Revista ARACÊ
ISSN: 2358-2472

# SUCCESSION OF SPOUSE AND PARTNER: AN EXAMPLE OF THE NEED TO UPDATE THE CIVIL CODE

https://doi.org/10.56238/arev6n3-192

**Submitted on:** 15/10/2024 **Publication date:** 15/11/2024

**Ícaro Fellipe Alves Ferreira de Brito[1], Maíra Gondim Almeida[2], Lucas Câmara de Assis[3], Vinícius Farias Santos Carvalho[4], Felipe Martins Maia[5], Heidy Cristina Boaventura Siqueira[6], Josiellen Cristhian da Silva Tiago[7] and Matheus Junio Souza Santos[8]**

## ABSTRACT

This article, completed in November 2024, investigates legislative inconsistencies and anachronisms in the succession of spouse and partner, with the aim of discussing possible updates to the Civil Code. The methodology includes documentary analysis and jurisprudential review, with emphasis on new academic interpretations and decisions of the higher courts. The study is current in the context of the institution of the Senate's committee of jurists, in September 2023, with the preparation of a draft to update the Civil Code. The result of the study indicates that the current legislation presents uncertainties regarding the inheritance of the spouse and partner, generating legal uncertainty. The conclusion reinforces the need for normative revision to ensure greater clarity and normative alignment with current social values, promoting greater predictability in succession situations.

**Keywords:** Succession. Marriage. Stable Union. Civil Code.

[1] Master and Doctorate student in Law at PUC Minas
Lattes: http://lattes.cnpq.br/9856173366358994
E-mail: dir.icaro.brito@gmail.com
[2] Doctorate student in Law at UFMG
Master in Law from PUC Minas
Lattes: http://lattes.cnpq.br/4417453725021012
E-mail: gondimmaira@gmail.com
[3] Master's student in Law at PUC Minas
Lattes: http://lattes.cnpq.br/0060778434918766
E-mail: adv.lucasassis@outlook.com.br
[4] Master's student in Social Development at UNIMONTES
Lattes: http://lattes.cnpq.br/8610964780261242
E-mail: viniciusfariasx@gmail.com
[5] Master in Economic Development and Business Strategy from UNIMONTES
Lattes: http://lattes.cnpq.br/9166959756530232
E-mail: felipe_martins@fadenorte.edu.br
[6] Master in Literary Studies from UNIMONTES
PhD student in Social Development at UNIMONTES
Lattes: http://lattes.cnpq.br/9480423427512713
E-mail: heidy@fadenorte.edu.br
[7] Master's Degree in Society, Environment and Territory from UFMG and UNIMONTES
Lattes: http://lattes.cnpq.br/6950816073640535
E-mail: josiellen@fadenorte.edu.br
[8] Master in Economic Development and Business Strategy from UNIMONTES
Lattes: http://lattes.cnpq.br/9617076123756725
E-mail: matheussantos.prof@gmail.com

Revista ARACÊ
ISSN: 2358-2472

## INTRODUCTION

Rural populations are communities whose ways of life and production are mainly related to land and water (BRASIL, 2013), being a space traditionally with little government action in the implementation of public policies related to the promotion of health and social assistance (SILVA, 2012). When compared to urban populations, they face a series of inequities, which impact their quality of life and must be analyzed in the light of their socioeconomic determinants and the orientation of the State in guaranteeing their rights (PESSOA, 2018). This context impacts their oral health indicators, intensifying more severe health problems that are expressed in the differences in availability and quality of health care offered (RÜCKERT, 2018). The access to thisstudy, carried out in October 2024, aims to describe the then current legislative treatment regarding the succession of the spouse and partner, highlighting some of its anachronisms and original legislative flaws, relying on updated academic and jurisprudential interpretations, I intend to contribute to the public debate regarding the updating of the Civil Code,  knowing the work started on September 4, 2023 by the committee of jurists established by the Presidency of the Senate.

The general rule, according to the current legislation, is that the spouse has the right of inheritance, either in competition with the descendants, or with the ascendants, or exclusively (article 1,829, items I, II, III of the Civil Code).

