sui generis

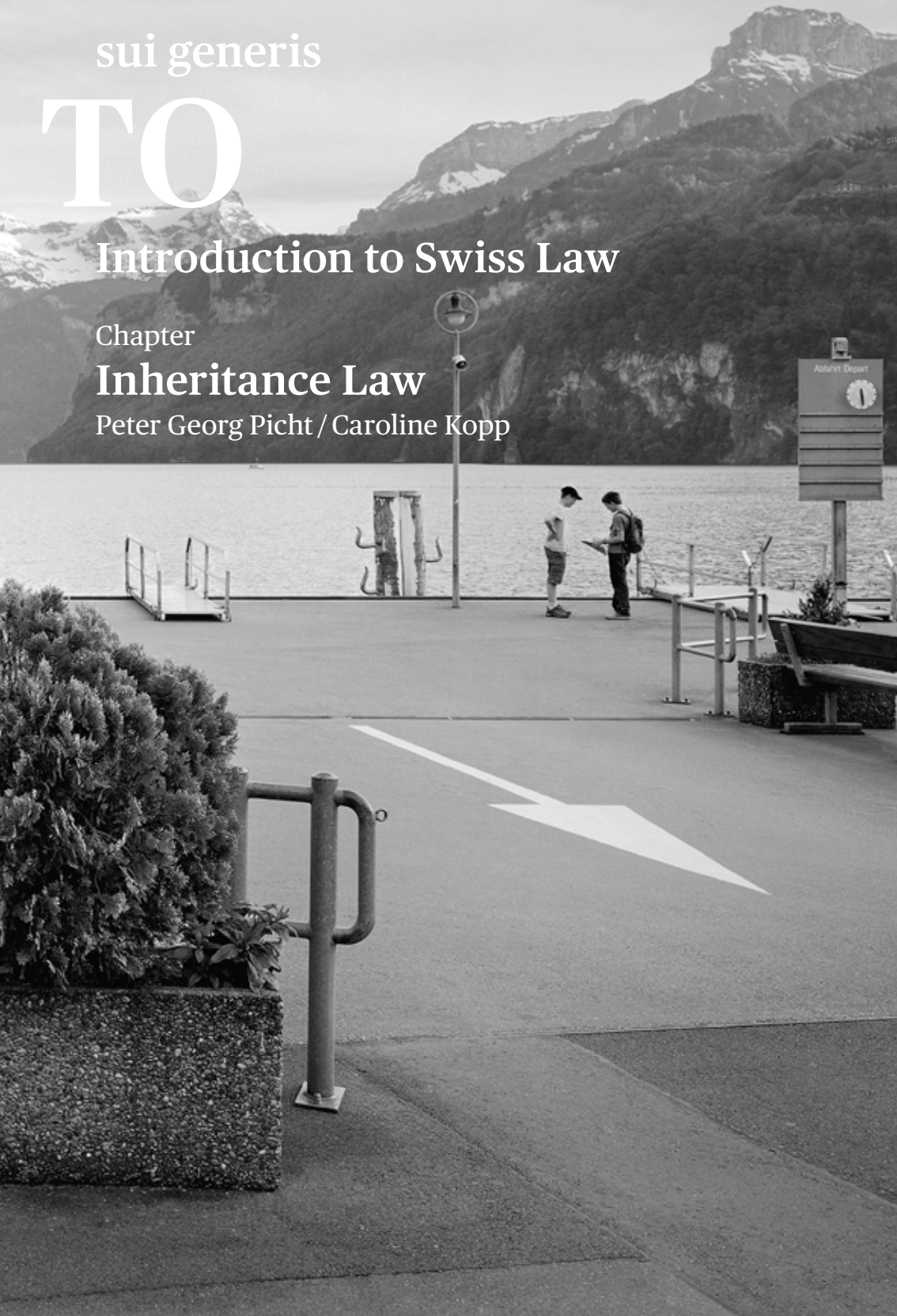
TO

Introduction to Swiss Law

Chapter

Inheritance Law

Peter Georg Picht / Caroline Kopp



Marc Thommen

Introduction to Swiss Law

Chapter

Inheritance Law

Peter Georg Picht / Caroline Kopp

Peter Georg Picht / Caroline Kopp

Inheritance Law

© 2022 Peter Georg Picht / Caroline Kopp, CC BY 4.0, DOI: 10.38107/026-12

I. Swiss Civil Code

Part 3 of the Swiss Civil Code (Articles 457-640)[1] regulates Swiss inheritance law. It is divided into two parts:

— the heirs (Articles 457-536)
— the succession (Articles 537-640).

The former part includes rules on intestate succession (Articles 457-461) and succession due to disposition, along with the right to a compulsory share (Articles 467-536). In general, it deals with the question of "who" inherits "what".

The latter part addresses the commencement of the succession process (Articles 537-550) and the effects of succession (Articles 551-601) as well as the division of the estate (Articles 602-640). This part is, thus, more concerned with the technical "how" of the implementation of the inheritance process.

Outside the Civil Code, there are relevant provisions on inheritance tax law (special cantonal law)[2], international inheritance law (Articles 86-96 Federal Law on Private International Law)[3] and some special provisions on inheritance law for rural land (Article 620 Civil Code in conjunction with the Federal Act of 4 October 1991 on Rural Land Rights)[4].

