Recent Developments in German Succession Law

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I. General tendencies

1. Legislation

a. Consolidated Promulgation of the Civil Code of Jan 2, 2002

The Bürgerliches Gesetzbuch (BGB)\(^1\) has been completely consolidated as of January 2, 2002\(^2\) due to a significant reform of the law of obligations which came into force on January 1, 2002 with the mere purpose to avoid textual errors which might have been caused by lots of changes of the BGB during the last century. Notwithstanding some minor corrections concerning the new German orthography as well as paragraph headlines this consolidated version did not change anything in BGB book no 5 on the law of succession.

Moreover there have even been very few changes in succession law during the last decade despite ongoing debates on several topics to be or not to be reformed. Only three remarkable changes since the mid-nineties are worth a discussion: The reform concerning succession rights of children born out of wedlock, the implementation of succession rights for so-called “life-partnerships” of same sex couples and changes and a new form for wills to be made by persons unable to speak and write.


The Erbrechtsgleichstellungsgesetz (act on equalization of succession rights) which came into force on April 1, 1998 eliminated all rules dealing with children born out of wedlock in succession law. From July 1, 1998 according to the Kindschaftsrechtsreformgesetz (act on the reform of the law of children) children born out of wedlock did no longer fall within a different category or status, making the application of general succession law to all relatives regardless whether there parents were married or not a necessity. In particular the Erbersatzanspruch (claim for succession substitute) under former §§ 1934a et seq BGB and the Vorzeitiger Erbausegleich (settlement of succession rights inter vivos) under former §§

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1 Abbreviations in this article follow the German system and language. They are explained in English at the first point of appearance. The German Civil Code (Bürgerliches Gesetzbuch) is referred to as “BGB”, paragraphs are noted as “§”.

1934d *et seq* BGB do no longer apply if the decedent dies after March 31, 1998 unless there has been a valid settlement under §§ 1934d BGB before that date (Art 227 EGBGB).

c. Succession Rights of same sex “Life-Partner”

The *Lebenspartnerschaftsgesetz* (LPartG; act on life-partnership), in force since August 1, 2001 implemented a new type of legal cohabitation which is open only to same sex couples. As the (then socialdemocrat-green) majority in the federal parliament (*Bundestag*) on one hand wanted to create kind of a “same-sex-marriage” and on the other hand to keep distance from the traditional concept of marriage as protected by Art 6 (1) of the constitution in order to avoid a verdict of unconstitutionality by the *Bundesverfassungsgericht* (BVerfG), the rules on life-partnership were promulgated in a special law instead of the BGB. Moreover those rules originally resembled an erratic selection out of the rules which are in force for marriages. The 2001 legislator re-assembled paragraphs, created new legal phraseology and left significant blanks in the new system in order to give proof of creating something completely different from marriage.

After the BVerfG had rejected a lawsuit that had been brought by several (conservative) governments of the *Bundesländer* (Federal States) claiming unconstitutionality, civil law rules on life-partnership became almost completely assimilated to marriage under a reform law which came into force from January 1, 2005. Nevertheless the rules on succession of life partners remain to be found in the LPartG which only sometimes refers to the respective rules for marriage in the BGB. Those rules do only apply to formal life-partnerships which have been entered into under § 1 LPartG. They do neither apply to mere cohabitation of same sex couples nor are such rules applicable to unmarried couples of different sexes.

Although § 10 LPartG dealing with succession rights looks quite erratic when compared to the succession rules for spouses in §§ 1931 *et seq* BGB, there are no material differences.

If the estate is intestate § 10 (1) and (2) LPartG grant the same shares to the surviving partner as a spouse would take under § 1931 BGB including the device on household items (§ 10 (1) S 3, 4 LPartG, see § 1932 BGB). If the life partners did live under the marital property system of *Zugewinngemeinschaft* (participation in marital gain), which under the 2005 reform became the property system imposed by law if there is no contract to the contrary, even § 1371 (1) BGB applies according to § 6 S 2 LPartG. There is no calculation of *Zugewinn* (marital gain) if one life partner dies intestate. Instead the surviving partner will take an increase of his or her share by one fourth of the estate. The same method applies – since the marital property regime of *Zugewinngemeinschaft* was created for spouses in 1958 – to a

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3 Introductory law to the BGB.
4 Federal Constitutional Court.
5 There remain significant differences in taxation laws and other public laws which can be changed by the Federal legislator only with the consent of the second chamber, the *Bundesrat* where a majority of the Federal States opposed the entire reform.
6 The only remaining difference is that adoption – with the exception of step-child-adoption – cannot be performed by same sex couples.
7 Although the German word “Gemeinschaft” would literally mean “community” there is no community property under this regime rather a mere valorization and distribution of gains which have been achieved during the marriage by one or both of the spouses.
surviving spouse regardless whether the deceased or the surviving spouse had the higher gains during marriage.  