However, a series of legislative failures generate a high degree of uncertainty regarding the exceptions to the general rule, preventing us from knowing with certainty in which situations the spouse inherits, in addition to the fact that there are anachronisms to be corrected in the face of the advent of comprehensive decisions of the Federal Supreme Court in control of constitutionality.

## SPOUSE SUCCESSION

Here is the main legislative provision on the legitimate/legal order of succession (or order of hereditary vocation), inserted in the Civil Code, in Book V - On the Law of Succession:

> Article 1,829. Legitimate succession is granted in the following order: I - to the descendants, in competition with the surviving spouse, unless the latter is married to the deceased under the regime of universal communion, or under the regime of mandatory separation of property (art. 1.640, sole paragraph [actually art. 1.641]); or if, under the regime of partial communion, the deceased has not left private assets; II - to ascendants, in competition with the spouse; III - to the surviving spouse; IV - collaterals.

Revista ARACÊ
ISSN: 2358-2472

The arrangement of the items is not accidental. It establishes exactly the preference in the receipt of the inheritance, consisting of a cogent rule that must be observed in the division under penalty of nullity (Medina; Araújo, 2022, p. 1125-1126).

In fact, article 1,829 of the Civil Code establishes a preferential list of people called to the succession, defined according to classes (descendants, ascendants, spouse and collaterals), establishing the so-called legitimate succession, so that a class will only be called to succeed when there are no heirs of the previous class. Therefore, for example, if the author of the inheritance is a widower and leaves descendants and ascendants, only the former will inherit, as the existence of descendants removes the ascendants from the succession (Guilherme, 2022, p. 962).

Until the enactment of Law 6.515/77 (Divorce Law), Brazilian Law adopted as a legal property regime the universal communion, in which the surviving spouse does not compete for the inheritance, after all, it was already up to him to share the entire assets of the couple. With the Divorce Law, however, the legal regime of property in marriage became that of partial communion, which was confirmed by the Civil Code of 2002 (article 1,640), a regime by which only the assets arising after the union are shared, also establishing, in the Civil Code of 2022, the spouse as a necessary heir (article 1,845).

Although part of the academic position was surprised by the position of the legislator that includes the spouse as a necessary heir, other systems already regulated the matter, such as the German system (Medina; Araújo, 2022, p. 1130).

The partner occupies the third class in the order of hereditary vocation, alongside the spouse, from the judgment by the Federal Supreme Court of Theme of General Repercussion 498 and 809, in 2017, establishing the following thesis: "The distinction of succession regimes between spouses and partners provided for in article 1,790 of the CC/2002 is unconstitutional, and should be applied, both in the cases of marriage and in those of stable union, the regime of article 1,829 of the CC/2002". Hence, in the text of article 1,829 of the Civil Code, where it reads "spouse", it reads "spouse and partner".

It is worth remembering that the current Civil Code, although published in 2002, has its project dated 1974, being conceived in the 1960s and 1970s, when the family of the time was based on it, based exclusively on marriage, which was indissoluble, today, statistically with a considerable percentage of marriages with relatively short duration (Simão, 2023, p. 1649).

Revista ARACÊ
ISSN: 2358-2472

The current wording of the Civil Code still contains anachronistically provisions that do not contemplate same-sex unions, in disagreement with the definition by the Federal Supreme Court, when judging the Direct Action of Unconstitutionality (ADI) 4277 and the Allegation of Non-Compliance with a Fundamental Precept (ADPF) 132, recognizing stable union for same-sex couples, then covering marriage, as affirmed by the Superior Court of Justice, in 2012 with the judgment of Special Appeal 1183378/RS, and by the National Council of Justice, in 2013 with the approval of Resolution 175.

**SPOUSE, WITH DESCENDANT**

The general rule is that the spouse competes with the descendants in the inheritance, and the current legislation provides that legitimate succession is deferred to descendants in competition with the spouse (article 1,829, item I, of the Civil Code).

Perhaps one of the most common cases is the death of one of the spouses leaving a child, in which, as a rule, the child and the spouse will divide the inheritance. But, as it is only a general rule, there are obviously exceptions, exceptions that are oriented according to the property regime of the spouses.

There are, at least in principle, three situations in which the inheritance is fully deferred to the descendants, that is, the spouse does not inherit: when there is a regime of universal community of property; when there is a mandatory separation of property regime; when there is a partial community of property regime, in which the deceased does not leave private property.