Following a parliamentary motion by councillor of state FELIX GUTZWILLER in 2011 *("For a contemporary inheritance law"),* the Federal Council undertook a reform of Swiss inheritance law. The reform project is divided into three

1 Swiss Civil Code of 10 December 1907, SR 210; see for an English version of the Swiss Civil Code www.fedlex.admin.ch (perma.cc/DG3C-PVHW). Since English is not an official language of the Swiss Confederation, the English version has no legal force.

2 In the Canton of Zurich there is for example the Law on Inheritance and Gift Taxes from 28th September 1986, 632.1.

3 Federal Law on Private International Law of 18 December 1987, SR 291; see for an English version of the Swiss Private International Law www.admin.ch (perma.cc/Q2HP-G8ET). The provisions are expected to be reformed and adapted to developments abroad due to the provisions of the Regulation (EU) No. 650/2012 of the European Parliament and of the council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (perma.cc/DEN9-Q8RM).

4 Federal Act on Rural Land Rights of 4 October 1991 (SR 211.412.11).

parts—a political one, a technical one[5] and one on the succession of companies under inheritance law. At the end of 2020, Parliament accepted a draft of the first part. The project's biggest innovation is that the strict regulations of forced heirship will be relaxed: the compulsory quota for descendants will be reduced from ¾ to ½ and parents of the deceased will lose their right to compulsory heirship completely. The first changes will come into force on 1 January 2023,[6] affecting (testamentary and intestate) successions occurring after that date (so-called *date-of-death principle,* Articles 15 and 16 Commencement and Implementing Provisions of the Civil Code).

5 The political part essentially implements the GUTZWILLER motion, while the technical part deals with further revision concerns, such as the question of an audio-visual emergency testament.

6 Decision of the Federal Council of 19th May 2021. See further LOUISE LUTZ SCIAMANNA, Nachlassplanung im Vorfeld der Erbrechtsrevision(en), AJP 2021, pp. 325 for more details on the upcoming law reform.

II. Principles

A key characteristic of Swiss inheritance law is the principle of *eo ipso* acquisition of an estate through universal succession (Article 560 I). Upon the death of the deceased, the estate in its entirety vests *ex lege* in the heirs. According to the *eo ipso* acquisition, the heirs acquire all the deceased's assets and debts automatically, without the requirement of any formal act by the heirs and/or any administrative or judicial body.

As a result of the *principle of universal succession* claims, rights of ownership, limited rights in rem, and rights of possession of the deceased, but also his/her debts, automatically pass to the heirs. The principle applies to both statutory and testamentary heirs. To protect heirs from receiving unwanted or over-indebted/insolvent estates, every heir has the right to renounce the inheritance within three months of learning of the death of the deceased (Article 567). In addition, there is a legal presumption in favour of renunciation in case of insolvent estates (Article 566 II).

Another characteristic of Swiss inheritance law is the relatively far-reaching rules on *statutory entitlement* (Article 471). Under these rules, a significant part of the deceased's estate is normally bound in favour of his statutory heirs and is not subject to his disposal. These inheritance law rules have been subjected to revisions due to being considered too strict.

1. The Heirs

a) Intestate Succession

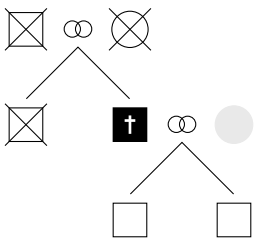
If the deceased doesn't leave a will (intestate succession), the Civil Code designates his relatives, spouse, or as ultima ratio the state (canton or commune) as statutory heirs, who will be eligible for a certain quota of the estate (Articles 457–466).

Articles 457–460 regulate the intestate succession of the *deceased's relatives*. The principle behind this succession is the *"system of parentelic succession"*. A parentela is a group of blood relatives who are connected by a common head of family. There are three groups of relatives entitled to inherit: the descendants of the deceased (1st parentela, Article 457), the parents of the deceased and their descendants (2nd parentela, Article 458), the grandparents of the deceased and their descendants (3rd parentela, Article 459). More distant relatives are not considered and have no legal right of inheritance (Article 460).

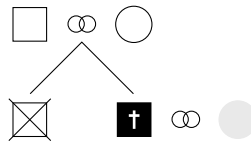
Four core rules determine the statutory heirs from the group of eligible relatives.[7]

First, the closer parentela excludes the more distant parentelae, and within one parentela those closer to the deceased exclude the more distant ones *(exclusion principle).* To illustrate: if the deceased has two children, they become his statutory heirs according to Article 457, since they are part of the 1st parentela as his descendants. His other relatives, for instance his parents and siblings (2nd parentela), are therefore excluded from intestate succession (Example 1). If the deceased has no children, his parents, as heads of the 2nd parentela (Article 458), become his statutory heirs. His brother is excluded: although he is part of the 2nd parentela as descendant of the deceased's parents, he is also more remote from the deceased than his parents (Example 2).

Example 1

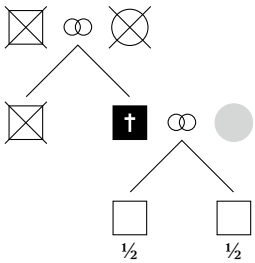


Example 2

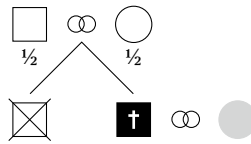


Second, all members of a parentela who inherit do so in equal shares *(principle of equality),* cf. Articles 457 II, 458 II, 459 III.