If the estate is testate a surviving life-partner is entitled under § 6 LPartG to the same Pflichtteilsanspruch (claim to a forced share) as a surviving spouse. On the other hand life-partners are entitled under § 10 (4) LPartG to testate commonly, a privilege previously granted only to spouses (§ 2265 BGB). This does not only facilitate the formal making of a will which in order to be valid may be entirely handwritten by one life-partner and signed by both of them under § 10 (4) S 2 LPartG, § 2267 BGB. It also makes the rules on correspective wills (§§ 2269 et seq) applicable to life-partners (§ 10 (4) S 2 LPartG).

d. Wills made by Persons unable to Speak and Write

A minor change of §§ 2232, 2233 BGB, the rules for so called “public wills” (i.e. notarial wills) which are made with a notary, in force since August 1, 2002, now makes it possible that a person who can neither write nor speak will be able to make a public will. Such persons do not have the option to make a holographic will (§ 2247 BGB) nor did they have the possibility of a public will which had to be either declared verbally to the notary or delivered to the notary in written form.

§ 2232 BGB does no longer ask for a “verbal” declaration of the will, so a testator who is unable to speak may clarify his or her intentions to the notary in whatever method even with the intervention of a third person if it is clear that the will is governed by the testator’s intentions. The former § 2233 (3) BGB which allowed making a will only by delivering it in writing if the testator was unable to speak has been abandoned. Nevertheless a person who is unable to speak, write or express himself in any way continues to be prevented from making a will.

2. BVerfG (Federal Constitutional Court)

a. Relevance of BVerfG-Decisions

As German courts are bound by law and codification under Article 20 (3) Grundgesetz changes in succession law cannot be implemented by mere court decisions. Although a German court, as courts in other civil law countries alike, may use its discretion when interpreting the law and thereby even change fundamental tendencies of codified law, succession law is not the field where fundamental changes are effected by court decisions. If the law is clear and unambiguous, as it has been in the most important fields of legal-political discussions concerning succession rights which took place in Germany during the last five decades, civil courts do not have the power to change the law.

On the other hand Germany has its powerful BVerfG which, as the guardian of constitutionality of the legislation, may declare any law null and void if it finds such law unconstitutional. Decisions of the BVerfG have the force of law and therefore are published

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8 Originally this rule was made for surviving housewives under the (irrebutable) assumption that the husband had collected all the marital property in his name and that half of his estate consisted in marital gain. For same sex partners such assumption is far from reality as, although the question who will die first statistically depends on the gender (husbands usually die first), there is no statistical rule that housekeepers in same sex marriages die first.

9 Relatives who are entitled to a Pflichtteil will not become forced heirs; instead they have only a claim to half the value of their potential intestate share.

10 Constitution (literally “Fundamental Law”).
in the Federal Official Gazette (BGBl). Therefore an impact of changes in society on legal developments can not only be caused by parliamentary legislation. There have been some significant cases when the BVerfG caused or prevented a move in the development of succession law in its social and constitutional context.

b. The impact of the BVerfG on the above mentioned Changes of the Law

The significant changes in succession law mentioned above (I.1.b, c and d) are closely related to the powers of the BVerfG. Both cases show in different ways the strong impact of BVerfG decisions concerning constitutional values on the law making process in German civil law and particularly in family law related aspects of succession law.

aa. Driving the reform...

The 1998 reform of the laws on children born out of wedlock (above 1.b) had been fueled not only by significant changes in society, but also by significant developments in the interpretation of Art 6 (5) constitution (Grundgesetz) demanding equal protection for children born out of wedlock, during more than 30 years of the BVerfG’s jurisdiction between the sixties and the nineties of the twentieth century. The first step made by a 1970 legislation called Nichtehelichengesetz (act on illegitimate children) was an immediate consequence of a BVerfG-decision which declared the complete exclusion of an illegitimate child from his or her father’s estate unconstitutional.11 After the 1970 reform for more than a decade the BVerfG followed a tendency not to declare the new rules unconstitutional despite significant criticism from the liberal part of the legal science. The grant of – and at the same time restriction to – a mere monetary participation of the illegitimate child in the estate of the deceased father (Erbersatzanspruch)12 implemented by the 1970 reform was held constitutional by the BVerfG.13 The possibility of a settlement of succession rights inter vivos (Vorzeitiger Erbausgleich) was held constitutional as well notwithstanding the fact that such settlement would not only exclude the child form the father’s estate but also the father from the child’s.14 Things began to change in the 1990ies when the BVerfG not only declared some paragraphs of family law relating to illegitimate children unconstitutional but also voided one succession rule (§ 1934c BGB) preventing post-mortem establishment of fatherhood and started reasoning whether society had changed far enough to even see other succession rules in a different light.15 Such changes in the BVerfG’s attitude towards equal right protection for children born out of wedlock are mentioned as a decisive factor for the new law making process in the legislative materials.16

