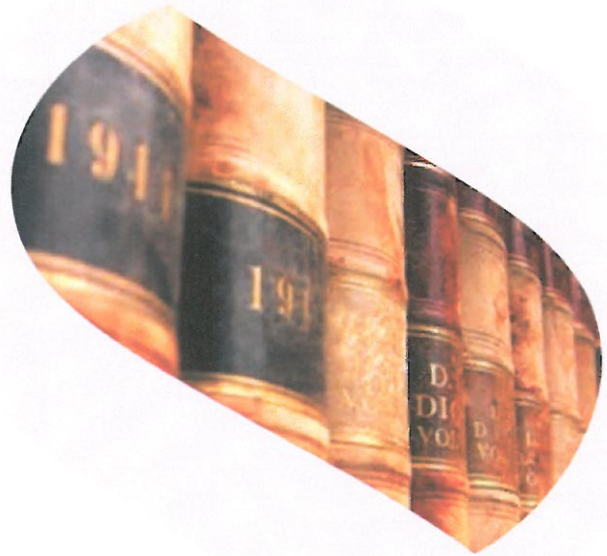


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## TABLE OF CONTENTS

<i>Julian Lubini</i> : The Free City of Danzig and its Higher Administrative Court (1920–1935) .....	
<i>Václav Zatloukal</i> : Max Kasers „Römisches Recht als Gemeinschaftsordnung“ und die „Krise des römischen Rechts“ unter der NS-Herrschaft .....	
<i>Carmine Galloro</i> : Die Umsetzung des römischen Privatrechts im Völkerrecht .....	
<i>Carmen Lázaro Guillamón</i> : Conflict Resolution by Consensus in Roman Law: Historical Approach to Mediation .....	
<i>Theodore Kazantzakis</i> : The Advocates in Byzantium during 12 <sup>th</sup> Century according to “Ecloga Basilicorum” .....	
<i>Ivan Milotić</i> : Arbitration Agreement of 1535 between the Habsburgs and the Venetians .....	
<i>Hadrian Ciechanowski</i> : The Polish Civil Status Registration System – the Longue Durée of the Prussian Idea .....	
<i>István Novák</i> : Die Entwicklung des Kirchenrechts im 20. Jahrhundert. Zur Auswirkung des Säkularismus und des Pluralismus auf die Entwicklung des Kirchenrechts am Beispiel des Eherechts .....	
<i>Zsolt Pfeffer</i> : The Development of Modern Budgetary Law in the European Legal Culture .....	
<i>Judit Balogh</i> : How to Make a Civil Code: Plans and Drafts of General Rules in 19 <sup>th</sup> Century Hungarian Private Law .....	
<i>Adam Boóc</i> : Comments on Some Important and Current Problems of the Law of Succession in Hungary – Considering Historical Aspects .....	1
<i>Norbert Varga</i> : The European Roots of Hungarian Regulation of the Cartels Special Attention to the Foundation of Cartel Supervisory Public Authorities .....	1
<i>Olga Lysenko</i> : Das Ehe- und Familienrecht in der byzantinischen Ekloge (8. Jahrhundert) mit Blick auf römisches, orientalisches und Kirchenrecht .....	1
<i>Volodymyr Kyrychenko, Olena Sokalska</i> : Western Penitentiary Tradition in the Kingdom of Poland .....	1
<i>Tetiiana Syroid, Oleksandr Havrylenko, Alona Shevchenko</i> : Foundation for Criminal Law in Antique States of the North Black Sea .....	1
<i>Keltis Kruija, Engjell Likmeta</i> : Historical and Legal Aspects of Heritage Law in Albania .....	1
<i>Markus Hirte</i> : Von der Folterkammer zum Rechtskundemuseum – Die Geschichte des Mittelalterlichen Kriminalmuseums in Rothenburg .....	1
<i>Kerstin Rupp</i> : Sozialer Wandel und soziale Stellung in China Achebes Things Fall Apart sowie Kazuo Ishiguros Remains of the Day – Teil I .....	1

## BOOK REVIEWS

<i>Tommaso Beggia, Aleksander Grebieniow (Hrsg.)</i> : Methodenfragen der Romanistik im Wandel. Paul Koschakers Vermächtnis 80 Jahre nach seiner Krisenschrift .....	1
<i>Tamás Antal</i> : The History of the Royal Appeal Court of Szeged between 1890 and 1950 .....	1
<i>Anna-Bettina Kaiser</i> : Ausnahmeverfassungsrecht .....	1
<i>Ulrich Loewenheim, Matthias Leistner, Ansgar Ohly (Hrsg.)</i> : Urheberrecht. Kommentar .....	1
<i>Martin Avenarius, Christian Baldus, Francesca Lamberti, Mario Varvaro (Hrsg.)</i> : Gradenwitz, Riccobono und die Entwicklung der Interpolationkritik .....	1
<i>Sebastian Stepan</i> : Scaevola noster .....	2