Example 1



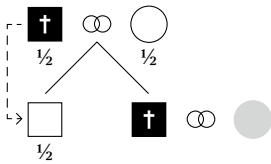
Example 2



7 In the following examples, the black filled boxes with the cross represent a deceased person, i.e. the testator/testatrix or, if there is more than one black box, a predeceased relative of him/her. The white, unfilled boxes represent the heirs, whereas the white, crossed-out boxes indicate that a person does not inherit anything. For illustrative purposes, the spouse of the testator/testatrix in Example 1 and Example 2 is treated as if he or she does not exist (grey filled boxes). Round boxes symbolize women, rectangular boxes men. The two rings symbolize marriage.

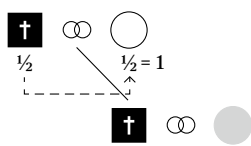
Third, where a member of a parentela predeceases the deceased, his descendants take over his position regarding inheritance *(principle of entry),* cf. Articles 457 III, 458 III, 459 III. In Example 2 above, if the father of the testator were to predecease, the mother inherits half of the estate *(principle of equality)* and the brother steps into the position of his dead father and inherits the remaining half of the estate, cf. Article 458 III.

Example 2 – Alt. 1



Fourth, when one of the statutory heirs predeceases without any descendants, his share of the inheritance falls to the co-heirs of the same level in equal parts *(principle of accretion),* cf. Articles 458 IV, 459 IV and V. This fourth rule only applies subsidiarily to the third rule. For example: The deceased has no children and no siblings, and his father has predeceased. Thus, there are no heirs of the 1st parentela and, hence, the heirs of the 2nd parentela are appointed: father and mother as parents inheriting half of the estate each (Article 458 I and II). Since the father of the testator is dead and has no descendants, the third rule (Article 458 III) cannot be applied and the fourth rule applies (Article 458 IV): the share of the predeceased father falls to the mother, who is then sole heir.

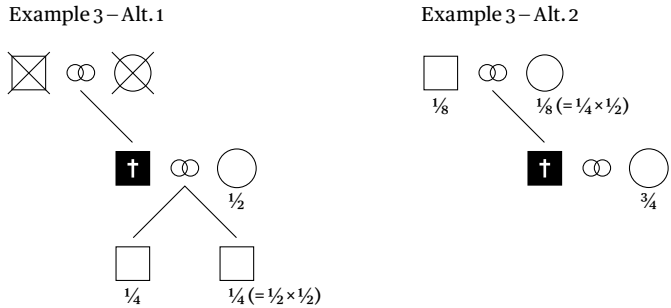
Example 2 – Alt. 2



Article 462 stipulates that the *spouse* or *registered partner*[8] of the deceased is a statutory heir. The size of her/his inheritance depends on the parentela

8 The legal institution of registered partnership is for same-sex couples, as under Swiss Law, marriage is currently only possible between opposite-sex partners. At the end of 2020, the Swiss legislator decided to change the Civil Code in order to permit marriage irrespective of the sexes of the spouses. This amendment was subjected to a referendum that took place on 26 September 2021. Since the amendment was accepted, the literal differentiation in Article 462 between *"spouse"* and *"registered partner"* will become obsolete over time, as existing same-sex partnerships remain valid and can be transformed into marriage, but new ones cannot be registered anymore.

she/he co-inherits with. If inheriting alongside heirs of the 1st parentela, the spouse/registered partner receives half of the estate (No. 1, Example 3–Alt. 1). If inheriting alongside heirs of the 2nd parentela, she/he inherits three-quarters of the estate (No. 2, Example 3–Alt. 2). If there are no relatives within the 1st or 2nd parentela, the spouse/registered partner inherits the entire estate (No. 3). Upon finalised divorce, the ex-spouse/registered partner loses her/his right of inheritance (Article 120 II). According to the current reform of inheritance law, the spouse/registered partner will also lose her/his right to a compulsory share (not her/his legal right of succession) when the deceased dies during pending divorce proceedings and some additional conditions are met (cf. draft Article 472).



In case the deceased leaves neither relatives in the sense of Articles 457-459 nor a spouse, Article 466 determines that *the canton or commune* is the statutory heir, with cantonal law regulating the details.

b) Succession Due to Disposition

As a consequence of the freedom to dispose of one's property as one sees fit *inter vivos* (Article 641), Swiss inheritance law stipulates the freedom to pass on wealth at death by way of a will (Article 470 I). Within the limits set by the *numerus clausus* of types of testamentary dispositions, the testator/testatrix may, in principle, freely allocate his/her property after death (Article 481 I).

The Civil Code stipulates testaments and contracts of succession as the two types of wills. The main difference between them is that the testament is unilateral and revocable, whereas the contract of succession is at least bilateral and irrevocable. Common features of both instruments are that the successor him-/herself must testate and decide on the succession *(absolute strictly personal right).* The testator/testatrix can only delegate these arrangements to a

very limited extent, for instance by giving instructions on how to implement details of dispositions made by him/her.[9]

Article 467 grants the right to make testamentary dispositions and Article 468 the right to enter contracts of succession. For both types of wills, the testator/testatrix must be at least 18 years old and possess capacity of judgement (see Article 16). As an example, a person who is severely affected by dementia cannot make testamentary dispositions. However, capacity of judgement is legally presumed until proven otherwise.[10] Lack of capacity of judgement does not automatically lead to invalidity of the will. Because of the *"favor testamenti"* principle, an invalidity claim (Article 519 I No. 1) must be raised within a certain deadline (Article 521).