Nevertheless the BVerfG did not change the situation concerning succession rights of children born out of wedlock before July 1, 1949. Neither the 1970 legislation nor the 1998 legislation granted any succession rights to such children. Recently the BVerfG confirmed a former decision which the court had delivered in 197617 on the transition rule of the 1970 NEheLG

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12 Substituted inheritance right.
13 BVerfGE 44, 1.
14 BVerfGE 58, 377.
15 BVerfG NJW 1996, 1884 (NJW = Neue Juristische Wochenschrift).
16 See Gesetzentwurf der Bundesregierung, Bundestags-Drucksache 13/4183, 7 (Legislative Proposal of the Federal Government, Documents of the Federal Parliament 13th Legislative Period no 4183); Bundestags-Drucksachen are published online under http://dip.bundestag.de/parfors/parfors.htm.
17 BVerfGE 44, 1.
(Art 12 § 10 (2) S 1 NEhelG). As the 1998 legislator had adapted the same transition rule, thereby finally excluding such children from the now unrestricted right to inherit as a child, the question could have been answered in a different way. The BVerfG\textsuperscript{18} held this rule constitutional. Treating such children differently was not unconstitutional as the father and other family members of children born before the coming into force of the Grundgesetz in 1949 deserved protection of their confidence that the general succession rules concerning such children would not change after almost half a century. What originally had been a mistake could not be reversed after that period.

\textit{bb. ...or not stopping it}

The impact of the BVerfG’s decision making on the 2001 reform concerning same sex life partnerships is in a different way significant for the German type of interrelation between the legislator and his constitutional supervisor. Had the BVerfG in its very close vote on the new LPartG\textsuperscript{19} delivered a vote of unconstitutionality the entire process would have failed. This time the BVerfG, although it had refused to actively promote the transformation of a social development into law, it did not hold the wheel when the legislator had started to move it. Less than three years later the legislator with the 2005 reform mentioned above walked through the door the BVerfG had unlocked and – at least in family and succession – put same sex life partnerships on almost equal level with marriages.\textsuperscript{20}

\textit{cc. ...and solving even marginal problems}

Even the marginal correction in §§ 2232, 2233 BGB is directly imputable to the BVerfG which had held before\textsuperscript{21} that it was unconstitutional not to provide measures to enable persons who could neither write nor speak to make a will.

\textit{c. Constitutional Protection of the Children-Pflichtteil (Forced Share)}

Recently the BVerfG had the opportunity to decide on one of the most important questions legal practitioners have to answer when asked for advice by potential testators. The aging society in European countries which is particularly a problem in Germany increases the number of potential testators wish to disinherit or at least reduce the intestate share of their children as economic family ties are significantly reduced when children are leaving home and aging parents rely for their future welfare on their respective partner or even more on social welfare. If even in regular cases aging testators do not want to grant the 50 percent forced share to their children imposed by law (§ 2301 BGB); usually hard cases bring up the question of constitutionality.

On April 19, 2005 the BVerfG\textsuperscript{22} rendered a combined decision on two cases where unconstitutionality of the following rules had been claimed: § 2303 BGB, the general rule granting a Pflichtteil to children, parents and spouses, § 2333 BGB, ruling on some extraordinary situations when the testator may take away the right to the forced share by will

\textsuperscript{18} BVerfG ZEV 2004, 114 (Zeitschrift für Erbrecht und Vermögensnachfolge).

\textsuperscript{19} BVerfG NJW 2002, 2543.

\textsuperscript{20} The undersigned national Rapporteur does not share the opinion of the BVerfG in this case. He continues to hold the LPartG unconstitutional under Art 6 (1) GG, the special protection rule for marriage and family, see Rauscher Familienrecht (2001) 513. The only continuing difference between marriage an life partnership in civil law is that life partners are not allowed to adopt with the exception of stepchild-adoption.

\textsuperscript{21} BVerfG NJW 1999, 1853.

\textsuperscript{22} BVerfG NJW 2005, 1651.
and § 2339 BGB ruling on even more exceptional situations when a person is disqualified to take as a heir under intestate or testate succession as well as under the concept of Pflichtteil. One of those cases was exceptional indeed, as the son who was claiming his Pflichtteil had attacked his mother several times, who then disinherited him, before he finally killed her and buried her dismembered body in the forest. Although this behavior, if done consciously and voluntarily, would have been sufficient to deprive him from any participation in her estate under § 2339 no 1 BGB and even more had been a good ground for disinheriting him (i.e. taking away his forced share) under § 2333 no 1 BGB he had been found not guilty due to mental disease.

