, the surviving spouse has a usufruct over the descendant's share.⁸⁹ This includes the right to housing. This entitlement arises *ex lege* and expires upon the death of the other spouse or remarriage.⁹⁰ At the time of the surviving spouse's exercise of the right of possession of the community property, the descendants appointed to the inheritance are referred to as "naked owners". The idea is that they have title to the property, but without the right to use such property. If the testator did not leave behind any descendants, the entire community property enters the surviving spouse's separate property.

In the case of separate property, there are five groups of heirs. If the testator did not leave behind any heirs from a particular group, the heirs who fall into the next group are entitled to inherit separate property.

In the first instance, the testator's descendants, i.e., joint natural or adopted children, and their descendants, are called to inherit the testator's personal property. At the same time, non-marital children are called to inherit to the same extent as children from a marriage, provided that the birth certificate shows the name of the testator as the father of the child, or at a later stage the testator has acknowledged the paternity of the child, or it has been judicially established.⁹¹ Judicial determination of paternity can be requested within one year from the date of death of the father.⁹²

⁸⁸ Such a solution is known to Arkansas state law.

⁸⁹ LA Civ. Code, Article 890.

⁹⁰ LA Civ. Code, Article 890.

⁹¹ LA Civ. Code, Articles 195, see also LA Civ. Code, Articles 203, 209.

⁹² Until 2005, the time limit for filing a paternity claim was very limited. An action for establishment could be brought within one year of the father's death or nineteen

Subsequently, those called to inherit separate property are the parents and siblings (sisters or brothers) of the testator, and their descendants (grandchildren). At this:

- if there are surviving siblings (or their descendants) and at least one surviving parent, the inheritance falls entirely to the siblings (in equal shares), but the parent(s) hold the joint and successive usufruct against the siblings;⁹³
- if there are siblings and no surviving parents, the entire inheritance estate goes to the siblings, and there is no usufruct;⁹⁴
- if only the parent or parents of the testator are left alive, they are appointed to inherit the inheritance in entirety.⁹⁵

In the absence of descendants, parents, siblings, or descendants form them, the testator's surviving spouse, if not judicially separated from him or her, is appointed to succeed to his or her separate property.⁹⁶ If the deceased does not leave descendants, siblings, or their descendants, or spouse, these are further ascendants who succeed to his separate property. If the ascendants in the paternal and maternal lines are of the same degree, the property is divided into two halves, one of which goes to the ascendants in the paternal line, and the other to the ascendants in the maternal line, irrespective of the number of ascendants on each side. In this case, the ascendants in each line inherit by heads.⁹⁷ In the absence of descendants, siblings or their descendants, his or her spouse, or ascendants, other collaterals are called to the inheritance. Among the collaterals, the nearest in degree are called to succeed and exclude all others. If there are several collaterals in the same degree, they share equally and by head.⁹⁸ If the testator left no heirs, his or her

years after the birth of the child, with the earlier date being considered. In 2005 (Act 192 of 2005), this provision was amended, with no intertemporal provisions, the rule according to which the new wording of the provision also applies to unrecognised extramarital children who were at least 19 years old on the date of its entry into force (29.06.2005). LA Civ. Code, Article 209.

⁹³ LA Civ. Code, Article 892, 893.

⁹⁴ LA Civ. Code, Article 892.

⁹⁵ LA Civ. Code, Article 892.

⁹⁶ LA Civ. Code, Article 894.

⁹⁷ LA Civ. Code, Article 895.

⁹⁸ LA Civ. Code, Article 896.

property becomes the property of the state of his/her domicile at the time of death.⁹⁹

3. FORCED HEIRSHIP AS AN INSTITUTION TO PROTECT THE TESTATOR'S DEPENDENT DESCENDANTS

Forced heirship¹⁰⁰ currently protects only the economic interests of descendants under the age of twenty-four, or who are physically or intellectually immature. For the assessment of these qualities, the time of the opening of death is decisive. Importantly – the forced heirship is subject to state constitutional protection.¹⁰¹

The limitation of this institution – in favour of the will of the testator – is the possibility of disinheriting forced heirs,¹⁰² but it applies only to cases of reprehensible behaviour of the disinherited towards the testator (such as physical attack on the testator, cruel treatment of the testator), enumerated in the law.

Previously, until the mid-1990s in Louisiana, all children, regardless of their age at the time of the testator's death, were entitled to a portion of the testator's inheritance as a reserve. Attempts to change this rule were made as early as the first half of the 1990s but were unsuccessful. The Louisiana Supreme Court declared the amendments of the rule unconstitutional.¹⁰³ These attempts were dictated by social changes, in-

⁹⁹ LA Civ. Code, Article 902.