Articles 498–511: on testamentary forms

According to Article 498, there are three forms of testaments: the public testament (Articles 499–504), the handwritten testament (Article 505) and the oral testament (Articles 506–508, also known as the "emergency will"). In principle, a testator/testatrix may change his/her will any time until death (Articles 509–511) and testamentary dispositions to the contrary are inadmissible. It is only by way of contracts of succession that the testator/testatrix can become bound during his/her lifetime.

The establishment of the *public testament* (Articles 499–504) takes place in front of two witnesses (Articles 498, 501) and by a notary certified according to cantonal law. While the notary drafts the will, the testator/testatrix needs to sign it (Article 500) and the notary himself/herself has to store the deed or to hand it over to a public office for storage (Article 504). Advantages of the public testament are not only this safe storage but also the notary advice available to the testator/testatrix.

The *handwritten testament,* regulated in Article 505, sets out the principle that the testator/testatrix can testify without any third person involvement. Article 505 I enumerates some conditions necessary for the testament's formal validity. To demonstrate the authenticity of the testament, it is crucial that the will is handwritten by the testator/testatrix in full. If someone else writes the will or guides the hand of the testator/testatrix, the testament will be inadmissible.[11] An exact date must also be put on the will. This is practically relevant in cases in which the testator/testatrix loses his/her capacity of judgement

9 PETER BREITSCHMID, Kommentierung zu Artikel 498 ZGB, in: Thomas Geiser / Stephan Wolf (eds.), Basler Kommentar, Zivilgesetzbuch II, 6th edition, Basel 2019, n 12 et seqq.

10 DFC 117 II 231 c. 2.b); DFC 124 III 5 c. 1 b); DFC 134 II 235 c. 4.3.3.

11 See DFC 98 II 73. In this decision, the Federal Supreme Court deals with the question until which degree the help of outside by writing is admissible.

and it is necessary to establish whether the will was issued before or after this occurrence. However, the lack of an exact date can only lead to invalidity if an invalidity claim is raised and if the exact date is relevant and cannot be proven otherwise (Article 520*a*). At the end of the text, the testator/testatrix has to sign the will. With the help of the signature, the testator/testatrix should be identifiable. A signature with a pseudonym or a shortcut is permissible.[12]

The *oral testament* (Articles 506–508) is not a real alternative to the public or handwritten testament. Rather, it is subsidiary to the other forms and only acceptable in emergency cases: for example, imminent risk of death, breakdown in communications, epidemics or war events. Articles 506 II and 507 regulate the requirements for the establishment of an oral testament. In particular, two neutral[13] witnesses must set down the will in writing, sign it and lodge it with a judicial authority, without delay, together with a declaration that the testator/testatrix was in full possession of his or her testamentary capacity and that he or she informed them of his or her will in the special circumstances prevailing at that time. Instead, the two witnesses may also have the will recorded by a judicial authority along with the same declaration. The oral testament is only valid for fourteen days after the point of time from which the testator/testatrix can again make use of one of the other forms of testament (Article 508).

Articles 512–515: contracts of succession

Unlike a testament, the contract of succession is always at least bilateral and has binding effect. The formal requirements correspond to those for a public will (Article 512 I in conjunction with Articles 499–504). Both parties must simultaneously be present and conclude the contract before the notary (Article 512 II).

Despite the binding effect of the contract of succession, it is possible to annul the contract. In principle, annulment is only possible by mutual written agreement (Article 513 I). Otherwise, unilateral annulment requires a behaviour of the other party that constitutes grounds for disinheritance (Article 513 II, 477). Furthermore, the contract lapses by law in case the contractual legatee predeceases (Article 515). Where the parties to the contract agree to certain benefits during the lifetime of the testator/testatrix, one party can terminate the contract unilaterally if the agreed benefits are not forthcoming (Article 514). This may be the case if the heir cannot provide the agreed care to the testator/testatrix.

According to current case law, even after the conclusion of a contract of succession, the testator/testatrix is in principle free to dispose of his/her assets

12 DFC 57 II 15.

13 DFC 143 III 640.

by means of gifts during his/her lifetime (Article 494 II). Gifts made after the contract by the testator/testatrix to third parties can only be successfully challenged by the contractual legatee (Article 494 III) if the contract of succession contains an (explicit or implicit) prohibition to make donations or if the legatee can prove in court that the testator/testatrix obviously intended to harm him/her by the subsequent gift.[14] The upcoming inheritance law reform will, however, overturn this case law. According to the proposed draft Article 494 III, the contractual legatee can, unless the contract of succession provides otherwise, challenge gifts *inter vivos* insofar as they affect her/his entitlements. In the future, making gifts after the conclusion of a contract of succession that are not merely of a customary occasional nature will be prohibited.