## REPORTS FROM HISTORY OF LAW

The Research of Hungarian Cartel Supervision ( <i>Norbert Varga</i> ) .....	2
50 Years of Právněhistorické studie ( <i>Kamila Stloukalová</i> ) .....	2
Reflections on the Genesis of the Moravian Vineyard Rules ( <i>Jiří L. Bělý</i> ) .....	2
Guidelines for authors .....	2

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## Comments on Some Important and Current Problems of the Law of Succession in Hungary – Considering Historical Aspects

Adam Boóc\*

### Abstract

The study provides an analysis of the most current issues of the law of succession in Hungary. The paper takes into consideration the regulation of the New Civil Code, also paying attention to the historical traditions of this part of the civil law in Hungary, referring to the roots in Roman law, too. The paper tries to identify and introduce the challenges, with which the law of succession is facing in the 21<sup>st</sup> century either in Hungary or in Europe. The author attempts to demonstrate the differences of the regulation between the former Civil Code (Act No. IV of 1959) and the new Civil Code (Act V of 2013). The essay pays attention to the economic factors of the law of succession, referring to the most important social phenomena of the recent decades. The study also analyses the most important findings of the case law in Hungary, as well.

**Key words:** law of succession; last will; substitute succession; new Civil Code; historical aspects; Hungary.

### I.

It has become increasingly justifiable that the law of succession has major importance within the Civil Law in Hungary today. There are legal, sociological, social and demographic reasons for this paramount importance. The pre-1990 socialist system, as it is known, has not brought significant private wealth accumulation. At the same time, during the so-called economic change that began immediately before the 1990s, and as a result of the political change that began in 1990, the representatives of private sector, involved in the privatization and those who actually started their individual business in the private sector, brought a significantly richer layer than the previous generations.

Representatives of this layer with significant wealth even compared to Western European standards, have now come to the point where inheritance and, in some cases, the succession of ownership and managerial positions in companies have become important issue. And pressing questions may be answered by the law of succession or and by other convergent jurisdictions, such as trust law, which may be considered as an alternative legal field.<sup>1</sup>

In this brief essay, we wish to highlight some of the issues that underlie the importance of the inheritance law, although we cannot be exhaustive. The purpose is to raise awareness.<sup>2</sup>

### II.

The new Hungarian Civil Code gives priority among the methods of succession, to the succession by will, so the basic concept of the Code is that the heir shall have the responsibility to settle the Civil Law relationships after his/her death.

Compared to this, *ab intestato* succession is of a secondary, subsidiary succession, but at the same time noticed a very significant conceptual change in the inheritance position of the surviving spouse.

The new Civil Code has significantly changed the succession rules of a surviving spouse next to the descendant compared to the previous code. The Section 7:58. § includes the property of the surviving spouse, which is the right of usufruct in the real-estate, and in all the equipment in it, and one child's part from the estate.

According to the Civil Code, the widow becomes holder of life estate in interest of one child's part, which was not used as housing if they lived together with the descendent.<sup>3</sup>

Another very significant change in the new Code is that the usufruct of the widow lasts until the real death of the widow. Life estate may not be limited, and no redemption value may be demanded from the spouse, and it is not consumed even by a new marriage.

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<sup>1</sup> On this topic see: SÁNDOR I.: *A bizalmi vagyonkezelés és a trust. Jogtörténeti és jogösszehasonlító elemzés. (The trust. Comparative and historic analysis.)* Budapest, 2017<sup>2</sup>.

<sup>2</sup> On the correlation of the law of succession and modern technology, see also: BOÓC Á.: *Technológiai kihívások a polgári jogban, különös tekintettel az öröklési jogra.* In: *Technológiai kihívások az egyes jogterületeken.* (ed.: HOMICSKÓ Á. O.) (BOÓC Á.: *Technological challenges in civil law, especially in the law of succession.* In: *Technological challenges on different fields of law.* ed.: HOMICSKÓ Á. O.) Budapest, 2018. 25–35.

<sup>3</sup> The Civil Code does not specify the concept of housing, so in some cases multiple kind of real-estates jointly used by the spouses can be considered as housing.



The 7:59. § of the Civil Code further regulates the widow's significantly secured, importantly protected position by stating that the spouse may at any time request redemption of his/her life estate for future considerations in money or in kind.

This makes the situation that a widow can only leave the property when he or she wants it, for example because of a new marriage. The Code says that redemption of life estate shall be carried out in due consideration of the spouse's and the descendant's reasonable interests.

By the rule, only the widow may initiate the redemption, he/she cannot place himself/herself in an unfair situation, the only unfair situation that can happen that the widow request the redemption of life estate in an unfair time for the descendants. If this is demonstrated in trial, then the application of the widow as plaintiff shall be refused.

The 7:60. § governs the situation, where with the absence of heir or in case of disinheritance, the surviving spouse inherits the property in such a way that the jointly used housing is wholly owned by the surviving spouse, while the widow inherits the assets beyond the joint property with the parents of the deceased. The parents of the deceased spouse acquire an equal share of the estate. The deceased's missing parent is replaced by the other parent and the spouse of the deceased.

