

## The Position of the Surviving Spouse in the Hungarian Law of Succession

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There is no lonelier man in death, except the suicide, than that man who has lived many years with a good wife and then outlived her. If two people love each other there can be no happy end to it.'

*Ernest Hemingway*

### I Introduction

After a person's death, the property and debts of this person will pass to those who survive. Such passing (or transfer) of property and debts belongs to the area of property law. Traditionally, however, in succession matters the general rules of property law are supplemented by special rules concerning to whom and how a person's property passes upon their death: the law of succession.<sup>1</sup>

As the saying goes, the law of succession is one of the most durable parts of civil law. If this statement were true then I could not tell you anything new; I should write about the unchanged succession rules. However, in the new Hungarian Civil Code there are many important changes in this area. On March 15<sup>th</sup> 2014, the new Book Seven of the Hungarian Civil Code, containing the new law of succession, entered into force.

These rules are influenced by socio-cultural, socio-economic and sometimes also religious factors. Generally, succession law does not develop by rapid and radical changes, as for example, does contract law. This may be due to the fact that succession law does not have to respond to the more usual and more rapid changes of business and economic practices and necessities. Its roots reach deeper into the fundamental concepts of justice, morals and society.<sup>2</sup>

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<sup>1</sup> Sjeff van Erp, 'New Developments in Succession Law' *Electronic Journal of Comparative Law*, vol. 11.3 December, <http://www.ejcl.org/113/article113-5.pdf> 1.

<sup>2</sup> Urve Liin, 'Laws of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading' (2001) *VI Juridica International* 114.

The former Hungarian Civil Code (Act IV of 1959 on the Civil Code of the Republic of Hungary, hereinafter referred to as FHCC) was enacted in the socialist era. Prior to that time there had been no private law codex in Hungary; there had been several acts in force, but it was fundamentally a case law system that had applied. The HCC was promulgated on 1<sup>st</sup> May 1960 and provided detailed rules for the private law of succession. Hungarian law is quite similar to German and Austrian law, but in the law of succession there are several rules that differ from those two systems. After 1989–1990, when the socialist system collapsed, the restrictions on private property were removed. Due to the social and economic changes, the role of the law of succession became more relevant. The range of assets that could be held by private individuals also expanded (shares in companies, intellectual property etc). Despite that, the civil law provisions on succession have remained basically unchanged; neither the provisions on intestacy nor the assets that can be inherited have changed. That part of the FHCC has been practically unchanged since its creation (i.e. since 1959). As a result, owing to the court practice of nearly fifty-five years, by now it has become a consistent and transparent area with a huge volume of case-law.<sup>3</sup>

The preliminary problem to be solved in succession matters is the question of how the estate of the deceased is transferred to their heirs.<sup>4</sup> The new Hungarian Civil Code (Act V of 2013 on the Civil Code of Hungary, hereinafter referred to as NHCC) does not change the definition of succession. The estate owned or controlled by a person at the time of decease shall pass in its entirety to the heir.<sup>5</sup> In Hungary there is no estate without a claimant; succession occurs automatically on the strength of law at the moment of the deceased's death.<sup>6</sup> The term 'universal succession' is of modern derivation, and is descriptive of the succession which occurs upon an individual's death. Universal succession means succession by an individual to the entirety of the estate, which includes all the rights and duties of the decedent.<sup>7</sup> The NHCC expressly states that the claim to inheritance is exempt from the statute of limitations; it is a perpetual claim to ownership.<sup>8</sup>

Succession can occur under the law or by testamentary disposition. If the deceased has left a testament, it determines the order of succession. If there is no testamentary disposition, the law provides for the order of succession.<sup>9</sup> In the NHCC, the structure of the succession law follows the logic of the legal titles of succession but this article will not. I suppose that, above

<sup>3</sup> Csehi Zoltán, 'The Law of Succession in Hungary' in Miriam Anderson, Esther Arroyo i Amayuelas (ed), *The Law of Succession: Testamentary Freedom: European Perspectives* (CSIC Press 2011) 170.

<sup>4</sup> A brief discussion relating to terminology is inserted here to acquaint the reader with some of the vocabulary used throughout this article. The word 'heir' is generally used as descriptive of all persons who share in the estate either by testacy or intestacy.

<sup>5</sup> NHCC, section 7:1 [Succession] – FHCC, section 598.

<sup>6</sup> The fact that the succession is considered as having been passed over to the heir in its entirety on the death of the deceased person does not prevent the heir from disclaiming.

<sup>7</sup> George A. Pelletier Jr., Michael Roy Sonnenreich, 'A Comparative Analysis of Civil Law Succession' (1966) 11 (2) *Villanova Law Review*, Article 3. 324–325.

<sup>8</sup> Section 7:2 [Succession Claims].

<sup>9</sup> NHCC, section 7:3 [Titles of Succession] – FHCC, section 599 paras 1–2.

all, we need to talk about intestate succession because the testator makes a testament only if the rules of intestate succession do not live up to their expectations. At the end of this article I will spend a little time on the changes to the compulsory share rules as well.

## II Intestate Succession

In the absence of a testament, the intestate succession will be transferred to the heirs, designated according to the legal principles on the devolution of succession. Basically, these principles are founded on consanguinity, with preference to descendants, excluding more distant relatives.<sup>10</sup> Rules of intestacy are regarded as subsidiary: they are applied only if the testator has made no testament or if the testament does not include provisions for the disposal of the whole estate.

### 1 The Surviving Spouse's Right to Succession

One of the main reforms concerns the position of the surviving spouse in cases of intestate succession. The need to protect the surviving spouse is a generally accepted rule. Although not a blood-relative, the spouse is recognised to have a legitimate claim towards the succession of their partner. In considering the position of the surviving spouse, one should also take into account what the surviving spouse receives through the liquidation of the marital property system.<sup>11</sup> Marriage in Hungarian law creates common ownership. A spouse may be considered as an owner of real property, even if he or she is not registered in the land registry, provided the property has been acquired during the marriage.