**UNIVERSAL COMMUNION, WITH DESCENDANTS**

At first, it may even seem contradictory to establish as a general rule the right of inheritance to the spouse and, at the same time, to establish as an exception the universal community regime, which is precisely the regime chosen when a greater patrimonial junction between the spouses is desired.

But this apparent contradiction is reasonably justified. The surviving spouse will already be entitled to the share involving the entire estate of the deceased, and as a rule the assets belonging to one of the spouses will already belong half to the other, that is, with the death of one of the spouses, the surviving spouse tends to keep half of the estate (Simão, 2023, p. 1649; Medina, 2022, p. 1129).

Revista ARACÊ
ISSN: 2358-2472

Example: C1, married to C2, under the universal community regime, dies and leaves a house and two children. First, C2's share (50% of the house) is separated and the inheritance (50% of the house that belonged to C1) will only belong to the couple's two children (25% for each of the children) (Simão, 2023, p. 1649).

This hypothesis is provided for with some clarity in the current legislation, providing that legitimate succession is first granted to descendants in competition with the surviving spouse, unless married under the universal community regime (article 1829, item I, of the Civil Code).

On the other hand, the current legislation is flawed as to the situation of private assets involving the universal community regime, not specifically providing for the succession treatment in this case.

In fact, even in the regime of universal communion, there may be assets that are not common, which belong to only one of the spouses, being, therefore, private assets, assets that are specifically provided for in the legislation, for example assets received as a donation engraved with a non-communicability clause (articles 1668 and 1669 of the Civil Code). In these cases, of private assets under the regime of universal community, does the surviving spouse inherit or not?

For Simão (2023, p. 1649), for example, if C1, married to C2 under the universal community regime, receives a donation house recorded with a non-communicability clause, the house will be C1's private property and there will be no share, but there will be succession competition.

## MANDATORY SEPARATION, WITH DECENT

There is a certain coherence between a provision for the mandatory nature of the separation of property regime (article 1641 of the Civil Code) and a prohibition of succession competition, which contributes to the idea of unity/systematicity of the legal system.

There is considerable uncertainty, however, as to the application of precedent 377 of the Federal Supreme Court, of April 3, 1964: "In the regime of legal separation of property, those acquired during the marriage are communicated".

Medina and Araújo (2022, p. 1127) interpret that the application of precedent 377 is exceptional, since it implies a violation of the literality of article 1829, item I, of the Civil

Revista ARACÊ
ISSN: 2358-2472

Code, making the partial community of property regime cross-functional. The authors do not clarify or exemplify which hypotheses justify the so-called exceptionality.

Simão (2023, p. 1649) interprets the mention of the precedent to "communication" regarding the division of aquestos, that is, of assets acquired during the marriage.

The Superior Court of Justice, in 2010, while judging a case involving a regime of conventional separation of property, stated that the regime of mandatory separation of property is a genre that brings together two species: legal separation and conventional separation. According to this judgment, the spouse married through separation of property does not have the right to share, nor to succession competition, respecting the stipulated property regime, which binds the parties in life and death. In both cases, therefore, the surviving spouse is not a necessary heir, and a different understanding would raise a clear antinomy between articles 1,829, item I, and 1,687, of the Civil Code, which would generate a breach of the systematic unity of the codified law, and would cause the death of the separation of property regime. Therefore, the interpretation that combines and makes complementary the aforementioned provisions must prevail. (STJ - REsp: 992749 MS 2007/0229597-9, Rapporteur: Justice NANCY ANDRIGHI, Judgment Date: 12/01/2009, T3 - THIRD PANEL, Publication Date: DJe 02/05/2010RSTJ vol. 217 p. 820).

## PARTIAL COMMUNION, WITHOUT PRIVATE PROPERTY

The rule applicable in cases of succession involving spouses under the regime of the partial agreement without private property has a certain reasonableness, equating these cases to those of universal community of property, that is, the spouse has the right to share, but does not have the right of inheritance.

If, in the partial community of property regime, the deceased did not leave private property, the assets left are all common and as for them, the surviving spouse is already protected by the share (Simão, 2023, p. 1649).