The other case is very much symptomatic for the everyday problem of mere estrangement between parents and children in the course of live. Particularly the son claiming his Pflichtteil had denied any contact to the testator during several years and prevented him from even meeting his grandchildren.

The BVerfG granted relief in the first case and denied it in the second. The court clearly stated that the concept of Pflichtteil – as far as children are entitled under it – enjoys protection under the constitutional protection of succession (Art 14 (1) S 1 GG) as well as under the constitutional protection of family (Art 6 (1) GG). The meaning of this statement exceeds the mere constitutionality of the Pflichteil as a restriction of the testator’s freedom which had been decided before.\(^\text{23}\) Instead this decision says that the concept of Pflichtteil of children cannot be abandoned by law. According to the BVerfG the concept of Pflichtteil is made precisely for cases when the testator wants to disinherit and thereby “punish” a child as a consequence of a situation of mere estrangement. However, the legislator is under an obligation to provide sufficient remedies for exceptional situations. Although the BVerfG found § 2333 BGB generally sufficient as such a remedy, only the interpretation of § 2333 no 1 BGB, that a lack of guiltiness for mental disease would make it impossible to disinherit a child who attacked and finally killed the testator, which had been given by the civil courts in the first case, was unconstitutional.

Despite the outcome in the exceptional first case this decision gives strong support for the German concept of Pflichtteil as far as children are concerned. The BVerfG’s reference to a strong and long lasting tradition in German law makes clear, that the freedom of the testator has no preference over the principle of transmission of property to further generations. The expectation that an abnormal case could destroy the entire concept was wrong; nevertheless discussions in the legal science will continue.

d. Wills and Fundamental Rights
The catalogue of Fundamental Rights of the Grundgesetz (constitution) has been made to protect individuals versus the state and therefore has no immediate impact on relations between individuals. However general clauses in civil law like good faith (§ 242 BGB) and good morals (§ 138) have been recognized as the entrance door for fundamental rights into civil law. In particular, what is essentially contrary to fundamental rights cannot be in accordance with good morals. Recently the BVerfG had to decide in a quite delicate case concerning heirship in the former Prussian dynasty of Hohenzollern. Former crown prince Wilhelm of Prussia who died in 1951 had made a will containing a chain of substitutional heirship in order to ensure that the house estate of the dynasty should pass in dynastical order.

This will contained a so called “adequateness-clause” whereas a future crown prince should not be a heir when entering into an inadequate marriage under the constitution of the house of Hohenzollern. This meant in particular that only a marriage with a woman of nobility would allow him to be an heir. On the application of the next heir who not only lived in “inadequate marriage” but also had expressly waived his right to future heirship when entering into such marriages, the lower civil courts had held the clause contrary to good morals. However, the Bundesgerichtshof (BGH, Federal Supreme Court) which had discussed the question whether such clause could be against good morals (§ 138 BGB) had finally held that such clause was no fundamental restriction of the freedom of marriage and that – at least – the testator had good reason to implement such clause which therefore was not an immediate attack towards a specific heir’s freedom of marriage.

On the other hand the BVerfG\(^24\) held, that the freedom to make a will (Art 12 GG) and the freedom to enter into a marriage (Art 6 (1) GG) had to be weighed against each other even in civil cases concerning a will that could affect freedom of marriage. The crucial point was whether such an adequateness-clause could cause intolerable pressure on the potential heir to enter or not into a specific marriage. In particular, the BGH had not sufficiently weighed whether, decades after the abandonment of monarchy in Germany, the stability of a dynasty’s house estate was good reason to restrict an heir’s freedom of marriage.

3. Civil Courts (by topics)

a. General tendencies

There are no noteworthy general tendencies in the jurisdiction of civil courts on succession law in a sense that could be understood as silent change of the law. Sometimes significant moves towards the BVerfG have been initiated by courts, who, if they consider a rule of law unconstitutional need to present it to the BVerfG.\(^25\) Nevertheless during recent years civil courts had to decide not only details but also some more general questions of succession law which might be of comparative interest. This is not the place to give an overview of jurisdiction on succession law during the last couple of years. Therefore the following examples are little more than spotlights on what kind of succession law problems German courts have been dealing with during the last years.

b. Succession and Divorce

aa. Several norms in the BGB deal with the impact of a divorce or pending divorce on succession. § 1933 BGB – concerning intestate succession – states that the succession right of a surviving spouse is barred if at the time of his death the decedent had filed for divorce and this petition was justified. During the succession proceeding – usually if the surviving spouse applies for a certificate of heirship according to § 2353 BGB – the succession courts have to decide whether or not such pending divorce was justified which usually is answered according to one of the presumptions stated in § 1566 BGB which depend on periods of living separately. Problems arise when the decedent was mentally ill or even unconscious at the time the petition for divorce was filed by his or her custodian (Betreuer, § 1896 et seq). In such cases it is questionable whether the custodian may file for divorce which has been discussed for decades but finally approved.\(^26\) Secondly, living separately as defined in § 1567 BGB


\(^{25}\) With the restriction that such rule must be post-constitutional i.e. either have been promulgated after July 1, 1949 or expressly or silently affirmed by the Federal legislator.