¹⁰⁰ Forced heirship as a legal figure performs a similar function to the Polish compulsory share (*zachowek*). It secures the financial situation of members of the nuclear family. However, the circle of persons counted as forced heirs is much narrower than the circle of persons appointed to succeed by law.

¹⁰¹ Louisiana Constitution art. XII, § 5. Amended by Acts 1995, No. 1321, §1, approved October 21, 1995, eff. 23.11.1995, available at: <https://senate.la.gov/Documents/Constitution/Article12.htm> [last accessed: 12.02.2025]. Also J. Rudnicki, *Wymiar Praktyczny Tradycji Prawnej...*, p. 212.

¹⁰² LA Civ. Code, Article 1494.

¹⁰³ *Succession of Louis Lauga, Sr.*, 624 So. 2d 1156, judgment of 1993, Supreme Court of Louisiana, available at: <https://law.justia.com/cases/louisiana/supreme-court/1993/93-ca-0034-2.html> [last accessed: 30.01.2025]. See also K. S. Spaht, *The Aftermath of the "Revolution": 1990 Changes to the New Forced Heirship Law*, "Louisiana Law Review", Issue 3, 1991, p. 469.

cluding changes in the model and role of the family.¹⁰⁴ They are part of a general trend to weaken the protection of the testator's loved ones.¹⁰⁵ Eventually, new provisions for the reserve were introduced on January 1, 1996 and their introduction was made possible by an amendment to the Louisiana state constitution on November 23, 1995.¹⁰⁶ The amendments consisted of extending the protection of the right of inheritance vested only in a limited circle of "forced heirs" – descendants in the first degree, who at the time of the opening of the inheritance:

- are under twenty-four years of age or
- are permanently incapable of directing their own conduct and managing their property owing to physical or intellectual disabilities or
- who have been diagnosed with a terminal illness that, according to reliable medical data, is likely to render them unable to direct their own actions or manage their assets in the future.¹⁰⁷

The group of forced heirs includes further descendants – grandchildren, if their parents did not survive the deceased, and these persons meet the above prerequisites.¹⁰⁸

The circle of forced heirs does not fully correspond with the parents' child support (maintenance) obligation,¹⁰⁹ however forced heirship is

¹⁰⁴ K. Venturatos Lorio, *The Changing Concept of Family and its Effect on Louisiana Succession Law*, "Louisiana Law Review", Issue 4, 2003, p. 1161.

¹⁰⁵ M. Załucki, *Przyszłość zachowku w prawie polskim*, "Kwartalnik Prawa Prywatnego", Issue 2, 2012, p. 549; J. Rudnicki, *Wymiar Praktyczny Tradycji Prawnej...*, p. 200.

¹⁰⁶ J. Rudnicki, *Wymiar Praktyczny Tradycji Prawnej...*, p. 212.

¹⁰⁷ LA Civ. Code, Article 1493.

¹⁰⁸ *Germain*, 23/C/25, judgment of 31.05.2023, Louisiana State Court of Appeals (Fifth Circuit). available at: <https://casetext.com/case/in-re-germain-6> [last accessed: 4.02.2025].

¹⁰⁹ Louisiana Revised Statutes Tit. 9, § 315.22 Generally, parents have a duty to provide for the maintenance and upbringing of their child until the child reaches the age of majority (18) or until independence (emancipation). Exceptionally, this obligation may be on the parents for longer. This applies to the following situations:

- an unmarried child who has reached the age of majority, or a child who has become independent, who is in full-time secondary education, has not reached the age of nineteen and is dependent on either parent;
- a child with developmental disabilities until he or she reaches the age of twenty-two, as long as he or she is in full-time secondary school;

a kind of extension of the child support obligation for minor children.¹¹⁰ As for the age limit for healthy forced heirs, the legislature's intention was to extend protection to children who have not completed their college education and therefore are not financially independent.¹¹¹ In fact, parents of college-educated children most often feel obligated to provide maintenance and upbringing for the children.¹¹²

If the will does not include the forced heirs, the will is considered invalid insofar as it concerns the non-distributable¹¹³ portion of the testator's estate. If the testator leaves a forced heir, this share is $\frac{1}{4}$ of the estate; if there are two or more, it is half of the estate and the heirs are appointed in equal shares.

4. DISINHERITANCE IN LOUISIANA

The institution of disinheritance in Louisiana law, as in Polish inheritance law, serves as a private "punishment" for the disinherited person's reprehensible behaviour towards the testator. The testator may disinherit his or her descendants in his or her will if the beneficiary has committed one or more of the following acts:

- committed a physical assault on the testator. This prerequisite is considered to be fulfilled only if the child hit the testator. It is not fulfilled in the event of a threat to commit such an attack;

-
- of an unmarried child who is incapable of self-support and requires substantial care and personal supervision owing to an intellectual or physical disability that manifested itself before the child reached the age of majority;
 - alimony is ordered for two or more children jointly, in which case the alimony obligation ends when the youngest child reaches the age of majority or independence.