The family is no longer seen as a blood relationship, but rather as a community of life, to which the spouse belongs by nature. In considering the position of the surviving spouse, one should also take into account what the surviving spouse receives through the liquidation of the marital property system. It must generally be considered that the spouse, as a rule, is the person closest to the deceased and therefore, the protection and enhancement of the interests of the surviving spouse is fully understandable and entirely appropriate. In doing so, it is also necessary, however, to consider the perspective of surviving children and other close relatives, who likewise have an interest in having the inheritance estate remain in the family. Accordingly, several conflicting interests and perspectives converge in this question, and reaching a resolution fair to all parties is not an easy task.<sup>12</sup>

The surviving spouse's right to succession is fashioned in a number of different ways. First, there are countries where the spouse is limited to the rights of usufruct over the fruits and revenues of the succession. If there are descendants, in Belgium the spouse receives usufruct of

<sup>10</sup> Alain-Laurent Verbeke, Yves-Henri Leleu, 'Harmonization of the Law of Succession in Europe' in Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud H. Hondius, Chantal Mak, C. Edgar du Perron (eds), *Towards a European Civil Code, Fourth Revised and Expanded Edition* (Kluwer Law International BV 2011, The Netherlands) 459.

<sup>11</sup> Verbeke, Leleu (n 10) 466.

<sup>12</sup> Liin (n 2) 119.

the entire estate, while in France, since the Act 2 December 2001, the surviving spouse can choose between such usufruct over the entire estate or a share in full ownership of one quarter of the succession.<sup>13</sup> In several countries, e.g., in Germany, Austria, Denmark, Sweden, Italy, Portugal and Greece, the surviving spouse invariably receives a share of the succession in full ownership. The size of this share varies according to the number of other heirs. In England and Wales, the surviving spouse receives the personal chattels and an amount of money, smaller or larger according to the number of other heirs. In the US Uniform Probate Code the entire succession is awarded to the surviving spouse if there are common descendants or blood relatives other than parents.<sup>14</sup>

An interesting intestate system has been introduced in the Netherlands by the Acts of 3 June 1999 and 18 April 2002, which came into force as of 1 January 2003. All assets and debts are awarded by virtue of law to the surviving spouse, leaving the children with a claim towards that spouse, to be paid in principle upon the death of that spouse. In the Netherlands, the rules of intestate succession were seen as giving inadequate protection to the rights of the surviving spouse. This led to a situation where, in a large number of cases, the surviving spouse was given as complete a right to the deceased's estate as possible by deviating from these intestate rules under a last will. The changes in Dutch succession law were in part aimed at creating a law of intestate succession that was in accordance with the existing legal practice, thus obviating the need to make a last will.<sup>15</sup> The new code is in accordance with the tendencies in the rest of Europe, where the strong position of the surviving spouse to the detriment of the position of the children of the deceased, the equality of all children whether born inside or outside a marriage, the reduction of the rights of the forced heirs away from a substantive share in goods to a less substantive share in value, and the protection of the rights of a surviving partner who was not married or registered to the deceased can also be seen.<sup>16</sup>

## 2 The General Order of Intestate Succession under the FHCC

The general order of intestate succession under the FHCC was as follows.<sup>17</sup> The child of the deceased was the priority heir under intestate succession.<sup>18</sup> Two or more children succeeded in equal shares. In the place of a child or a more distant descendant disinherited from succession,

<sup>13</sup> Brackets note: In the original version of the Code Civil, the surviving spouse hardly had any rights to succession – they only inherited when there were no relatives up to the twelfth degree.

<sup>14</sup> Verbeke, Leleu (n 10) 466.

<sup>15</sup> B. E. Reinhartz, 'Recent Changes in the Law of Succession in the Netherlands: On the Road towards a European Law of Succession?' *Electronic Journal of Comparative Law*, vol. 11.1 (May 2007) 1. <http://www.ejcl.org/111/article111-17.pdf>.

<sup>16</sup> B. E. Reinhartz (n 15) 15.

<sup>17</sup> The hierarchy of the legal heirs is very strict: a person who is 'lower' in the order can only be regarded as a legal heir if all persons standing higher in the hierarchy disqualify. At each level, the estate is divided equally between those entitled.

<sup>18</sup> The NHCC states that all persons have legal capacity (the ability to have rights and obligations) from the day of conception. Even an embryo has the ability to inherit property if the child is born alive. Minors have no legal

the children of a disinherited person succeeded in equal shares.<sup>19</sup> The spouse inherited only the usufruct of the estate, which is called the right of survivorship (widow's right).<sup>20</sup> Only the descendants may have requested restricting (limiting) the usufruct at any time; however, it can only be limited to the extent of securing the needs of the spouse, with a view to the items of property inherited by them as well as their own property and the gains of their occupation. Both the spouse and the heirs may have requested the redemption of the usufruct. No redemption may have been requested with regard to the usufruct of the apartment shared with the deceased with its furniture and equipment. The spouse was entitled to a share of the redeemed property equalling – in kind or money – the share they would inherit intestate as the deceased's child, together with the other descendants. Redemption may have been requested during the probate procedure, or in the absence of it, no later than one year upon opening succession at the notary public otherwise having jurisdiction to conduct the probate procedure.<sup>21</sup> In the absence of any descendant, the spouse or the registered partner inherited the estate.<sup>22</sup> Act XXIX of 2009 on Registered Partnership and the Modification of Rules in connection with Registered Partnership and the Facilitation of Cohabitation allows same-sex couples to register their relationships so they can claim the same rights, benefits and entitlements as opposite-sex couples. These changes to the law of succession have given registered partners of the same sex the same legal status as spouses.