If the testator has no descendants or ascendants alive, or if these persons have been disinherited previously, then according to the 7:61 §. of the Civil Code, only the surviving spouse inherits. (Only traditional lineal inheritance can prevent this.)

One of the conditions for the legal inheritance of a surviving spouse is that there is a cohabitation at the time of the opening of the inheritance, that is to say a real cohabitation and marital community of property before the deceased dies, between the deceased and the spouse. According to the 7:62. §. of the Civil Code, if there was no cohabitation between the deceased and the spouse at the time of the opening of the inheritance, and the circumstances of the case clearly indicate that there was no prospect or intention of restoring the cohabitation, the surviving spouse falls out from succession. The first condition, the fact of separation, can be objectively established, while the second condition, the lack of prospect of restoration of the marital partnership, can be found if the two parties have separated for a longer period of time without either party initiating the restoration of the partnership. According to the section (2) 7:62. §. of the Civil Code, only a person who would inherit the surviving spouse or who would like to be relieved of his or her obligations or other burdens can claim the fall out of the surviving spouse. So the burden of proof is not on the surviving spouse, but on the person who claims the fall out.

Reviewing the regulation of the new Civil Code, the intention to facilitate the succession by will is fully appreciated. From a formal point of view, the Section 7:17. §. may be an important example, which, in the case of a holographic will, the Civil Code

does not state the case, only the date of issue is a binding condition of validity.<sup>4</sup>

In the application of the Civil Law Unity Decision 2/2016 (PJE) is very important too, which also eases formalities relating to wills. This PJE makes very important statements on the signing of the will as a witness and on the rules of the identification of the witness.

The Civil Law Department of the High Court of Justice, in the revision procedure Pfv.I.20.728/2015. initiated based on the a) (1) of paragraph 32 and b) (1) of paragraph 32 of the Act CLXI of 2011 on the management and infrastructure of courts (Bszi.) and judged based on the a) (4) of paragraph 34, decides that the Civil Law Unity Decision 3/2012 shall be invalid. It also states that the signature of a testamentary witness meets the requirements for signature, if the witness signs the document in a way that reflects his or her unique form and style of writing. If the identity of the witness cannot be ascertained from the document, the court may carry evidence on that.

This decision is of paramount importance because it has been transforming a position which has been very rigid so far, sometimes nulling with the formal validity of wills, in a more equitable way, where the principle of *'favor testamenti'* can be more applicable.

Within the scope of formal invalidity, legal practice - both under the old and the new Civil Code - very often face problems arising from the contract of inheritance. As is well known, according to the 7:49. § of the Civil Code, for contracts of inheritance the same rules are applicable as for holographic wills, so in some cases it is not enough to have a lawyer's signature on the inheritance contract involving the transfer of a property, but also two witnesses are required. This has caused many invalidity issues already under the former Civil Code.<sup>5</sup>

In the professional material of the Hungarian Lawyers' Insurance and Assistance Association (MÜBSE), which is the market leader in the field of legal liability insurance in Hungary, the following statements can be read in connection with the contract of inheritance:

I. Statistics: Claims for invalid contracts of inheritance or holographic wills are the ones where the supportive decision of claims is the highest rate in MÜBSE practice compared to claims submitted.

II. Basis: The case law is consistent and completely clear in that the principle of *'favor testamenti'* (that the will is always to be interpreted by the realization of the real will of the testator) can be only applied in case of valid wills. However, the *'favor testamenti'* principle does not apply if the wills have a formal and substantive defect and cannot be remedied by a procedure to prove the will of the testator. (...)

The Civil Code brought the Case Law to the level of Law, stating that *'favor testamenti'* cannot remedy the formally invalid wills and make them valid (7:24. §.). It is therefore extremely important for lawyers to pay the utmost attention to the for-

<sup>4</sup> It should be noted that in some cases marking the place of issue marked the proving procedure easier.

<sup>5</sup> See also: SÁNDOR I. – SZÚCS B.: *Az ügyvédi felelősség és biztosítása. (The Liability of the Lawyer and the Third-Party Liability Insurance.)* Budapest, 2001. 113-114.

mal and substantive requirements of wills, since their absence cannot be remedied by a procedure to prove the will of the testator.<sup>6</sup>

In the light of the above, it may be worthwhile to consider de 'lege ferenda' the advisability of maintaining in this form the strict conditions of validity of the contract of inheritance.

### III.

In the field of succession by wills, in certain substantive questions of the will, the substitution of heir is a very important problem.