¹¹⁰ R. C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, "Louisiana Law Review", Issue 4, 1996, p. 1.

¹¹¹ K. S. Spaht, K. Venturatos Lorio, C. Picou, C. Samuel, F. W. Swaim Jr., *The New Forced Heirship Legislation: A Regrettable 'Revolution'*, "Louisiana Law Review", Issue 3, 1990, p. 437.

¹¹² *Ibid.*, p. 437.

¹¹³ This applies to the disposition of property by gift between the living, donation *mortis causa* and by will.

- treated the testator in a cruel manner, inflicted grievous bodily harm on a parent or committed any other offence against the testator. This condition is also met in the absence of a criminal conviction, but in inheritance proceedings it is necessary to prove such an event;
- attempted to deprive the testator of his or her life;
- accused the testator, without good reason, of committing a crime punishable by life imprisonment or death;
- used violence or coercion to prevent the testator from making a will;
- as a minor, married without the consent of the testator;
- has been validly convicted of a crime punishable by life imprisonment or death;
- as an adult, without good reason, broken off contact with the testator for a period of two years. This circumstance cannot be a premise of disinheritance in the case of a person performing active military service in the United States armed forces during this period.¹¹⁴

5. THE RIGHT TO USE THE TESTATOR'S PROPERTY (USUFRUCT)

The non-distributable portion of the testator's estate (reserved for forced heirs) cannot be encumbered by third-party rights.¹¹⁵ An exception to this is the right to use the testator's property (usufruct), which is intended to protect the financial situation of the testator's surviving spouse.¹¹⁶

This entitlement may derive from the law or from a testamentary disposition. The entitlement originating in the law is generally limited to the right to use property that was part of the joint estate during the marriage, and the ability to withdraw without succession proceedings from a joint bank or deposit account an amount up to \$10,000.¹¹⁷

¹¹⁴ LA Civ. Code, Article 1621.

¹¹⁵ LA Civ. Code, Article 1494.

¹¹⁶ LA Civ. Code, Article 890.

¹¹⁷ Louisiana Revised Statutes, *Title 9: Payment to surviving spouse without court proceedings*, § 1513. as of 1.01.2023, Westlaw, available at: <https://1.next.westlaw.com/Document/IB68B1EB0901F11ED86358A0F7514A972/View/FullText.html?origination->

The right of usufruct under the will may also include real estate from the testator's separate property.¹¹⁸ In addition, the testator may further look after the interests of his or her spouse and in his or her will extend the right of usufruct to movables, including consumable goods¹¹⁹ (e.g., cash)¹²⁰ and non-consumable goods (land property, building property, furniture).¹²¹ Wearable movables may be completely consumed by the usufructuary during the term of the usufruct and the heir has only a limited recourse claim after the expiration of the right.¹²² Objects acquired in their place are covered by the right of usufruct by operation of law. Non-usable movable property may be used by the usufructuary. However, he or she may not, without the consent of the owner (heir), dispose of his or her property.¹²³ The right of usufruct vested in surviving spouse may be extinguished owing to his or her long-term non-exercise or abuse of this right by the testator's spouse.¹²⁴

6. MARITAL SHARE AS AN INSTITUTION THAT PROTECTS THE SURVIVING SPOUSE

An expression of family solidarity is also the institution of the so-called marital share. The prerequisite for its award is the determination that the testator's separate property is significantly greater than the separate property of the surviving spouse.¹²⁵ The legislator has not defined when this "significant disproportion" occurs.¹²⁶ In practice, it is assumed that it occurs when the compared assets remain in a ratio of 1:5 in favor of

Context=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default [last accessed: 20.01.2025].

¹¹⁸ LA Civ. Code, Article 1496.

¹¹⁹ LA Civ. Code, Article 1499.

¹²⁰ LA Civ. Code, Article 536.

¹²¹ LA Civ. Code, Article 537.

¹²² LA Civ. Code, Article 538.

¹²³ LA Civ. Code, Article 539.

¹²⁴ LA Civ. Code, Articles 621, 623.

¹²⁵ LA Civ. Code, Article 2432.

