

SUCCESSION PLANNING AND PRENUPTIAL AGREEMENTS: A BRAZILIAN CASE STUDY

Planejamento sucessório e acordos pré-nupciais: um estudo de caso brasileiro

Planificación de sucesión y acuerdos prenupciales: un caso de estudio brasileño

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ABSTRACT

The paper analyzes the possibility of waiving the competition law of the spouse or partner by means of a prenuptial agreement or cohabitation contract, considering that the Brazilian legal system, in the current wording, does not offer a direct and legally stable way to align, in a preventive way, the patrimonial effects of living together with the succession effects of death. The research adopts the deductive method, with a bibliographic procedure, based on doctrine, jurisprudence, legislation and sources pertinent to the theme. In the end, the relevance of the legislative debate on the possible amendment of article 426 of the Civil Code is highlighted, insofar as proposals such as PL 4/2025 signal the search for clearer criteria to deal with the matter, reinforcing private autonomy and the need to adapt the system to contemporary family transformations.

Keywords: antenuptial agreement, inheritance waiver, succession law, private autonomy, brazilian civil law.

RESUMO

O trabalho analisa a possibilidade de renúncia ao direito concorrencial do cônjuge ou companheiro por meio de pacto antenupcial ou contrato de convivência, considerando que o sistema jurídico brasileiro, na redação atualmente vigente, não oferece um caminho direto e juridicamente estável para alinhar, de forma preventiva, os efeitos patrimoniais da vida em comum com os efeitos sucessórios do falecimento. A pesquisa adota o método dedutivo, com procedimento bibliográfico, a partir de doutrina, jurisprudência, legislação e fontes pertinentes ao tema. Ao final, destaca-se a relevância do debate legislativo sobre a possível alteração do art. 426 do Código Civil, na medida em que propostas como o PL 4/2025 sinalizam a busca por critérios mais claros para tratar a matéria, reforçando a autonomia privada e a necessidade de adequação do sistema às transformações familiares contemporâneas.

Palavras-chave: acordo pré-nupcial, renúncia de herança, direito sucessório, autonomia privada, direito civil brasileiro.

RESUMEN

El artículo analiza la posibilidad de renunciar a la ley de competencia del cónyuge o pareja mediante un acuerdo prenupcial o un contrato de convivencia, considerando que el sistema jurídico brasileño, en la redacción actual, no ofrece una forma directa y jurídicamente estable de alinear, de forma preventiva, los efectos patrimoniales de convivir con los efectos sucesorios de la muerte. La investigación adopta el método deductivo, con un procedimiento bibliográfico, basado en doctrina, jurisprudencia, legislación y fuentes pertinentes al tema. Finalmente, se pone de manifiesto la relevancia del debate legislativo sobre la posible modificación del artículo 426 del Código Civil, en la medida en que propuestas como la PL 4/2025 señalan la búsqueda de criterios más claros para abordar el asunto, reforzando la autonomía privada y la necesidad de adaptar el sistema a las transformaciones familiares contemporáneas.

Palabras clave: acuerdo antenupcial, renuncia a sucesiones, derecho sucesorio, autonomía privada, derecho civil brasileño.

1 INTRODUCTION

The regulation of family and of matters of inheritance in Brazil is governed by a number of precepts and by the private autonomy of individuals. Therefore, agreements entered into prior to marriage (so-called antenuptial agreements) that include provisions whereby one of the spouses waives his or her rights to a portion of the other spouse's estate even before the other spouse's death are subject to many controversies. A recent decision by the Superior Council of Magistracy of the State of São Paulo (Civil Appeal nº 1000348-35.2024.8.26.0236, decided in October 2024) deals with the administrative aspect of the registration of the aforementioned type of agreements. Therefore, an in-depth analysis of the matter is necessary. This case study analyzes the Civil Court's decision in the aforementioned case to address a specific problem. In Brazil, the freedom of contract of individuals is limited by legislative restrictions on contracts found to be contrary to public policy or good morals. Article 426 of the Brazilian Civil Code contains provisions that date back centuries, when family bonds were stronger, families possessed fewer assets, and there were no businesses. Therefore, in order to protect the solidarity of the family, this provision prohibits the contracts that are entered into by the living individuals in order to regulate the inheritance of the other party. However, nowadays, the vast majority of families

possess significant assets, either in cash or in kind, and many have businesses that generate substantial wealth. Therefore, it is very common for individuals to establish, prior to their marriage, an agreement that governs how they will manage their property and assets after their marriage. To do so, they enter into an antenuptial agreement that establishes the property regime of the couple after their marriage.

