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PROCEEDINGS CONFFAM

6th EUROPEAN CONFERENCE ON FAMILY LAW

"The legal protection of the family in matters of succession"

A Conference organised by the Council of Europe
in co-operation with the European Commission
and the International Union of Latin Notaries

14 and 15 October 2002
Strasbourg

PROCEEDINGS

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FOREWORD

The 6th Conference on Family Law was held in Strasbourg on 14 and 15 October 2002 on the theme of "The legal protection of the family in matters of succession".

The following topics were considered:

- the legal protection of the family in matters of succession – a comparative approach;
- the effect of European laws on matrimonial property regimes on the legal protection of the family in matters of succession; and
- advantages of closer co-operation in Europe in order to promote and improve the legal protection of the family in matters of succession.

The legal protection of the property rights of the different members of the family, in particular concerning succession and matrimonial property regimes, is of importance especially in light of recent reforms undertaken by States in their laws on succession. The topic is also of importance in light of the reservation made by States to Article 9 concerning succession of the European Convention on the legal status of children born out of wedlock [ETS no.85], showing that problems still remain in this field.

This Conference constituted a forum aiming at examining the various legal questions relating to the legal protection of the family in matters of succession. Indeed the Conference focused on the substantive law in the member States of the Council of Europe in order to pinpoint similarities and differences that exist between the different legal systems in the legal protection of the family in matters of succession. In particular the Conference highlighted the importance of the legal protection of the surviving child, spouse or other members of the family in the case of succession.

This text contains in particular the opening speeches, the reports and papers presented by the Rapporteurs and certain participants in the Conference, the conclusions adopted by the Conference as well as the list of participants.

PROGRAMME

Monday, 14 October 2002

08h00 onwards Registration (outside meeting Room 5)

10h00 Opening of the Conference
- Guy De Vel, Director General of Legal Affairs
- Marie-Odile Baur, National expert on secondment, Unit of Judicial Co-operation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission
- Helmut Fessler, Honorary President of the International Union of Latin Notaries (speech not available)

10h30 **The legal protection of the family in matters of succession – a comparative approach from the point of view of the European Commission**

Chair: Miloš Hatapka, Director, Ministry of Justice (Slovakia)

Rapporteur: Marie-Odile Baur, National expert on secondment, Unit of Judicial Co-operation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission and
Claudia Hahn, Unit of Judicial Cooperation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission

11h15 Break

11h45 **The effect of European laws on matrimonial property regimes on the legal protection of the family in matters of succession**

Chair: Werner Schütz, Deputy Director General, Ministry of Justice (Austria)

Rapporteur: Gert Steenhoff, Senior Lecturer, Molengraaf Institute for Private Law, University of Utrecht (Netherlands)

12h30 Lunch in the Blue Restaurant

14h30 **The advantages of a closer co-operation in Europe in order to promote and improve the legal protection of the family in matters of succession**

Chair: Andrea Schmucker, *"Notarassessorin"*, Federal Chambre of Notaries (Germany)
Rapporteurs: Patrick Yaigre, notaire (France)
Gillian Cockburn, solicitor (United Kingdom)
Dagmar Coester-Waltjen, Professor, Institut für Rechtsvergleichung (Germany)

15h45 Break

16h15 Discussions

17h30 End of the first day

Tuesday, 15 October 2002

9h30 **Future work on succession by the Committee of experts on family law (CJ-FA) (identification of areas suitable for further consideration by European States in order to promote the legal protection of the family in matters of succession)**

Chair: Jsaak Jansen, Counsellor of Legislation, Ministry of Justice (The Netherlands)
Panellists: practising lawyers from different legal systems

Questions to be considered:

a) the extent of the legal protection accorded to the different members of the family in cases where there is a will and in cases of intestacy (e.g. spouses and former spouses, unmarried couples, children and questions of parentage, appointment of a guardian by will, other members of the family including step families);
b) the role of matrimonial property regimes in protecting the interests of a surviving spouse;
c) means to reduce cases of intestacy, registration of wills, effectiveness of foreign wills, simplification and speeding up the time taken to distribute assets to the family;
d) effect of death or presumption of death on family property and distribution to beneficiaries;
e) payments to the State (e.g. preferential treatment of members of the family and outside for inheritance tax purposes, repayment of social welfare debts and the extent of death duties paid by different members of the family and the effect of such duties on family property).

11h15	Break
11h45	Continuation of discussions with the panellists
12h30	**Lunch in the Blue Restaurant**
14h30	Final session

Chair: Margaret Killerby, Head of the Private Law Department

General Rapporteur: Maria Puelinckx-Coene, Professor of Law, University of Antwerp, Belgium. Possible follow-up to the Conference by the Committee of experts on family law (CJ-FA)

16h30 **End of the Conference**

OPENING SPEECHES

OPENING SPEECH

by

Guy DE VEL
Director General of Legal Affairs

Ladies and gentlemen,

It is an honour for me to open the Sixth European Conference on Family Law on behalf of the Council of Europe.

I should like to take this opportunity to thank the European Commission and the International Union of Latin Notaries (UINL) for their contributions to this Conference. I am sure it will be a unique opportunity to pool our experience, compare our practices and step up our co-operation in an area that affects us all and is part of the functioning of a State governed by the Rule of Law.

For more than 50 years the Council of Europe has been working to spread the values of pluralist democracy, Rule of Law and respect for human rights. These values are the foundation on which we are building Europe.

This involves working on a continuous basis with our 44 member States, from Iceland to the Caucasus and from Reykjavik to Vladivostok, an area counting more than 800 million citizens. The primary aim is to ensure that these countries' institutional and legislative reforms comply with European standards, as established by the European Convention on Human Rights and other more specific conventions.

* * *

The Council of Europe has substantial experience in the field of family law and was for a long time the only European intergovernmental organisation working in this field.

It has drawn up many international instruments on the subject, and in doing so, has always aimed to protect the family and especially the best interests of children.

Many Council of Europe legal instruments deal specifically with children.

In fact a great deal of work has been done on children, not only in the area of family law but also in that of criminal law: last year the Committee of Ministers adopted a new Recommendation on the protection of children against sexual exploitation, which was a key contribution by European countries to the World Congress on the subject in Yokohama.

Our Convention of 25 January 1996 on the Exercise of Children's Rights provides an essential complement to the United Nations Convention on the Rights of the Child, since it concerns procedural matters. We all know that children lie at the heart of our member States' policies, especially since the United Nations Special

Assembly in New York last May. That is why the Council of Europe has a duty to intensify its work in this area.

Other Council of Europe instruments cover topics such as the custody of children, children born out of wedlock and adoption. Still others address different subjects but also concern children, including the European Convention on Human Rights, the European Social Charter, the Bioethics Convention and the Convention on Nationality.

In the area of family law the latest standard-setting text on children is the Convention on Contact concerning Children, which was recently adopted by the Committee of Ministers and will shortly be opened for signature by the member States so as to allow the European Community to sign it as well. The Commission, whose representative, Ms Baur, is here, has proposed to the Council of the European Communities that the Commission should also sign this Convention, since it will help to achieve the objectives underlying current and future Community provisions on the recognition and enforcement of court decisions concerning parental responsibility. As you see once again, the European Union and the Council of Europe have similar views and co-operate very closely. However, I hope the European Union will take the decisions required for signature very soon.

This Convention replaces the concept of "right of access" with that of "contact".

It will chiefly encourage contact between the child and the parent who does not have custody, under appropriate arrangements allowing the child to return home at the end of the visit.

The legal protection of the different family members' property rights, especially as regards succession and matrimonial property systems, is an important issue and the topics to be discussed over the next two days concern us all as individuals and members of a family.

A number of Council of Europe legal instruments contain important provisions in the area of family law and succession. One is the European Convention on Human Rights, especially Articles 8 and 14 on the right to respect for private and family life and the prohibition of discrimination. There is also Article 1 of the Protocol to the European Convention on Human Rights, on the protection of property, and Article 10, paragraph 5 of the European Convention on the Adoption of Children, which provides that "in matters of succession, insofar as the law of succession gives a child born in lawful wedlock a right to share in the estate of his father or mother, an adopted child shall, for the like purposes, be treated as if he were a child of the adopter born in lawful wedlock".

We also have the Convention on the Establishment of a Scheme of Registration of Wills and many resolutions and recommendations on the subject.

However, there are still situations in which discrimination in matters of succession arises in a family when someone dies, generating a state of affairs that may be hard to bear for the other family members. This may concern the surviving spouse,

for example, or a partner in an unmarried couple, an adopted child or a child born out of wedlock.

This is a particularly important and interesting topic in the light of Article 9 of the European Convention on the Legal Status of Children born out of Wedlock (ETS No.85), which provides that "a child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock".

The question of spouses' property rights was discussed early on, at the First European Conference on Family Law in Vienna, Austria, in 1977. Issues relating to the surviving spouse's powers over property for the spouses' common use were already raised in the conclusions of this conference, particularly with a view to entitling the survivor to possession of the family home and the household items it contains, by appropriate legal means such as the preferential assignment of this property.

The Third Conference on Family Law, held in Cadiz, Spain, in 1995, discussed the issue of matrimonial property regimes. It was pointed out that legislation on matrimonial property regimes in European countries was extremely varied and that this diversity posed numerous problems in marriages, particularly where there was an international element.

With the future enlargement of the European Union, which we welcome, inheritance issues will nevertheless become more complex because individuals will increasingly enter into transfrontier relationships due to the possibility of working and living in other European Union countries.

You are experts in this field and familiar with these situations, so we invite you to share your experience with us and pool ideas during this Conference.

Many countries have already revised their legislation on succession and on legal protection of the family, or are in the process of doing so. Our societies have changed and many domestic law provisions were out of step with these changes. At this conference we shall see the differences and similarities between the various legal systems as regards the legal protection of the family in matters of succession.

I am sure the issues raised and proposals for action put forward during the discussions at this two-day Conference will allow the Council of Europe and all the countries, institutions, organisations and individuals represented here to work together to devise better solutions for the future.

I would like to suggest that you try to work out some solutions of this kind, which might subsequently be the focus of a legal instrument such as a Committee of Ministers recommendation on the implementation of succession procedures and the protection of the various family members.

I wish you every success in your discussions.

OPENING SPEECH

by

Marie-Odile BAUR
National Expert on secondment, Unit of Judicial Co-operation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission

I should first like to say a few words on behalf of Mario Paulo Tenreiro, Head of the Judicial Co-operation in Civil Matters Unit of the Commission's Directorate General for Justice and Home Affairs.

He would of course have wished to be here today, but mandatory obligations of which he was informed very recently prevented him from attending.

However, he wishes to apologise to all the participants and of course to the Council of Europe Secretariat. He knows very well that the Secretariat will not view his absence as reflecting a lack of interest in its work, because he made it clear from the outset that he was very much in favour of this Conference being jointly organised by the Council of Europe and the European Commission.

Generally speaking, it must be emphasised that co-operation between the two organisations is excellent.

This is perhaps best evidenced by the frequency of the contacts between the two organisations, at all levels. Every week, members of the two organisations, and even top officials, meet or take part in joint meetings. Only last week a member of the Commission took part in a meeting of a Council of Europe working party, and in a few days an important joint meeting on access to justice is to be held in Brussels.

As the Secretariat knows, the European Commission does not hesitate to take an interest in the Council of Europe's work whenever it has an opportunity to do so.