¹²⁶ *Succession of Zilfe*, 378 So. 2d 500, judgment of 1980, Louisiana Court of Appeal (4th Circuit).

the testator's estate.¹²⁷ At the same time, circumstances such as the surviving spouse's earning capacity are irrelevant in assessing whether the spousal share should be awarded to him or her.¹²⁸

The marital share varies depending on whether the testator died childless or was survived by children, and if so, by how many. In the first case, it is a $\frac{1}{4}$ share in the ownership of the items included in the estate. If the testator left behind between one and three children, it is $\frac{1}{4}$. If the testator left behind more than three children, it includes the child's share of use. In any case, however, the value of this share cannot exceed one million dollars.¹²⁹

The marital share is a personal entitlement and is not inheritable. The claim for this share is time-barred three years after the date of death. The surest way to determine whether a spouse is entitled to this share is to bring a legal action for the court to declare it. The marital share is reduced by the value of bequests to the surviving spouse and spousal death benefits (insurance, social security).¹³⁰

7. INTERPRETATION OF THE WILL AS MEANS TO PROTECT THE INTENTIONS WILL OF THE TESTATOR

One of the issues significantly affecting the actual protection of the testator's will is the judicial practice aimed at assessing the validity of a will, including in terms of its form. Formal requirements are considered to protect testamentary freedom by ensuring that the will is executed in accordance with the testator's actual intentions will.¹³¹ The concept of formal requirements is understood more broadly than in civil law. It also includes the content of the last will (whether it is unambigu-

¹²⁷ P. Tuttle, Chapter 12, *Successions in Louisiana*, available at: <https://law.loyno.edu/sites/default/files/successions.pdf>, [last accessed: 25.01.2025]; *Succession of Adams*, 2002-0005, 816 So. 2d 988, judgment of 05.08.2002, Louisiana Court of Appeals (3 Cir).

¹²⁸ A. Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, "Emory Law Journal", Issue 49, 2000, p. 487.

¹²⁹ LA Civ. Code, Article 2434.

¹³⁰ LA Civ. Code, Article 2436.

¹³¹ *Succession of Liner*, 19-2011, 320 So.3d 1133, 1137 (citing *Soileau v. Ortego*, 189 La. 713, 718, 180 So. 496, 497), judgment of 30.06.2021, p. 4 (La. 6/30/21).

ous and clear) and the mandatory elements of a given form of will. The content of a will must be interpreted literally (directive of literal interpretation). In other words, the use of functional interpretation when it leads to a contradiction of the literal content of the testator's will is impermissible.¹³² This applies especially to notarial wills.¹³³ In Louisiana, the notarial form is preserved when the following conditions are met at the same time:

- the testator declares in the presence of two witnesses and before a notary public that the document is his last will and testament,
- the testator puts his own signature under the body of the will and on each page of it,
- the notary and two witnesses, simultaneously present, declare that the will meets the requirements under Article 1577(1) Louisiana Civil Code.¹³⁴

In addition, the will of the testator, as well as the statement of the notary and witnesses, must be expressed in a clear and unambiguous terms. Failure to meet any of the above requirements renders the will invalid.¹³⁵

Faced with such far-reaching consequences of a defective last will, Louisiana courts have adopted the model of liberal interpretation¹³⁶ – the so-called substantial-sufficient compliance doctrine – deriving it from the presumption of the will's validity.¹³⁷ According to the doctrine, a notarized will is valid if it shows substantial compliance with statutory requirements. This applies to the last of the mandatory elements, i.e. the statements of the notary and witnesses. According to established case law, the requirement that the statements of the notary and witnesses comply with the statutory requirements is not treated in an absolute

¹³² LA Civ. Code, Article 1611(A).

¹³³ LA Civ. Code, Article 1576. Notarial wills are more akin to the official will known to Polish inheritance law, in that the testator's declaration is made in the presence of a notary and two witnesses.

¹³⁴ *Succession of Siverd*, 08-2383, 08-2384, 24 So.3d 228, judgment of 9.11.2009, Louisiana Court of Appeal, First Circuit.

¹³⁵ *Succession of Faulk*, 22-249, judgment of 26.10.2022 (La.App. 3 Cir.). Available at: <https://caselaw.findlaw.com/court/la-court-of-appeal/1972544.html> [last accessed: 20.02.2025].

¹³⁶ B. Kucia, *Forma testament w systemach common law*, Warszawa 2016, p. 144.

¹³⁷ *Succession of Holbrook*.

manner.¹³⁸ This is dictated by their declarative nature – they only state a certain factual and legal state.¹³⁹ In this regard, it must also be noted that the purpose of introducing formal requirements was to protect against fraud and to ensure that the will is executed in accordance with the intentions will of the testator.¹⁴⁰ The traditional model of interpreting¹⁴¹ the provisions on the form of a will would lead to a violation of the testamentary freedom.¹⁴²

VI. CALIFORNIA

At the other end of the spectrum from Louisiana, California is a traditional common law state. Its legal system favours testamentary freedom over family solidarity. For this reason, Californian courts generally accept no-contest clauses in wills. However, this does not mean that there are no guarantees for the family members of the deceased. The courts have also adopted the doctrine of harmless error to relax the formal requirements of a will. The expression of family solidarity can be found in the courts' practice with regard to no-contest clauses – the courts accept that the clause will not be triggered if there are reasonable grounds for doubting the validity of the will or if the action brought by the heir or legatee is not a direct challenge to the will. The concept of family protection can also be found in the rules on intestate succession, the protection of the abandoned spouse and/or child, the right to own a house, furniture, clothing, and other family items for a certain period of time,¹⁴³ and family allowances. The protection is, however, often limited in time and in value.