This type of agreement has been very common among couples because it allows them to regulate their marital property regime in accordance with their personal objectives regarding succession. In other words, the individuals have been interested in entering into antenuptial agreements that include provisions allowing the spouses to waive their inheritance rights. In this sense, this case study is divided into three objectives. Firstly, this study aims to present a case study of a decision of the Superior Council of Magistracy of the State of São Paulo. In this decision, the Council addressed an administrative question: whether an antenuptial agreement containing a clause waiving the right of inheritance early was capable of being registered in the Public Registry Office. Secondly, this study aims to analyze the decision of the Superior Council of Magistracy of the State of São Paulo of October 2024, regarding the Civil Appeal nº 1000348-35.2024.8.26.0236, in order to solve the problem of the freedom of contract of the individuals, opposed with the restrictions imposed by the legislation on the contracts that are considered to be against public policy or to be contrary to good morals, by analyzing the provisions of Article 426 of the Civil Code. Thirdly, this study aims to analyze solutions offered by other countries to the same problem, in order to present alternatives to Brazilian legislation.

The present study shall pursue three distinct objectives. The first of these shall consist of a study of the case law from the São Paulo Superior Court of Justice. The study shall be based upon a civil appeal, wherein one or more of the Appellants shall stand against one or more of the Respondents. Said study shall, upon confirmation of the registration of an antenuptial agreement containing a waiver of early inheritance by the Parties prior to the marriage, analyze the decision in the aforesaid case, analyzing said decision in light of the prevailing Brazilian civil law, and studying the principal legal arguments, as understood through a combination of Doctrinal analysis and Jurisprudential analysis, with respect to waiver of early inheritance as referenced within the aforementioned antenuptial agreement. The second of the objectives sought in the present study shall consist of an analysis of the implications of the decision in the case study above, with said analysis being conducted

from a perspective that is both affirmative and negative with respect to the principle of private autonomy, thus examining in what ways the decision in the aforesaid case shall expand the said principle, and in what ways said decision shall impose limitations on the said principle. The third and final objective pursued in the present study shall consist of a comparison of the case study above with similar cases from other countries in which the waiver of early inheritance has been permitted, or has even prompted legislative reforms, and in which said waiver has been prohibited. Said comparison shall strive to identify the possible avenues for Brazilian legislation.

The registration of antenuptial agreements that include an early waiver of children's right to inherit their parents' property is an extremely relevant case for analyzing a significant shift in the Civil Code governing succession and spouses' marital property. As already mentioned, the rules governing succession affect not only the deceased's relatives but also the deceased's spouse. In this sense, all family members are affected by the rules governing the distribution of a deceased member's property. These rules must be revised to reflect the changes in our society, namely the new family structures. In this way, all family members must clearly understand their rights and duties to avoid disputes. As mentioned above, the case analyzed in this work is purely administrative. However, it has important bearing on the consequences of registering the agreements under analysis and on the substantive rules currently in force. In this sense, the decisions of the Superior Council of Magistracy of the States are extremely important in our society.

In analyzing the case decided by the Superior Court of Justice (STJ) in São Paulo, the theoretical framework shall be grounded in the civil law as analyzed by a group of Brazilian scholars. First, the waiver by spouses in antenuptial agreements of the interests they are entitled to as spouses in the other's estate does not contravene Article 426 of the Brazilian Civil Code, because it is a mere unilateral act that does not amount to a contract entered into by the parties concerning the inheritance of a living person. As already stated by Rosa and Alves (2023), minimal family law must increasingly respect private autonomy, particularly in contracts relating to the family and succession. The historical perspectives on the various interpretations of rules of succession provided by Santos (1951) – as cited by Madaleno (2008) – will be especially taken into consideration. Furthermore, the case shall also be analyzed in light of the ongoing debate in the Brazilian legislature regarding the reform of the Brazilian Civil Code (Preliminary Draft of Civil Code, 2023/2024). The purpose

of this case study is to present a framework to analyze a case and its consequences. The decision of the Superior Council of Magistracy in a case is unique for analyzing changes in civil law and its relations with the private sphere, and for discussing the challenges and possibilities of reforming the laws of succession.