Articles 481–497: *numerus clausus* of testamentary dispositions

The content of testamentary dispositions is limited by the law. Inheritance law provides an exclusive list of permitted types of dispositions (mainly regulated in Articles 481–497). According to this list, a disposition in a testament (there are slight differences for contracts of succession) may contain:

Condition (Article 482)	*"My grandson A is to become my sole heir if he successfully completes his studies by the age of 25."*
Appointment of an heir (Article 483)	*"My neighbour F is to become my sole heir."*
Legacy (Articles 484–486)[15]	*"My granddaughter F is to receive CHF 20,000 on my death as legacy."*
Substitute disposition in the event of predecease (Article 487)	*"In the event that my son and heir H should predecease me, my neighbour F shall inherit in his place."*
Provisional succession and reversionary inheritance (Article 488–492*a*)	*"My long-term partner C is to become my sole heiress as a provisional heiress. She may use and consume the remainder of the estate in the sense of a reversionary inheritance. On her death, the remaining assets are to go to my son B as remainderman."*

Figure 1: Permitted types of testamentary dispositions

In case that a disposition in a testament or contract of succession is deficient, the *interpretation* of the respective provision becomes paramount. Articles 519–520*a* list grounds for deficiency. In such cases, the real will of the testator/

14 DFC 140 III 193.

15 The legacy (Articles 484–486) is, under Swiss law, a title (Article 562 I) and not a legal position in rem.

testatrix is decisive.[16] Circumstances outside the testament may be taken into account, as long as these are indicated in the document (*"theory of indication"*). The Federal Supreme Court has moved away from the *"theory of indication"* in connection with the contracts of succession.[17] This means that judges can use external facts to interpret the contract of succession without any indication as such in the text itself. If the true will cannot be ascertained because of a gap in the testament, the testament must be interpreted in accordance with the hypothetical will of the testator/testatrix. Finally, there are some legal presumptions which guide interpretation. According to the *"favor testamenti"* principle, a disposition should be preserved, if possible, by giving it a valid, permissible meaning, even though the principle cannot heal real defects of a will.

Example: A widow, H, died without any descendants. In October 1986 she created a testament and pronounced *"Mister C.F. Dupont, [address in New York City, USA]"* as her sole heir. Unfortunately, investigations established that there was no person with the initials C.F. in the Dupont-line familiar with the heir. However, there was a relevant person with the initials C.C. (Charles Constant). Due to the rule of interpretation in Article 469 III, the words C.F. in the testament can be reinterpreted to C.C. given there was an obvious error regarding the initials from the person announced as her heir. On top of that, there were two persons with the same initials: *"C.C. senior"* and *"C.C. junior",* providing the additional problem of interpreting an ambiguous declaration of intent. Due to the *"favor testamenti"* principle and given that C.C. senior died more than 20 years before the testatrix wrote her testament, C.C. junior was declared as heir.[18]

If someone wishes to contest the defectiveness of a disposition, he/she must file an action for invalidity, provided he/she has legal standing, for example as the prior beneficiary of the will supposedly revoked by another will (Articles 519–521).

Example: A widowed man D had no descendants. He established a public testament with A, B and C as his sole heirs. In a later testament, he revoked all previous testamentary dispositions and designated E as his new sole heir. A, B and C brought an action for invalidity in the sense of Article 519 I regarding D's last will. According to Article 519 II, the plaintiffs have the right to sue since they would profit if the court declared the last will as invalid, and similarly would suffer if the last will was allowed to stand. In this case, the former testament is declared valid again, meaning that A, B and C become D's

16 DFC 133 III 406; Judgment of the Federal Supreme Court 5A_850/2010 of 4 May 2011.

17 DFC 127 III 529; DFC 133 III 406. The Federal Supreme Court left the question open if it extends its decision on testaments.

18 Cf. DFC 124 III 414.

heirs.[19] A's friend G, on the other hand, who thinks that A has been treated unfairly by D, does not possess the right to sue.

c) Right to a Compulsory Share

The freedom to make a will is significantly limited by Switzerland's restrictive regime of forced, statutory entitlements. Under this regime, only the "disposable part" of a testator/testatrix's assets can be passed on following death at his or her discretion (Article 470 para.1); a substantial quota of the testator/testatrix's assets is reserved for the testator/testatrix's offspring (three-quarters of the statutory inheritance entitlement), spouse (half), and parents (half) (Article 471).[20] Siblings or other relatives, although potential statutory heirs, are not entitled to a compulsory share. Furthermore, the testator/testatrix can legitimately deprive an heir of his or her compulsory heirship by way of disinheritance (Articles 477 et seqq., for example where the heir has committed a serious crime against the testator/testatrix or a person close to the testator/testatrix).

The compulsory heirs do not simply receive the right to make a claim for payment against the testator/testatrix's estate; they receive a share in the estate *ex lege*. Thus, they obtain an absolute right, which does not only have effect between certain individuals, but towards all others. If an heir does not receive at least the value of her/his statutory entitlement, he/she can sue, within a forfeiture period (Article 533), against any excessively favoured person for the reduction of the excessive dispositions to the legally permitted extent (Article 522 I). Finally, to prevent the testator/testatrix from violating statutory entitlements by dispositions *inter vivos* (e.g. gifts), such dispositions can be abated after the testator/testatrix's death (Article 527).