¹³⁸ *Succession of Holbrook*.

¹³⁹ *Succession of Morgan*, 257 La. 380, 242 So.2d , para. 551, 552, judgment of 1970; see also *Succession of Porche*, 288 So.2d, para. 27, 29-30, judgment of 1973; cited after *Succession of Faulk*.

¹⁴⁰ *Succession of Hebert*, 12-281, judgment of 3.10.2012 (La.App. 3 Cir.), 101 So.3d, para. 131, 135, cited after *Succession of Faulk*.

¹⁴¹ B. Kucia, *Forma testament w systemach common law...*, p. 129.

¹⁴² *Succession of Bilyeu*, 28,701, judgment of 25.09.1996 (La.App. 2 Cir.), 681 So.2d, para. 56, 59.

¹⁴³ LA Civ. Code, Article 570.

1. CALIFORNIA NON-CONTEST CLAUSES IN WILLS

California courts have taken a conservative approach to so-called *no-contest clauses*, i.e., the imposition by testators on heirs (or legatees) of an obligation not to act directly to declare a will invalid. This is because such clauses are seen as a harsh sanction, depriving the testator's family members of their due share of the inheritance.¹⁴⁴ The clauses are therefore treated as contradictory to the principle of family solidarity. At the same time, these clauses, (correctly worded and with no grounds for declaring the testator's last will invalid) are considered effective, not only against the testator's descendants or further relatives, but also against the surviving spouse who contests the validity of the testamentary disposition. Certainty in legal transactions, the elimination of lengthy and costly disputes over the estate¹⁴⁵ and the protection of the testator's will¹⁴⁶ are cited as the primary reasons for recognising their effectiveness.

Significantly, in assessing the effectiveness of these provisions, courts not infrequently look to the extra-legal criterion of the interests of the testator's surviving family members who were not appointed to inherit by will.¹⁴⁷ The practice of California courts shows that, although formally the overriding principle is the protection of the testator's will, when there is a collision with the interests of individual family members, the courts sometimes give primacy to the latter.

The jurisprudence of California courts accepts that the sanction provided for in the no-contest clause is not triggered when:

- the person challenging the validity of the will has good reasons for doing so (*probable cause*).¹⁴⁸ If the court declares the will inva-

¹⁴⁴ *Restatement of Law, Restatement Third of Property...*, pp. 369-370; See also California Probate Code (Cal. Prob. Code) §§ 21303, 21304 (West 2011). Cited after A. A. Golling-Sledge, *Testamentary Freedom vs The Natural Right to Inherit...*, p. 148.

¹⁴⁵ *Estate of Schuster*, 163 Cal. App. 3d, para. 337, 342, judgment of 1984 (Cal. Ct. App.).

¹⁴⁶ Revision Report, *supra* note 10, p. 364-68; see also Cal. Prob. Code § 21310(c) (West 2011).

¹⁴⁷ F. H. Foster, *The Family Paradigm of Inheritance Law*, "North Carolina Law Review", Volume 80, 2001, pp. 210-212.

¹⁴⁸ R. H. Sitkoff, J. Dukeminier, *Wills, Trusts, And Estates*, Wolters Kluwer Law & Business 2017, p. 303.

lid, it results in the invalidity of *the non-contest clause* along with the private sanction contained in such provision.

- the heir or legatee takes actions that do not directly seek to challenge the validity of the will.

The concept of "legitimate reasons" is not defined in California statutes. Its content is filled in by the jurisprudence of the courts in each case. It should be pointed out that cases in which the courts have recognised the existence of such legitimate reasons are rather rare.¹⁴⁹ For example, in the opinion of the courts, such legitimate reasons occur when the behaviour of a third party improperly influenced the content of the will (*undue influence*)¹⁵⁰ or when the instruction was worded in an unclear manner.¹⁵¹ At the same time, it should be noted that California courts accept only clauses whose content is specific and explicit. General commands – directed to anyone or covering any legal action regarding the will – are considered inadmissible. A properly worded "non-contest command" must include a precise indication of the addressee of the command, the content of the obligation imposed on him to act or not to act, and the sanction.¹⁵²

California courts recognise that actions that do not directly challenge the validity of a will are:

- the filing of an action for determination by the beneficiaries in connection with the ambiguous wording of the amendment to the trust.¹⁵³ In the court's view, the purpose of the plaintiffs' action was to clarify interpretive doubts, even if in the letter initiating the proceedings and in the course of the proceedings they advocated an interpretation of the amendment that was favourable to them.¹⁵⁴
- invoking during the probate proceedings a defect in the testator's declaration of intent in a situation where the defect con-

¹⁴⁹ Ibid., p. 303.