2 THEORETICAL FRAMEWORK

There have been recent discussions regarding the validity of contracts entered into by spouses or partners prior to marriage that contain so-called pre-emptive waiver clauses on their respective inheritance rights from the other spouse or partner, commonly known as antenuptial agreements. To fuel these discussions, recently the Superior Council of Magistracy of the State of São Paulo has published a series of decisions in 2024 (Brasil, TJSP, 2024). These decisions, for the first time, allow for the registration of antenuptial agreements for publicity purposes; however, their substantive validity will be decided by the respective Courts. The validity of contracts entered into by spouses or partners concerning the inheritance of the other spouse or partner who is still alive is an old problem, already addressed by Article 426 of the Civil Code. Such contracts are to be considered mere speculative agreements, contrary to moral principles, aimed at defeating the purposes of the provisions on inheritance of a deceased person by attempting to anticipate them and thus attacking family solidarity.

In relation to prenuptial agreements, the prohibition established by Article 426 of the Civil Code (Brasil, 2002) in relation to contracts that regard the heritage of a living person is considered to be a statutory restriction in relation to the prohibition of usurpation. However, this provision is very old and does not align with the way people live and manage their patrimony today. Madaleno has already argued in 2008 that agreements containing provisions waiving spouses' inheritance rights in a marriage are unilateral contracts that do not fall within the ban of Article 426 of the Civil Code. He further dealt with this topic in 2020 under the title *Legítima Sucessão e estatutos de restrição e moderação na atual direção patrimonial* (Legitimate succession and statutes of restriction and moderation in current patrimonial direction).

The principle of private autonomy has become a major concern in modern family law. For the proponents of a “minimal family law” (Rosa and Alves 2023, 2025), family law is

above all a matter of respecting the choices of family members for the structuring of their patrimonial relationships. In this perspective, issues related to succession planning (Rosa 2024) and the inventory and partition of assets between spouses or family members (Rosa and Rodrigues 2022) are of great practical relevance. The main line of the current doctrine on these topics is that of extreme respect for the choices of the individuals involved in the family in matters of succession.

As said before, there are many other approaches to the matter at hand. For example, Soares Carmo and Arantes (2020) studied the uncommunication of assets substituted by one of the spouses for the purposes of the contract and the burden of proof on the other spouse regarding the existence of those assets. Pássaro de Laet (2024) analyzed the compatibility of the uncommunication clauses with the partial community regimes, while Loureiro (2022) examined the consequences of the uncommunication clause for the donation of shares, assessing the impact such a plan would have on the couple's assets.

However, the Preliminary Draft of Reform of the Civil Code (2023/2024) does allow spouses or partners to waive their legal rights to succession in the context of an antenuptial agreement (Brasil, Preliminary Draft, 2023/2024, Art. 426, § 1). The novel authorization of waiver of legal rights to succession has recently been analyzed by scholars such as Diniz (2023), and, more generally, succession law has been recently the object of in-depth studies by many scholars who also try to adapt the principles of the current succession law to the current reality, such as Tepedino, Nevares and Meireles (2022).

Fleischmann and Pituco (2023) analyze succession security in corporate environments. In their study, they legitimize the so-called post mortem clauses in limited liability companies. Hironaka and Tartuce (2019) analyze succession planning, its mechanisms, and its limitations. The approach of these authors enables an analysis of the existing debates in Brazilian civil law from a comparative law perspective. The family law approach takes priority in the management and organization of a family's assets. Lôbo (2022) explains how family law has evolved and now prioritizes the family's autonomy regarding its assets.

In summary, there are two lines of thought on the matter of antenuptial agreements which include provisions waiving inheritance rights. On the one hand, there are those who see the spouses' waivers as legitimate manifestations of private autonomy; on the other hand, there are those who see these agreements as contracts that contravene the

provisions of the Civil Code and moral principles.

3 METHODOLOGY

This research was designed as a single-case descriptive study (Yin, 2004). We also followed Saunders *et al.* (2009) in a large extent, adopting an inductive rationale, interpretive approach, exploratory inquiry, based on archival research, and direct observation. Given the nature of the subject matter under analysis—recent legal developments—the single case study was the most appropriate vehicle for an in-depth examination within the specific context in which it was unfolding. A Civil Appeal nº 1000348-35.2024.8.26.0236 was chosen as the focus for this research. The primary and secondary sources analyzed in this research were the judgment in the above case (Brasil, TJSP, 2024) and a legislative proposal (BRASIL, Anteprojeto, 2023/2024) dealing with the same subject matter, as well as the relevant secondary material, namely the so-called doctrinal works on the subject, including Madaleno (2008; 2020), Rosa and Alves (2023; 2025), and Diniz (2023). The case was then analyzed and reconstructed descriptively, and the results of this analysis were examined in light of the relevant material on the subject. The findings were then subjected to triangulation.