From that point, the FHCC utilises the system called *Parentelen* (statutory heirs), under which blood relatives are grouped into classes corresponding to their relationship to common ancestors.<sup>23</sup> The first *Parentelen* consists of the parents of the deceased and their descendants; the second, the grandparents of the deceased and their descendants, and the third is an incomplete *Parentelen*. In the absence of any descendant, a spouse or a registered partner and both parents of the deceased inherit the estate in equal shares. The descendants of a disinherited parent replace the parent in the order of succession in the same manner as the descendants of a disinherited child replace that child. If the disinherited parent has no children, the other parent or their descendants are the sole heir(s).<sup>24</sup> If there are no descendants, spouse or registered partner, parents, or descendants of parents; the grandparents of the deceased and their descendants become the legal heirs.<sup>25</sup> If neither the grandparents of the deceased nor their descendants

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competency (if less than 18 years of age) or limited legal competency (if 14 years of age or more) and need the legal assistance of a guardian (e.g. one of their parents or another relative) in all legal issues of importance, including succession.

<sup>19</sup> FHCC, section 607 paras 1–3.

<sup>20</sup> FHCC, section 615 para 1.

<sup>21</sup> FHCC, section 616. Courts in Hungary normally do not process succession proceedings. The probate procedure belongs to the scope of activities of the Notary Public in whose territory of competence the last residence of the deceased person was found. If no legal disputes concerning the inheritance arise and no relevant questions remain unanswered, the Notary Public closes the procedure with a decision that hands the inheritance over to the heirs.

<sup>22</sup> FHCC, section 607, para 4.

<sup>23</sup> Pelletier Jr., Sonnenreich (n 7) 336.

<sup>24</sup> FHCC, section 608.

<sup>25</sup> FHCC, section 609.

are eligible for inheritance, more distant ancestors of the deceased become legal heirs in equal shares.<sup>26</sup> In the absence of any other heir, the estate will be obtained by the state.<sup>27</sup>

### 3 The General Order of Intestate Succession under the NHCC

As one can see, contrary to many other European legal systems, a Hungarian spouse does not inherit property from the deceased if the descendants are still alive. The spouse only inherits property as a legal heir in the absence of descendants. The existence of only one child of the deceased, regardless of whether from the present or a previous marriage, or born out of wedlock, leaves the spouse with 'empty hands'. The FHCC solves this problem by declaring that the spouse inherits usufruct in all property not otherwise inherited by the spouse. This legal right is created automatically for the benefit of the deceased's spouse, and provides an unlimited right to use the property. This may create difficult legal situations, e.g. the children of the deceased inherit property which is of no value to them because of restrictions arising from the usufruct of the spouse.

According to the NHCC, the child of the deceased is the priority heir under intestate succession only if the deceased has no surviving spouse or registered partner.<sup>28</sup> Act XXIX of 2009 on Registered Partnership invariably states that the rules for the widow of the deceased shall apply to registered partners.<sup>29</sup> On the other hand, the law still does not apply to the succession of non-registered partnerships, in which case the partner cannot therefore inherit.

If the deceased has a surviving spouse or a registered partner, we have to divide the estate into two parts. The heirs of the apartment shared with the deceased and of the furniture and equipment used in common are the children of the deceased, and the spouse inherits only the usufruct of it. From the rest of the estate, the spouse is entitled to the share they would inherit intestate as the deceased's child, together with the other descendants.<sup>30</sup> So, if the deceased has two children, the spouse is entitled to usufruct on the apartment shared with the deceased (on its furniture and equipment) and the ownership of one third of the rest of the estate. However, under an allocation agreement<sup>31</sup>, instead of a child share, the spouse may be granted usufruct in respect of the entire estate.<sup>32</sup> If the spouse of the deceased has the right of survivorship on a property as an heir, such property will be released after the right of survivorship is terminated.<sup>33</sup>

The matrimonial home and its contents are used by the entire family, though they undoubtedly have particular importance to the surviving spouse as a major asset that may largely

<sup>26</sup> FHCC, section 610.

<sup>27</sup> FHCC, section 599 para 3.

<sup>28</sup> NHCC, section 7:55 [Succession by descendants] para 1.

<sup>29</sup> See section 3 para 1, item *c*.

<sup>30</sup> NHCC, section 7:58 [Spouse's share from the estate contemporaneously with a descendant] para 1.

<sup>31</sup> Heirs are entitled to share the estate – pertaining to succession property exclusively – by agreement concluded within the framework of probate proceedings. In the case of an allocation agreement the estate shall be delivered under the title of succession according to the agreement. See NHCC, section 7:93 [Allocation agreement].

<sup>32</sup> NHCC, section 7:58 [Spouse's share from the estate contemporaneously with a descendant] para 3.

<sup>33</sup> NHCC, section 7:88 [Delivery of specific property from the estate encumbered by right of survivorship].

determine their standard of living in widowhood. Thus, to the extent that the application of succession law and the preferences it provides to the surviving spouse help to ensure the perpetuation of the same living conditions as those that existed prior to the death of the intestate spouse, they provide stability and security; not only in the financial sense, but also spiritually and emotionally. Average life expectancy has increased substantially, which has also meant that, in most instances, the death of the intestate occurs when their children are largely middle-aged and financially secure with their own homes and families. As such, surviving children are not likely to depend on the matrimonial home and contents for their own habitation, which will, however, continue to be of vital importance to the surviving spouse.<sup>34</sup>