\(^{26}\) However, not clear at all BGH NJW 2002, 671.
means that the spouses do not only factually live separate but at least one of the spouse does not want to live together because of repudiation of the marital community. Some courts held that living separately begins with the loss of consciousness of the later decedent. However, a spouse who lost consciousness is unable to decide against living together and therefore cannot cause living separately at all.27

bb. Under §§ 2077 (1), § 2279 (2) BGB the succession right of a spouse under a will or a succession contract ceases when the marriage between this spouse and the testator has been divorced.28 This is also true for common wills according to § 2268 (1) BGB. There is a unanimous opinion that the loss of the right to inherit is only presumed and therefore a will, common will or succession contract may survive divorce, if the spouse or the spouses had such an intention. Recently the BGH29 had to decide whether a common will, which under § 2270 BGB is binding as far as its dispositions are correspective, can be cancelled after divorce unilaterally by one former spouse under § 2271 BGB. The former prevailing opinion argued that there was no longer any binding effect after divorce as divorced spouses could not have made a common will at all; whether such a will remained valid or not was a matter of interpretation under § 2268 BGB; the binding effect, however should cease with divorce notwithstanding any different interpretation at the time of making the will. The court now decided that the binding effect of correspective dispositions did not necessarily cease with divorce; as for the entire will it was a matter of interpretation at the time of making the will whether the spouses wanted the binding effect to survive their divorce or not.

c. Heirship and Legate

Testators do not necessarily care about what the law says on the differences between heirs and legatees; they sometimes bequest the entire estate, item by item, to different persons. As German law follows the principle of universal succession of the heir into the decedent’s entire estate, including debts (§ 1922 BGB), there is a strong necessity to exactly know, who is or are the heir/s and who mere legatees. If the general rule of interpretation (§ 2087 BGB) that the bequest of a share of the estate is considered heirship and the bequest of an individual piece of property or an amount of money is considered a legate does not help, if none of the bequest is general, another general rule of interpretation will apply, if the testator when dealing only with specific items wanted to distribute the entire estate: The person/s who receive/s the most important item (the family home, the enterprise etc) will be considered the heir/s, other bequests are considered legates. This rule also applies if several persons share the most important item or if there is more than one important item, making them heirs according to the relation of the value of what they receive under the will.30 Recently the BGH31 added some aspects to this rule: If the testator bequests the Pflichtteil to his or her children, this will not be considered heirship although the bequest is general in kind (§ 2304 BGB); by using the word “Pflichtteil” or similar words the testator usually wants to express the deprivation of an intestate share. When the testator disposed of his entire estate by bequesting individual items to different persons giving to two of them what remained after selling his houses and paying the Pflichtteil debts, those who got the remainder were considered heirs notwithstanding the

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27 See Oberlandesgericht Frankfurt/Main FGPrax 2002, 124 (Praxis der freiwilligen Gerichtsbarkeit).
28 Or if a divorce is pending in a situation as described in § 1933 BGB.
29 BGH NJW 2004, 3113.
30 See Bayerisches Oberstes Landesgericht (BayObLG) NJW 2000, 1174; OLG Celle MDR 2003, 89 (Monatsschrift für Deutsches Recht).
31 BGH NJW 2004, 3558.
fact that they would not receive the biggest part of the estate. To be one of the heirs instead of being a mere legatee one does not need to receive the most valuable part of the estate.

d. Succession and Social Security
There is an increasing number of cases where the heir or someone entitled to the Pflichtteil receives or did receive social security benefits which he or she would lose or be obliged to repay due to such acquisition. If the recipient of social security benefits becomes an heir the only way to prevent a social security agency from access to the estate would be to reject the heirship thereby passing it to the next person entitled as an heir under intestate or testate succession. This method could be particularly successful if the person who is then qualified as the heir is under no obligation to support the rejecting heir, for example if the estate falls to a brother or sister. However this method will not work as a rejection made in order to prevent a social security agency from access is considered contrary to good morals (§ 138 BGB).\(^{32}\) If the beneficiary is merely entitled to the Pflichtteil (what sometimes is the case because the decedent wanted to prevent his estate from falling to social security) there is no immediate access of the agency if the beneficiary does not claim the Pflichtteil. However social security laws allow the agency to transfer such claim from the beneficiary to the agency which means the agency becomes the creditor instead of the beneficiary.\(^{33}\) This also occurred in the above mentioned case of the BVerfG where a mentally ill son had killed his mother thereafter claiming the Pflichtteil.