The study under analysis has no ethical implications, as it was developed using public case law, legislation, and books, and conducted in a fair and professional manner. The study has been written in compliance with academic standards and the ABNT citation rules. Given the chosen single-case study approach, the study's findings cannot be generalized. The study, however, conducts an in-depth analysis of the decision rendered by the São Paulo State Judicial System as well as of the discussions on private autonomy and on the Brazilian legislation on succession, which are taking place in the current legislation and in the prevailing doctrine, and within the framework of the current reforms.

4 RESULTS AND DISCUSSIONS

On October 1, 2024, it was judged by the Superior Council of the Judiciary of São Paulo, which had as rapporteur Judge Francisco Loureiro, General Inspector of Justice, a judgment (Civil Appeal No. 1000348-35.2024.8.26.0236) that discussed the registration of a prenuptial agreement with a reciprocal waiver of the right of succession, addressing the possibility or not of early waiver of inheritance in this type of agreement. However, the decision did not address the validity of this waiver, but rather the possibility of registering a prenuptial agreement containing a clause waiving the spouse's right to inheritance in competition with descendants. The parties, dissatisfied with the denial of registration made by the Real Estate Registry Officer, appealed to the Court of Justice of the State of São Paulo. The officer argued that the clause violated article 426 of the Civil Code, which prohibits contracts on inheritance of a living person. On the other hand, the appellants argued that the validity of this waiver should be determined in the judicial sphere, during the succession process, rather than in the administrative sphere. They also questioned whether the validity of a single clause would be sufficient to bar registration of the entire agreement, which included not only the waiver of future inheritance but also the adoption of the conventional separation-of-property regime.

The Court, by majority, accepted the appellants' arguments, holding that the validity of the waiver clause is for the judge, not the registration officer. According to the decision, the registration of the prenuptial agreement has an advertising character, that is, it serves to give publicity and effectiveness against third parties, but without recognizing or invalidating any clause. This means that, even after registration, the renunciation of the inheritance can be questioned in court at the time of succession when there is competition between the spouse and the necessary heirs (ascendants or descendants). Among the most relevant arguments brought by the rapporteur in defense of the validity of this clause, we can highlight:

1. The clause does not violate Article 426 of the Civil Code for two reasons: first, because the waiver is a unilateral act par excellence and is not to be confused with a contract; second, because the registration of the prenuptial agreement has a merely advertising character, serving to confer transparency and enforceability on third parties, without this implying validating or invalidating any clause. The discussion

about the actual effectiveness of the waiver remains open and will be resolved at the time of probate, when succession competition needs to be faced.

2. In the division during life, widely used in succession planning, the anticipation of inheritance to the necessary heirs occurs, not the renunciation of the reserved portion. These concepts are not to be confused: the reserved portion is a portion unavailable by force of law and can only be removed in the exceptional cases of indignity or desertion provided for in arts. 1,814 and 1,962 of the Civil Code.
3. In several European countries, early renunciation of inheritance is authorized by law, as is the case in Germany (BGB, § 1941) and Switzerland (Swiss Civil Code, art. 468). In Italy, since 2006, civil legislation has allowed the division of the family business during life, in order to avoid the fragmentation of assets, as well as to allocate hereditary assets according to the aptitude of each heir (Italian Civil Code, art. 768, bis).
4. The prohibition of early renunciation of inheritance no longer seems to be consistent with the desires of today's society. Now, if the couple opts for the separation of property regime, their will follow the same logic of not sharing the marriage with the end of the relationship, whether such end is operated in life or at death. Even more forcefully, it reveals the will of the spouses and partners is carried out through an express declaration of will.

And as highlighted by the appellants in their appeal, there is a bill to reform the Civil Code that aims to expressly provide for the possibility of spouses or partners to waive succession competition. In other words, the clause under analysis, according to much of the doctrine, is valid in the current legal system and there is a reasonable expectation that the future legislation will put an end to the discussion, expressly admitting the possibility of waiving competition law. Dissenting judges argued that registering a prenuptial agreement with an inheritance waiver contradicts Article 426 of the Civil Code (Brasil, 2002), making the clause null. They emphasized that only valid titles and the will should be used for succession planning. In addition, they cited precedents that reinforce the prohibition on registering agreements involving future inheritance, and they argued that the Real Estate Registry Officer's denial was correct to avoid insecurity and legal uncertainty. Thus, they concluded that the pact should not be registered. However, as already mentioned, these judges lost the decision.