Example: At the time of his death, the testator (whose spouse died a couple of years previously), leaves behind both a daughter and assets of around CHF 1 million. The testator always wished *"to leave the world a better place"* and has, over a period of three years prior to his death, made various donations totalling CHF 9 million to charitable institutions. In his testament, the testator has appointed his daughter as sole heiress. In spite of this formally generous

19 Cf. as more complex example DFC 83 II 507, 509.

20 The upcoming inheritance law reform (cf. above) will extend the freedom of disposition under inheritance law. It has been decided that the compulsory quota for descendants will be minimised from three-quarters to half (see draft Article 471) and parents of the deceased will lose their statutory entitlement completely (see draft Article 470 I e contrario). Furthermore, the spouse will lose her/his right to a compulsory share in case of a consensual pending divorce proceeding (draft of Article 472). In this case, she/he will also no longer have any right to claim entitlements from dispositions on death, unless the testator/testatrix has ordered otherwise (draft of Article 120 III No. 2).

appointment, the *inter-vivos*-donations substantially undermine the daughter's compulsory share. Without the deceased's donations, the estate would have amounted to CHF 10 million and the daughter would have been entitled to a compulsory portion of three-quarters of the estate (Article 471 I), i.e. CHF 7.5 million. However, given the donations, she only gets CHF 1 million under the testament. According to Article 527 No. 3, however, gifts made in the last five years before the deceased's death are subject to abatement. As a result, the daughter can demand CHF 6.5 million from the donee (i.e. the charitable institution) to fully restore her compulsory portion of the inheritance.

2. The Succession

While the first part of the inheritance law addresses the issues of how to designate an heir and assign an inheritance to him/her, the second part regulates the "how"–the implementation of the inheritance process. This includes, in general, provisions on the transfer of the estate, as well as on the possibility of the heirs to actually inherit (for example: capacity to inherit, unworthiness to inherit and disclaimer of succession). Furthermore, there are provisions on the division and liability of the estate. The following section provides an overview of these provisions.

a) Transfer of the Estate

The estate of the deceased passes *ex officio* to the heirs (Article 560 I), whether they are statutory heirs or heirs by disposition. As a consequence of this *principle of universal succession,* the heirs obtain a legal position *in rem* in the complete estate. Whether assets or liabilities: everything is transferred automatically to the heirs without any further formal act. However, the estate initially forms a kind of separate asset.

To protect the inheritance, for example in cases of the heir's permanent absence or unsettled succession rights, the responsible authority can ex officio order security measures under Articles 551–555 in conjunction with cantonal law.[21]

If, nevertheless, an unauthorised person gains hold of an object of inheritance, the heir(s) can sue this person within a certain deadline for surrender of the object (*inheritance action,* Articles 598 et. seq.). A *rei vindicatio* (*property action,* Article 641 II) is also possible.

21 In the Canton of Zurich, the District Court is responsible for such measures.

b) Requirements for the Heirs

While natural persons can inherit both as statutory and testamentary heirs, legal entities can only be appointed as heirs by way of testamentary disposition. Pursuant to Article 542, an heir must be alive and capable of inheriting at the time of succession.

In addition, unlike disinheritance by a willed disposition, unworthiness to inherit is exercised *ex officio:* in certain constellations (for example, if a person wilfully and unlawfully caused or attempted to cause the death of the deceased) a person will be regarded as unworthy (i.e., incapable) of inheriting, thus excluding such person as statutory and/or testamentary heir (Articles 540 et. seq.). By operation of law, the excluded person's descendants inherit from the deceased as if the person unworthy to inherit had predeceased the deceased (Article 541). A pardon of the testator/testatrix, however, will prevent the heir being deemed unworthy to inherit (Article 540 II).

If the heir is alive, capable and worthy of inheriting at the time of succession, he/she can only slip out of his/her role as heir by declaring his/her renouncement within a three-month deadline (Articles 566 et. seq.). This may be attempted, for example, if the estate is over-indebted. Otherwise, he/she acquires the inheritance unconditionally (Article 571 para. 1). Unconditional inheritance equally occurs if the heir actively engages in matters of administration of the estate before the expiry of the three-month period and this exceeds mere administrative measures (Article 571 II). An alternative to the outright renouncement is the application for a public inventory (Articles 580–592) or the initiation of an official liquidation (Articles 593–597).

c) Division of the Estate

Often there is more than only one heir. The co-heirs then form a joint heirship (Article 602 I). This joint heirship arises *eo ipso* with the death of the deceased and the group of co-heirs inherit everything together as joint ownership (Article 602 II). Thus, the estate is a special asset (see also Articles 652–654*a*). The end of this joint heirship is heralded with the division of the inheritance. The purpose of the division is therefore to transfer the objects of the estate from the joint heirship to the sole right of the individual heirs. Every co-heir can at any time request that the estate be divided (Article 604 I) and, if necessary, sue for this right *(partition action).*[22] It is only in rare cases that the division can be postponed (Articles 605, 604 II, contract-bound).

22 Judgment of the Federal Supreme Court 5A_357/2016 of 12 April 2017.

Within the division of the inheritance, the co-heirs have only a right to a certain quota from the estate and not to a special object. There are two types of division: the real division *("once the lots have been formed and received")* and the contract of division *("on conclusion of the contract of division")* (Article 634 I). The essential feature of real division is the simultaneous execution of the obligation and disposal transaction (comparable to a gift by hand, Article 242 Code of Obligations). Every object of the estate needs its own, appropriate act of disposition. The distribution and with that the division between the heirs becomes binding step by step. The contract of division of the estate is an obligatory, mutual agreement of all heirs to divide the estate in a certain way and to perform the acts of disposition necessary for the final execution of the contract. With the contract of division, a binding effect can be created before the final execution of the division. For larger estates this is a more attractive option, in that the division can be completed more easily and quickly.

d) The Liability

Before an inheritance can be divided, all liabilities must be settled, Article 603. Co-heirs are jointly and severally liable for obligations of the deceased and obligations arising from the decease (e.g. funeral expenses).

