

Chicago-Kent Law Review

Volume 70

Issue 4 *Symposium on Ancient Law, Economics & Society Part I: The Development of Law in Classical and Early Medieval Europe / Symposium on Ancient Law, Economics & Society Part I: The Development of Law in the Ancient Near East*

Article 5

June 1995

Changes in the Power Structure within the Family in the Late Roman Republic

Christoph G. Paulus

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Christoph G. Paulus, *Changes in the Power Structure within the Family in the Late Roman Republic*, 70 Chi.-Kent L. Rev. 1503 (1995).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss4/5>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

CHANGES IN THE POWER STRUCTURE WITHIN THE FAMILY IN THE LATE ROMAN REPUBLIC

CHRISTOPH G. PAULUS*

I

The horrible and terrifying history of the last century B.C., with all its political, social, and religious revolutionary disturbances, is notorious. Thus, there is no need to go into it. It is sufficient to mention that, at the end of this epoch, the political order and social structure were different than at its beginning.¹ These changes in the large scale provoke the less familiar question as to whether, and if so how, they influenced the “little scale”—the family.

From a legal perspective there are indications of a similar revolutionary disturbance in the power structure within upper class Roman families. The baker's family in Ostia or the wine seller's family in Pompeii existed without major changes to their structural integrity. But, since the aforementioned indications derive from the law of succession, my guess is that changes primarily took place within the elite families. I am in agreement with David Daube² that this area of law was mainly a domain of the upper ten percent. This does not preclude the existence of some personal interest in the law of succession among the lower ninety percent. But, in all probability, they were not the main addressees of the respective regulations.

II

There were three legal events that were important to the evolution of family relations: the introduction of the *querela inofficiosi testamenti*, the enactment of the *lex Falcidia*, and the insertion of the clause ‘*si quis ommissa causa*’ into the *praetor's* edict. The *praetor's* edict contained another very important set of regulations—the *praetorian* rules for the succession *contra tabulas*. These regulations made it possible to void a testator's will to those children who were not mentioned in the will, and marked the highly important transition from

* Christoph G. Paulus, Dr. iur. (Munich), LL.M. (Berkeley, Cal.) is Professor of Law at the Humboldt University at Berlin.

1. See only Syme, *The Roman Revolution*, 1939 (paperback reprint 1960).

2. Daube, *The Preponderance of Intestacy at Rome*, in: *Collected Studies in Roman Law II*, 1991, p. 1087 seq. Additionally, Champlin, *Final Judgements*, 1991, p. 41 seq.

agnatic to cognatic descent. But, the date and the circumstances of the origin of this edict clause are too vague and uncertain to justify its treatment in this context.

To facilitate an understanding of the historical development, it is helpful to imagine a common family scenario: a dispute between the *paterfamilias* and his son which took place before the introduction or "invention" of the three aforementioned legal novelties. The reason for this dispute might be that the father wanted his son to do certain things—let us say, to step into a senatorial career.³ Perhaps the son did not want a senatorial career but instead preferred a life as an actor or some such. A heated debate developed between them and culminated when the father yelled, "If you do not obey and do not become a senator you can forget the inheritance. I will disinherit you!" What a powerful bargaining chip for the father!

From a legal perspective, the father had every right to disinherit his son. Legal historians concentrated for a long time on this legal side of a father's power. They had reason to do so since the jurist Gaius (among others) emphasized that nobody else had such a strong power over the children as "we Romans do have."⁴ But, the actual social life had more facets than just the legal one.⁵ As a matter of course, there existed conventional and other pressures that made it a bit more difficult for the father to express such a threat, let alone to realize it. In the present context, the most important one was the custom or practice of seeing one's children as natural heirs and setting up one's will accordingly. Such a custom can be found in almost every legal system that offers the freedom to set up a will. For example, Plato said in this context, "I tell you that these goods are not yours; they rather belong to your lineage, the past as well as the future one."⁶ The same notion is found most dominantly in the intestate law of succession, where the children are treated as necessary heirs. It is noteworthy that this necessity was also applicable to the testate law, the

3. For "dynastic" tendencies within senatorial families see Hopkins/Burton, *Political Succession in the Late Republic*, in: Hopkins, *Death and Renewal*, 1983, p. 31 seq. (reviewed in 103 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 514 (1986) by the present author).

4. *Institutes* 1.55. See, e.g., Eyben, *Fathers and Sons*, in: Rawson (ed.), *Marriage, Divorce and Children in Ancient Rome*, 1991, p. 114 seq.; Corbier, *Family Behavior of the Roman Aristocracy*, in: Pomeroy (ed.), *Women's History and Ancient History*, 1991, p. 173 seq.