¹⁵⁰ Ibid., p. 303.

¹⁵¹ *Aviles v. Swearingen*, 16 Cal. App. 5th 485, 492 n.4 (Cal. Ct. App.), judgment of 23.10.2017.

¹⁵² Ibid.

¹⁵³ *Donkin v. Donkin*, No. S202210, 58 Cal. 4th, para. 425, (Supreme Court of California), judgment of 26.12.2013.

¹⁵⁴ Ibid.

cerned the testator's disposition of the components of the trust.¹⁵⁵

In the court's opinion, the action of the heirs was aimed only at determining what rights were included in the estate;¹⁵⁶

- filing an action to establish ownership.¹⁵⁷

In each of the above cases, the court's decision in the case initiated by the action of the heir or legatee affected the size of the shares in the estate or the composition of the estate, but not the will itself.

2. PROTECTING THE "SMALL FAMILY" UNDER THE RULES OF STATUTORY SUCCESSION IN CALIFORNIA

California is one of nine states in which a community of property is created between spouses during the course of marriage, unless the spouses otherwise contractually regulate their marital arrangement.¹⁵⁸ This means that in the event of the death of one of the spouses, the estate consists of his or her share of the community property and the components of his or her separate property. At the same time, as in Louisiana, California law has different rules of statutory inheritance for the share of community property,¹⁵⁹ share of quasi community property,¹⁶⁰ separate for separate property.¹⁶¹ As a rule, the surviving spouse and the testator's children are the first to be appointed to inherit by law.

In the case of a share in joint and quasi joint property, the surviving spouse is called to inherit half of the property. In the case of the testator's separate property, if the testator left no descendants, parents, siblings, or descendants of siblings, the surviving spouse is called to in-

¹⁵⁵ *Johnson v. Greenelsh*, no. S166747, S166747, 47 Cal. 4th 598, 604 (Cal. 2009), para. 599, judgment of 29.10.2009 (Supreme Court of California).

¹⁵⁶ *Ibid.*, para. 609.

¹⁵⁷ *Estate of Dayan*, no. B268416, 5 Cal. App. 5th 29 (Cal. Ct. App.), judgment of 3.11.2016.

¹⁵⁸ Anonymous, *Community Property States 2024*, available at: <https://worldpopulationreview.com/state-rankings/community-property-states> [last accessed: 2.02.2025].

¹⁵⁹ Cal. Prob Code (2024) § 6401 (a)(b).

¹⁶⁰ Quasi-community property is the property spouses acquired when they were not domiciled in a community property state.

¹⁶¹ Cal. Prob Code (2024) § 6401(c).

herit in the whole. If the testator left behind other family members in addition to his spouse, the share of the widow/widower is:

- 1/2 of the inheritance if the testator also left one child or grandchildren descended from that child, or if the testator left no descendants, but left parents or siblings;
- 1/3 of the estate, if the testator left behind more than one child, or one child and descendants of at least one deceased child, or descendants of at least two deceased children.

The remainder of the estate – or, in the absence of a surviving spouse, the entire estate – falls to:

- descendants or further descendants, with heirs of the same degree of consanguinity inheriting in equal shares, heirs of a further degree inheriting an equal share from the share that would have fallen to their ascendant if he or she had lived to the opening of the inheritance
- if the testator left no descendants – to parents in equal shares, or in place of a deceased parent – to siblings;
- if the testator left no descendants, parents or siblings – to grandparents in equal shares and in their absence – to aunts and uncles;
- if the testator left no descendants, parents, siblings, grandparents, aunts or uncles – to the children of the spouse in equal shares and in their absence – to the parents of the spouse.¹⁶²

In the absence of heirs, the inheritance mass becomes the property of the state.¹⁶³ However, owing to the wide circle of heirs at law, this rarely occurs.

3. PROTECTION OF THE OMITTED SPOUSE

One of the instruments inherent in family solidarity is the protection afforded to the testator's spouse who was omitted from the last will, in the form of a claim for the inheritance of a certain portion. At the same time, the negative prerequisites excluding the emergence of such a claim on

¹⁶² Cal. Prob Code (2024) § 6401(c).