In the Green Paper on Alternative Dispute Resolution, for example, the Commission mentioned the work done here on mediation, specifically by the CJ-FA.

Likewise, the Commission has just asked the Council of the European Union to authorise the European Community to sign the Convention on Contact concerning Children adopted by the Committee of Ministers of the Council of Europe on 3 May 2002.

The different organisations bringing European countries together in various capacities are sometimes considered from the outside to be competing.

This view of the situation is really very superficial. First of all, no organisation obviously has the exclusive right to create rules of law. Secondly, it is on the contrary in the best interests of the citizens of these organisations' member States, and of the organisations themselves, to co-operate and co-ordinate their action in order to avoid making substantial efforts in identical areas at the same time.

Contrary to what you might think, this is not an unrealistic objective.

The Community, (further to the first instrument it adopted, the 1968 Brussels Convention, which has now become the regulation known as “Brussels I”,) is mainly working on issues relating to the free movement of decisions within the European judicial area, that is to say, on the rules governing the jurisdiction and the recognition and enforcement of decisions.

The Council of Europe, on the other hand, is mainly drawing up rules of substantive law.

The two approaches are thus complementary and should encourage us as a matter of course to co-ordinate our efforts in order to ensure the emergence of a broad judicial area for the protection of those freedoms to which we are all attached.

So I repeat that it is a great pleasure for the Commission to be involved in the discussions at this Conference, which I hope, of course, will be beneficial for all of us and also mark an important stage in the work currently in progress in both our organisations.

REPORTS

The legal protection of the family in matters of succession – a comparative approach from the point of view of the European Commission

by

Marie-Odile BAUR
National Expert on secondment, Unit of Judicial Co-operation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission

Before giving the floor to my colleague Claudia Hahn, who will talk in greater detail about succession, I should like to explain the European Commission's approach to the studies it has commissioned both on matrimonial property regimes and on succession.

With your permission, I shall go back a few years and events to outline the course we have taken.

As you know, the European Economic Community was founded in the late 1950s. It very soon became apparent that it was not enough to draw up economic rules to establish a common market, but that exchanges inevitably engendered disputes and that common legal rules would have to be introduced so that these disputes could be settled in a satisfactory manner for economic operators. That is how the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters was first drawn up.

The purely economic concerns of the time partly explain why this Convention did not cover topics such as matrimonial property regimes and succession. Clearly, too, family law issues were considered too sensitive at the time for common rules to be adopted in that area.

So it was only in the 1990s, after an unfortunate attempt concerning maintenance claims, that work was again started on judicial co-operation in civil matters as it applies to family affairs. The intention was to work out a system for designating the court with jurisdiction and ensuring that court decisions moved virtually unimpeded within the European area, but this time in a comparatively narrow field - that of divorce and custody of children following the separation of spouses. The outcome was the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, which was replaced even before it came into force by a regulation on the same subject, known as the "Brussels II" Regulation, which has been in force for a few months.

Under the Treaty of Amsterdam, which came into force in 1998, the drafting of civil law instruments in the European Community took a major step forward, since it was now a matter for the Community rather than for co-operation between member States. The Commission thus acquired powers in this area alongside those of the member States, and was consequently able to take initiatives. Community

instruments - chiefly regulations and directives - are now adopted instead of conventions, as was the case in the past.

Article 65 of the Treaty provides that measures to be taken in the field of judicial co-operation in civil matters which have cross-border implications should aim to facilitate the recognition and enforcement of decisions in civil and commercial cases and to promote compatibility between the rules applying in the member States concerning the conflict of laws and of jurisdiction.

Subsequently, the European Council held in Tampere, Finland, in October 1999 considered that reinforcing mutual recognition of judicial decisions and judgments was the cornerstone of co-operation in civil matters and called for a programme of measures to implement this.

A "Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters" was accordingly adopted at the end of 2000. It provides in particular that legal instruments will have to be drawn up on international jurisdiction and on the recognition and enforcement of judgments concerning the dissolution of matrimonial property regimes, the property consequences of the separation of unmarried couples and matters of succession.

It provides for a three-stage process in this respect:

- the drafting of instruments on the model of the Brussels II Regulation
- then the revision of these instruments to include simplified procedures such as those set out in the Brussels I Regulation, together with provisions on the provisional enforcement of decisions and protective measures, and lastly,
- the abolition of the exequatur procedure.

With a view to carrying out this programme, the Commission has commissioned two studies, one on matrimonial property regimes and property issues arising from the separation of unmarried couples and the other on succession.

Clearly, the adoption of common substantive rules is not one of the objectives set by the Treaty of Amsterdam for judicial co-operation in civil matters between the member States of the European Community, and the Commission's work in this area must concentrate on rules governing conflicts of jurisdiction and the conflict of laws.

It was nevertheless important for the Commission to assess the differences between the member States' legislation before it drew up proposals for instruments.

The studies initiated by the Commission consequently cover:

- a comparative analysis of the rules of private international law, including those provided for by international conventions, in force in the different member States of the European Community (i.e. the rules governing conflicts of jurisdiction, recognition and enforcement and the rules governing the conflict of laws);

and also

- the state of domestic law in the member States (i.e. a description of the rules in force in the member States together with a comparative analysis).

My colleague's presentation on succession will be based on the initial findings of one of the studies commissioned by the Commission. I do not think it will be an exhaustive presentation on the subject, since the initial information provided by the study and the information otherwise available to the Commission, which, as I said, deals with private international law, is not sufficient for that.

However, we thought it would be of interest to give you the information received by the Commission, albeit in very succinct form.

In any event, the distinguished lawyers who took part in the work on this study, some of whom are in this room, will be able to add to the information supplied.

The legal protection of the family in matters of succession – a comparative approach from the point of view of the European Commission

by

Claudia HAHN[1]
Administrative Officer, Unit of Judicial Cooperation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission

INITIAL SURVEY OF THE RESULTS OF THE STUDY ON PRIVATE INTERNATIONAL LAW ON SUCCESSION AND WILLS AT THE REQUEST OF THE COMMISSION

By way of introduction, and before giving a brief overview of the results of the "*Comparative Law Study on the rules governing conflicts of jurisdiction and conflicts between legislation on wills and succession in the member States of the European Union"*[2] which the European Commission has just received, I would like to refer to a particular case submitted to us by a European citizen extremely annoyed at the divergence of rules under private international law in the European Union member states.

A Dutch citizen, who owns a summer house in the south of France, complained to the Community institutions that he had learned, to his great surprise, that if he or his partner died, the survivor would become the remainderperson merely of part of the house and life tenant in respect of the other part. Having made enquiries with a French *notaire,* he was even more surprised to learn that it was impossible to get round this by drawing up a will under Dutch law as the rules under French private international law stipulate that the French courts and French law have exclusive jurisdiction in respect of property situated in France. Concerned that he could not choose how to dispose of his assets upon his death, he turned to the European Parliament to ask when it intended to legislate in this area to bring to an end a situation he described as unacceptable.

This is not the time or place to look at whether French law has other means of affording the surviving spouse appropriate protection. It must simply be noted that several petitions and letters sent to the Community institutions in recent years were prompted by citizens' incomprehension vis-à-vis the great diversity of regimes governing succession and the resulting practical difficulties in organising international succession.

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1 Presentation given by Claudia Hahn, Administrative Officer in the Judicial Co-operation in Civil Matters Unit in the Directorate General for Justice and Home Affairs in the European Commission. The opinions expressed by the author are purely personal and do not necessarily reflect those of the institution to which she belongs.

2 Study carried out by the Deutsches Notarinstitut in conjunction with Professors Heinrich Dörner and Paul Lagarde in 2002 (the text of the final report on the study should soon be available on the website of the Directorate General for Justice and Home Affairs of the European Commission: http://europa.eu.int/comm/justice_home/fsj/civil/fsj_civil_intro_en.htm).

A few figures

The above-mentioned Dutch case is not an isolated one. In the absence of statistics on the frequency of international disputes in the area of succession, the study conducted on behalf of the Commission attempted to quantify the potential scope of international successions in the European Union:

- on average, 1.5% of the residents in a member State are nationals of other member States; in the case of Luxembourg it can be as high as 20%, in Belgium it is 5.5%. Almost 2 million nationals of other member States live in Germany;

- approximately 12% of Irish citizens, 8% of Portuguese and 4% of Greeks live abroad in another member State;

- it is estimated that about 800,000 to 1 million Germans own property abroad (Spain, Italy, France). The British and the Dutch also have houses in southern Europe. Although there are no precise figures, it is a fact that there is a large number of foreign citizens with a bank account in Luxembourg.

Accordingly, the above indicates many potential cases of international succession.

The Commission's study covers the main practical difficulties arising from the divergent legislation in member States in the field of private international succession law (II); these difficulties clearly result from the differences in substantive succession law in member States (I). I shall conclude with a brief overview of the study's conclusions as to the measures to be taken at Community level (III).

I. DIFFERENCES IN SUBSTANTIVE SUCCESSION LAW IN THE UNION

As substantive family and succession law do not fall within the competence of the European Union, I shall leave it to the specialists to discuss this matter in greater detail this afternoon. However, insofar as the contemporary rules governing conflicts of legislation make reference to specific national features and seek to co-ordinate the different legal systems, I would like to mention briefly some of the major differences which, according to the study, have given rise to difficulties for citizens.

1. Order of succession and the surviving spouse's right to inherit

It is difficult to make a generalised comparison of the order of devolution of property in the various countries because of the diversity of systems in Europe. The rights of the surviving spouse are just one example. As part of the study, practitioners in the 15 member States were asked to resolve specific cases. One of these involved a surviving spouse and various members of the deceased's family. In England and Ireland the surviving wife would be entitled to all of the estate, whereas in France she would be entitled only to one quarter. In the countries modelled on Roman law, the surviving spouse has only a secondary role in relation to descendants, while in the Scandinavian countries, he/she automatically obtains all assets – half following dissolution of the matrimonial property regime and the other half as inheritance.

2. Unmarried or homosexual partners

A person who has cohabited with the deceased without being married or registered as partner is at present entitled to succession rights only under Danish law. A further series of legislation makes provision for succession rights for the registered

partner (Denmark, Sweden, Finland and Germany, with bills apparently currently being discussed in Spain and England). In contrast, Austria and Italy have no provisions for these new forms of partnership and the French PACS (the "Civil Solidarity Pact") makes no provision for succession rights.

3. Joint or reciprocal wills and succession agreements

In countries modelled on Roman law, such practices are generally speaking prohibited. In the Nordic countries, however, a much more liberal attitude prevails.

4. Reserved portions (of an estate)

In the systems modelled on Roman law, there is provision for reserved portions for family members, but such a concept is alien to English law with its emphasis on the freedom to bequeath as one wishes and in application of which only those people who were dependants of the deceased have a right to claim maintenance from the heirs.

5. Renunciation of succession or reserved portion

The Germanic systems are, generally speaking, very open to the practice of anticipated renunciation of succession, i.e. while the testator is still alive and this is one of the elements of the organisation of succession. In the Roman law systems, this is prohibited.

*

As a result of all these differences, and of course because the rules governing a conflict of legislation lead to different solutions from one country to another, citizens are faced with a number of practical problems.