5. Saller, *Corporal Punishment, Authority, and Obedience in the Roman Household*, in: Rawson (ed.), *Marriage, Divorce, and Children in Ancient Rome* (N. 5), p. 144 seq.; Dumont, *L'imperium du paterfamilias*, in: *Parenté et stratégies familiales dans L'antiquité Romaine*, 1990, p. 475 seq.

6. *Nomoi* XI. 923 a.

only difference being that here the necessity was forced by mores and social expectations instead of by law.

The philosopher Seneca said some one hundred years later that, in general, such a social compulsion is more effective than the law.⁷ Nevertheless, from the middle of the first century B.C., there must have been more and more intolerable and unacceptable exceptions. We are told by Valerius Maximus⁸ that, at about this time, suits in which some close relatives tried to get their share of the family goods were successful for the first time. For example, a son contested the validity of his natural father's will even though he was adopted by his uncle. Valerius stressed that the action was successful, despite the fact that Pompeius, a powerful statesman and colleague of Caesar's, was testamentary witness as well as heir. Another example is a suit exactly the reverse. A father received the *praetorian* heirship (*bonorum possessio*) of his son's estate even though he had given his son up for adoption.

These are the beginnings of what finally became known as the *querela inofficiosi testamenti*, which is the historical root of the modern legitimate portion. It is important to point out that, at its initial sanction, a successful *querela* made the whole testament void, not just parts of it. The justification for this rather harsh consequence was the belief that a testator who totally or in part neglected his close relatives in his will must have been mentally deranged. The Romans called this phenomenon *color insaniae*, which was probably influenced by Greek rhetoric.

It was an extraordinary threat to a testating Roman that his will could be totally annulled and his estate distributed according to the laws of intestate succession. It is almost impossible to overestimate the importance and meaning of the will in ancient Rome. For the moment it suffices to remember the famous, if not somewhat exaggerated, statement of the elder Cato that the one day on which he lived without a testament was one of the three things in his life that he regretted.⁹ Cicero even ranked the setting up of a will among the means to gain immortality. I will return to this below.

These few hints give a first impression of the social background against which a total nullity sanction is to be seen. Its threatening

7. De beneficiis V. 21.1. The same notion exists still today. See, e.g., Reisman, Lining Up: The Microlegal System of Queues, 54 U. Cin. L. Rev. 417 (1985); Weyrauch/Bell, Autonomous Lawmaking: The Case of the "Gypsies", 103 Yale L.J. 323 (1993).

8. Facta et dicta memorabilia 7.7.2 and elsewhere.

9. Plutarch, Cato 329.

imminence must have influenced the power structure within the family, at least from a legal perspective. If the dispute between the *paterfamilias* and his son now came to the point where the father threatened his son with disinheritance, the son could relax and lean back. The possibility of disinheritance was drastically reduced, with the law requiring good cause for it. If the father did not have good cause, he risked losing his will. Thus, the novelty of the *querela* was that a good cause could be contested through a judge and not just through public opinion. The common testamentary succession, which was followed before because of mores and social expectations, was now sanctioned and enforced by law.

The *querela inofficiosi* was step number one in the historical evolution of family relations. Step number two followed in the year A.D. 40 when the *lex Falcidia* was enacted. The *lex Falcidia* was necessary because the testators were still threatened by the ineffectiveness of their wills, notwithstanding the existence of the *querela*. The heirs would not enter upon their heirship, or respectively, they would not accept it. A will without accepting heirs was ineffective and therefore the succession was ruled by intestacy.

The heirs' reaction was again the testators' fault. The testators learned their lesson from the introduction of the *querela* and installed their kin as heirs. They added so many legacies, however, that substantially none of the assets was left for the heirs. Thus, from a materialistic point of view, it was quite undesirable for an heir to enter upon the offered heirship.

The enactment of the *lex Falcidia* was an attempt to handle this danger for wills in general. It guaranteed the heir one-quarter of the testator's assets even though the testator might have given away more than three-quarters to other people. The details of this regulation were complicated and gave rise to disputes for centuries. But, for this Article, the significance of the *lex Falcidia* is that heirs were protected by the reservation of one-quarter of the testator's estate for them.