A certain form of substitution of heir (*substitutio pupillaris*) was also known in Roman Succession law, which was an important institution for the freedom of final wills.<sup>7</sup> The essence of the '*substitutio pupillaris*' can be summed up in that the testator paterfamilias calls the underage under his power heir in his will. For the case if the '*impubes*' died in early age, before he/she could make final will, the testator names the person, the '*pupillariter substitutus*', who becomes the heir in this case. (As to who is considered to be under the authority of the father, the time of the death of the '*paterfamilias*' is always decisive.) According to classical rules, the '*substitutus*' is the heir of the father rather than the '*pupillus*'. The essence of '*substitutio quasi pupillaris*' is that, according to the already mentioned rules of '*substitutio pupillaris*', with a few exceptions, '*substitutus*' can be ordered for a lunatic, mentally ill child. The essence of a legal institution known from Roman law is that the person who has been designated as the heir, after the opening of the succession and getting his/her position in succession, is replaced by another person from a certain moment or condition.

Thus, not like in case of alternation of heir, where the primary heir could not inherit at the time of opening of the succession, he is replaced by another heir appointed also by the testator, in the case of succession, the testator in fact makes a double inheritance in his will, since after the succession of the primary heir, the substitute will inherit in any case. (An alternate heir - in Roman law a '*substitutio vulgaris*', a common substitute - will inherit only if the first appointed heir cannot or unable to inherit for some reason.)

The substitution of heir shows a very varied picture in our law, as previously it was legal, while actually it is expressly forbidden by Hungarian private law.<sup>8</sup> The General Civil Code Proposal of 1900, the Proposal of 1913, and the Private Law Bill

of 1928 (Mjt.) also knows, permits, and regulates in detail the substitution of heir.

It is a specific of the older Hungarian rules, among other things, that if a person who has not yet conceived is called a heir at the time of the death of the testator, then in case of his/her birth he/she shall be considered as substitute taking into account that direct heir can be only a person who is alive at the time of the death of the testator. Another important feature is the institution of residual inheritance (*fideicommissum eius quod supererit*), whereby it is possible to name a successor in such a way that the substitute heir only receives the assets remaining at the time of the testator's death. In this case, the heir is entitled to dispose on the asset with pecuniary transactions, but not entitled to violate the right of the substitute heir neither with gifting, nor with provisions for cases of death.<sup>9</sup> Apparently, older Hungarian private law makes substitution of heir possible extensively. It should also be noted that the inheritance is permitted by many foreign legal systems, for example German and Austrian law.

Paragraph 2100 of the BGB defines the term 'substitution of heir' as follows: „Der Erblasser kann einen Erben in der Weise einsetzen, dass dieser erst Erbe wird, nachdem zunächst ein anderer Erbe geworden ist (Nacherbe).” („The testator may appoint an heir in such a way that the person only becomes an heir after another heir has first been heir (subsequent heir).”)

With regard to German law, the *Berliner Testament*, governed by Paragraph 2269 of the BGB, which is a frequent succession institution, deserves special mention. In fact, the *Berliner Testament* is a joint will of spouses (and also registered partners) in which they are mutually designated as the heirs of each other, whereby after the death of the surviving spouse the estate must be given to a third person, usually the child of the spouses.

From a procedural point of view, this third person is to be considered the heir of the surviving spouse, but taking into account that his/her succession is based on the joint will of the spouses, he/she can be considered as a substitute heir.<sup>10</sup>

The legal purpose of the *Berliner Testament* is clear, as it enables spouses to look after each other even after the death of one of the parties, and to settle the property jointly after the death of both parties.<sup>11</sup>

The repealed 1959 Civil Code, (hereinafter referred to as "the old Civil Code"), expressly prohibited succession. Article 645 of the old Civil Code provides as follows: 645. § (1) A tes-

<sup>6</sup> See also: [http://mubse.eduweb.hu/ilias.php?baseClass=iLMPresentationGUI&ref\\_id=69](http://mubse.eduweb.hu/ilias.php?baseClass=iLMPresentationGUI&ref_id=69) date of download: 2017. 04. 21. 23:30

<sup>7</sup> See also on the substitution of heir in Roman Law: BOÓC Á.: *Az utóöröklés a római jogban, javaslattal a jövőbeni magyar szabályozásra (On the substitute succession, with recommendation of the Hungarian regulation)*. Közjegyzők Közlönye, 4 (2002). 3-18. See on the question of the freedom of final will: SZÁSZY-SCHWARZ G.: *A végrendeleti szabadság a római jogban. (The freedom of final will in Roman Law.)* Budapest, 1881. See on the Substitution of heir in a recent article: TÓTH Á.: *Az utóöröklésről. (On the substitute succession.)* Közjegyzők Közlönye 9 (2001). 3-15.

<sup>8</sup> See on the substitution of heir in Hungarian law: BOÓC Á.: *Az utóöröklés jogintézménye a magyar magánjogban. (The legal institution of substitute succession in Hungarian civil law.)* Közjegyzők Közlönye, 6 (2002). 3-15.

<sup>9</sup> See: SZLADITS K.: *A magyar magánjog vázlatja II. (The sketch of the Hungarian civil law. part II.)* Budapest, 1933. 443.