If a spouse or registered partner remarries or enters into another registered partnership, their usufruct will not cease to exist.<sup>35</sup> The usufruct cannot be limited and only the spouse has the right of redemption at any time for future consideration. Redemption of usufruct shall be carried out in due consideration of the spouse's and the descendant's reasonable interests. It is unchanged that the spouse is entitled to a share of the redeemed property equalling the share they would inherit intestate as the deceased's child, together with the other descendants.<sup>36</sup>

In the absence of any descendant, the spouse or the registered partner inherits the estate only if the deceased has no surviving parents.<sup>37</sup> If the deceased has parents, we have to divide the estate into two parts. The heir of the apartment shared with the deceased and of the furniture and equipment used in common is the spouse with no beneficiary ownership by the parents. The spouse inherits half of the rest and the other half goes to the parents. If one of the parents is disinherited, the other parent and the spouse take the disinherited parent's place.<sup>38</sup> So, for example, if the father of the deceased is deprived of his inheritance, the spouse inherits the apartment shared by the deceased (with its furniture and equipment) and five eighths of the rest (half plus one eighth) and the mother of the deceased inherits three eighths of it (one quarter plus one eighth).

It is unchanged that the spouse of the deceased is not entitled to inherit if they were separated at the time of the opening of the succession and it is manifestly evident from the circumstances that there was no reasonable expectation of reconciliation. Disinheritance of the deceased's spouse can only be alleged by a person who, as the result of the disqualification of the spouse, would themselves inherit or would be exempted from an obligation or other burden to which they are bound by virtue of the testamentary disposition.<sup>39</sup>

In the absence of any descendant, spouse or registered partner, the heirs are the parents of the deceased and their descendants.<sup>40</sup> If there are no descendants, spouse or registered partner,

<sup>34</sup> Liin (n 2) 121.

<sup>35</sup> On the other hand, the FHCC put an end to usufruct if a spouse or registered partner remarried or entered into another registered partnership. FHCC, section 615 para 2.

<sup>36</sup> NHCC, section 7:59 [Spouse's right to redemption].

<sup>37</sup> NHCC, section 7:61 [Spouse as the sole heir].

<sup>38</sup> NHCC, section 7:60 [Spouse's share from the estate over parent].

<sup>39</sup> NHCC, section 7:62 [Spouse's debarment from intestate succession] – FHCC, section 601 paras 1, 3.

<sup>40</sup> NHCC, section 7:63 [Succession by parent and parent's descendant].



parents, or descendants of parents; the grandparents of the deceased and their descendants become the legal heirs.<sup>41</sup> However, the NHCC introduces one more Parental with the great-grandparents of the deceased and their descendants. According to the new rules, if neither the grandparents of the deceased nor their descendants are eligible for inheritance, not the more distant ancestors of the deceased become legal heirs in equal shares but before them the great-grandparents of the deceased and their descendants.<sup>42</sup> It was a great need in practice to expand inheritance by collateral heirs.

## 4 Lineal Succession

The NHCC does not abolish lineal succession, which substantially means that certain properties are returned to the deceased's family if the deceased leaves no children or descendants, instead of going to the spouse. This is a special form of succession, originally made to replace feudal restrictions to the principle of the freedom of inheritance. Linear succession ensures that any assets belonging to the family of the deceased are returned to their family and not to another person, particularly the spouse of the deceased. Assets falling under the rules of linear inheritance are an independent sub-category of the estate.

If the legal heir is not a descendant of the deceased,<sup>43</sup> a property that has come down to the deceased from an ancestor by inheritance or by donation is subject to lineal inheritance. Property inherited or donated from a brother or sister or his or her descendant is also subject to lineal inheritance if the property had been inherited or donated by the brother or sister or their descendant from their and the deceased's common ancestor. Whosoever would inherit under the title of lineal succession shall prove the lineal nature of the property.<sup>44</sup>

A parent shall succeed to property that has come down to the deceased from them or one of their ancestors. Descendants of a disinherited parent shall succeed in his or her place according to the general provisions on intestate succession. If there is neither a parent who is entitled to succeed to a lineal property nor a parental descendant, the grandparent, and if there is no grandparent, a more distant ancestor of the deceased shall inherit the property that has come down to the deceased from them or one of their ancestors.<sup>45</sup> The spouse inherits the usufruct of the linear property and, after redemption, the spouse receives one third of it. The usufruct cannot be limited and both the spouse and the lineal heir have the right to request the redemption of usufruct at any time for future considerations with one exception: redemption from the spouse

<sup>41</sup> NHCC, section 7:64 [Succession by grandparent and grandparent's descendant].

<sup>42</sup> NHCC, section 7:65 [Succession by great-grandparent and great-grandparent's descendant]. According to section 7:66 [Succession by distant relatives] if there are no great-grandparents and descendants of great-grandparents, or if they are excluded from succession, the distant relatives of the decedent shall become legal heirs in equal shares. In the absence of legal heirs the estate shall revert to the State. NHCC, section 7:74 [Succession by the State of necessity] para 1.

<sup>43</sup> The total absence or disinheritance of descendants who could be regarded as legal heirs (particularly children, grandchildren, and great-grandchildren) is the first criteria necessary to qualify for linear succession.

<sup>44</sup> NHCC, section 7:67 [Lineal property] – FHCC, section 611.