According to Gaius,¹⁰ the *lex Falcidia* was the final *lex* in a series of legislative enactments that started approximately 160 years earlier. The purpose of this series of enactments was to protect the heir from getting nothing out of the estate. Gaius stated that the first enactment was the *lex Furia* which forbade any legacy exceeding 1000 Asses, a very modest sum even in those days. Some thirty years later, in 169 B.C., the *lex Voconia* was enacted and prohibited any legatee from get-

10. Institutes 2.224 seq.

ting more of the assets than the heir. The *lex Voconia* was necessary because the *lex Furia* had been circumvented by ordering not just one legacy of 1000 Asses to the legatee, but several of them. One hundred and thirty years later, the aforementioned *lex Falcidia* was enacted.

It is still debated whether or not Gaius was correct in his assumption that the *lex Furia*, *lex Voconia*, and *lex Falcidia* were all part of the same series. To be sure, they certainly belonged together insofar as their common goal was to preserve at least a part of the estate for the heir. But, Gaius's idea of a causality between the laws seems to be somehow inconsistent. The period of some thirty years between the enactment of the *lex Furia* and the enactment of the *lex Voconia* is quite a long time during which the heirs did not get an acceptable portion of the estate. The one hundred years until the enactment of the *lex Falcidia* is even more inexplicable. Why did the legislature wait such a long time to satisfy the needs of the heirs, especially in light of the fact that inheritance was at that time the main source of income, at least for the senatorial class?

This is not to deny a practical necessity for the enactment of the *lex Falcidia*. On the contrary, it is very likely that there were a large number of heirs who received nothing or only a small portion of the estate prior to the *Falcidian* law guaranteeing them one-quarter. But, most likely, the legislative purpose for the *lex Falcidia* was not the circumvention of the *lex Voconia*. Rather, the *lex Falcidia* was probably a response to a dramatic change in the conditions and circumstances of the Roman society. As far as I can tell, there are at least two factors supporting this assumption.

The first factor is the difference between the *Falcidia's* approach toward its legislative goal as compared to the approach of its predecessors. The *leges Furia* and *Voconia* tried to protect heirs in indirect ways, first by prescribing an absolute maximum amount of legacies and then by prescribing a relative amount. In contrast, the *lex Falcidia* solved the problem in a very direct manner by reserving one-quarter of the estate for the heir, regardless of the number and size of the legacies. This directness parallels that of the *querela inofficiosi testamenti*. Indirect pressure from testate attitudes or the *praetorian* rule of succession would no longer suffice. The heirs needed more effective assistance. The law offered that assistance.

It is necessary to discuss a possible argument against the legitimacy of the comparison of the *lex Falcidia* to the *querela*. The *Falcidian* quart was not restricted to those heirs who were protected

by the *querela*, that is to say the next of kin. Instead, the quart was granted to the heir as such, whether or not he was a relative of the testator. This is indeed an important distinction since this Article examines family relations while the *Falcidian* law extends far beyond that circle.

The testators' attitudes changed. Before the introduction of the *querela*, testators skipped their close relatives, especially their children, simply by disinheriting them. Under the regime of the *querela* and before the enactment of the *lex Falcidia*, testators obeyed the law and established their relatives as heirs. They undermined the heirs' legal position, however, by creating vast numbers of legacies whose fulfillment left little or nothing to the heirs.¹¹

The testators' closest relatives were the primary targets of the *Falcidian* law's protection. The reason for extending the law's protection to all heirs, including the extraneous, could be that the extraneous no longer felt obliged to play the unpleasant role of distributor of the estate. This role was, most likely, not unknown in earlier times as the enactments of the *leges Furia* and *Voconia* amply demonstrate. But, why should the extraneous continue playing this role when even the next of the testator's kin no longer hesitated to use the *querela* to nullify the will?

There are, at least, two factors which support my supposition that children were the primary addressees of the *lex Falcidia*. First, the testamentary custom of installing one's children as heirs continued well into the times of the *Principate*. This is true even though Ulpian reported that the *querela* was a common remedy in his days.¹² In Ulpian's time, the *querela* had long since become a means to bring the heir's share up to the *Falcidian* quarter.

Secondly, a passage in Cicero's *de officiis* serves as the second factor supporting my earlier assumption that the enactment of the *lex Falcidia* was a reaction to the changed parameters of the actual social life rather than to attempts to circumvent the *lex Voconia*. In the first book of his doctrines of duties, Cicero dealt with charities and openhandedness (*beneficentia* and *liberalitas*) as well as with their limits

11. This, at least, is a very typical constellation of facts in the Digest title 35.2 which deals explicitly with the *lex Falcidia*.