## CONVENTIONAL SEPARATION

The interpretation of article 1,829 of the Civil Code, a provision has two moments, a first stating that legitimate succession is first granted to the descendants, in competition with the surviving spouse, that is, the general rule is that the spouse as a rule has the right of inheritance. In a second moment, there is the exposition of the exceptions to the general rule, that is, it is stated that there will be no right of inheritance to the spouse in the regimes

Revista ARACÊ
ISSN: 2358-2472

of universal communion, mandatory separation of property and partial communion, without private assets. Therefore, the most obvious interpretation is that in the regime of conventional separation there is a right of inheritance.

According to Simão (2023, p. 1649), in this regime there will be no sharing of any type of property, even in case of silence of the prenuptial agreement regarding the aquestos, so that each of the spouses will have only private assets. Consequently, the surviving spouse may be left helpless, and the provision of the right of inheritance serves as a safeguard against helplessness, although the criticisms of the provisions are not few, notably to the extent that the choice of the separation of property regime presupposes the desire for patrimonial isolation between the spouses.

## PARTIAL COMMUNION, WITH PRIVATE PROPERTY

As there are no reservations in the legislation regarding the spouse's right of inheritance when under the regime of partial community of property with private property (article 1,829, item I, of the Civil Code), his participation in the inheritance in competition with the descendants is taken for granted. But the legislation fails to clarify whether the spouse's right of inheritance involves only private assets or all assets.

Statement 270 of the III Conference on Civil Law proposes: "Article 1829, item I, only ensures the surviving spouse the right to compete with the descendants of the deceased when married under the regime of conventional separation of property or, if married under the regime of partial community or final participation in the affairs, the deceased possessed private property, hypothesis in which competition is restricted to such assets, and the common assets (share) must be shared exclusively among the descendants".

For example: C1 owns an apartment acquired in 2015 and marries C2 in 2016 under the partial community of property regime and they have two children. In 2017 C1 acquires a beach house and dies in 2019. The apartment, as it is very private, will not be shared and will be shared equally between C2 and the two children. The beach house will suffer sharecropping (50% of which will be owned by the wife) and the children will inherit 25% each (Simão, 2023, p. 1650).

In 2015, the Superior Court of Justice stated precisely that, by interpretation of article 1,829, item I, of the Civil Code, the surviving spouse, married under the partial community of property regime, will compete with the descendants of the deceased spouse only when the deceased spouse has left private assets, but exclusively as to the private assets

Revista ARACÊ
ISSN: 2358-2472

contained in the hereditary estate (STJ - REsp: 1368123 SP 2012/0103103-3, Rapporteur: Justice SIDNEI BENETI, Judgment Date: 04/22/2015, S2 - SECOND SECTION, Publication Date: DJe 06/08/2015). This judgment was reiterated in 2019 in a judgment involving succession of a partner (STJ - REsp: 1617501 RS 2016/0200912-6, Rapporteur: Justice PAULO DE TARSO SANSEVERINO, Judgment Date: 06/11/2019, T3 - THIRD PANEL, Publication Date: REPDJe 09/06/2019 DJe 07/01/2019).

It should be clarified that private assets are those that the deceased owned before the marriage, and the ideal is that these immovable assets, movable and immovable, are identified in the prenuptial agreement, although this does not seem to be a common practice, which ends up making the division of assets difficult given the confusion between assets before and after the marriage (Medina; Araújo, 2022, p. 1129).

**PARTIAL COMMUNION, WITH PRIVATE PROPERTY**

Ascendants only inherit if there are no descendants. There is an absolute presumption, although not always correct, that ascendants have a personal and financial organization that justifies their secondary position in the succession plan (Median; Araújo, 2022, p. 1130).

The legislation is clear in providing for the succession of the spouse in competition with the ascendants, regardless of the property regime and provided that there are no descendants (articles 1,829, item II, and 1,836, caput, of the Civil Code).

Although of dispensable existence, given the absence of relevant interpretative controversy, at least controversy at a considerable level, statement 609 of the VII Conference on Civil Law proposes the interpretation that "the property regime in marriage only interferes with the succession competition of the spouse with descendants of the deceased".