¹⁶³ Cal. Prob Code (2023) §§ 6404; 6800.

the part of the surviving spouse indicate that the legislator also took into account the testamentary freedom and, in regulating this institution, tried to offer an optimal solution in a situation where the two values collide.

A positive condition for the emergence of a surviving spouse's claim to inheritance is the fact that the testator made a will before marrying the surviving spouse.¹⁶⁴ The granting of protection to the spouse here is based on the assumption that the probable will of the testator would have been to appoint the spouse to the inheritance. This is reflected in the wording of the negative prerequisites that exclude a claim to inheritance.

The surviving spouse will not be called to inherit if:

- (a) the testator's intention was not to include the spouse in the will, and this intention can be established based on the content of the will;
- (b) the testator made a donation to the spouse through a disposition other than a will with the intention that the donation would compensate the spouse for the lack of consideration in the will;
- (c) the spouse validly waived his or her right to a share of the testator's inheritance.¹⁶⁵

As for the amount of the share, the omitted spouse is entitled by law to one-half of the share in the joint property, one-half of the share in the quasi-community property, and the share in the personal property to which he or she would be entitled in the absence of a will, but in any case not more than one-half of the share in the personal property.¹⁶⁶ The share due to the omitted spouse should be taken first from the property not included in the will or trust and, if this estate is insufficient, constitute a debt to the estate chargeable to each of the heirs and legatees in proportion to their share of the estate.¹⁶⁷

¹⁶⁴ Cal. Prob Code (2024) § 21610-12.

¹⁶⁵ Cal. Prob Code (2024) § 21611.

¹⁶⁶ Cal. Prob Code (2024) § 21610.

¹⁶⁷ Cal. Prob Code (2024) § 21612.

4. OMITTED CHILD – PROTECTION OF THE TESTATOR’S OMITTED CHILDREN IN THE WILL

Another manifestation of family solidarity is the protection of the testator’s omitted child in the will (*omitted child*). It should be noted, however, that only in exceptional cases are omitted children given a share. These rare cases are when the testator omitted a child from his or her will, remaining in the mistaken belief that the child was dead or having no knowledge of his/her birth. In such a case, the omitted child may claim such a share as he/she would be entitled to in the absence of a will or trust.¹⁶⁸

5. THE TEMPORARY RIGHT TO HOUSING, FURNITURE, CLOTHING, AND OTHER FAMILY ITEMS

The protection of the testator’s immediate family members is also manifested by granting the testator’s surviving spouse and minor children the right to: 1) to live in the family home, 2) to use the family’s furniture and clothing and 3) to use other items excluded from the execution of money. The entitlement to their possession and use is time-limited – it expires 60 days after the date of the inventory or at any other time set by the court (for a valid reason).¹⁶⁹

6. FAMILY ALLOWANCE AS A MEANS OF PROTECTING THE TESTATOR’S FAMILY MEMBERS FOR THE DURATION OF THE PROBATE PROCEEDINGS

As an expression of the protection of the property interests of the testator’s family, the immediate family members are entitled to receive family allowances during the succession proceedings. This entitlement is granted *ex lege* to the surviving spouse, minor children of the testator,

¹⁶⁸ Cal. Prob Code (2024) § 21622

¹⁶⁹ Cal. Prob Code (2024) § 6500.

and adult children of the testator who, owing to their physical or mental condition, are unable to earn their own living and who were supported in part or in whole by the testator during his life.¹⁷⁰

In addition, the court may grant such allowance, if it deems it necessary, also:

- to the remaining adult children of the testator who were financially dependent on him or her in part or in whole during his or her lifetime;
- to a parent of the testator who was financially dependent on him or her in part or in whole during his lifetime.¹⁷¹

At the same time, if several people are entitled to the allowance and the applicant has other reasonable sources of income, the court should award the allowance only to those members of the testator's family who have no other sources of income.¹⁷²

7. THE HARMLESS ERROR DOCTRINE AS A RELAXATION OF THE STRICT REQUIREMENTS FOR THE FORM OF A WILL

As a rule, California courts have adopted a model of restrictive interpretation of the testator's will. However, with regard to the so-called *formal will*, the legislature of that state has allowed an exception – the harmless error doctrine.¹⁷³ *It resembles the Polish regulation of the holographic will with regard to the requirement to indicate the date of the last will. The legislature's indicated scope of application of this theory is limited only to situations in which the form of the will does not comply with the requirements of Section 6110 of the California Probate Code. This provision requires that the formal will contain the testator's written (handwritten, printed) statement, the testator's handwritten signature, and the statement (attestation) of two witnesses present at the same time.*¹⁷⁴

¹⁷⁰ Cal. Prob Code (2024) § 6540 (a).

¹⁷¹ Cal. Prob Code (2024) § 6540 (b).

¹⁷² Cal. Prob Code (2024) § 6540 (c).