The following case in the BGH\(^{34}\) shows that sometimes parents who try to avoid that social security will take the estate act quite understandable. Spouses had made a will under which the estate would defer to the surviving spouse. After the surviving spouse the estate should go to their children including a mentally disabled daughter. In order to grant this daughter some advantages on top of the social security benefits which she would have to live from for her entire life the testators ordered execution of the will (Testamentsvollstreckung) after the death of the surviving spouse. The social security agency instead transferred the disabled daughter’s claim of Pflichtteil and sued the surviving spouse. The BGH held that after such transfer the social security agency may claim the Pflichtteil even if the beneficiary or the curator decides not to do so in order to avoid the loss of benefits after the death of the surviving spouse under a so-called clause of forfeiture (Verwirkungsklausel).\(^{35}\) However the Verwirkungsklausel had to be interpreted with respect to what both parents intended in favor of their daughter: Therefore she was not deprived of her position as an heir after the surviving parent as the social security agency rather than the daughter in person had claimed her Pflichtteil.

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\(^{32}\) OLG Stuttgart FGPrax 2001, 199.

\(^{33}\) § 93 Sozialgesetzbuch XII (Social Code Volume XII) formerly § 90 Bundessozialhilfegesetz (BSHG, Federal Law on Social Assistance).

\(^{34}\) BGH ZEV 2005, 117; as the claim is originally of civil nature, it falls within the jurisdiction of civil courts notwithstanding a social security agency is the plaintiff.

\(^{35}\) Usually in a common will of spouses such clause will say that a child who claims the Pflichtteil after the death of the first parent will be disinherited in taking only the Pflichtteil after the surviving parent.
4. Legislative Projects

a. Reduction of the Pflichtteil (Forced Share)

Legislative projects concerning the civil aspects of succession are very limited. The “Coalition contract” recently entered into by the Christian Democrats and the Social Democrats in order to form a government supporting majority in the Bundestag36 does not mention succession law at all.

Nevertheless there have been signals recently that the widespread discussion concerning the Pflichtteil (forced share) could promote legislative activities during the 2005-2009 legislative period.

When answering37 a parliamentary request38 concerning the future of the Pflichtteilsrecht the former German government stated on one hand an increasing loss of acceptance in society of the formerly “natural” principle that parents, children and spouses should expect to receive a forced share; on the other hand the answer clearly states that – to a “certain extent” – the Pflichtteil should not only be considered a constitutional restriction of the testators freedom to make a will, but also to be protected under the constitution.

Recently Federal minister of Justice, Frau Zypries, mentioned during an interview that there was some preparatory reasoning in her ministry whether the Pflichtteil which, as such, according to the new decision of the BVerfG as explained above, must be considered mandatory under the German constitution, could be reduced to a share below 50 percent of the intestate share. Undoubtedly, as the forced share for children enjoys the strongest protection under the constitution, this question cannot be solved without regard to the forced share of parents and spouses (and same sex life-partners). No legislative proposal concerning this topic has been published until this day. As this question has been under discussion for more than three decades, probability for significant changes is low and it is quite questionable if the legislator should actually accelerate the social trend against economic solidarity within families. To realize a significant change at this point would mean for the legislator to explore how serious the BVerfG was about constitutional protection of the Pflichtteil.

b. Inheritance Taxation

Although Inheritance Taxation is not the immediate focus of this article, activities of the German legislator are worth to be mentioned due to serious activity and significant developments which might happen in a near future. The German inheritance tax system as regulated by the Erbschaftsteuergesetz (ErbStG Federal act on inheritance taxation) follows the principles of personal taxation of the heirs, progressive taxation according to the value of the individual share and family protection by applying tax exempt amounts and different taxation rates.39

37 Antwort der Bundesregierung Bundestags-Drucksache 15/3899.
38 Kleine Anfrage Bundestags-Drucksache 15/3768.
39 A tax exempt amount for the spouse of EUR 307,000 and for each child of EUR 205,000 applies. Parents, brothers, sisters, grandchildren, some step-relatives and the divorced spouse enjoy lower exemptions, other heirs receive a tax exemption of EUR 5,200 only. Tax rates start at 7 percent and increase to 30 percent for children, spouses and orphaned grandchildren. Parents etc as mentioned above owe 12 percent to 40 percent in taxes and other heirs 17 to 50 percent. For example when taking a share of a net value of EUR 1 million (not including the
Different measures of valuation of property for tax purposes have posed one of the major problems in estate taxation including inheritance taxation during the last years. Traditionally the value of real estate has been measured far below the actual marked value in order to protect real property, particularly family homes and production sites from an overload in taxes. On the other hand this concept faces severe criticism even from the BVerfG and from the Bundesfinanzhof (BFH, Federal Supreme Court of Finance) for being unconstitutional under the general protection of equal rights clause (Art 3 (1) GG). Legislative initiatives to reduce the effective spread of tax load between real and personal property and (reluctantly) reduce the high rates of inheritance taxation, and at the same time to extend family tax exemptions in order to protect moderate family homes have been brought during the last legislative period and are expected to be brought up again during the present legislative period 2005-2009.