II. PRACTICAL DIFFICULTIES IN INTERNATIONAL SUCCESSION

1. Difficulties in drawing up a will

When a person is aware of the differences in the various substantive laws, he or she may wish to get round this by drawing up a will. However, as private international law in virtually all member States does not allow one to choose a single law governing succession of the entire estate, such a solution remains difficult in practice. The only alternative is to draw up a will which satisfies the requirements of all the member States concerned. The fact is that the more complicated the provisions contained in a will are, the less legal certainty there is. The study therefore reached the conclusion that there was a need for harmonised rules governing conflicts in order to avoid such difficulties and argues in favour of allowing people, within certain limits, to choose the law applicable to succession of their estate.

2. Divergences in the outcome of judicial procedures

Given that each member State applies its own rules governing conflicts of legislation which differ significantly from each other, and given that there is no harmonisation with regard to jurisdiction of the courts, there is a risk of forum shopping, i.e. that the heirs will refer their case to the court likely to rule most favourably in respect of their interests. Of course, there are no statistics on this. But the mere fact that such a possibility exists gives rise to some uncertainty when drafting the will. Worse still, it may well happen that the courts in two or more countries deliver contradictory rulings with regard to the same case of succession.

3. Impossibility of foreseeing the situation in the event of changes of country of residence

In the majority of member States, the rules on conflict tend to apply the law of the deceased's last country of residence. Today, an increasing number of people take advantage of the freedom of movement within the European Union. When such persons make a will and then change country of residence, they are often not aware that this change of residence may mean that their will no longer has the anticipated effects, as it becomes subject to a different law. Either the solicitor must take account of the other possible applicable laws when drawing up the will, or the testator must check whether the will is still valid in the new country of residence.

4. Systems based on the separation of assets in the estate

The application of the law of the country in which the property is located, a rule which applies in several member States, clearly makes it easier to transfer ownership of the property but makes it more difficult to organise succession of the entire estate and to draft wills.

5. Recognition of succession agreements and joint wills

One of the key questions concerns recognition of succession agreements and joint wills in countries whose domestic legislation does not provide for such things. This is the most frequent question asked of the Deutsches Notarinstitut (German Solicitors' Institute). The question is all the more difficult given that no clear response to this question is to be found in either the laws or the case-law of many European legal systems.

6. Unnecessary duplication of procedures to prove one's status as heir

There is a practical difficulty with regard to the recognition of national documents in order to establish one's statute as heir in another member State. For example, Luxembourg banks are often faced with the question of the legal value of a German *Erbschein* or a French *acte de notoriété*. All too often heirs are required in practice to initiate new proceedings to obtain a document attesting to their status as heir when in fact such a document had already been issued in another member State. This gives rise to additional expenses and slows down the procedure.

7. Fulfilling the terms of a will

In some member States it is obligatory to appoint an executor to deal with matters of succession (UK, Ireland), whereas it is merely optional in the majority of member States. This can give rise to practical difficulties, for example when a British personal representative wants a property located in Germany to be registered in the name of the trust which has inherited it. German law does not acknowledge the legal personality of such a trust which accordingly cannot be entered into the Land Register ("*Grundbuch*").

8. Conflicts between succession law and property law

Such a conflict occurs, for example, when the law of the last country of residence provides that the surviving spouse automatically becomes life tenant of all property, whereas the law of the country in which a property is situated stipulates that such life tenancy can only be arranged by contract.

9. Search for wills drawn up abroad

The search for wills drafted abroad can also hinder cross-border successions, because before issuing a document attesting to the status of heir or before going ahead with the succession, it has to be checked whether the testator has drafted a will in his or her former country of habitual residence. The study shows that the Council of Europe's 1972 Basle Convention has made it possible to set up in several member States central registers for the depositing and registering of wills. Ideally, all member States should have such central registers in the future.

10. Knowledge of the applicable foreign law

As succession law is a very complex subject, involving tax law, succession law, matrimonial property regimes and property law, it is not easy for someone to know the regime which applies in another country. A regularly updated database could prove to be of great practical use.

III. CONCLUSIONS OF THE STUDY: HARMONISATION OF THE RULES ON INTERNATIONAL JURISDICTION AND THE RULES GOVERNING CONFLICTS OF LEGISLATION AND THE ESTABLISHMENT OF A UNIFORM EUROPEAN CERTIFICIATE OF INHERITANCE AND CERTIFICATE OF EXECUTOR

The study concluded that the harmonisation of substantive succession law at European level was unlikely to take place overnight. In the short term, only harmonisation of the conflict of law rules could help overcome the aforementioned difficulties. I cannot go into detail here about the measures advocated, but would like to mention some of the main points.

3.1 Harmonising the rules on international jurisdiction

The authors of the study recommend extending the scope of the "Brussels I" Regulation to successions. They accept, however, that in a matter as complex as this, it could not be done without harmonising the rules on conflict of laws. The study concludes that it should be the courts of the deceased's last habitual residence that should have jurisdiction over both movables and imovables. It does, however, refer to the possibility of granting jurisdiction to the courts of the country in which the property is located, not to rule on succession as such, but with regard to aspects of rights *in rem* which are often linked. The study also comes out in favour of the possibility of jurisdiction being granted to the courts chosen by the parties concerned.

3.2 Harmonising the rules of conflict of law

The study argues for a general acceptance of the jurisdiction of the law of the deceased's last habitual residence. This would imply abandoning the system based on the separation of assets in the estate, particularly in the Latin countries. It also suggests introducing certain aspects of freedom of choice, enabling testators to choose – within certain limits – the law applicable to their succession.

3.3 Uniform European certificate of inheritance and certificate of executor

A uniform European certificate of inheritance and certificate of executor should be recognised in all member States as sufficient evidence of the status of an heir and of the power to dispose of the estate. Such a certificate should be granted by the court or the notary of the deceased's last permanent residence. There would be a legal

presumption that the person stated in the certificate was the heir or the executor and that he had the power to dispose of the estate. It should also serve as proof for entries in land registers, in particular to allow the heir to be registered as the new owner. This would provide protection for anyone who, in good faith, acquired property from the person specified in the certificate or repayment to him or her of a debt.

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In conclusion, I would like to express my regret at not being able to discuss in detail the results of this very rich and thought-provoking study, which focuses primarily on private international law, a topic not on the agenda of this Conference.

The study also shows that much remains to be done in this field. It seems to me to be a subject where the activities of the European Union and the Council of Europe could complement each other in order to facilitate the day-to-day life of European citizens.

The effect of European Laws on matrimonial property regimes on the legal protection of the family in matters of succession

by

Gert STEENHOFF
Senior Lecturer, Molengraaf Institute for Private Law,
University of Utrecht (Netherlands)

1. Short outline of the statutory matrimonial property regimes in Western Europe:

Separate property:

United Kingdom (England and Wales, Scotland) (full)
Ireland (full)
Austria (limited: some assets are by law common property)
Greece (full: but with rebuttable presumption that certain assets are common property)

Community of property: (limited; premarital assets excluded)

Belgium
France
Italy
Luxemburg
Portugal
Spain
Switzerland

Community of property (full or "universal"; premarital assets included)

Netherlands

Separation during marriage, deferred community of property upon death or divorce:

Denmark
Norway
Sweden

Separation during marriage, equalization of accrued gains upon death or divorce:

Germany

2. Freedom to deviate from the statutory regime by contract:

In most countries absolute freedom, in some countries limited freedom (limitation to specific "legal" regimes), in some countries specific prohibitions (Portugal: couples aged 60 or more may only choose the legal system of separation; married couples with children may not choose full community of property). In England and Ireland marriage contracts are subject to judicial discretion upon divorce and death and can be partially set aside ("equal distribution ", property adjustment orders). Limited judicial discretion also exists in the Scandinavian countries.

3. Use of marriage contracts in order to improve or to safeguard the financial position of the surviving spouse.

3.1. Contractual (universal or limited) community of assets

In the "separate property"- countries the establishment of a contractual community of property is a sure way to provide the surviving spouse with a 50% share of the (full or limited) community property upon death of the other spouse.

3.2. Contractual "deferred" community of assets

In the "community property"-countries the law itself already provides this opportunity. However in case of a marriage contract where the spouses have agreed on separate property because of "business-risks" and the wish to avoid losing the community property to creditors, a way to safeguard the financial interests of the surviving spouse is to contractually devise a "deferred community"; that is to agree that upon death of one of the spouses there will be a computation of gains and losses and the assts will be equally divided "as if there had existed a community of property during the marriage".

This is regular practice in the Netherlands, inspired by the Scandinavian statutory system of "deferred community" . Recently this practice has been "codified" by the legislator.

3.3. Contractual universal community of assets with allocation (fully or partly), in case of death, of the share of the spouse who dies first, to the surviving spouse.

In some cases the parties for various reasons may want to provide the surviving spouse with more than 50% of the estate, or even with the full estate. If that would be allowed there would be (at least until the death of the surviving spouse) little or nothing left for the children of the couple. However, for the children of one of them either from a previous marriage or adopted or born outside of wedlock there would be nothing left at all. In all European countries except in the UK and in Ireland children have a statutory "forced share" in the estate of their parents. Is it possible to frustrate this forced heirship by allocating to the surviving spouse - partly or fully – the "community property-share of the deceased spouse? This construction has a statutory basis in Belgium, France, and Luxemburg. In the Netherlands the construction has been upheld by the courts but with the coming into force of the new provisions on

inheritance on the 1rst of January 2003 it is deemed to constitute a "hidden legacy" (semi-legaat) that cannot frustrate the forced share of the children.

In France article 1524 of the Civil Code *(clause d'attribution intégrale de la communauté au conjoint survivant)* has provided elder couples with a means to repair the lack of statutory inheritance rights of the spouse in general. As of the 3rd of December 2001 the surviving spouse has been given the right to choose between usufruct of the whole estate or to inherit one quarter of it, the need to resort to this construction has diminished. The construction needs approval by the courts, and may be refused if it is deemed to be contrary to the interests of the family. Children of one of the spouses from a former marriage or born out of wedlock have a right to oppose the construction.

In Belgium and in Luxemburg a similar provision exists. In both countries the surviving spouses now have statutory inheritance rights and therefore the need to resort to this construction has become less obvious. In Belgium the construction cannot interfere with the "forced share" of the children of one of the spouses from a former marriage (art. 1465 CC). This also applies to children adopted before the marriage and, as is assumed by legal scholars, to children born out of wedlock.

In Luxemburg the construction is becoming more and more popular with elder couples; it provides (contrary to the situation in Belgium) a way to avoid paying estate taxes, moreover it cannot be opposed by children from a previous marriage of one of the spouses and no permission from the courts is required.

The advantages of a closer co-operation in Europe in order to promote and improve the legal protection of the family in matters of succession

by

Patrick YAIGRE
Notary, Bordeaux (France)

In our Romano-Germanic legal system, and especially in French law, the notary is central to family law and the law on succession - codified law - thus ensuring certainty of the law through officially recorded documents.

I shall not, as I had intended, look again at the different laws applicable in our European countries. Those participants who are to address this Conference will look at the different systems of matrimonial property and their consequences for succession settlements, and will, in particular, compare the different disposable portions of testators' estates.

The differences highlight the benefits of closer co-operation in Europe, with a view to improving the legal protection of the family where succession is concerned. In so far as we are doing away with borders and allowing families to settle anywhere in Europe, we must either endeavour to keep to the minimum the disparities between the different legal statuses or put forward ways of resolving the discrepancies.