As seen in the judges' report and their divergences on the subject, there are two significant doctrinal currents. In general, the first defends the practice of early renunciation of inheritance, emphasizing the importance of private autonomy and the greater freedom it provides individuals in managing their assets. On the other hand, the second school of thought argues that this act should be considered null and void, as it contravenes Article 426 of the Civil Code, which prohibits the disposition of inheritances of living persons, in addition to the fact that the Renunciation may also encourage immoral feelings, such as greed or the desire for the death of the person whose inheritance is targeted.

It is important to note, when commenting on the ruling, that Brazilian legislation still does not allow couples to exclude one another from the other's inheritance, even when this is the express will of both. Regardless of the chosen property regime, spouses are "chained" to outdated legislation still based on the idea of an inseparable family, without offering true freedom of patrimonial choice.

In addition to the TJSP's decision, it is worth mentioning that the issue has also reached notarial practice. The Code of Norms of the CGJ/RJ (CGJ Provision No. 87/2022) now admits that the public deed of stable union contains a clause waiving competition law, provided that the parties are expressly warned about its disputed effectiveness (art. 390, §3). This warning serves as a cautionary technique: it allows the will to be formalized and publicized, without creating the impression that the simple inclusion of the text guarantees, in itself, the intended result.

Finally, the topic also reached the legislative level. PL 4/2025 proposes a new wording to article 426, providing that contracts on inheritance from a living person will not be considered businesses that allow spouses or cohabitants, by prenuptial or cohabitation agreement, to renounce the condition of heir, including reciprocally and even conditioned to the existence (or not) of successive relatives. The proposal also provides that the waiver will be ineffective if, at the time of death, the deceased does not leave successive relatives, and that it does not imply loss of the real right to housing, unless expressly provided. The logic of the project is not simply to release the agreement, but to offer a more defined legal path for a demand that already exists and that today ends up being pushed into interpretations, notarial precautions, and complex, costly alternative structures.

5 CONCLUSIONS

This case study was designed to analyze how succession legislation is put into practice, that is, how the limits set by laws governing individual wills can be overcome. Specifically, regarding the registration of antenuptial agreements with clauses waiving inheritance, the study focused on how the judiciary has addressed these issues. In general, the judiciary has opted to register these agreements to ensure transparency, without, however, validating their effects. The study also enabled an in-depth analysis of the agreements of anticipation of wills and of the vast possibilities they offer for patrimonial planning, as well as of the restrictions established by Article 426 of the Civil Code. Finally, the study on the subject also analyzed the contributions made by the doctrine and legislative proposals, especially the Preliminary Draft of the Civil Code Reform, which are moving toward greater recognition of waivers of inheritance, anticipating a change of paradigm in family law and in the law of succession.

To conclude, it is worth noting that private autonomy is a fundamental principle in Civil Law, allowing people to determine their own rules and interests. In the context of Family and Succession Law, this autonomy is expressed through prenuptial agreements and cohabitation contracts, allowing couples to define rules on the division of assets. However, the absence of a clear regulation on the early renunciation of inheritance in the conventional separation of property regime still generates legal uncertainty. Decisions like this encourage the much-needed legislative changes that the current scenario demands.

6 FUTURE RESEARCH

The waiver of succession rights in marriage and cohabitation contracts should be analyzed comparatively to examine how other countries address it in prenuptial agreements in future research. Many countries, such as Germany, Switzerland, and Italy, have already addressed anticipatory succession in some form, and the corresponding legislation can be of great use when examining possible future legal developments in Brazil. An in-depth study of how families today handle succession in Brazil, using corporations, trusts, and other extrajudicial instruments, would also reveal the practical gaps in the law and its application.

A further interesting research question would be to study the relationship between succession law and social changes. Future studies should, for example, examine how current rules of succession deal with so-called blended families. Above and beyond this, however, a study of the general and specific implications of amending the rules of succession for individuals and families would be highly relevant. Such a study would have to be interdisciplinary and conducted from the perspectives of law, economics, and sociology. It would have to clarify whether clear rules on waiving forced heirship rights would decrease the number of lawsuits, be fairer, and increase the private autonomy of individuals and families in today's world.

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