<sup>10</sup> *Berliner Testament* also includes provisions on the legacy (*Vermächtnis*), according to which the jointly ordered tradition can be passed on in the case of doubt at the earliest at the death of the surviving spouse. Regarding *Berliner Testament*, with interesting practical information, see especially: <http://www.berliner-testament.net/>

<sup>11</sup> On the regulation of substitute succession in German and Austrian law see especially: BOÓC Á.: *Megjegyzések az utóöröklés szabályozásához a német és az osztrák magánjogban. (Comments on the regulation of substitute succession in the German and Austrian law.)* In: *Scire aliquid laus est. Tudományos Diákköri Dolgozatok.*, 2002. (edited by: GARAI B. és TAKÁCS P.) Budapest, 2003. 61-74. To the concept of *Berliner Testament* see especially: PH. STICHERLING: *Zum Begriff des Berliner Testaments* Juristische Schulung - JuS 2002, 1248.

tator's testamentary disposition according to which another heir shall, as of some event or a date, replace the previous heir in respect of the inheritance or a part thereof, shall be invalid. However, in the event of the death of the devisee named in the first place, a devise shall be valid as an alternate devise if the conditions thereof have been satisfied.

(2) This provision shall not preclude a legacy that is contingent on some condition or date. A person who has acquired a legacy shall not be entitled to dispose of it either 'inter vivos or mortis causa'

until the condition or date has occurred. Prohibition of alienation and encumbrance shall be recorded in the real estate register in respect of the real property serving as the legacy. This provision shall not affect the rights of a third person, acquired in good faith and for a consideration.

As can be seen, the old Civil Code did not allow the substitution of heir, only the ordering of the substitute legacy.<sup>12</sup> (It is also worth considering Article 93 of the Ptké. in this respect as well, according to which if the succession was opened before the entry into force of the Civil Code, the substitution succession shall continue to be governed by the earlier law even if the substitution succession happened after the entry into force of the Civil Code.)

According to the ministerial commentary of the Civil Code, the essence of the freedom of the final will is that the testator obtains a single disposable right over his assets in the event of his death. He/she may not exercise this right more than once, thereby limiting his/her pre-heirs by depriving on his/her right of ownership and on making final will.<sup>13</sup> The practice established on the basis of the old Civil Code has done this to the maximum.

In this regard, we refer to BH. 1992.246, declaring the invalidity of the designation as a successor does not invalidate the other provisions of the will.

In the particular case, the testator, in according to the will, intended to transfer his marital property to the heir named in the will only after the death of his spouse, the plaintiff. Therefore, according to the intention of the testator, until that date, the property belonged to the plaintiff. This is in fact an heir designation not allowed under the old Civil Code, but the invalidity of this provision does not affect the validity of the other provisions of the will.<sup>14</sup>

It is also worth noting that under the second sentence of Section 645. § (1) of the old Civil Code, the succession of the heir designated for the event of death of the primary named heir can happen as alternate heir, under certain conditions. This only seems to be an exception to the prohibition on substitution of heir, as in this case the person named as heir will inherit not as substitute, but as alternate heir.<sup>15</sup>

#### IV.

During the codification of the new Civil Code, which was enacted by Government Decree 1050/1998 (IV. 24.), also raised the question of whether the substitute succession could be included in the new Civil Code. It should be noted that there have previously been positions in the literature that supported the designation of a substitute heir. Emilia Weiss, in her monograph on the surviving spouse's inheritance status, argued that in case of surviving spouse the substitute succession should be restored.<sup>16</sup> This concept governs the inheritance so that the spouses may designate each other heir as pre-heirs, and after the death of the pre-heir, a third person inherits the estate. This type of inheritance is very similar to the above mentioned *Berliner Testament* concept known in German law.

The concept adopted by the Codification Committee at its meeting on 8 November 2001 as regarding Substitute succession states: "The Civil Code shall recognize the possibility of a substitute heir designation and a residual substitute heir designation in a narrow circle. Thus, on the one hand shall recognize that spouses may, for the benefit of one another, either in joint will or a separate will so that the spouse named as heir in the will shall be pre-heir, and after his/her death, the remaining estate shall be inherited by a third person, whether from the first testator's family or by another person named by testator. This so-called residual succession, with the exception of dispositions free of charge, shall not limit the right of disposition of the heir with the estate. On the other hand, it shall recognize the institution of the *substitutio pupillaris*, so that the possibility for the testator to designate a substitute heir in place of his/her descendant if the descendant dies at an age or condition unable to make final will. The wider recognition of the substitute heir is still not necessary."<sup>17</sup> The Concept underlines that in particular in the field of copyright, the use of substitute succession would be important.<sup>18</sup> (We take note that before the

<sup>12</sup> See: TÖRÖK G. (ed.): *A Polgári Törvénykönyv magyarázata. V. kötet. Öröklési jog. (Commentary of the Civil Code. volume V. Law of succession. Budapest, 2005.)* 204 – 205.