12. Digests 5.2.1.

and the precautions which have to be given to responsible and ethical behavior. It is in this context that he wrote:¹³

[O]ur beneficence should not exceed our means; for those who wish to be more open-handed than their circumstances permit are guilty . . . they do wrong to their next of kin; for they transfer to strangers property which would more justly be placed at their service or bequeathed to them.

We know from his letter to Atticus¹⁴ that Cicero finished *de officiis* on November fifth, in the year 44 B.C., four years before the enactment of the *lex Falcidia*. *De officiis* and the *lex Falcidia* are strikingly similar, the main difference being that Cicero appealed to the *Pflichtgefühl* (sense of duty) when he declared it more just to leave one's fortune, besides all the necessary liberalities, to the next of kin. But, this appeal was too weak. Only four years later the law had to enforce what the sense of duty could no longer guarantee.

This similarity between Cicero's book and the *lex Falcidia* is hardly accidental. It seems, rather, there was an increase in testamentary distributions that the testating and inheriting Roman upper class could no longer accept. This conjecture would be admissible even if Cicero would give here only a translation of Panaitios.¹⁵ Cicero, however, generally did not blindly follow Panaitios's model but rather transformed the Greek original in a sovereign and carefully calculated manner to the needs and expectations of the Roman audience.

Moreover, legal protection for the next of kin, especially the children, was not a historical novelty of the *lex Falcidia*. For example, Plato restricted the testamentary freedom of those who died without having natural children to one-tenth of their mobile goods with the remainder, including the real estate, going to adopted children.¹⁶ According to the law of Gortyn, foreign heirs were not allowed to get more than one-half of a son's share.¹⁷ Epikteta's will included the consent of her daughter right in the beginning.¹⁸ And, under the Syrian-Roman law book, the children were to get one-quarter even if they were disinherited.¹⁹

13. 14.44: . . . ne benignitas maior esset quam facultates, quod qui benigniores volunt esse quam res patitur, primo in eo peccant, quod iniuriosi sunt in proximos; quas enim copias his et suppeditari aequius est et relinquere, eas transferunt ad alienos.

14. XVI.1.4.

15. Cicero ad Atticum XVI.11.4.

16. Nomoi XI. 924 a.

17. X. 48 seq.

18. For this testament, see Wittenburg, *Il Testamento di Epikteta*, Trieste 1990.

19. L. 1 and 9.

Taken together, the peculiarities of the *lex Falcidia* establish this statute as a further move in restructuring family relations. Since the law guaranteed them one-quarter of the testator's estate, the children were more willing to accept or enter upon their heirship. At that time, the law provided the children sufficient protection in guaranteeing them their share of the testator's estate. It is noteworthy that the subsequent development of the Roman law of trusts (*fideicommissa*) opened a loophole to the detriment of the heirs. The loophole closed some one hundred years later through the *Senatus consultum Pegasianum*. But, this development was presumably conditioned upon the legal enforceability of trusts, which Augustus enacted quite a long time after the end of the Republic.²⁰

Step number three in the historical evolution of family relations is a reaction in the opposite direction. After sufficient grounds were established for the heir to enter upon the deferred inheritance, a new risk for the testament emerged. There were still heirs who could gain from the nullification of the will. This happened when intestate succession offered the heirs more than one-quarter of the testator's estate. These heirs could reject the inheritance or make use of their *ius abstinendi* by refraining from entering upon the inheritance if they were the testator's children and under the testator's power at the time of his death. This meant that the testator was succeeded *ab intestato* and that his will was virtually worthless. This was a very unpleasant vision for the Romans.²¹

The Roman appreciation of wills was not based on the fact that they were documents distributing a deceased's goods. That was more or less a legal technicality that served a more deeply-rooted, almost anthropological purpose. A will guaranteed that the testator would be remembered after his death. In his *Tusculanes*, Cicero called this a form of immortality.²² To be sure, immortality in this context has nothing in common with the modern connotations of the word. There are not the slightest resemblances, especially to the Christian notion of eschatology. Instead, the Romans simply wanted to be kept in the memory of the living. This is a fundamental and ubiquitous understanding of immortality. We probably would not know of the pharaoh Cheops if he had not built his pyramid, and Horace, in writing his

20. This is my preliminary answer to David Johnston, who has comprehensively dealt with "The Roman Law of Trusts," 1988.

21. For the following, see my book, *Die Idee der postmortalen Persönlichkeit im römischen Testamentserbrecht*, 1991.

22. I. 31.

poetry, has constructed a monument more lasting than bronze (carm.III.30). This notion still exists today. In I. Allende's novel *Eva Luna*, Eva's mother tells her nine-year-old daughter that she will not die until she is forgotten. Dedication tablets at American universities are another example of a striving to be remembered.