In this context, a perfect example of this move towards harmonisation of our national systems of law is a change in French legislation, which the body of notaries helped to draft, and which relates to the rights of the surviving spouse and of the adulterine children, thus modernising various provisions of the law on succession. The new law was dated 3 December 2001, and it came into force on 1 July 2002.

Unlike legislation in most other countries, French law was very slow to grant rights to the surviving spouse and to grant him or her the status of heir within the family. The old principle of assets going to heirs of the blood held good for more than a century and a half, and still holds good now.

Today, under this new law, the spouse benefits from improved status in three respects (these statuses exist under the legislation of most of the countries around us):

- better status in the order of succession,
- better status in respect of the home,
- recognition of the right to continue to live in the same conditions as before.

Thus a better balance is struck between the right of the persons entitled to a reserved portion in the estate (descendants) and the right of the spouse.

A. Status in the order of succession

The surviving spouse comes into the 3rd order. Under the French Civil Code, a deceased person may have:

- descendants: 1st order,
- failing descendants, ascendants: 2nd order,
- failing ascendants, others up to the 6th degree,

failing which, the estate goes to the State.

The new text allows the spouse, if there are descendants, either to retain a life interest or to retain one-quarter not subject to a life interest. If there are also children from different relationships, his or her rights are limited to a quarter.
If a deceased leaves only a mother and father, the spouse receives half not subject to a life interest; the figure is three-quarters if there is only one ascendant, eliminating the deceased's brothers and sisters (the principle that assets go to heirs of the blood is a limited one). If there are neither descendants nor ascendants, the spouse inherits the whole estate.

Three points should be noted:

- there is a new donor's contingent reversion in the event of the donee's dying before him or her, applying to family assets and benefiting the brothers and sisters;
- ascendants other than the mother and father benefit from maintenance;
- they may also benefit from conversion of a life interest into a life annuity (paragraph to be compared with the previous legislation).

B. Status in respect of the home

Much has been changed:

- the surviving spouse retains his or her home for one year, free of charge.
- he or she may request a lifetime right of user and civil-law right of habitation in that home.

This is not an automatic right, but has to be claimed.

C. The granting of the right to continue to live in the same conditions as before

The new law enables the surviving spouse to claim maintenance and, in particular, where there are no descendants, he or she acquires entitlement to a reserved portion of one quarter of the estate.

This reform increases the spouse's rights, the family traditionally being represented by parents and children, with the addition of the dependent grandparents, but certainly not collateral relatives.

II. Elimination of discrimination in the context of succession

Pressure from European Conventions has enabled French minds, and therefore legislation, to move forward. The first change is that the concept of “adulterine child” has been eliminated from our Civil Code. Equality between all the children has become the rule, but the consequences of this are not yet clear.

Questions arising include the fate of inter vivos distribution of the estate among the presumptive heirs signed under the former legislation, whether or not former "adulterine children" will be able to obtain their equal rights, and the position in respect of retroactive application of the laws and decisions already signed.

The second change is the deletion of the rules on the death of persons in the same incident (former Articles 720 et seq). Henceforth, when two persons, one of whom was entitled to inherit from the other, die in a single incident, and when it is impossible to determine the order of their deaths, the estates are settled separately, each without involvement of the other deceased.

The third change relates to unworthiness to inherit. There are no major changes to the principles, but minor ones (provision is made for the murderer's accomplice to be able to be declared unworthy, and account is taken of perjury committed by a witness, all under the supervision of a court). A new aspect is that the children of an unworthy person are no longer excluded, and may inherit through their ascendant.

Testate succession

The concept of reserved portion in kind (retained by France). The concept of public policy. The concept of the disposable portion. (paragraph to be fleshed out)

While intestate devolution is considered in French law to be the principle, testate and contractual transmission merely provides an exception.

The applicable law is, where international succession settlements are concerned:

- the law of the country where the real property is located, in respect of immovable assets,
- the law of the deceased's last ordinary residence, where movable assets are concerned.

Study of the wills, the testamentary gifts and the succession agreements results in limitation of the scope of the law on succession.

I. Wills: requirements as to form

The Hague Convention of 5 October 1961 came into force in France on 19 November 1967. Wills are valid if they comply with the requirements as to form or the place of disposal, of the nationality or of the ordinary residence. The aim being to validate their form to the greatest extent possible.

A. Joint wills

These are not recognised by the French Civil Code, but the French Court of Cassation has decided that, where the country in which such a will was drawn up recognises it, it will be accepted in France.

B. Registration of wills

The Basle Convention of May 1972, which France has ratified, advocated an international will registration system, and it is the central register in Aix, kept by the notarial profession, which is responsible for registration in France.

C. International wills

France ratified the Washington Convention on 25 April 1974. A will may be written by the testator or by a third party, in a language of his/her choice, with two witnesses attesting the declaration and signing it, together with the testator and a person authorised to act in connection with wills, who, in France, is a notary.

Such a will is merely additional to a holograph or officially recorded will.

II. **The effects of wills** (to be expanded orally)

A will discovered abroad must be registered in France. If succession takes place in France, the will is registered by a notary. The appointment of an executor depends on the law on succession (example of the limits applying to the power to dispose).

The executor has no power to sell an immovable property in France when there are heirs entitled to a reserved portion of the estate.

Testamentary trusts

The succession may be governed by a testamentary trust which empowers the trustee to sell the assets of the succession. If the succession is governed by French law, the trust will not be able to operate against the heirs entitled to a reserved portion, who will be able to demand the whole of their portion.

The Hague Convention of 1 July 1985 on the Law applicable to Trusts and on their Recognition has not been ratified (unless I am mistaken) by France.

Finally, testate succession is limited by the public policy principle of the reserved portion.

The concept of public policy in respect of assets subject to national law.

Descendants' reserved portion determined by the number of children.

Reduction in reserved portion depending on whether there is a spouse or a third party.

Lastly, where there are no descendants, the reserved portion for the ascendant differs, depending on whether there is a spouse or a third party.

As we have just stated, difficulties appear when a succession has to be settled which either includes assets outside national territory or concerns heirs of a different nationality.

Reserved portions in France and marriage contracts

When all the children were born of the same relationship, if an *avantage matrimonial* (enrichment of a spouse by virtue of the rules governing matrimonial property, to which the rules on gifts do not apply) has been agreed in a marriage contract, this contract is not subject to the rules on succession or to transfer duties, so may affect the reserved portion, which is a matter of public policy.

The *avantage matrimonial* is frequently used by spouses who wish the surviving spouse to retain the whole estate exempt from any transfer duties.

Civil Solidarity Pacts (PACSs)

Under the law of 15 November 1999, the Civil Code now allows Civil Solidarity Pacts, authorising two persons not connected by other links, such as marriage or family relationship, to bind themselves together.

In terms of succession, the PACS has no effect unless both partners confirm their intentions in a will.

A question unanswered by French legislation is that of the situation of persons who have entered into a PACS and who benefit from inheritance rights under their national law. The question is even more relevant for homosexual spouses, whose situation is not recognised by our Civil Code.

There are, however, other ways of ensuring an income for the surviving spouse and the registered partner. This can be done by taking out, in certain conditions, life-insurance contracts which may not be subject to either transfer duties or the conventional rules on succession. It is clear to me that France is not the only country where such contracts exist, contracts which may thus provide a solution to the legislation's sensitivity towards, for example, cohabitation, but this is something I know we shall be looking at very shortly.

CONCLUSION

- Harmonisation

- Or settlement of conflicts between legislation (accepting the particularism of each)

The decision in this case seems difficult, for great illusions would prove false. The laws governing succession, in France at least, are rooted in our culture. Our starting point is a system of succession in which the main heir is the descendant (assets go to heirs of the blood), and where the concept of minimum income for the spouse is neglected. Some of our European partners take as their starting point a system of succession in which the heir is the spouse.

Society is changing, and families are no longer tribes, now consisting solely of father, mother and children, with the addition of the grandparents.

The new provisions recently adopted by France demonstrate this development, a veritable cultural revolution: the spouse has joined the club of heirs entitled to a reserved portion.

The legal protection of the family in matters of succession in English law

by
Gillian COCKBURN[3]
Solicitor, Cockburns, Panorama (United Kingdom)

The following applies to England and Wales as both are governed by common law. Different provisions apply to Scotland which has a civil law system and already has fixed rules of heirship.

The primary distinctive feature of English succession law as contrasted to many European jurisdictions is that in England there is complete freedom of testamentary disposition. As a result, an individual is free to leave his or her estate to any one he or she may chose. This freedom is preciously and keenly guarded. Whilst there are some ways in which it is curtailed or overcome, the freedom is always the starting point on any consideration of disputed cases or (in the perception of practitioners) public policy.

It must also be contrasted with the position on divorce. Whereas many continental European jurisdictions view death and divorce as the same, both ending the community of marital property, England has totally separate laws and polices. Again this is highlighted most in freedoms to make arrangements on divorce. Whereas many EU countries allow binding pre marriage agreements, just as we allow binding testamentary dispositions, English law forbids attempts to oust the jurisdiction of the family court and pre marriage agreements, even separation agreements, will merely be considered by the family court as one of many other factors to produce affair outcome. They are often routinely ignored including foreign pre marriage agreements even if binding in the country where they were made if the divorce had been there.

The most obvious way in which testamentary provision is proscribed is when a person does not chose to make any testamentary provision i.e. dies intestate. In England there is some limited protection of the family in succession in the intestacy laws. They are set out in Administration of Estates Act 1925. This only applies where the deceased dies without leaving a valid Will. It sets out the order and extent in which the spouse and other close blood relatives, usually the children, share in the estate of the deceased. The children do not have to be children of the marriage. All children, whether legitimate or illegitimate, are entitled to share in the estate, depending on the amount in the estate.

The intestacy laws do not benefit a cohabitant, however long term the relationship, as only marriage partners benefit under the intestacy laws. In addition, if the estate is under £125,000 (approx Euro: 200,000) the children will not take any share in the estate under the intestacy laws.

[3] Gillian Cockburn acknowledges the help of David Hodson of the Family Law Consortium, London (www.tflc.co.uk) in the preparation of some of these notes.

However, where the deceased dies with a valid Will (*testate*) then the provisions of the Will take priority over any responsibility that the deceased may have for his family.

The law has however given some protection to the family from being disinherited in the following ways:-

1. The **Inheritance (Provision for Family and Dependants) Act 1975** ("I(PFD)A").

1.1 This Act gives a category of claimants a right to claim provision or further provision from the estate. The possible claimants include spouse, heterosexual partners (for deaths after 1st January 1996), children, and anyone being maintained by the deceased at the date of death.

1.2 The Act only applies to the estate of an individual who was domiciled in the United Kingdom at the date of death. Query whether this could be extended to the UK estates of EEC Nationals.

1.3 There is a difference in the level of provision from the estate provided for spouses and all other applicants. Spouses are entitled to such financial provision as would be reasonable to receive in all the circumstances for a husband or wife to receive. All other applicants can only apply for "such reasonable provision ………………………..for his maintenance" A more generous level of provision for spouses.

1.4 The Court does have power under the Act to open up previous transactions made within 6 years of death (**s10**) and can take into account certain trust interests

1.5 But there are strict time limits for claims.

2. By allowing a Will to be challenged if:

2.1 The Testator did not have legal capacity at the time of making the Will. The tests for capacity are set out in **Banks v Goodfellow** (1870) LR 5 QB 549 at 565).