<sup>13</sup> It is worth noting that in his textbook, Ferenc Fábrián considers the pre-heir in the relation of the substitute heir and the pre-heir as the beneficiary, who has to settle with the substitute heir according to the rules of the usufruct by the substitute succession. According to Fábrián, "the peculiarity of the situation is that, by the fulfilment of the condition stated in the will, the substitute heir will not become the heir of the heir originally designated, but the heir of the testator, when substitute" See: FÁBRIÁN F.: *Előadássorozatok az öröklési jog köréből. (Draft Lectures on the Field of the Law of Succession.)* Budapest, 2012. 56.

<sup>14</sup> See: ÖSZTOVITS A. (szerk.): *A Polgári Törvénykönyvről szóló 1959. évi IV. törvény magyarázata. II. (Commentary of the Hungarian Civil Code (Act IV of 1959). II. Budapest, 2011. 2215.*

<sup>15</sup> See: GELLÉRT GY. (szerk.): *A Polgári Törvénykönyv magyarázata II. (Commentary of the Hungarian Civil Code II.) Budapest, 1998<sup>4</sup>. 1948.*

<sup>16</sup> WEISS E.: *A túlélő házastárs öröklési jogi jogállása történeti kialakulásában és fejlődési tendenciáiban. (The legal status and its historical evolution and development of the surviving spouse.)* Budapest, 1984. Emilia Weiss points out that a rule similar to the remainder substitute succession was contained in the law of the former German Democratic Republic in the case of joint wills, which are permitted only in respect of spouses.

<sup>17</sup> See the full text of the concept: *The concept of the new Civil Code. Magyar Közlöny, 2002/15/II. Publication based on the 1009/2002. (I. 31.) Government decree. See also: WEISS E.: A Ptk. öröklési jogi könyvréneke koncepciója. (The concept of the book of the Civil Code on law of succession.) Polgári Jogi Kodifikáció 6/2001. 16-27.*

<sup>18</sup> See also especially on this topic: BOÓC Á.: *Az utöröklés intézménye a magyar magánjogban. (The legal institution of the substitute heir in the Hungarian civil law.) Közjegyzők Közönye, 6 (2002). 14 – 15.*

adoption of the current Civil Code, Endre Nizsalovszky had a similar position.<sup>19</sup>)

The Expert Recommendation, edited by Lajos Vékás, contained the following rule regarding substitute succession: “6:32. § (1) A testator’s testamentary disposition according to which another person shall, as of some event or a date, replace the previous legatee in the bequest, shall be invalid. (2) The testator shall validly designate a substitute heir for the estate transferred to the prior designated heir, if the descendent does not have the ability to inherit and dies without obtaining it. The substitute heir designation shall not affect the right of disposition of the pre-heir.” The Recommendation leaves the possibility of substitute legatee, and the rule according to which in case of the death of the primary designated heir stands as alternate heir designation, if its conditions are fulfilled.

However, the Recommendation rejected this possibility on the grounds that it would be difficult to set up a suitable rule for the specific items of the estate, and also would be difficult for the proper separation. At the same time, the Recommendation allowed that a descendant without a will and dying in such a state to designate a substitute heir, which is in fact a new appearance of the *substitutio pupillaris* known from Roman law. The reasons for this are summarized in the Recommendation as follows: “As an exception to the general prohibition on substitute succession, the Recommendation recognizes the institution of *substitutio pupillaris*. This means that an heir can validly designate a substitute heir if the pre-heir cannot make a final will, due to his age or any other reason at the time of his/her designation nor later. However, heirs who are incapacitated for minority or other reasons may freely dispose of the estate, within the limits of regulation of the legal capacity. So this substitute succession means a so-called residue substitute succession.”<sup>20</sup>

During the codification, the Expert Committee justified the substitute succession, inter alia, with claims of royalties, patent fees and other continuously and intermittently enforceable pecuniary claims. In these cases, according to the Expert Committee, it is possible that testators often consider it appropriate for their surviving spouse to be their heir, but they do not want the surviving spouse’s legal heirs to inherit the estate coming from the testator, after the death of the surviving spouse.<sup>21</sup>

The 2009 text of the new Civil Code, approved by Parliament (but never became effective), contains changes compared to the above recommendation. This text is the following:

6: 30. § [Substitute heir and ordering substitute legatee]

(1) The testator’s testamentary disposition according to which another heir shall, as of some event or a date, replace the previous heir in respect of the inheritance or a part thereof, shall be invalid.

(2) In the event of the death of the heir named as the primary heir, an heir shall enter as an alternate heir if the conditions thereof have been satisfied.

(3) Spouses and partners can validly make a will for each other, in which the testator designates a substitute heir in the place of the designated spouse or partner, in the event of the death of the spouse or partner. The disposition of the spouse or partner with the estate exceed-

ing gifts of ordinary value, without the prior permission of the substitute heir or his/her *ex post* approval, is invalid. This provision shall not affect the rights of a third person, acquired in good faith and for a consideration.

(4) The testator shall be entitled to validly designate a substitute heir for his/her estate devolving upon a descendant named as a primary heir for the eventuality if the descendant is lacking testamentary capacity at the time the succession has been opened, and he/she dies without acquiring such capacity.