Another significant problem is posed by inheritance taxation of property belonging to enterprises personally held by the decedent. Whereas taxes imposed on the taking of shares in a corporation will not endanger the capital basis of the corporation itself, inheritance tax imposed on the value of a personal enterprise will. Actual exemptions are not considered a sufficient protection particularly because of the impact on job stability of such enterprises’ employees. Legislative initiatives have been brought during the last legislative period and are expected to be re-filed during the new period in order to protect enterprises which are to be continued by the heirs and to prevent tax evasion by shifting money into be-to-sell-enterprises. The probable concept will be to defer payment of inheritance taxes for enterprises for ten years and to reduce the inheritance tax by 10 percent for each year the enterprise continues to be run by the heirs in order to achieve a complete waiver of inheritance taxes after ten years of continued business.

II. Reform Tendencies as Discussed in Legal Science

1. Changing Aspects

Public interest in questions of succession as well as discussion in the legal science on what should happen de lege ferenda is abundant and therefore in significant contrast to the very restricted activities of the legislator. Probably this situation will continue as such discussions are already a good tradition for more than four decades, since on May 14, 1969 the Bundestag passed the part of the marital property share of one quarter according to § 1371 (1) BGB) a spouse will pay EUR 131,670 in taxes, a child 151,050, a parent or non-orphaned grandchild EUR 180,272, a brother or sister EUR 267,219 and a non-relative (including non-marital partners) EUR 348,180.

For example, a house of a market value of EUR 500,000 will usually pass to the surviving spouse without any inheritance taxes as the taxable value of real property usually doesn’t exceed 60 percent of the market price.

According to § 13a ErbStG there is a tax exemption of EUR 225,000 for domestic property belonging to enterprises and an additional tax exemption of 35 % of the value of such property exceeding EUR 225,000. This exemption is granted before family tax exemptions are deductable.

Which, by the way, did not prevent the legislator from reducing those exemptions from January 1, 2004 (formerly EUR 256,000 and 40 percent).

Gesetzesantrag des Freistaates Bayern, 4.5.2005 (Bundesrats-Drucksache 341/05) Legislative initiative of the Free State of Bavaria; Gesetzesentwurf der Bundesregierung, 6.5.2005 (Bundesratsdrucksache 322/05) Legislative initiative of the Federal Government.
decided that a great reform of German succession law should take place during the next (1970-1974) session, which never did nor was even discussed in the parliament any more. The debate is mostly fuelled by particular interests. Some examples: Notary publics tend to fight for more freedom for testators as their customers don’t understand why the law will prevent them from disinherit their children. In the early 70ies it was vividly discussed whether the surviving spouse should take a bigger intestate share including suggestions the spouse should take the entire estate even when children where present. Not surprisingly in all those discussions the surviving spouse was the surviving wife and in particular the surviving housewife. Today a new aspect has entered the discussion: During the next ten to twenty years Germany will see estate cases totaling several billions as the wealth which has been acquired between the 50ies and 70ies will pass to the next generation during this period. As at the same time the Federal budget is in a worse situation as it has ever been since 1949 some might suggest that the state should get its share from those profits which might be considered a windfall for the middle-age generation. However, this middle-age-generation, got known as “sandwich-generation” during the last decades, which on one hand has to pay more and more in taxes and social security duties to keep retirement pensions as high as promised before, and on the other hand has to support their children whose education takes longer than it ever took before. Finally as people get older most estates which pass under a will pass to a surviving spouse (again it is the wife) and the “children” will usually be heirs when reaching an age of about 60. Some say they had to wait too long, others argue they won’t need it any more, so pass it to grandchildren or the society.

2. Recent Conferences on Succession Law

After the first wave of conferences in the early 70ies following the above mentioned 1969-decision in the Bundestag there has been a long period of silence in succession law. After the German reunification and the 1998 reform there is something like a second wave of discussion and conferences during the first years of the new millennium. Considering this picturesque bouquet of arguments not surprisingly there is no general trend and in particular there is no established good reason for change. In contrast to the early stages of discussion when, among others, in 1972 the 49th Deutsche Juristentag (German Law Congress48) dealt with the subject of a “Reform of succession law” and produced far going demands de lege ferenda (which with the exception of the 1998 reform of the succession rights for children born out of wedlock were never realized or even entered legislative proposals) recent conferences on succession law, despite their significant number, can be considered as quite conservative. If there is any demand for change which could find a majority under German legal professionals it is surely the demand to restrict the Pflichtteilsrecht and thereby enhance the testator’s freedom. However, this topic, as already mentioned before, has been decided by the BVerfG in a sense that will prevent major corrections although there might be some space for minor changes.