From a sociological point of view, the Roman testament took over the testator's position in society. It was akin to a map of the social network in the middle of which the testator was replaced by the testament. The testament held this network together and functioned as a monument for immortality.

This is why Roman wills usually contained numerous further bequests in addition to the nomination of the heir. For example, the *testamentum Dasumii*,²³ has about 120 of them. When the addressees gratefully remembered the deceased, the will fulfilled its higher purpose. This interrelationship between the giver and the receiver explains the genesis and truth of the ancient expression that the will is a mirror of the testator's character.²⁴

Part of a deceased Roman's character presentation was openhandedness and charity, described by Cicero as *beneficentia* and *liberalitas*. Therefore, it was very common to free slaves in one's will. Some forty years later, in 2 B.C., the *lex Fufia Caninia* limited this custom by prescribing a limitation on the number of allowed manumissions. That *lex* was probably necessitated by the widespread growth of Roman *beneficentia*.

This has merely been a short description of the peculiarities and essence of the Roman will, which was threatened by the behavior of heirs who profitably used their right to reject the inheritance. This right gave Roman children incredible power over their fathers. According to everything we know about the ancient Roman family structure, it is obvious that such a situation must have been intolerable.

The *praetor* reacted by putting a new clause into his edict: *si quis omissa causa testamenti ab intestato possideat hereditatem*. The clause carefully and warily balanced the interests involved. It left the heir the freedom to abstain. But, if the heir intentionally used his right to someone's detriment, the *praetorian* clause decreed the validity of the will's bequests and manumissions. Thereby, the *praetor* saved the social network map/immortality monument and left the family as much

23. Fontes Iurisprudentiae Romanae Anteustiniani (ed. by Arangio-Ruiz), vol. 3 Nr. 48.

24. The letters of the younger Pliny 8.18.1.

as the testator wanted to give to it. This reduced the children's power under the *lex Falcidia* to a tolerable level.

The inclusion of these events is not free from speculation, because the date of the clause's origin is unknown. But, Labeo has commented on it.²⁵ It is possible to conclude from D 35.2.1.2 that the *lex Falcidia* was the earlier legal remedy. Those possessing an inheritance *omissa causa* were excluded from the regulations of the *lex Falcidia* because the *praetorian* edict transferred the statute's force on them. But, since the *lex Falcidia* itself regulated who was included and who was not, it follows that the *praetorian* edict did not yet contain the *si quis omissa* clause at that time, 40 B.C. Therefore, it is an acceptable assumption that it originated in the late first century B.C.

III

The aforementioned development did not end with the end of the republican times. At the beginning of the next century, Augustus uniquely juridified and restructured the family relations through his famous family legislation.²⁶ But, the reason why this legislation is not covered here is not so much that it falls outside of the time of the republic, but that it was based on a broad structuring plan. Its widespread coverage indicates a general crisis in the family as opposed to a singular defect.

But, a conclusion can still be drawn from the aforementioned sequence of events. It is based on the assumption that these legal innovations were reactions to changes in social attitudes and intrafamilial behavior. It can be concluded that the law comes into force when morals, tradition, or common habit drift in a socially unacceptable direction. In other words, as soon as a social consensus vanishes, the law steps in. The situation at the end of the republic was the same as the situation before the introduction of the *querela*, *lex Falcidia*, and *si quis omissa*. A testator's next of kin could generally expect to become heirs and to receive a decent, if not satisfying, share of the estate, and the testators were assured that their immortality monument would come into force. Thus, a power equilibrium was reinstalled within the

25. Digests 29.4.1.12.

26. See only Nörr, *The Matrimonial Legislation of Augustus: An Early Instance of Social Engineering*, 16 *Irish Jurist* 350 seq. (1981); Treggiari, *Roman Marriage: Iusti Coniuges from the time of Cicero to the time of Ulpian*, 1991, p. 60 seq.; Mette-Dittmann, *Die Ehegesetze des Augustus: eine Untersuchung im Rahmen der Gesellschaftspolitik des Princeps*, 1991.

family. But, what originally was a matter of mores and testamental custom, was now the result of legal pressure.²⁷

27. This is an abridged and revised version of an article that was published in 111 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, p. 425 seq. (1994) under the heading: *Die Verrechtlichung der Familienbeziehungen in der Zeit der ausgehenden Republik und ihr Einfluß auf die Testierfreiheit*.