(5) Substitute legatee depending on a certain moment or condition, and the devise depending on a certain moment or condition shall be valid. A conditional successor designation is also valid, but the condition cannot be for a period after the estate is opened. Conditional successor designation for the period after the opening of the succession, if it’s a not allowed substitution of heir, is invalid. The person who acquired the object of the legacy cannot have control over it, either before the condition or the date, or in the event of death. This provision shall be without validating the right of a third party in good faith and acquired against payment.

The 2012 Codification Committee’s Recommendation also differs slightly from the 2007 and 2009 versions respectively. This version of the text is as follows:

7: 28. § [Substitute heir]

(1) The testator’s testamentary disposition according to which another heir shall, as of some event or a date, replace the previous heir in respect of the inheritance or a part thereof, shall be invalid.

(2) In the event of the death of the heir named as the primary heir, an heir shall enter as an alternate heir if the conditions thereof have been satisfied.

(3) The testator shall be entitled to validly designate a substitute heir in the event of death of his/her spouse named as the primary heir for the estate devolving upon the spouse. The designation of a substitute heir shall not affect the spouse’s *quid pro quo* right of disposition and his/her right to give advancements not exceeding gifts of ordinary value. These rules also apply *mutatis mutandis* to the substitute succession of the registered partner.

(4) The testator shall be entitled to validly designate a substitute heir for his/her estate devolving upon a descendant named as a primary heir for the eventuality if the descendant is lacking testamentary capacity at the time the succession has been opened, and he/she dies without acquiring such capacity. Naming a substitute heir shall not affect the right of disposition of the descendant named as a primary heir applicable within the limits of the provisions on legal capacity.

The 7:28. §. (1) of the draft, as a general rule, does not authorize the substitute succession, since it states that the designation of the successor is invalid and must be considered as an alternate succession if the conditions for it are met. The draft contains two important exceptions. The first is the legacy disposed to the spouse, where the substitute succession is possible, and the second the is the case of a descendant, where the descendant does not have the ability to make final will and dies without such ability. This is in fact the appearance of the *substitutio pupillaris* known from Roman law.

<sup>19</sup> See: NIZSALOVSZKY E.: *A szerzői jog öröklése és a Ptk. tervezete.* (The succession of copyrights and the sketch of the Civil Code.) Magyar Jog 6 (1958). 167-172.

<sup>20</sup> See: VÉKÁS L. (ed.): *Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez* (Expert proposal on the sketch of the new Civil Code.) Budapest, 2008. 1164.

<sup>21</sup> See: WELLMANN GY. (ed.): *Az új Ptk. magyarázata I/VI.* (The commentary of the new Civil Code. I/VI.) Budapest, 2014. 200.

## V.

The text of the new Civil Code, the Act V of 2013, approved text, which entered into force on the subject of succession, is as follows:

7: 28. § [Substitute heir]

(1) The testator's testamentary disposition according to which another heir shall, as of some event or a date, replace the previous heir in respect of the inheritance or a part thereof, shall be invalid.

(2) In the event of the death of the heir named as the primary heir, an heir shall enter as an alternate heir if the conditions thereof have been satisfied.

(3) The testator shall be entitled to validly designate a substitute heir in the event of death of his/her spouse named as the primary heir for the estate devolving upon the spouse. The designation of a substitute heir shall not affect the spouse's *quid pro quo* right of disposition and his/her right to give advancements not exceeding gifts of ordinary value.

(4) The testator shall be entitled to validly designate a substitute heir for his/her estate devolving upon a descendant named as a primary heir for the eventuality if the descendant is lacking testamentary capacity at the time the succession has been opened, and he/she dies without acquiring such capacity. Naming a substitute heir shall not affect the right of disposition of the descendant named as a primary heir applicable within the limits of the provisions on legal capacity.

In our view, if the legislature has permitted succession in two such substantive cases, then the general rules that otherwise prohibit substitute succession are basically meaningless.

The provisions of the new Civil Code relating to substitute succession may be summarized as follows. The new Civil Code states that, as a general rule, the final will, in which by the occurrence of a certain condition the original heir (pre-heir) is replaced by another person entirely or partly, is null. However, in some cases, it is possible for a testator to decide on the inheritance of his/her estate over several generations, concerning the perfectly acceptable view from the testator that he does not want the family property to migrate to another family through further inheritance.

Substitute succession actually functions as an heir deposition in case of death of the heir. The testator may validly designate a substitute heir if he/she transfers his/her property, but he/she does not want the property to get transferred to the legal heirs of the deceased spouse. It is also possible to designate a substitute heir even if the pre-heir would not be able to make a valid final will because of his/her age or due to a lack of final will power, in which case the heir actually uses a quasi guardian replacement.

Thus, the new Civil Code makes the succession applicable, albeit in a relatively narrow range of cases, to certain situations that may be considered sensitive.