After the division, it may subsequently turn out that the value of the individual estate items was lower than the heirs had assumed at the time of division. In addition, it may be that the assigned inheritance object belongs to a third party or that the assigned claim is worthless due to the debtor's insolvency. In these cases, Articles 637 is the relevant rule on liability between the co-heirs. At this stage, co-heirs are mutually liable in proportion to their inheritance quota for the estate property as if they were purchasers and vendors (Art. 637 I). In respect of claims as part of the divided estate, the co-heirs are jointly liable as simple guarantors for the debtor's solvency, in the amount at which such claims are brought. This results from the fact that they guarantee each other the existence of these claims during the division (Article 637 II, Article 495 CO).

Example: A testator leaves the spouse and two descendants whose shares of the inheritance correspond to the statutory inheritance quotas (surviving spouse: half, the two descendants each: one-quarter, Article 462 No. 1, Article 457). In the division of the inheritance, one descendant receives a certain inheritance object at the imputed value of CHF 20. If the object proves worthless or is rightfully claimed by a third party, the surviving spouse owes the entitled descendant CHF 10 (½ of 20) and the other descendant CHF 5 (¼ of 20).

However, subject to consent of the creditors and for a period of five years following division, co-heirs are still jointly and severally liable (with all their property, Article 639) for debts of the deceased.

III. Landmark Cases

1. Legacy Hunter[23]

In 2006, the Federal Supreme Court was given the (rare) opportunity to (i) shed light on the question of whether a duty to inform can be derived from the general principle of good faith according to Article 2 I and (ii) to elaborate on grounds for unworthiness to inherit pursuant to Article 540.

E ("testatrix") was a widow, born on 7 February 1907. She remained childless. In her last years, due to an accident, she lived in a nursing home where she remained until she died on 9 July 1995.

K ("plaintiff") was part of a family that belonged to the circle of friends and acquaintances of the testatrix. According to a will dated 31 August 1987, the testatrix appointed the plaintiff as her sole heir. In a supplement to that will, the testatrix confirmed the plaintiff's position as sole heir on 10 March 1991.

B ("defendant") acted as the testatrix's lawyer from 1991 until, presumably, her death. His service to the testatrix included advising her on inheritance matters. When asked about her wishes regarding her estate, the testatrix replied to the defendant with the words: "That's you." During a visit at the nursing home in April 1994, the defendant was informed by the testatrix about her will and was told that he had been appointed as her sole heir. The testatrix originally instructed him in her testament from November 1992/1993 to pay out a certain sum as legacy to the plaintiff. However, in a testament dated on 2 December 1993, she confirmed only the dispositions in favour of the defendant. Finally, in a letter to the defendant dated 25 February 1995, the testatrix expressly revoked all previous testamentary dispositions and instructions, except for those in favour of the defendant. The defendant took the testament dated on 2 December 1993 with him when he left the testatrix following his visit to the nursing home in April 1994.

In addition to being in a relationship of trust with the testatrix as her appointed lawyer, the defendant exercised great personal influence over the testatrix. The testatrix had, through constant gifts, attempted to gain and maintain the friendship and affection of the defendant. The defendant was almost the sole confidante for the testatrix. The testatrix assumed that the defendant's consideration towards her was the result of genuine friendship

23 DFC 132 III 305.

and affection, and in this context she designated him as her sole heir. The defendant, on the other hand, did not act out of friendship, but out of a wish to enrich himself. As the court found, these true intentions of the defendant remained hidden from the testatrix.

The plaintiff challenged the defendant's appointment as the sole heir and executor of the testatrix and, inter alia, brought an action seeking annulment of the testament dated 2 December 1993, stating that the defendant was unworthy to inherit and thus incapable to act as executor. The civil court of Basel-Stadt declared the last will of 2 December 1993 invalid. The appellate court of the Canton of Basel-Stadt came to the contrary conclusion, i.e. that the last will of 2 December 1993 was valid. However, the appellate court ultimately allowed the claim by finding that, although the final will was valid, the defendant was unworthy to inherit and an inappropriate executor.

In an appeal, the defendant requested to be reinstated as executor and declared sole heir of the testatrix. The appeal was dismissed by the Federal Supreme Court. As to the question of defendant's unworthiness to inherit, the Federal Supreme Court had to consider whether the defendant, as the lawyer of the testatrix, had been under the duty to inform her about his conflict of interest (as lawyer and presumed sole heir) and, as a result, had maliciously prevented the testatrix from making a new and/or revoking the existing (final) will.

Firstly, the Court held that a malicious act or omission pursuant to Article 540 I No 3 does not require a criminal act to be committed. Secondly, the Court confirmed the view that there must be a causal relationship between the malicious act or omission and the fact that the deceased did not make or revoke a will. In cases of a potential failure to provide advice and information, hypothetical causality must be established. In other words, one must consider whether–based on the ordinary course of events and the general experience of life–a testatrix would have made, amended, or revoked a testament had he/she been properly informed.