Example: C1 is married under universal community of property to C2. C1 dies leaving parents alive. 50% of the estate belongs to C2 by reason of the shareholding and the other 50% will be shared between C2 and C1's parents. Despite having the share guaranteed by the adopted property regime, the spouse will also have succession competition over the inheritance (Simão, 2023, p. 1651).

Example: C1 owns an apartment acquired in 2015 and marries C2 in 2016 under a partial community of property regime. C1 acquires a beach house in 2017 and dies in 2019, leaving parents alive. The apartment, as it is very private, will not be shared and will be

Revista ARACÊ
ISSN: 2358-2472

100% shared between C2 and C1's parents. The beach house, as it is a common good, will be shared, with 50% of C1 being shared, and the other 50% will be shared between C2 and C1's parents (Simão, 2023, p. 1651).

Example: C1 and C2 are married under the conventional and absolute separation of property regime. C1 dies and leaves parents alive. 100% of C1's assets will make up the inheritance due to the absence of shareholding, given the property regime adopted, and will be divided between C2 and C1's parents.

"In the class of ascendants, the closest degree excludes the most remote, without distinction of lines" (article 1,836, § 1, of the Civil Code), with this, there is no right of representation in the ascending line.

There is in the succession of ascendants the so-called succession by lines, and "if there is equality in degrees and diversity in lines, the ascendants of the paternal line inherit half, with the other half being those of the maternal line" (article 1.836, § 2, of the Civil Code), obviously the references to paternal and maternal are only illustrative, and the same logic applies in the presence of any other configuration in the ascending line, as in the hypothesis of two maternal or paternal lines, notwithstanding the anachronism of the legal wording.

Example: If descendant D1 dies and leaves his parents A1 and A2 alive (both first-degree relatives), A1 and A2 receive 50% of the inheritance each, even if D1's grandparents are alive (Simão, 2023, p. 1661).

Example: If descendant D1 dies and leaves only one A1 parent alive, with another A2 parent predeceased, A1 receives 100% of the inheritance even if A2's parents are alive, as the closest degree (first degree) excludes the most remote degree (second degree), and there is no right of representation in the ascending line (Simão, 2023, p. 1661).

Example: If descendant D1, children of A1 and A2, dies and leaves two parents of A1 and one father of A2 (ascendant in the second degree), the two parents of A1 will keep 50% of the inheritance and the father of A2 will keep the other 50%, and the inheritance in the ascending line occurs without distinction of lines (Simon, 2023, p. 1661).

## SPOUSE AS SOLE HEIR

The legislation is clear in providing for the succession of the spouse with exclusivity when there are no descendants and ascendants (article 1,829, item III, of the Civil Code). Therefore, he will inherit all the assets.

Revista ARACÊ
ISSN: 2358-2472

## COLLATERALS UP TO THE FOURTH DEGREE

If there is no spouse, descendant or ascendant, the succession of the collateral up to the fourth degree occurs (article 1,829, item IV, of the Civil Code c/c 1,839).

## CONCLUSION

The analysis undertaken throughout this article shows that the current legal regime of succession of the spouse and partner in the Brazilian Civil Code has gaps and inconsistencies, generating situations of uncertainty and legal uncertainty for those involved. In this way, the importance of the work of updating the Civil Code, instituted by the Senate, is reinforced. This normative revision is essential to provide greater clarity and predictability in succession situations, taking into account the principles of equality and private autonomy. The expectation is that, with the completion of the update, contradictions will be minimized and a safer legal environment will be promoted that is more appropriate to new and old family configurations.

Revista ARACÊ
ISSN: 2358-2472

## REFERENCES

1. Guilherme, L. F. do V. de A. (2022). *Código Civil comentado e anotado* (3ª ed.). Santana do Parnaíba: Manoele.

2. Medina, J. M. G., & Araújo, F. C. de. (2022). *Código Civil comentado* (5ª ed., rev., atual. e ampl.). São Paulo: Thomson Reuters Brasil.

3. Simão, J. F. (2023). Livro V: Direito das Sucessões. In: Schreiber, A. *Código Civil comentado: doutrina e jurisprudência* (5ª ed., rev., atual. e ampl.). Rio de Janeiro: Forense.