<sup>45</sup> NHCC, section 7:68 [Lineal heirs] paras 1–2. – FHCC, section 612 paras 1–2.



relating to usufruct on the apartment used together with the deceased, including its furniture and equipment, may not be requested.<sup>46</sup> Redemption of the usufruct shall be carried out in due consideration of the reasonable interests of the holder of usufruct and the heir to the property.<sup>47</sup> If there is no lineal heir, lineal property shall be treated the same as the deceased's other property.<sup>48</sup> Lineal property shall be inherited in kind. If succession in kind appears to be impossible or impractical, the court may – at the request of either of the parties affected – order payment of the monetary value of the lineal property.<sup>49</sup>

Under the FHCC, provisions relating to lineal succession cannot be applied to lineal property that no longer exists at the time of the decedent's death, or to property that replaced lineal property, or to property purchased for the value of lineal property.<sup>50</sup> The judicial practice exceeded this rule and allowed lineal inheritance when the donation was money in order to buy something, for example a house. The practice said that the real donation was the house; the donor just simplified the transaction.<sup>51</sup> However, it should be remembered that the donor could not have bought the house because of the restrictions on obtaining property in the era of socialism. After lifting the controls the reason for this practice ended but it still exists. The NHCC incorporates into law that a property that has replaced lineal property or was purchased for the value of the lineal property can be the subject of the lineal inheritance.<sup>52</sup> I think this rule will result in many evidence problems.

### III Testate Succession

In Hungarian law, the types of testament are the last will, contract of inheritance (contract of succession) and testamentary gift<sup>53</sup> (*donatio mortis causa*). The minimal requirements for a testament are proof that: the declaration was made by the testator and contains their testament

<sup>46</sup> Under the FHCC no inheritance, under the title of lineal succession, may be claimed with regard to furniture and equipment of the apartment used in common from the surviving spouse after fifteen years of marriage. Section 613 para 3.

<sup>47</sup> NHCC, section 7:69 [Spouse's usufruct on lineal property] – FHCC, section 615 para 1 and section 616 para 4.

<sup>48</sup> NHCC, section 7:68 [Lineal heirs] para 3. – FHCC, Section 612 para 3.

<sup>49</sup> NHCC, section 7:71 [Lineal estate] – FHCC, section 614.

<sup>50</sup> FHCC, section 613 para 1. Gifts of common value are also exempt from these provisions. Substitution or compensation for the value of lineal property that does not exist at the time of the deceased's death (e.g. property that was transferred, consumed, or has perished) is not affected according to paragraph 2.

<sup>51</sup> PK No. 81, item *a*).

<sup>52</sup> NHCC, section 7:70 [Property excluded from lineal succession]. The provisions on lineal succession shall not apply to gifts of ordinary value. The provisions on lineal succession shall not apply to any property that no longer exists at the time of the testator's death, however, they shall apply to any substitute property or a property purchased from the proceeds received for such property. No claim can be filed, on the grounds of lineal succession, for furnishings and/or household accessories of common value against the deceased's spouse.

<sup>53</sup> Testamentary gift is a special testament. If a gift has been given under the condition that the donee outlives the donor, the regulations governing gifts shall apply to the contract, with the exception that the formal requirements to be applied shall be the same as those for contract of inheritance. A testamentary gift shall be deemed valid only for a bequest that would qualify as a specific legacy in a will. NHCC, Section 7:53 [Testamentary gift].

(i.e. a testament cannot be made by an agent) and it contains a declaration that makes it obvious the testament has the character of a ‘real’ testament. A declaration lacking one of these two characteristics is not regarded as a testament and is treated by law as a ‘non-existing testament’. The notary public who is in charge of the procedure is obliged to verify *ex officio* the existence of the minimal requirements.<sup>54</sup>

## 1 Formal Requirements

In Europe, four types of will may be distinguished: the holographic, the witnessed, the closed and international will and the public or notarial will. The holographic will must be written and signed personally by the testator. This type of will exists in most European countries, although the formal requirements are not as strictly applied in all of them. It does not exist in the Netherlands and Portugal, where the intervention of a notary is always required. Such a will is also unknown in Common Law jurisdictions, e.g. England and Ireland. Typical for these Common Law jurisdictions is the witnessed will. It may be written personally, but also typed or even written by a third person. Essential here is the simultaneous presence of witnesses at the moment of signing the will, their confirmation of this signature and their signing of the will. A similar type of will is known in Austria and Denmark. The closed will, written or typed by the testator or a third party and signed by the testator, must be put in a closed envelope and presented to a notary and several witnesses. Such a will is known in the Netherlands, France, Denmark, Italy, Spain, Portugal and Greece. Some of these countries also recognize the international will created by the Treaty of Washington of 26 October 1973.<sup>55</sup> Other countries, such as Belgium, have replaced the closed will with this international will. A public will in most countries is drafted by a notary but signed personally by the testator. In Austria, a public will can also be made by a judge. Under Belgian and French law, the will must be dictated by the testator to the notary. In other countries, such as Germany and Austria, delivery of a document confirmed by the testator to be their will, is sufficient. Generally, the presence of witnesses is required.<sup>56</sup>

The basic form of will in Hungarian law is the written will. Oral wills are only regarded as valid if they were made under life-threatening conditions and the lack of an ability to write.<sup>57</sup> According to the FHCC, written wills can be divided into public wills (made with the aid of a notary public or before a court),<sup>58</sup> private wills (are made in three different forms: holographic wills, allographic wills and wills deposited at a notary public). A private will can only be written in a language that the testator can understand, read and write, not exclusively in Hungarian.<sup>59</sup> Non-standard forms of writing (e.g. shorthand, cryptography, Cyrillic or Arabic characters) are

<sup>54</sup> Vékás Lajos, *Öröklési jog (Law of Succession)* (Eötvös József Könyvkiadó 2013, Budapest) 39.

<sup>55</sup> The 1973 Treaty of Washington regarding international wills is a very valuable attempt to unify one aspect in the area of succession law.

<sup>56</sup> Verbeke, Leleu (n 10) 467.

<sup>57</sup> FHCC, section 634 – NHCC, section 7:20 [Exceptional nature of oral wills].

<sup>58</sup> FHCC, section 625 para 1.