The Court then turned to the question whether the defendant was under a legal obligation to inform the testatrix about his true intentions which were not based on genuine friendship and about the conflict of interest arising from his simultaneous position as the testatrix's appointed sole heir and lawyer. The Court underlined that from 1991 until her death the defendant was the only confidante for the testatrix. From the testatrix's perspective, this was much more than a working or purely professional relationship. Against this background, the court relied on the principle of good faith (Article 2) requiring parties to a legal relationship to act in an appropriate and honest manner. By not informing the testatrix about his true–i.e. purely economic–intentions

and the conflict of interest as the testatrix's appointed heir and lawyer, the defendant caused the testatrix to believe that they were connected by a genuine friendship. Against this background, the testatrix maintained the designation of the defendant as sole heir and executor until her death. Interestingly, the Court did consider that the testatrix, from a legal point of view, could have amended or revoked her last will and/or made a new testament at any time. However, it emphasised that the testatrix had relied on the (wrong) assumption that she and the defendant shared a friendship, which made her believe there was no need to revoke her will or to make a new one. In the eyes of the court, the defendant's conduct qualified as grave misconduct, resulting in his unworthiness to inherit and to act as executor.

This jurisdiction of the Federal Supreme Court widens the notion of a "legacy hunter" through an broad interpretation of Article 540 I No. 3. This could lead to difficulties in distinguishing between affectionately meant gifts and frowned-upon flattery. It should not be the task of the courts to decide whether a client's present to his/her attorney arises from a relationship of dependence between them both or is merely a nice gesture. Not every lawyer appointed as heir should be stigmatised as a legacy hunter. The testator's freedom of disposal should still be the principal concern.

2. The Revocation of the Revocation[24]

Both court judgements referenced and discussed in this section deal with the issue of *"the revocation of the revocation",* in the case of multiple wills by the same testator.

In the case at issue, the testator drew up a will in favour of his life partner, C, that included a legacy of CHF 10 million. Two years later he drew up another testament that only provided a monthly payment to C for a certain period and included the passage: *"This will supersedes all previous testamentary dispositions and wills including all addenda thereto."* The testator destroyed this last will with undisputed intention to cancel it.

Subsequently, C brought an action against the heirs and demanded payment of her legacy of CHF 10 million. The courts rejected the claim, and the case went to the Federal Supreme Court twice before it was finally dismissed.

In the DFC 144 III 81, the Court underlines that there is a mandatory, essential right of the testator to freely revoke his testamentary dispositions at any time. Such revocation, however, presupposes that the testator actually

24 DFC 144 III 81 and Judgment of the Federal Supreme Court 5A_69/2019 of 20 July 2019.

expresses his intent to revoke in one of the forms provided for by law (Article 509 et seq.). The revocation itself is a last will and prevents the revoked testamentary dispositions from having any legal effects after death of the testator. Nevertheless, the revocation by destruction is only significant if the destroyed document was a will in the legal sense. Since this had not been established by the lower court, the Federal Supreme Court ruled that the question of the existence of a will should not have been left open by the High Court of the Canton Zurich. If the High Court had found that there was a will, there would then be the different question of (i) whether the testator, with the revocation, had also expressed his legal intention to revive an earlier testamentary disposition which had been revoked in the will in question and (ii) under which conditions such a "revocation of the revocation" is valid.

At the remittal back the High Court of the Canton of Zurich, the High Court found a testamentary intention in the later will, in particular with regard to its clause revoking all earlier testamentary dispositions. In a second step, the question was which consequences resulted from the destruction of the later will. By way of interpretation, the High Court found that the testator did not express the required *"animus revivendi"* in one of the forms prescribed by law by destroying the later will. Therefore, the initial will had not been revived by the destruction of the subsequent one.

The Federal Supreme Court confirmed the ruling of the High Court of the Canton Zurich in its decision of 20th July 2019 (5A_69/2019). In its decision, it once again expressly clarified that the destroyed will is still relevant despite its destruction. It would be misleading to consider that the first disposition is decisive, since it is the only document that still exists. On the contrary, revocation by destruction (Article 510, I) has no effect different from the other forms of revocation (Articles 509, 511). The mere act of destroying the document does not have the effect of reviving the earlier, revoked will. Irrespective of the form of revocation, the revival of a previous will presupposes the testator's intention to reinstate the original will. Such a will could not be established in the case at hand. In particular, it could not be clearly determined whether the testator was still aware of the existence of the earlier will at the time of revocation.

The decisions of the Federal Supreme Court are convincing and very instructive concerning the basic principles which regulate the revocation of wills and in particular the common issue of the "revocation of the revocation".

Selected Bibliography

OLIVER ARTER, Residence in Switzerland, Entry, work and residence permits, purchase of real estate, social security and pension system, marital and inheritance law, system of taxation, Zurich / St. Gallen 2015

TINA WÜSTEMANN / DANIEL BADER / DANIEL LEU, Private Client Law in Switzerland: Overview, in: Practical Law, Private Client Global Guide 2022

026

INTRODUCT SWISS LAW

Authors: Kern Alexander, Ruth Arnet, Martina Becker, Elisabetta Fiocchi Malaspina, Christoph Beat Graber, Tina Huber-Purtschert, Caroline Kopp, Luisa Lichtenberger, Matthias Mahlmann, Sophie-Katharina Matjaz, Matthias Oesch, Peter Georg Picht, Giulia Rossi, David Roth, Madeleine Simonek, Goran Studen, Andreas Thier, Marc Thommen and Felix Uhlmann

sui generis
ISBN 978-3-907297-26-1
DOI 10.38107/026