47 As to the early stages of this process see Rauscher, Reformfragen des gesetzlichen Erb- und Pflichtteilsrechts (Regensburg, 1993).

48 The Deutsche Juristentag is an association of lawyers of different legal professions which, despite its reputation has no official background at all. The annual conferences are usually divided into different sections including one civil law section and prepared by opinions and resumes given by legal professionals from university as well as practice. They are dealing with actual problems in law particularly under legal-political aspects and finally produce demands de lege ferenda which, due to the private structure of the undertaking must not be misunderstood as representative opinion of German law professionals or even some kind of legislative initiative.
The most significant activities are to be mentioned in order to give an overview and citations where the arguments, discussions and results can be found. As legal conferences usually do not produce any common decisions (with the exception of the Deutsche Juristentag) the subsequent citations refer mostly to presentations given by law professors during such meetings.

The Deutsche Notarkammer (German notaries chamber) held a meeting in Berlin in 2000 to debate on questions of a reform in succession law including the law of the Pflichtteil.49 In 2002 the Deutsche Juristentag discussed questions of “Financial Solidarity between Relatives” including the Pflichtteilsrecht.50 Finally in 2003 the Arbeitsgemeinschaft Familienrecht im Deutschen Anwaltverein (Working group on family law of the German Lawyers Association) held their annual meeting in Hamburg including one session dealing with questions concerning a reform in succession law.51

3. Impact of Comparative Law and the EC-integration

It is no surprise that comparative law plays its role in the course of the above mentioned reform discussions. Most contributions do some comparative work including opinions and presentations given in the listed meetings and conferences. In particular a conference of the Institute for Family Law of the Wissenschaftliche Vereinigung für Familienrecht e.V. (Scientific corporation for Family Law, registered corporation) in Regensburg in 2000 was expressly dedicated to “Succession in the Family and Freedom to make a Will in the European Context”.52

However, such activities are dedicated on one side to a better understanding of each others succession laws and to the comparative method in the law making and reasoning process on the other side as similar activities on a European level are.53 There is no known activity for unification or harmonization of succession law on a European level and the undersigned rapporteur is definitely d’accord with the paper of the German Notary Institute54 that, regardless of the question whether the EC had any competency in this field, harmonization is neither necessary nor desirable and traditional cultural differences in succession law55 should not be eliminated in favor of European harmonization.

This statement is even more important as German private international law is featuring the application of the law of the decedent’s last citizenship (Art 25 (1) EGBGB) and German legal professionals are fully aware of the need to provide sufficient and actual information on succession law of other countries, including, but not limited to, EC members.56 There are

49 Report bei Keim DNotZ 2001, 434 (Deutsche Notar Zeitschrift) including an opinion given by Henrich (p 441 et seq) and Strätz (p 452 et seq); see also Strätz FamRZ 1998, 1553.
50 Verhandlungen des 64. Deutschen Juristentages (Berlin 2002) with opinions by Martiny and Eichenhofer.
51 With a presentation given by Rauscher, Forum Familienrecht 2003, Sonderheft 141; see http://www.familienrecht-dav.de/publikationen.php.
52 Reported in FamRZ 2001, 273.
55 By the way, this is also true for Family Law.
56 It is noteworthy that the biggest groups of foreign citizens living in Germany are not from other EC countries. Over decades there has been a strong number of succession cases including US citizens and during recent years Turkish cases and even Iranian and Pakistani cases outnumber succession cases including citizens of most EC countries. However there are regional differences as Germany’s geographical position in Central Europe.
compendiums on foreign succession law; court decisions on international and foreign private law including a significant number of succession cases are published on a regular basis. Several university institutes for comparative law as well as the Max Planck Institute for Foreign and International Private Law Hamburg are specialized in particular succession laws and give opinions for courts in more difficult cases, some of which are edited in annual volumes. Improving the information on foreign law and preserving the legal and cultural traditions should therefore be the future task for comparative succession specialists in Europe.


produces a significant number of cross-border families with members from close EC-neighbors, with, for example lots of cases including Austrian succession law in Bavarian courts.

57 Including the famous lose leaf collection of “Ferid/Firsching/Lichtenberger Internationales Erbrecht”.
58 Internationale Privatrechtsprechung (annual volumes).
60 Basedow/Kegel/Mansel (ed) Gutachten zum internationalen und ausländischen Privatrecht (annual volumes).