<sup>59</sup> FHCC, section 627.

not valid, even if the person using them is capable of writing and reading such characters.<sup>60</sup> The document must be identified as a last will, specify the date of creation and the place where it was made, and include the signature of the testator. If composed of more than one sheet, every sheet (not page) has to be numbered and signed by the testator and witnesses. A holographic will is hand-written and signed by the testator. An allographic will is valid if signed by the testator in the presence of two witnesses or, if previously signed, the signature is declared to be his or her own before two witnesses. The witnesses' knowledge of the contents of the will and their awareness that the testator has drafted a will are not conditions for the validity of the will. A will is regarded as invalid if a witness cannot verify the testator's identity, or if the testator is a minor or legally incompetent or illiterate. Private wills do not have to be written by the hand of the testator; however, the testator must sign the will and may deposit it personally with a notary public, either as an open document or a sealed document, specifically marked as a will.<sup>61</sup>

According to the new rules, a public will must be drafted with the cooperation of a notary public and cannot be taken before a court.<sup>62</sup> The formal requirements for a valid last will are simplified in the NHCC, in order to give more weight to substance (the deceased's intent) than to form (validity rules). For example, the NHCC does not require the testator to indicate on the last will the place where it has been made. It is all the same that the testator writes a last will on a fascinating mountain-top or get bored with their life reading my article. In order to the last not cannot happen to you, let's take look at the most important changes in testate succession related to spouses.

## 2 Joint Wills

A last will made in any form by two or more persons within the same deed is invalid in order to prevent abuses.<sup>63</sup> However, under the NHCC, spouses can make joint wills at the time of their coexistence if they meet several formal requirements. A written joint testament is valid if one testator writes it with their own hand from the beginning to the end, and signs it; and the other testator declares with their hand in the same deed that the document includes also their testament. If the testament consists of several separate sheets, it is valid only if all of its sheets are numbered in a continuous order and all sheets are signed by the other testator as well. A joint testament written by another person is valid if both testators sign it in the joint presence of two witnesses, or – if it had been signed by them before – acknowledge in the presence of two witnesses the signatures as their own signature. A testament written by another person consisting of several separate sheets is only valid if all of its sheets are numbered in a continuous order, and all sheets are signed by the testators and by both witnesses. The joint will is also valid if it is a public will drafted before a notary public.<sup>64</sup>

<sup>60</sup> FHCC, section 628 para 3.

<sup>61</sup> FHCC, sections 629–630.

<sup>62</sup> NHCC, section 7:14 [Notarial will] para 1.

<sup>63</sup> NHCC, section 7:23 [Joint will] para 1. – FHCC, section 644.

<sup>64</sup> NHCC, section 7:23 [Joint will] paras 2–3.

The joint will is inoperative if they live in legal separation after the time of making the will and they do not reconcile the marriage before opening succession. The joint will become inoperative if, after making the will, both or one of them has a baby (including adoption), except if there is other provision in the contract.<sup>65</sup> In some countries (for example, in France) joint wills are not permitted due to the belief that there is a difficulty in revoking such wills.<sup>66</sup> In Germany spouses are permitted to execute joint wills, and frequently do so. Any revocation during the lifetime of both spouses requires a publicly certified declaration addressed to the other spouse. After the death of one spouse, the surviving spouse can only affect a revocation by first renouncing all rights under the will of the deceased spouse. About this problem, our new codex says that the unilateral revocation (withdrawal) is invalid if the testament excludes it or it happens without the other testator's notification. The valid unilateral revocation (withdrawal) makes the other testator testament inoperative only if neither of them would have made the testament without the other.<sup>67</sup> It is remarkable that our legislator treats spouses as they were one soul in two bodies, but needless to say that unfortunately most of the time it is not true to life, so I am afraid that joint wills will be breeding grounds for abuses.

### 3 Reversionary Succession

Another important change is connected with reversionary (substitute) succession. Any testamentary disposition according to which the original heir is replaced by another heir with regard to the estate or a part of that from a given date or in the case a certain event would happen is invalid. However, in the event of the death of the heir named as the primary heir, an heir enters as an alternate heir if the conditions thereof have been satisfied.<sup>68</sup> In the FHCC, the rules are completed here but the NHCC rules are continued. The appointment of a reversionary heir, naming an heir for the case of the decease of the spouse, is valid and does not affect the spouse's contingent right of disposition and their right of donation no more than the gift of common value. The appointment of a reversionary heir is also lawful in cases of *substitutio pupillaris* (for a child who has no testamentary capacity at the time of the descent and distribution and dies without getting it).<sup>69</sup>

### 4 A Last Will Made For The Benefit of a Spouse before Separation

There is a new section in the Hungarian Civil Code about revocation of a last will made for the benefit of a spouse or domestic partner. In the FHCC, it was reason for disqualification but only for spouses and registered partners. A decedent's spouse or registered partner was not entitled to inherit by virtue of a last will dated prior to their separation if they were already separated at

<sup>65</sup> NHCC, section 7:43 [Annulment and revocation of joint wills] paras 1–2.

<sup>66</sup> Pelletier Jr., Sonnenreich (n 7) 348.

<sup>67</sup> NHCC, section 7:43 [Annulment and revocation of joint wills] paras 3–4.

<sup>68</sup> FHCC, section 645 para 1. – NHCC, Section 7:28 [Reversionary heir] paras 1–2.

<sup>69</sup> NHCC, section 7:28 [Reversionary heir] paras 3–4.

the time of descent and distribution, unless the circumstances suggest that the decedent had not revoked their testamentary disposition because they had intended to bequeath a disposition to his spouse or registered partner regardless of their separation. If the spouses or registered partners were separated at the time of descent and distribution, disinheritance of the deceased's spouse or registered partner could only be alleged by a person who, as the result of the disqualification of the spouse or registered partner, would themselves inherit or would be exempted from an obligation or other burden to which they are bound by virtue of the testamentary disposition.<sup>70</sup>

According to the NHCC, a last will made for the benefit of the spouse or domestic partner during the period of matrimonial relationship or cohabitation is inoperative if the marriage or partnership no longer exists at the time of opening the succession, and it is manifestly evident from the circumstances that there was no reasonable expectation of reconciliation and that the testator did not wish to leave any property to their spouse or domestic partner.<sup>71</sup> The reason for this change is simply dogmatically that it has no practical influence.