2.2 The Testator was unduly influenced to make the Will.

2.3 The Will was not validly signed and witnessed in accordance with **s9 Wills Act 1837.**

3. By providing tax breaks

3.1 Transfers on death between spouses are exempt from UK Inheritance Tax ("IHT"). However if the donee spouse is foreign domiciled then the tax exemption, apart from the usual nil rate band, is limited to £55,000, approx Euros 90,000 (**s18 Inheritance Tax Act 1984** "IHTA"). Thus in general a spouse will not have to sell his or her inheritance to pay IHT on death.

3.2 If the estate contains a business asset or agricultural property then there may be a 50% or 100% relief from IHT on death under **s 103 - 124 IHTA**. This relief is intended to prevent the need for the break up of the family business or the family farm on the death of the proprietor. However, it also applies to non family members who inherit as the relief depends on the type of the asset and not the relationship of the person inheriting to the deceased.

4. Other Safeguards

4.1 Private Companies often contain restrictions in their articles of association on the transferability of shares on death. This is to prevent shareholders leaving their family company shares to any outside the family.

4.2 Trusts can be used to preserve family assets and to prevent family members from dissipating those assets or from leaving them outside the family. Provision can be set up in lifetime or on death. The types of trusts which could be used include:-

- Protective trusts
- Discretionary trust
- Life interest trusts.
- Accumulation and maintenance trusts.

5. Special provisions affecting children

5.1 Trusts can also be used to protect a child's inheritance under a Will. Statutory trusts for children under 18 arise automatically under the intestacy laws.

5.2 Trustees are bound by statutory provisions under Acts such as

- Administration of Estates Act 1925
- Trustee Act 1925
- Trusts of Land (Appointment of Trustees) Act 1996
- Trustee Act 2000

These Acts set out the Trustees duties of care and other responsibilities in running the trust for the benefit of the beneficiaries. These are designed to protect the children's inheritance and to allow the Trustees to provide funds for maintenance until the children reach the age of inheritance.

5.3 Guardians can be appointed under the Will to look after children of the testator and may be given provision by the Trustees from the children's inheritance to use for the benefit of the children. They can be different persons from the Trustees. A guardian's appointment will cease once the child reaches 18 even if the child is not yet entitled to his or her inheritance. See "Appointing Guardians of children" by Gillian E Cockburn and David Hodson pp96-104 of Probate Practitioners Handbook (3rd Edn) (1999) Law Society Publishing for further details.

6. Harmonisation?

To bring England and Wales into line with other European jurisdictions which do have fixed heirship rules it would first be necessary to remove or curtail the fundamental freedom of testamentary disposition.

The advantages of a closer cooperation in Europe in order to promote and improve the legal protection of the family in matters of succession

by

Dagmar COESTER-WALTJEN
Professor, Institut für Internationales Recht,
München (Germany)

Introduction

When looking at my abstract you might have wondered why I concentrate on German, Irish and Chinese law. The reason for this is that I wanted to contrast rules from very different legal families on the one hand and – on the other hand – stress some similarities especially between Irish and German law. In my speech, however, I shall mention also other legal systems which provide similar solutions.

Let us first move to the protection of the family in cases of intestacy.

I. Protection of the family in cases of intestacy

1. Participation of the family

a) General principles
In almost all jurisdictions the family members will participate in the wealth of the deceased. On intestacy normally only family members and the spouse (or registered partner) take a share. In some legal systems, like for example China, also the in-laws, step-parents and step-children will inherit under certain conditions. The same applies there for non-relative dependants. In Irish and German succession law as well as in most other European systems this would not apply.

There is also the general rule that the estate will be distributed among the issues and the surviving spouse (partner) and that close relatives exclude the more remote.

b) Position of the surviving spouse
The surviving spouse is included in the circle of persons who will benefit under intestacy. There is growing tendency to enlarge the portion of the spouse, because of the potential wishes of the deceased, the declining importance of the ancestor family and the diminishing dependency of the younger generations (life expectancy, life circles).

Under German law the surviving spouse in general takes one half of the estate under intestacy (one quarter being purely inheritance, and one quarter under the marital statutory property regime). The other half will go to the issues, if there are any. If there are no issues, the surviving spouse will, however, have to share the estate with the parents of the deceased, the parents taking one quarter of the

estate. The wisdom of this rule is doubted and if there were a reform, probably this rule would change insofar as the surviving spouse would take all in case of want of issues.

Furthermore, the surviving spouse takes the household chattels in addition to his or her statutory portion.

According to the new German law on registered homosexual partnerships the surviving homosexual partner will be treated like a spouse at the death of the other.

Under Irish law the position of the surviving spouse is even stronger. If there are issues the surviving spouse will take 2/3 of the net estate, the rest will be distributed among the issues. If there are no issues at all, the surviving spouse takes the whole estate. All other relatives will be excluded by the surviving spouse.

In addition it has to be stressed that even though the surviving spouse inherits together with the issues, the surviving spouse has a claim to the transfer (appropriation) of the matrimonial home and the household chattels against the personal representative. It should be mentioned that the benefits under life insurance as well as the position of a joint tenancy devolves outside the rules of inheritance.

Under the law in force in China for the time being spouse, children and parents inherit in the first order. They exclude all further relatives, but widowed daughters-in-law and sons-in-law will be regarded also as successors of the first order, if they have made the predominant contributions in maintaining their parents-in-law. In addition, an appropriate share of the estate may be given to a person, who depended on the support of the decedent and who neither can work nor has a source of own income. The latter, however, has not a legal position as successor of the deceased.

If we look into other European legal systems we shall find comparable results: in Swiss law for example the surviving spouse takes one half besides issues, three quarters together with the parents; in Austria the surviving spouse takes one third, res. two thirds (but might have to share the estate even with the deceased's grand parents); in Italy one third, if there is only one issue, half of the estate if there are several issues, and besides parents two thirds; Greek law provides one quarter resp. one half for the surviving spouse and the Netherlands place the surviving spouse in the same position as the child. However, it has to be seen that in all these legal systems the spouse might have in addition a claim under the marital property regime as all systems mentioned adhere to a kind of community of accrual regime.

c) Position of the children

The position of the children has become weaker insofar as the position of the surviving spouse has been enlarged. Where there is no surviving spouse, the children take to the exclusion of all other relatives in Irish and German law. This

is also true for most other European systems. In Chinese law they might have to share the estate with the parents of the deceased (and possibly the in-laws).

d) Situation where there are no next of kin
Where there are no next of kin in German and in Irish law the state takes the estate. However, in Irish law the state has the possibility to appoint a person close to the deceased to inherit.

2. Participation of the state

Despite the principle of family succession there is always a stranger, who takes part in the wealth of the deceased: The state. This is done by way of taxes.

The German system of inheritance tax provides progressing rates depending on the value of the estate and the degree of the relationship. There are three classes of relationships and several steps with regard to the value. The inheritance tax may amount up to 50% of the net value of the estate. However, for spouses and children there are considerable abatements, which might lead in many of the middle class families to an exemption from inheritance tax altogether.

The Irish inheritance tax system is more complicated. In principle it is also progressive and provides different classes of successors with certain abatements. The surviving spouse has to pay no inheritance tax at all. Thus also in many cases no inheritance tax or only a very small sum may have to be paid. There is, however, an additional probate tax in Ireland.

3. Protection against fragmentation of estates

The rules under which successors take equal portions may lead to fragmentation of estates. In the past there have been special laws which eliminated these problems (partly) with regard to certain estates (for example farms), however, these statutes have only a limited relevance and with the new structure of wealth they do not play such an important role. Yet it has to be kept in mind that if the surviving spouse inherits the family home together with the grown up children or if there has been a small family business which has to be shared now between persons with different interests, problems might arise. However, these are situations, of which the deceased may take care of by writing a will.

In Irish law – as in other Anglo-American legal systems the creation of a joint tenancy may avoid these problems.

4. Protection against liability for the debts of the deceased

All legal systems provide a kind of a disclaimer or release of the position under intestacy. These rules are important where there is an excess of liabilities over assets.

II. Protection of the family in testate succession

1. Freedom of testation

Under German, Irish and even Chinese law there is no fixed share, of which the testator may not dispose. He has the possibility to dispose of the whole estate. In German and in Irish law this is stressed to be the outflow of the principle of autonomy.

In China, however, there is the rule that a necessary portion of the estate shall be reserved for a successor who neither can work nor has a source of income. But there are no fixed shares (like for example in French law) in any of these legal systems. This is different in many other European systems – excluding English law – which following the French example reserve a certain share of the estate for close relatives and restricting insofar the freedom of testation. A will disposing of the whole estate contrary to these provisions may be reduced to the free share. This is for example true in France, Belgium, Spain, Turkey, Czech Republic, Denmark, Norway, and even in Louisiana (USA).

In principle, the freedom of testation is only limited by the standard of public policy. Immoral dispositions will be regarded as void.

Variation of wills is not possible under German law. If there has been a mistake by the testator or in the case of fraud and duress the will may be contested. The same is true under Irish law. But in all these cases the judge must not draw up a new will for the testator. If the will is successfully contested in whole or in part, the laws on intestacy will apply, as far as there is no valid testamentary disposition.

However, there are some correcting measure for the protection of the family.

2. Correcting measures

Though under German law there is no reserved share of which the testator may not dispose, close relatives of the testator may take a compulsory portion. This, however, is not a share in the estate, but a money compensation in lieu of inheritance. Such a compulsory portion may be asked for by the surviving spouse, the issues and the parents, if they have been disinherited. The compulsory portion is half of the share under intestacy.

Whether it is a wise rule to give a claim to such compulsory portion to children if there is a surviving spouse who inherits the whole estate, is under strong discussion at the moment. Also, the compulsory portion of the parents is under discussion. With regard to registered partners in Germany the same law as to spouses apply.

Irish law takes a partly different, partly similar view. The surviving spouse in Irish law has – very similar to the compulsory portion of the German law – a legal right, if he or she has been fully or partly disinherited. If the testator is survived by children and spouse, the legal right of the spouse will concern 1/3 of the net value of the estate. Where there are no children, the legal right concerns half of the net value of the estate.

Such monetary claim is also to be found in the laws of Austria, Poland, Hungary, Sweden, Finland and the Netherlands. It has the advantage that the disinherited family member will not be forced upon the other beneficiaries who form a community for the purpose of distributing the estate. The disinherited family member remains outside that community and may not demand the transfer of certain goods, though in Irish law the spouse may ask for appropriation of the matrimonial home and household chattels in satisfaction of his or her legal right.

The size of this compulsory share (including for this review the forced heirship) and the circle of persons entitled varies in the other European legal systems. The Czech Republic and the Netherlands do not grant such right (respectively a forced heirship) to the surviving spouse but some protection with regard to the matrimonial home. Often the share of the surviving spouse amounts to one half of the share under intestacy (Austria, Switzerland, Denmark), but it may be even greater (Italy: half of the estate) or limited to a certain sum (Sweden and Norway). Issues may be protected even to a higher degree, some legal systems provide two thirds (Netherlands) or three quarters (Switzerland) of the share under intestacy, some rules protect especially minor children (Poland, Czech Republic), others reserve bigger shares of the estate (Italy: 1/2 for one child, 2/3 for several children; Spain: 2/3; France: 1/2 for one child, 2/3 for two children, 3/4 for three and more children).