Regarding the pre-heir and the substitute heir, Tibor Anka draws attention to a very interesting relationship in the Commentary on the new Civil Code:

"The substitute heir regarding the estate transferred from the testator to the pre-heir is not the heir of the substitute heir, but the heir of the testator, so regarding the estate transferred from the testator to the pre-heir based on the will the pre-heir is replaced by the substitute heir as the heir of the testator, and the pre-heir does not inherit the property as the estate of the pre-heir transferred based on the will. This means that the substitute heir is the successor of the testator, and not of the pre-heir. According to the regulation of the Civil Code, the pre-heir is not only the beneficiary of the estate transferred to him/her from the testator, which belongs to the substitute heir after the death of the pre-heir, but during his/her life is the real owner in cases of legal transactions between its livings."<sup>22</sup>

For the sake of clarity, the new Civil Code - in accordance with the provisions of the old Civil Code - recognizes without limitation the substitute legatee, so the will of a testator to replace the holder from a particular event or date in the legacy. Similarly, to the cases of substitute succession recognized by the Civil Code, substitute legatee is a residual legacy, as - if the testator states otherwise - the deposition of the substitute legatee does not affect the right of disposition and his/her right to give advancements not exceeding gifts of ordinary value.<sup>23</sup>

It is also worth noting that the allowed form of substitute succession in case of the spouse is in fact based on the analogy of the *Berliner Testament*, already mentioned in German law, taking into account that *Berliner Testament* - as above mentioned - is the joint final will of the spouses, according to which the spouses deposit one another as heirs of each other, and after the death of the surviving spouse, the heir will be a third person.

Based on the above, the new Civil Code allows the substitute succession in case of spouses, so the *Berliner Testament* should be transposed into Hungarian law. Although the § 7:23 of the Civil Code, under certain conditions, recognizes the joint will of the spouses (with special formal conditions), but even with the allowed form of substitute succession mentioned in § 7:28, it is not equivalent to the *Berliner Testament*.<sup>24</sup> Considering that the political purpose is clearly that spouses would like to have the possibility to take care of the joint property and each other after their death I think the full implementation of the *Berliner Testament* to the Hungarian law would fulfil this purpose.

In summary, the new Civil Code, although narrow in scope, allows the substitute succession, which is, in our view, an important sign of the recognition of the freedom of final will. So in case of substitute succession, Pandora's box, even if slightly, but has been opened.

<sup>22</sup> See: OSZTOVITS A. (ed.): *A Polgári Törvénykönyv Nagykommentárja IV. (The Big Commentary of the Civil Code IV.)* Budapest, 2014. 508.

<sup>23</sup> See: VÉKÁS L. - GÁRDOS P. (ed.): *Kommentár az új Polgári Törvénykönyvhöz II. (Commentary on the new Civil Code II.)* Budapest, 2014. 2413.

<sup>24</sup> In addition, with regard to the introduction of joint wills, Emília Weiss points out the followings: „Regarding the re-recognition of a joint will particularly the so-called mutual wills and mutual-reciprocal wills require additional regulation in matters of the extent of unilateral revocation of such joint wills, whether the property promised in the joint will should be restricted in free of charge transferring between livings, but today's rapid changes in living, wealth, and family relationships will certainly raise further questions in the course of regulation.”

See: WEISS E.: *A Polgári Törvénykönyv öröklési jogi könyvének kodifikációja elé. (Prior to the codification of the book of law of succession of the Civil Code.)* In: *Magister artis boni et aequi. Studia in Honorem Németh János.* (ed.: KISS D., VARGA I.) Budapest, 2003. 990 - 991.

The jurisprudence, and the legislation that may be influenced by the jurisprudence, will decide in the future whether the box of Pandora will continue to be opening, or closed forever and this legal institution will permanently become a relic of our legal past. For our part, we sincerely hope that the institution of substitute succession, adapting to the changing needs of the 21<sup>st</sup> century, can become a valued and reasonably applicable instrument of modern will law in Hungarian legal practice.

It is important to mention that in connection with the making of wills, some new conditions of the disinheritance may be problematical.<sup>25</sup> The reason of disinheritance, introduced by the new Civil Code, which allows the disinheritance in cases

when that testator was in need of help and the heir denied helping, makes a subjective evaluation possible, so basically can lead to discretionary disinheritance.

The attack of these wills can be successful in front of courts, which can lead to a negative change in trust in the wills and in the social perception of the wills.

However, based on the above, it is still true that the preferred legal instrument of our law of succession is the succession by will. Paraphrasing the Latin sentence slightly: *navigare necesse est* we can say: *testamentum facere necesse est*. Whatever the reefs we encounter on the imaginary cruise of the will-making, or where we may get in storm, the practice will give the answer.

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<sup>25</sup> See also: RATKOVICS G.: *Könnyebb lesz a kitagadás az új Ptk. szerint (Disinheritance will be easier in the new Civil Code.)* <https://arsboni.hu/konnyebb-a-kitagadas-az-uj-ptk-szerint/> Date of downloading: 2018. 11. 08. 22.40