## 5 Contract of Inheritance

After discussing the joint will and reversionary succession, let's see another type of testament – the contract of inheritance.

According to the FHCC, in a contract of inheritance the deceased undertakes to make the other contracting party their heir against receiving maintenance or life annuity.<sup>72</sup> The obligation to provide maintenance includes general care, medical treatment, nursing, and burial.<sup>73</sup> Life annuity is a specific sum of money or a specific quantity of agricultural produce periodically.<sup>74</sup> In an inheritance contract, the testator may also make other testamentary disposition; the other party has no such right.<sup>75</sup> That's why its formal requirements follow those of a last will with two exceptions. The provisions on private wills shall be applied regarding the validity of contracts of inheritance, with the exception that the consent of the legal representative and the approval of the guardian shall be required for the validity of a contract of inheritance made by a person of limited capacity and, furthermore, that the formal requirements of wills written by other persons shall apply to contracts of inheritance, even if they are drafted in the handwriting of one of the parties.<sup>76</sup> This contract has a fiduciary nature and continuous service must be provided; it must be concluded for a long term. If the provider pays a life annuity then the fiduciary, personal relationship is not that important.<sup>77</sup> The contract of inheritance

<sup>70</sup> FHCC, section 601 paras 2–3.

<sup>71</sup> NHCC, section 7:46 [Annulment of a will made for the benefit of a spouse or domestic partner].

<sup>72</sup> FHCC, section 655 para 1.

<sup>73</sup> FHCC, section 586 para 3.

<sup>74</sup> FHCC, section 591 para 1.

<sup>75</sup> FHCC, section 655 para 2.

<sup>76</sup> FHCC, section 656. – NHCC, section 7:49 [Validity of a contract of inheritance].

<sup>77</sup> BH 1996. 534. – Legf. Bir. Pfv. V. 22.148/1995. sz., BH 2000. 105. – Legf. Bir. Pfv. III. 20.539/1995. sz.

concluded by spouses as deceased with a third person is considered valid, even if it is drafted in the same deed.<sup>78</sup> The deceased may not dispose *inter vivos* or *mortis causa* over their property that has been made the subject of a contract of inheritance. With regard to real estate subject to a contract of inheritance, restraint on alienation and encumbrance must be recorded in the land registry for the benefit of the party who has concluded the contract with the deceased.<sup>79</sup> The prohibition on alienation and encumbrance is based on the law (on the FHCC provisions). Once it has been recorded in the land registry, the acquisition of the contractual heir is guaranteed with the effect of property rights. In exceptional cases, the courts acknowledge that the testator may make another last will, if they have already started the procedure or lawsuit with the purpose of ceasing or terminating the contract of inheritance.<sup>80</sup>

The definition of a contract of inheritance is much wider in NHCC. The contract can be concluded for a third person's (for example for spouse's) maintenance, life annuity or just for care. If the contracting party's obligation is a third person's maintenance, life annuity or care, after the deceased's death, the real estate subject to a contract or right of support must be recorded in the land registry for the benefit of the third person.<sup>81</sup> The contract of inheritance concluded by spouses as deceased with a third person is considered valid, even if it is drafted in the same deed. If there is no other contractual provision, the surviving spouse inherits usufruct on the flat shared with their wife or her husband with its furniture and equipment.<sup>82</sup> The contracting parties can exclude a restraint on alienation and encumbrance.<sup>83</sup>

## IV Compulsory Share

And now a few words about the changes of compulsory share. Only a few, because I am prejudiced, being a great opponent of this legal institution and if I had been the legislator I would have cancelled it. The original function of the compulsory share can no longer be justified; its function of supporting the young generation with establishing an independent life has become obsolete by now, owing to the increase in life expectancy.

Compulsory share has existed in Hungarian law since 1852. The Hungarian rules upheld this institution, which was adopted from the Austrian ABGB. The compulsory share has become an integral part of the Hungarian private law culture; this cultural tradition practically survived the modifications of the Civil Code and it remains unaffected by re-codification.<sup>84</sup> The reason is that

<sup>78</sup> Section 73 of the Decree-Act No. 11 of 1960.

<sup>79</sup> FHCC, section 657 para 1.

<sup>80</sup> BH 1994. 80. – Legf Bír. Pfv. II. 20 791/1993. sz.

<sup>81</sup> NHCC, section 7:48 [Contract of inheritance] paras 1–2.

<sup>82</sup> NHCC, section 7:51 [Contract of inheritance concluded by spouses].

<sup>83</sup> NHCC, section 7:50 [Transfer of estate] para 1.