With regard to the protection of issues the Irish legislator has chosen another way of protection, closely related to the English/Australian/Canadian approach. The disinherited child or a child which has not been looked after properly by the deceased may make an application for a provision out of the estate and the court may consider this application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children. This order may not affect the legal right of the surviving spouse. In Irish law this possibility is not limited to dependent children like it is for example in some Canadian provinces.
Under Chinese law there is, at the moment, only the very general rule that the reservation of a necessary portion of an estate shall be made in a will for a successor who neither can work nor has a source of income. This seems to be a very undetermined provision which due to the lack of big estates has practical value mostly for the family home and household chattels.

The protection of family members by forced heirship of compulsory shares and even by a right to claim provisions out of the estate would be incomplete if one would not take into account two aspects: first the unworthiness of the persons concerned and secondly, the protection against disposition of the deceased during his lifetime, which might defeat or substantially diminish the protective rules.

With regard to the first issue there exist rules which exclude persons who have killed or mistreated the deceased or have been found guilty of a serious offence against other family members (German, Irish, Austrian, Swiss law); neglect of family, especially maintenance obligation may also constitute a cause of

unworthiness (Spain, Czech Republic, Hungary, Poland, Switzerland), as well as immoral lifestyle (Germany, Greece).

With regard to the second issue life time dispositions of the deceased may be contested (France, Spain, Italy) or varied, or the person benefiting under such a disposition may be obliged to pay certain sums to the protected family member. The time limit for such contestable dispositions varies from two years (Israel, *Austria*) three years (Ireland), five years (Italy, Netherlands, Switzerland), six years (England) up to ten years (Germany, Greece), 15 years (Hungary), or – at least in principle – without any time limit (France). The details of these rules especially with regard to the intent of the deceased and the application of the rules in case of intestacy vary. This, however, would be the subject of a separate contribution. For the moment this short overview should suffice.

I thank you for your attention.

General Report[4]
Possible follow-up to the Conference by the Committee of experts on family law

by

Maria PUELINCKX-COENE
Professor of Law, University of Antwerp (Belgium)

I Introduction
II Protection by succession

A. The various members of the family and their right to inherit on intestacy

1. The surviving spouse
(a) the influence of matrimonial property regimes
(b) rights of the surviving spouse on intestacy
(c) the dual protection of the surviving spouse
2. Descendants
(a) the impact of matrimonial property regimes
(b) the right to inherit on intestacy
3. More distant relatives

[4] This report is based on the reports presented and the contributions and other input provided during the Conference, and on other comparative law research made on the subject, in particular: K. Boele-Woelki, *Huwelijksvermogensrecht in rechtsvergelijkend perspectief,* Molengraaf Instituut voor Privaatrecht 1999; 408 p.; Fédération royale des notaires de Belgique (ed.), Examen critique de la réserve successorale, Tome I, Droit comparé, 1997, 445 p. and Les relations contractuelles internationales, Le rôle du notaire, 1995, Part 2, Droit comparé, 401- 613 ; C. Labrusse-Riou, "Sécurité d'existence et solidarité familiale en droit privé: Etude comparative du droit des pays européens continentaux, in M.T. Meulders-Klein and J. Eekelaar, Famille, état et sécurité économique d'existence, Volume I: Famille,1988, 99-135; D. Leipold, "Europa und das Erbrecht" in G. Köbler, M. Heinze end W. Hromadka (eds.) *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends, Festschrift für A. Söllner zum 70. Geburtstag,* München 2000, 647-668;Y.-H. Leleu, La transmission de la succession en droit comparé, 1996 and "Nécessité et moyens d'une harmonisation des règles de transmission successorale en Europe", European Review of Private Law, 1998, 159-193; E. N. Frohn, Internationaal Juridisch Instituut, Onderzoek buitenlandse wetgeving, *erfrecht*, 1992; 100 p.; W. Pintens, "Die Europäisierung des Erbrechts", *ZeuP*, 2001, 628-648; H. Schwab (ed.) *DerSchutz der Familienwohnung in europäischen Rechtsordnungen,* 1995, 209 p. and *Familienerbrecht und Testierfreiheit im europaïschen Vergleich,* 2001, 389 p.; U. Spellenberg, "Recent developments in Succession Law" in R. Blanpain (ed.) *Law in Motion*, 1997, 711-749; A.Verbeke et al.: "European marital property law, Survey 1988-1994, *European Review of Private Law*, 1995, 445-481; A. Verbeke and Y.-H. Leleu, "Harmonization of the law of succession in Europe", in A. Hartkamp et al. (eds.) *Towards a European Civil Code*, 1998, 173-18.
The following works were also consulted: *International Encyclopedia of Laws* (Gen. Ed. R. Blanpain), Vol. 3 Family and Succession Law (ed. W. Pintens) and in particular the contributions of D. Schwad, P. Gottwald and E. Büttner (Germany); S. Storm and H. Viggo Godsk Pedersen (Denmark); M. Savolainen (Finland); G. Garcia Cantero and J. Rams Albesa (Spain); Miroslava Gec- Korošec and Vesna Rijavec (Slovenia); M. Kirilova Eriksson and J. Schiratzki (Sweden); *Jurisclasseur de droit comparé* , Collections of the juris-classeurs, in particular the contributions of A. Philip and H. Ekstrand (Denmark); M.P. Garcia-Rubio (Spain); B. Lancin (Finland); P. Drakidis (Greece); L. Lenti (Italy), V. Lange (Norway); A. Ferreira (Portugal) and B. Linden (Sweden).

4. Recent members
(a) the surviving partner in an unmarried couple
(b) children of a reconstituted family not related to the deceased

B. Mandatory protection for certain members of the family

C. Testamentary succession

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A. Is harmonisation possible in matters of succession?

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I. Introduction

1. Nowadays, when the question arises as to how the family is protected in matters of succession reference is no longer to the family as an entity in itself but to the various members of the family. All domestic laws provide for the right of the members of the family to inherit the deceased's wealth. However, a family may consist of many members, especially when the term "family" is taken in its widest sense, which is evident as today the de facto family increasingly enjoys certain legal protection.
On the other hand, the legal techniques whereby European States endeavour to organise family solidarity in order to ensure the financial security of its members vary widely from one country to another.

The theme of this 6th Conference was therefore quite wide and had to be circumscribed.

2. It is clear that the diversity of domestic provisions is most evident when an estate with an
international aspect is being divided. Harmonisation of the rules on conflict of laws will
certainly make those operations easier. However, the approximation of the domestic substantive rules on succession will prevent too many different solutions to solve a same problem.
That is what this Conference is concerned with.

3. "Protection of the family in matters of succession": it was therefore necessary to concentrate on the techniques of family property law . However, that does not mean that one should disregard that nowadays these techniques are no longer either the only means of transferring (large) fortunes or the only means of ensuring that equivalent living standards are maintained. I refer, for example, to the many types of insurance, diversified ad infinitum, and of the pensions (survivors' and other types) which in our welfare states often play a much greater part than family wealth in ensuring that close relatives of the deceased are able to enjoy the financial security necessary to exist. It is self-evident that in order to be able to ensure the material security of its members, the assets to be transferred must have a certain consistence. Inheritance law merely organises the way in which the assets are divided and cannot alter their amount, unlike tax law and, more particularly, the inheritance tax which may considerably reduce the net benefit which the members of the family receive in the estate. But even though the family is no longer generally the provider of significant wealth owing to the deterioration of the assets and pressure of taxation, I believe that it still continues to be a means of financial security for a considerable part of the population. As Professor M.A. Glendon has stated, "Work, family and the state are the three pillars of financial security and social standing of each individual in our societies ... What has changed in recent years is the relative predominance of the elements in the mix, with market work and claims of various sorts against the state gaining on, but not displacing the family."[5]

As a general rule, succession operates to the advantage of the family (see part II) , but it sometimes represents a danger to it (see part III).

II. PROTECTION BY SUCCESSION

4. Traditionally, a distinction has to be made between: protection by **succession on intestacy**, applicable in the absence of a will; protection by **mandatory succession**, i.e. protection

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[5] M.A. Glendon, "Changes in the relative importance of family support, market work and social welfare in providing financial security" in M.T. Meulders-Klein and J. Eekelaar, *Famille, état et sécurité économique d'existence*,
Volume I: *Famille*, 1988, (3-16), 5.

of members of the family who cannot be disinherited and protection by **testamentary succession**, arranged by the deceased himself for the benefit of the member of the family whom he prefers or who is in greatest need.

None the less, it was repeatedly emphasised during the Conference that two preliminary observations must be made:

- first, in the countries of continental Europe, which have structured matrimonial property regimes, i.e. a structured organisation of the financial relations of the spouses during the marriage and when it is dissolved - the scope of the estate and hence the protection of the other members of the family may thoroughly be influenced by the matrimonial property regime.
- second, the importance of tax law cannot be denied.

In that regard, it should be noted that in Germany, the Bundesverfassungsgerichtshof decided in 1995, that since the right to inherit of members of the family and freedom of testation are principles protected by the Constitution, they cannot be jeopardised by too heavy a financial burden.[6]

A. THE VARIOUS MEMBERS OF THE FAMILY AND THEIR RIGHT TO INHERIT ON INTESTACY

1. The surviving spouse

(a) The influence of matrimonial property regimes

5. The member of the family who is today regarded as (most) deserving of protection is undoubtedly the surviving spouse. A particular feature of this protection is that it may be organised - at least in most countries of continental Europe - on two levels, since those countries have structured matrimonial property regimes, which allow the surviving spouse to be protected even before the succession is divided. It may even be said that in those countries it is possible to identify *ersatz* inheritance laws in the guise of the matrimonial property regimes.

Structured matrimonial property regimes do not exist in the Common Law countries, as was admirably explained in the report by Professor Rieg at the Vienna Conference in 1977. As Professor Steenhoff clearly and amply demonstrated in his report, these structured regimes differ from country to country, even from the limited viewpoint of the rules governing the composition and the division of the common assets. But these factors determine the composition of the deceased spouse's estate and therefore the protection of the (other) members of the family.

6. Many countries, especially those of the "Latin" tradition (Belgium, France, Spain, Italy, Luxembourg, Portugal), have chosen as a statutory regime, applicable ipso jure to spouses who have not entered into a marriage contract, a community property regime, which establishes a common fund of assets alongside the spouses' personal assets, that is allocated to household expenditure. Nowadays such community of property is generally limited to assets acquired during the marriage, but it may also be extended to (family) assets inherited or received as a gift or existing before the marriage (e.g. the universal community of the Netherlands). In the event of dissolution by death, this "community" is divided into two equal parts, regardless of the actual contribution made by each spouse. This rule provides a (first) guarantee that

[6] BverfG. 22.6.95- 2 BvR 552/91; *NJW 1995, 2624*.

equivalent living standards will be maintained (in particular) for a surviving spouse who is not in gainful employment. Often the surviving spouse has the right to be allocated, as a matter of priority, the family home and/ or the household contents provided they are part of the community property. In addition the consent of both spouses is often necessary before these assets can be alienated during the marriage. As the protection of property intended for spouses' common use was the subject of the Vienna Conference in 1977, I shall make only brief reference to it.