¹⁷³ D. Horton, *Partial Harmless Error for Wills: Evidence From California*, "Iowa Law Review", Volume 103, 2018, p. 2048.

¹⁷⁴ J. H. Langbein, *Substantial Compliance with the Wills Act*, "Harvard Law Review", Issue 3, 1975, p. 489.

The theory of harmless error is applied to irregularities related to the latter element. For example, it occurs in the absence of the signature of at least one of the witnesses, or the signatures of witnesses without their simultaneous presence. This model does not apply to defects in the testator's declaration of intent, content, or requirements related to the testator's own signature. The legislator has also excluded its application to amendments to an already existing will.¹⁷⁵ If the court finds that the testator's intentions to leave a will with a given content was expressed in a sufficiently clear and *convincing* manner (*clear and convincing*), the affected will is validated.

For example, courts in California have held that the indicated premise is met in the cases *Estate of Burns* and *Estate of Campbell*.¹⁷⁶ In both cases, the testators informed their heirs before their death that they had made a will.¹⁷⁷ Also, it was clear from the content of the will or other documents that they intended to make a will with such content.¹⁷⁸ Moreover, the testators, who would have come to inheritance under the law, did not question the validity of the will.¹⁷⁹ On the basis of the facts, the court established that the testator's intent was clear and there were no grounds for questioning its validity.

On the other hand, California courts refused to execute the will in the *Estate of Ben-Ali* case¹⁸⁰ on the grounds that it was invalid. At the same time, the circumstances of this case were quite drastic – the testator's father hid his son's death and his body for four years. Moreover, he also forged the will. This was indicated by: the content of the will, according to which the main heir was the father of the deceased and not his newly married wife,¹⁸¹ the illegible signature of the second witness and lack of possibility of establishing his identity,¹⁸² the testimony of the relatives and friends (no mention of having made a will),¹⁸³ and the lo-

¹⁷⁵ D. Horton, *Partial Harmless Error for Wills: Evidence From California...*, p. 2050.

¹⁷⁶ *Estate of Campbell*, HP10543410, judgment of 25.10.2010 (Cal. Supr. Ct.).

¹⁷⁷ D. Horton, *Partial Harmless Error for Wills: Evidence From California...*, p. 2050.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Estate of Ben-Ali*, 157 Cal. Rptr. 3d 353, 1028 (Cal. Ct. App. 2013), judgment of 24.06.2013.

¹⁸¹ *Ibid.*, para. 362.

¹⁸² *Ibid.*, para. 1036.

¹⁸³ *Ibid.*, para. 362.

cation of the document itself (it was found in the estate of the deceased's father).¹⁸⁴ The court established that Hassan – Taruk's father, had an obvious financial motive for concealing Taruk's death if a will leaving the building to Hassan did not in fact exist when Taruk died.¹⁸⁵ Moreover, the court paid attention to the fact that the wife of the deceased was referred to as "my wife" in the will, not by name. In the court's opinion, the circumstances cast doubt on the will's provenance.¹⁸⁶ Eventually, the court reversed the judgment of the first instance court.¹⁸⁷

In practice, the theory is not often applied. This is owing to its exceptional nature. Courts do not extend its application to cases other than those expressly indicated in the law. In addition, an analysis of court proceedings related to the validity of a will shows that defects related to witness signatures are rare, so there is no need to invoke this theory more often. Much more often, the reason for questioning the validity of a will is based on material legal grounds.¹⁸⁸ Nevertheless, this theory is a break from the principle of restrictive interpretation of the will and, as such, is a manifestation of the protection of testamentary freedom.

CONCLUSIONS

Testamentary freedom is the overriding and organizing principle of the law of succession. At the same time, legislators in the individual states recognise a need to protect members of the family of the deceased. This protection, however, is implemented to varying degrees. Louisiana is the only state with an institution of forced heirship – an expression of a strong protection of family solidarity. This legal figure protects children under the age of twenty-four against the will of the testator. California, on the other hand, prioritizes testamentary freedom and provides the family members of the deceased with a limited protection. Also, a model law was created in the pursuit of unifying inheritance law at the federal level – the Uniform Probate Code. It favours the pri-

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid., para. 1039.

¹⁸⁷ Ibid.

¹⁸⁸ D. Horton, *Partial Harmless Error for Wills: Evidence From California...*, p. 2061.

macy of testamentary freedom, but also includes interesting mechanisms to protect the family, such as family allowance or homestead allowance. The model regulation corresponds to the social expectations on a just disposition of one's property after death. An analysis of these three legal systems shows that none of the legislators has opted exclusively for one of the norms. Rather, state legislators are trying to find a golden mean – to protect the family's property interests while ensuring that the will is executed in accordance with the testator's wishes.