<sup>84</sup> The elimination of compulsory share has been raised in the Hungarian legal literature, see Besenyei Lajos, 'De lege ferenda gondolatok az öröklési jog köréből. [De lege ferenda Reflections on the Law of Succession]' (2008) LIII Acta Universitatis Szegediensis de Attila József Nominatae, 33–43.

the basis of society is the family and not the single individual. The basis of social coexistence is not the unrestricted and unconditional free will of the individual but rather the written and unwritten rules of social life. This situation of social coexistence is manifested in the compulsory share.<sup>85</sup> One should distinguish between the Anglo-American legal systems, where the freedom of will has traditionally been unlimited, and to a large extent still is.<sup>86</sup> As opposed to that, the civil law countries defend the notion of forced share, thereby stating that the estate does not exclusively belong to the deceased but at least partially also to their family, who may not be deprived of the entire estate.<sup>87</sup>

The institution of compulsory share reflects the attachment of the estate to the family; certain persons who were the closest to the testator are entitled to the minimum share to be taken primarily from the estate. The deceased's descendants, spouse, registered partner and the deceased's parents are entitled to a compulsory share if, at the time of the opening of succession, they are an intestate heir of the deceased or they would be an heir in the absence of testamentary disposition.<sup>88</sup> Under the FHCC, the descendants and the parents are entitled to a compulsory share equalling half of the share they would receive as an intestate heir – calculated according to the basis of the compulsory share.<sup>89</sup> The basis for the calculation of a compulsory share is the net value of the estate plus any donations granted by the testator during their lifetime at the time of their donation. However, if the net value of a donation at the time it is made is unjust to any person concerned, the court is entitled to determine the value of the donation in the light of the circumstances.<sup>90</sup> If the spouse would be entitled to usufruct as intestate heir, their compulsory share is the limited extent of the usufruct covering their needs, with account to the items of property inherited by them as well as their own property and the results of their work. The spouse would otherwise be entitled to a compulsory share equalling half of their share as an intestate heir.<sup>91</sup>

The extent of the compulsory share is changing in the NHCC. Those entitled to a compulsory share receive a compulsory share equalling one third of the share they would receive as intestate heir – calculated according to the basis of the compulsory share. If the spouse would be entitled to usufruct as intestate heir, their compulsory share is the limited extent of the usufruct covering their needs, with regard to the items of property inherited by them. The spouse who is entitled

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<sup>85</sup> Csehi (n 3) 177.

<sup>86</sup> In the Anglo-American jurisdictions, freedom of a will is not restricted, but those persons whom the deceased was bound legally or morally to support during their lifetime may claim a right of maintenance from the estate. The courts are given a discretionary power to award a so-called family provision.

<sup>87</sup> Verbeke, Leleu (n 10) 468.

<sup>88</sup> FHCC, section 661. – NHCC, section 7:75 [Compulsory heirs]. In Europe there is a tendency towards reducing the class of heirs entitled to a forced share. Descendants are invariably recognised as being entitled to a forced share. Often also the surviving spouse is protected through a reserved right. Forced share rights for ascendants have been limited or abandoned. Reserved rights for brothers and sisters are very rare and seem to have been increasingly excluded. Verbeke, Leleu (n 10) 468.

<sup>89</sup> FHCC, section 665 para 1.

<sup>90</sup> FHCC, section 666 paras 1–2.

<sup>91</sup> FHCC, section 665 para 2.



to usufruct as a legal heir is entitled to lay claim to his or her compulsory share as if his or her usufruct had been redeemed.<sup>92</sup>

It would only be proper to ask what the reason for this reduction is. I do not know what to say to you, because it was not a prepared and conscious modification, just a political one and every competent person was very surprised.<sup>93</sup>

Compulsory share is not a claim to inheritance: its term of limitation is five years.<sup>94</sup> The right to a compulsory share does not amount to succession, even if it is linked to the testator's death. It is, in fact, a claim under the law of obligations, which those entitled to the compulsory share must enforce. It must be filed at the probate proceedings and enforced against the obligors. Belgian law still applies, with few exceptions, the traditional Napoleonic forced share property right upon the assets of the succession. The German 'Pflichtteil' represents only a claim in money for the protected heir; he or she has no property rights upon the assets of the succession. Under the new Dutch legislation, since 2003, the protected heir is reduced to a creditor of the succession. In France, the entitlement of a protected heir to the assets of the succession was limited to the relationship towards third parties. In the internal relationship between heirs, the forced share right has been reduced since 1971 to a right in value. Under the new French legislation in force since 2007<sup>95</sup> the forced share right has been reduced to a right in value in all cases.<sup>96</sup>

## V Conclusion

Although the law of succession is generally considered rather fixed and static, especially as compared to contract law or even family law, the last fifty years have seen many important changes in this body of law.<sup>97</sup> The social problem to be solved by the law of succession is the issue of transferring property after death, and how and to whom. Even considering all of Europe as part of the modern Western capitalist world, the social problem involved is of a morally and culturally more delicate nature than contract law. Perhaps the law of succession (even more than family law) is a field reserved to local rules and customs, a field in which the desire or need for unification seems to be moderate.<sup>98</sup>

In many European jurisdictions, the law of succession is currently undergoing reforms or has been reformed. From the perspective of contemporary comparative law, the law of succession constitutes part of a country's cultural heritage. It differs from all of the other branches of private

<sup>92</sup> NHCC, section 7:82 [Extent of compulsory share of inheritance].

<sup>93</sup> See further Vékás Lajos, 'Bírálat és jobbitó észrevételek az új Ptk. Törvényjavaslatához (a zárószavazás előtt). [Comments, criticisms and improvements on the new Civil Code (before the final vote)]' (2013) 1 Magyar Jog, 1–7.

<sup>94</sup> NHCC, section 7:76 [Lapse of right to compulsory share].

<sup>95</sup> See Act of 23 June 2006.

<sup>96</sup> Verbeke, Leleu (n 10) 468.

<sup>97</sup> Liin (n 2) 124.

<sup>98</sup> Verbeke, Leleu (n 10) 462.

law in that it most closely reflects a given society's traditions, achievements, beliefs, practices, views and legal customs. The law of succession is to a large extent influenced by local rules, moral values and cultural conventions. For these reasons, a harmonised and unified law of succession is neither feasible nor desirable. However, were one to evaluate the current state of the law from the perspective of whether the Hungarian law of succession has considered the thrust of current developments throughout the world, one would have to answer affirmatively.