However, this initial protection of the surviving spouse is excluded if the legal regime is that of separate property (Austria, Greece[7]), when each spouse continues to own and control his or her own assets as though unmarried. Neither spouse benefits from an increase in the other spouse's assets.

In order to avoid this "cold exclusion", a number of countries have chosen the intermediate solution of so called "participation" systems. As did the Scandinavian countries where the statutory regime consists of a combination of separation of property during the marriage and (a more or less wide) community of property, deferred until the marriage is dissolved. Then this community is divided *in kind* and in principle in equal parts.

Other countries prefer a mechanism of equalisation of the assets and of any increased value thereof There each spouse becomes entitled at the end of the marriage only *to the value of* half of the assets acquired by the other during the marriage.

In Germany, for example, a surviving spouse who was married under the statutory matrimonial regime of the *Zugewinngemeinschaft* receives a standard additional quarter share in the deceased spouse's estate by virtue of this right of participation. It would be difficult to find a better example of the great complementarity between these two components of family property law!

7. In some countries the statutory regime is imposed on every married couple. That is the general rule in Eastern Europe countries. But where spouses are allowed, by entering into a marriage contract, to derogate - to a greater or lesser extent - from the statutory regime, they are at the same time able to reduce or increase the financial security of the surviving spouse.

If, for example, the spouses may extend the community of property so that it covers all their assets and in addition leave this community entirely to the surviving spouse, or postpone its division until his/her death, they reduce or indeed completely exhaust the estate of the first to die and therefore the protection of other members of the family.

If on the other hand they are able to choose a regime of separate property, then their matrimonial property regime does not in any way affect their estate.

In the Scandinavian countries the "cold exclusion" resulting from the choice of a regime of separate property may be corrected by the courts and lead to a mitigated participation and even to a fairer division of the assets.

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[7] With some amendment: see the Steenhoff Report.

However, this "cold exclusion" is a reality (especially where the marriage is dissolved by divorce) in certain countries (such as Belgium) where the marriage contract is regarded as the immutable law of the parties.

On the other hand certain countries (such as Belgium, France or Switzerland) made statutory provisions for correcting the opposite situation where the marriage contract tends to exhaust the estate of the first to die (income and capital of the first to die that have become part of the community property may be recovered by his heirs, matrimonial benefits are classified as gifts.). In Portugal a universal community regime cannot be adopted if the future spouses already have children and a separate property regime is mandatory when one of the spouses is aged over 60. In Italy equal division of communal property is a rule of public policy.

8. In English law, which does not recognise structured matrimonial property regimes or marriage contracts subject to a particular status, the financial situation of the spouses is comparable to that of spouses married under a regime of separate properties. However, this does not prevent the courts[8], when a marriage is dissolved, from taking appropriate financial measures and, if necessary, reallocating the ownership of assets (e.g. the family home).

(b) Rights of the surviving spouse under intestacy

9. When the first spouse dies, the division of the matrimonial property regime (if any) is followed by the division of the deceased's estate. To speak of the protection of the family in matters of succession is somewhat pleonastic. Succession by lineage was traditionally regarded - and indeed criticised - as the means of preserving the family property and therefore of ensuring the financial security of its members. A large number of (other) members of the family may claim rights in the deceased's estate, but not all together, since a priority is established by law. The result is automatic protection of those members of the family, but in the form of a cascade. This means that this protection is real only for those whose rights to inherit have greatest priority, as close relatives exclude the more remote.

10. As we were shown by Professor Coester-Waltjen, the established priorities were during the final decades of the last century overturned everywhere in Europe. In all domestic laws the surviving spouse, despite not being a blood relative, has become an heir whose inheritance rights have dramatically increased at the expense of the traditional rights of lineage extended to distant relatives. The logic based on blood was thus substituted by a logic based on affection. Financial solidarity between spouses has to a large extent replaced the desire to transfer (family) assets to the next generation. Nowadays the traditional vertical function of the right to inherit is combined with - or gives way to - this new horizontal function, regardless of any protection afforded to the surviving spouse under the matrimonial property regime.

11. But how are these two functions of inheritance law to be combined or reconciled in a balanced manner, especially where the family assets are quite modest?

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[8] See the Cockburn report.

This issue was heavily debated in a number of countries, given that the various interests at stake are not always the same. In the Netherlands it took almost half a century before a solution was found. The solutions adopted by the various national legal orders are manifold and sometimes complex. As a general rule, however, the surviving spouse obtains (at least) a right (to occupy) the family home and (to use) the household contents. This was one of the concerns expressed in 1981 by the Committee of Ministers of the Council of Europe in its Recommendation on the rights of spouses relating to the occupation of the family home and the use of the household contents.

12. In several legal orders the surviving spouse has a life interest in a part or even the whole of the estate of his partner: this marks a compromise between maintaining the standard of living of the surviving spouse and keeping the assets in the family of origin. That is the solution adopted in most countries of the "Latin" tradition (Belgium, France and Spain, but also in Hungary). An increasing number of countries grant the surviving spouse a greater or lesser part of the estate in plain property (for example, two thirds in Ireland, one half in Switzerland, one third in Denmark, one quarter in Greece ...). Where the surviving spouse is granted a child's share (as in a number of countries in Eastern Europe) this is sometimes stigmatised as a penalty on fertility and often considered as being insufficient of maintaining the standard of living of the surviving spouse. That was the reason why the law changed in the Netherlands. Other countries organise a kind of *fideïcommis de residuo* (Sweden) of which the surviving spouse is the initial beneficiary and the relatives the second beneficiaries. In some counties the surviving spouse is entitled to the entire estate up to a certain maximum limit. Thus in England, as Mrs Cockburn explained in her report, small estates go entirely to the surviving spouse, as he/she is entitled to the personal chattels, to a statutory portion of £125,000 if there are issues and of £200,000 in want of issues, plus a life interest in one half of the residue. However, that does not , as was pointed out, necessarily preclude difficulties in allocating the family home, given the very high price of residential property in some parts of England.

13. Sometimes all other relatives than issues are excluded by the surviving spouse. In many legal systems however, the portion or the nature of his/her share varies according to the number or order of the relatives with which he/she competes.

14 . The most recent reforms tend to favour the surviving spouse as the main and priority heir. Thus the new inheritance law in the Netherlands, which enters into force on 1 January 2003, gives the surviving spouse the entire estate, irrespective of its amount, while the issues are entitled only to a claim in the amount of a child's share only (as a general rule) being payable on the death of the surviving spouse. The new French law is less generous, but none the less leaves a life interest in the entire estate to the surviving spouse (or one quarter outright). That is also the case in Hungary and (already since 1981) in Belgium.

(c) The dual protection of the surviving spouse

15. It was already pointed out that to adopt a statutory community regime and to grant a large inheritance share to the surviving spouse is equivalent to giving with both hands. And indeed this protection at different levels may have regrettable

consequences in an international context. The connecting factors not necessarily being the same for matrimonial property regimes and inheritance law, the risk exists that the protection afforded to the surviving spouse might sometimes be too limited and sometimes too great. However this argument holds so long as in domestic laws the inheritance rights of the surviving spouse depend on the protection afforded under the matrimonial property law. E.g. the Napoleonic Code, which introduced community of property as the statutory matrimonial regime, relegated the surviving spouse to the last rank of the heirs, while on the other hand the large inheritance rights the English spouse has enjoyed since 1938 compensate for the strict separation of the spouses' assets. This link tends however to disappear, as their is a growing tendency all over Europe to enlarge the inheritance portion of the surviving spouse, irrespective of the statutory matrimonial property regime chosen. Here the approximation of the substantive domestic rules ensures that even in an international context the surviving spouse, even if subject to a separate property regime, will none the less enjoy a certain degree of protection.

16. This dual protection is reserved for a spouse who was not divorced at the time of death. But divorce does not prevent the equal division of the community of property, it does exclude however matrimonial advantage granted by the marriage contract, such as, allocation of the entire community of property, to be honoured. An ex-spouse, as a general rule, loses all rights to inherit on intestacy of the former partner. The effect of mere de facto separation varies from one country to another.

17. To date, the Netherlands is the only State to allow couples of the same sex to marry, with all the financial advantages which that entails as regards matrimonial property regimes and inheritance rights. In Belgium a Bill to that effect has been laid before Parliament. A Resolution of the European Parliament (of 8 February 1994) on the rights of homosexuals and lesbians recommends that member States put an end to the prohibition on homosexual couples marrying or enjoying an equivalent legal status which would grant them the same rights and advantages as married couples (and also the right to be parents or to adopt or raise children).

2. Descendants

(a) The impact of matrimonial property regimes

18 Only a regime (statutory or by agreement) of separate property affords a protection to next of kin other than the surviving spouse. That regime is the preferred choice in Belgium of persons with issue who (re)marry at an advanced age. In Portugal, as was already mentioned, that regime is compulsory when one of the spouses is over 60 years old.

(b) The right to inherit on intestacy

19. It was rightly pointed out during the Conference that the recent enlargement of the inheritance rights of the surviving spouse inevitably reduced the protection of the other members of the family. Their financial security is less and less guaranteed where they have to share the estate with a surviving spouse. Between relatives priority has always been given to issues , who exclude more remote relatives out of the estate. Now however they must face competition from the surviving spouse. In

more and more countries the children must even wait until the death of the surviving spouse before being able to enjoy inherited property or to derive any benefit from it, since the surviving spouse is the owner (the Netherlands), has a life interest (Belgium, France, Hungary) or is the principal beneficiary (Sweden) ... of the whole of the estate.

This option is justified by the fact that as the assets of the *average* family are rather modest, only wide inheritance rights are capable of maintaining the standard of living to which the surviving spouse was accustomed.

20. However whenever the surviving spouse and the descendants share the estate together, the interests at stake are not always the same. To find a balanced and fair solution for all possible situations is not easy and not many national legal systems have been successful in solving that problem. It certainly seems to be justified to give priority to the surviving spouse when he or she takes the estate together with common children, since they will inherit at a later date from the surviving spouse, who is their second parent,. That is even self-evident when the widow has already reached a certain age the common children being capable of earning a living. Such a preference is still reasonable when a young surviving spouse takes the estate together with his/her infant children, since he/she has the obligation to maintain the common children and to provide education and training so that they will be able to provide for themselves one day.

In that respect it should be noted that a number of domestic laws (Germany, Belgium, Spain, Italy) have, in the course of recent reforms, provided a better guarantee of the child's right to education and to adequate training. Some have done so beyond the age of majority, aware that in a society where, for many people, work is the most important source of wealth, education and adequate training guarantee better the next generation's security of existence than a right to inherit, which they would nowadays (normally) be entitled to only at an advanced age. As the old saying has it, it is better to give the fishing rod than the fish!

21. The scenario is however different when the descendants are only related to the deceased and , accordingly will not inherit from the surviving spouse, their stepparent, who may even be the same age as they are: the well-known problem of the old goat and the green leaf. When even there the surviving spouse's rights are given too much priority the result is, not that the stepchildren must wait to enjoy their rights of inheritance but that they are definitively precluded from doing so. The balance is therefore upset, especially when the children's education and training has not been completed, since the surviving spouse is often no longer under an obligation to maintain the partner's children following the partner's death. That is why certain countries (Belgium, Germany) require that the surviving stepparent help to finance the children's education.

