Law

Thank the Romans

Mark Accettura

Although the written Will has been in existence for five thousand years, the modern American Will can be traced to the Romans. The Will first appeared in Roman culture in the first century AD. It was lost with the fall of the Roman Empire in about the 6th Century and laid dormant during the succeeding 600 years and reemerged with the resurgence of continental Europe. The Romans were the first to recognize the individual's right to leave his worldly possessions to people of his choosing. The Roman Will, however, governed much more than the passage of property; beneficiaries also inherited the decedent's standing in the community. Under the concept of universal succession, a decedent's heirs continued his civil life such as his military position or public office. In so doing, continuity of position, authority, and responsibilities were maintained. The disposition of property through the Will was secondary to the assignment of the decedent's status and position.

The concept of inheritance was of little importance to primitive man who possessed only a few tools, utensils, and weapons. Early food-gatherers and hunters owned no lands or herds, and currency had not been invented. Early man's few possessions were often destroyed after death to prevent the decedent's spirits or magic from haunting the new owner. The Papua of New Guinea and the Damara of Namibia, for example, burned the hut of the decedent to prevent the spirit of death from following a new occupant. Needless to say, resale shops and estate sales would not have done well in this period.

Other early peoples either destroyed or buried the possessions of the deceased under the belief that the deceased would need his possessions in the afterlife. On this belief, the Herero of southwest Africa would slaughter a dead man's goats in order that the spirit of his herd would pass with him. Providing for the needs of the dead in the afterlife led to the widespread custom of burying food, utensils, treasure, slaves, and even wives with the decedent. This practice was common in the Stone and Bronze ages and of course in Egypt and pre-Columbian Mexico whose great burial tomb treasures are scattered in museums around the modern world.

As the concept of individual ownership developed, the freedom to direct its passage at death ("freedom of testation") was at first limited. The informal rules of inheritance of the day favored the decedent's blood relatives over his spouse and children.

In such societies, a person was more closely tied to his kinship group than to his marriage partner. The surviving spouse and children of the deceased were often excluded from the inheritance with the exception of personal items like articles of clothing or jewelry that were left to the family as a remembrance. Lands, buildings, livestock and other material possessions which were critical to survival of the group were passed along family lines to ensure that the much more broadly defined "family" could support itself.

What made the Romans unique is that they were the first to recognize absolute freedom of testation; a concept that we today consider to be an inalienable right. From the fall of the Roman Empire until the eleventh century–what we call the dark ages–inheritance was divided into two categories: personal property such as clothing, tools, jewelry, and other valuables; and real property (i.e., land). The church had jurisdiction over the passage of personal property while the feudal lord governed the passage of real property.

The disposition of personal property was typically a deathbed

"The Papua of New Guinea and the Damara of Namibia, for example, burned the hut of the decedent to prevent the spirit of death from following the new occupant. Needless to say, resale shops and estate sales would not have done well in this period."

bequest orally communicated to the attending pastor or priest at the time of administering last rites. The dying declaration was as much about the passage of the decedent's soul as it was about the passage of his things. A portion of the decedent's personal property (usually one-third) was given to the church to secure the decedent's passage to a better afterlife, with the balance passing to the decedent's family. The church used these bequests to fund its educational and charitable works and to support the arts.

During the feudal period, lands passed to the eldest son under a system known as primogeniture. Lands were granted by invading barbarians in exchange for the military service of the grantee and his eldest son. Like the Roman practice, the eldest son also succeeded to his father's military and political office. The eldest son was expected to care for his extended family, including his mother, the wife of the decedent. Primogeniture also had the advantage of holding lands in larger parcels that were more profitable and agriculturally prosperous.

Gradually, between 1540 and 1740, the primary character of Wills changed. The oral deathbed Will was replaced by the written Will, the priest was replaced by a lawyer, and the passage of real and personal property was merged into a single system governed by secular courts. Europe, and most relevant for the development of American law, England, had again embraced the Roman Will and system of testamentary freedom.

The American Revolution signified our break from Britain toward independence. Despite the break, we adopted much of the English legal system, including their inheritance system. As a result, we have enjoyed testamentary freedom since the beginning our history. Freedom of religion, freedom of testation, and the separation of church and state are part of our fiber.

Today, we enjoy the freedoms envisioned by the Romans two thousand years ago. The right to leave our property and possessions at death as we please is presumed. Unfortunately, too many of us have grown bored with the freedoms that our forefathers fought for so passionately. A frighteningly high percentage of us fail to prepare a Will or trust.

With the freedom to dispose of our assets as we please comes the responsibility to give direction to our family and avoid confusion, expense, and conflict.

Contact attorney Mark Accettura at (248) 848-9409.