Organising the way the estate is divided between a surviving spouse and the stepchildren has proved to be a very delicate point which has considerably delayed a number of the recent reforms and has led to a variety of measures of protection some more effective than others. In some countries this might even lead to a quantitative reduction in the surviving spouse's inheritance rights and in the matrimonial advantages conferred by the marriage contract.

22. The most significant positive event in recent decades, as regards descendants' inheritance rights is indisputably the abolition in most domestic substantive laws of the former discrimination of children born out wedlock. This principle was proclaimed in Article 9 of the European Convention on the Legal Status of Children born out of wedlock. However, a number of exceptions remain, especially in relation to the right to inherit part of the estate in kind.

One condition still remains: affiliation with the deceased must be established, which raises of course more problems in the case of paternal affiliation than in that of maternal affiliation.

As a general rule, children who have been (fully) adopted enjoy equal treatment, as provided for under Article 10 of the European Convention on the adoption of children.

23. All children are entitled to equal shares in the estate. However, in various countries there are systems of preferential allocation of assets in favour of a child for whom these assets provide a job. That child must then compensate its co-heirs in value in accordance with the various procedures.

3. More remote relatives

24. Where the deceased has no issue, the father, mother, brothers and sisters were traditionally called upon to take the assets in priority to the grandparents and more distant collaterals. Today their rights of inheritance have been greatly reduced, and sometimes even abolished when they take the estate together with a surviving spouse. Under the *Ancien Régime*, protection of the family by inheritance was extended to an unlimited degree, as is still the case in Germany and in Scotland. In most countries, however, the right to inherit is more limited. It is most restricted in certain countries of Eastern Europe, under communist influence, where even grandparents have no rights of inheritance. Not only do more remote relatives have less priority as regards inheritance rights, even where they do qualify, their net benefit may be considerably reduced owing to the higher rates of inheritance duties which apply to them by comparison with those applicable to descendants and the surviving spouse.

4. Recent members

25. This is the name which I propose to give to members of the de facto family, with whom the deceased has no legal ties. They are not received with the same enthusiasm in the various domestic laws. I am referring to the partner in an unmarried couple and the children of a reconstituted family who are not related to the deceased.

(a) The surviving partner of an unmarried couple

26. Nowadays - and it is quite a recent development - a distinction needs to be drawn. The mere fact that partners were living together for a certain period is generally not accepted as being able to establishing a reciprocal right to inherit. Slovenia is one of the only countries in which the survivor in an unmarried couple, on certain conditions, is granted the same right to inherit as the surviving spouse. In Czech law anyone who

has lived with the deceased during the year preceding his death forms part of the second order of heirs. That Sweden, although an avant garde country in this field, does not recognise an inheritance right to an unmarried partner was justified by the fact that a dissolution of such a relationship by death is quite rare. None the less, Sweden accepts that common property between unmarried couples is created, limited to the family home and the furniture.

27. In some countries cohabiting partners have for some time enjoyed a greater or lesser degree of legal protection provided that they declare before an official authority that they intend to live together. Sometimes this status is available only to homosexual couples (the Scandinavian countries, Germany), sometimes it is also available to heterosexual couples (Belgium, the Netherlands, France). In the Scandinavian countries and the Netherlands these registered partners enjoy the same financial regime as married couples, including the dual protection of the surviving spouse. In France and in Belgium, however, there is no provision for either an inheritance right or the access to a structured matrimonial property regime. German law has chosen an intermediate solution. The registered partners must declare that they intend to live under the structured matrimonial property regime of the *Ausgleichgemeinschaft*, which is very like the statutory *Zugewinngemeinschaft* regime, or under another matrimonial property regime.

(b) Children of a reconstituted family not affiliated to the deceased

28. Children of the other spouse who have been raised by the deceased as his own children and who form part of the new “reconstituted” or “mosaic” family none the less have no legal ties with the deceased. Therefore the various national legal orders refuse to grant them an inheritance right in the estate of the stepparent. However, the expense of their maintenance and education are sometimes part of the household expenditure and are therefore debts of the community property, of which the deceased is liable. Nowadays adoption is the only way to ensure that these children get a share in the estate. None the less, they sometimes enjoy protection in the estate of their parent against too great a right of inheritance of the new partner, who has raised them, but from whom they do not inherit.

B. MANDATORY PROTECTION FOR CERTAIN MEMBERS OF THE FAMILY

29. The mere fact of being entitled to inherit on intestacy is no guarantee of actually inheriting from the deceased. The right not to be disinherited is a privilege enjoyed by a much more restricted category of members of the family. During the Conference the various ways in which national laws organise that essential protection was discussed at great length.

30. The most common technique is that of the reserved share. Laurent considers it as belonging to the common core of the civil law of Europe, since the reserved portion exists in the whole of continental Europe, albeit under different names (*legitieme portie, Pflichtteil,voorbehouden deel, réserve, legitima* etc.) and although it differs on many points. Its main characteristic is that a fraction specified by statute is guaranteed to those entitled, irrespective they be in need or not. In some Eastern European countries (Poland, the Czech Republic) infants or handicapped children are entitled to a larger fixed fraction. The Norwegian solution is rather original, the reserved portion

of the descendants (the only persons entitled to it) is subject to a maximum limit. As a consequence the deceased is free to dispose as he sees fit only for a (sometimes very) limited portion of his estate, known as the disposable portion. Professor Coester-Waltjen provided details of the various fractions.

31. According to the Latin tradition, a person entitled to the reserved portion remains an heir, even if he is disinherited, and therefor remains entitled to a fraction of the assets of the estate. In the Germanic systems however the person entitled to the "Pflichtteil must, if disinherited, be content with only a money claim against the estate, which means a compensation in money, the consequences of which were described by Professor Coester-Waltjen. A certain alignment with the Germanic system is becoming apparent, the aim being to ensure that legal certainty is not too disrupted, since in the Latin tradition gifts can become ineffective several years later. The Netherlands, for example, where the Latin tradition long prevailed, has now clearly opted for the Germanic approach.

32. The right to a reserved portion was traditionally a privilege enjoyed only by descendants and ascendants. That privilege has now in the majority of domestic laws been extended to children born out of wedlock but some countries have abolished or limited the fixed share of (all) the ascendants. The surviving spouse joined sometimes - but not everywhere - the circle of persons entitled to a reserved portion, but is in the majority of cases entitled to enjoy the family home and the furniture, even if a request to that effect is required (France, the Netherlands). However, due to the enlarged inheritance rights of the surviving spouse, the reserved portion available for the descendants has most of the time been reduced or delayed. As a compensation the issues have sometimes been granted a right to maintenance and to appropriate education and training to be financed to a certain degree by the stepparent or by a right to a sum necessary for this maintenance and education, which ranks as a priority claim against the estate.

33. The reserved portion is unknown in England, where freedom of testation is the principle, as Mrs Cockburn made clear. However, the members of the family are none the less not deprived of all protection; be it not provided for in the abstract by legal provision. The court may make “reasonable financial provisions” if it considers that in the specific case before it, and regard being had to the various interests at stake, the statutory provisions and/or the provisions made by the deceased cannot be regarded as “reasonable financial provisions”. These “provisions” may (at least as regards the surviving spouse) go as far as allocating assets from the estate. Moreover the group of persons entitled to it is much wider than that consisting of the persons who under continental law benefit of a reserved portion. In addition to the surviving spouse (who does not have to be in need), the issues, a cohabiting partner, a former spouse who has not remarried, a “child of the family” (a child raised by the deceased but having no relationship of affiliation with him) and anyone who at the time of his death depended on the deceased for his financial existence are included.

34. This second technique of protection available to members of the “family” in a much wider sense, is not unknown on the continent. In some countries of the Latin tradition, there exists alongside a reserved portion maintenance claims against the estate. But the protection afforded here is much more restricted, as the person entitled to it must be in need and only periodic monetary payments are provided for. It seems

to be rarely used in practice. The beneficiaries are persons with whom the deceased had certain ties but on whom there is no wish (yet or any more) to confer (mandatory) rights in the actual estate. They include the surviving spouse (not being entitled to a reserved portion), a former spouse, ascendants (no longer having a reserved portion), grandparents (no longer having a right of inheritance), adoptive parents and so on. In Italy, for example, children whose natural affiliation has not been established are none the less entitled to maintenance and education and therefore have a claim against the estate of their possible parent which entitles them to a life annuity equal to the amount of the income from the share of the estate to which they would have been entitled if their affiliation had been established and which they may prefer to the gifts received. "Children of the family" are not included in that category, as is the case in English law.

C. TESTAMENTARY SUCCESSION

1. Ways of derogating from succession on intestacy

35. Where no adequate statutory protection exists, the future deceased can organise the financial security of a member of the family found to be the most deserving or in greatest need. However his initiative may encounter a number of constraints. The various domestic laws provide several instruments, not always the same, whereby it is possible to derogate from the rules on intestacy, e.g. gifts inter vivos, trusts, agreements, wills etc. Wills have the distinguishing characteristic of being able to replace succession on an intestacy in whole or in part. Wills are known in all the national legal systems, but several types are currently in use in Europe: the holograph will, written and signed in the testator's own handwriting; the "witnessed will", signed in the presence of witnesses; the public will, executed before a notary; the secret will, placed in an envelope and presented to a authorised person in the presence of witnesses and signed by the testator. As we are aware, all hope of securing the universal unification of the conditions of the form of wills by establishing an international will by means of the Washington Convention of 26 October 1973 has been dashed. The few countries which have ratified that Convention have generally been content to accept it alongside the other recognised forms of national wills. These various types of wills do not always have the same effects as regards their enforceability, for example, and they are not always equally guaranteed to be discovered in time. This last problem is more likely to arise when the deceased has lived in several countries. The Council of Europe has already endeavoured to resolve the problem by the Convention on the Establishment of a Scheme of Registration of Wills (1972) [ETS No. 077] - but too few countries have ratified it.

36. In some countries the will is an essentially personal act, while others recognise the validity of a joint will if it is drawn up by spouses.

37. In English law and in the legal systems of Germanic tradition, it is possible, by agreement, to derogate (in whole or in part) from the rules on succession on an intestacy. In the countries influenced by the Napoleonic Code, however, such agreements are condemned as containing an agreement on the succession of a living person (pactes sur succession future), a legal device whose features are not always so clear and differ from one country to another. These agreements are regarded as

contrary to public policy and as immoral and therefor are null and void. However, an increasing number of statutory exceptions endeavour to ensure that clauses which represent the reasonable wishes of the deceased and which may sometimes afford better protection to certain members of the family are valid. None the less, these statutory exceptions, being subject to strict interpretation, give rise to distinctions which come very close to being arbitrary, as may be seen from an example taken from Belgian law. Article 918 of the Belgian Civil Code allows the other children to waive their right to request the reduction of a gift to their brother or sister under (for example) a reservation of a life interest; but such a waiver of a gift of property not subject to a life interest will be void as containing an agreement on the succession of a living person, which is not covered by the statutory exception provided for in Article 918 of the Civil Code.

2. Obstacles

(a) Mandatory rights to inherit

38. The freedom to overcome the statutory priorities runs often into serious problems, due to the absolute rights imposed by the reserved portion or by decision of the court, which were discussed above. The protection of those entitled to a reserved portion even extends to gifts made during the life time of the deceased, which must be reduced if they exceed the disposable portion. In some countries the persons concerned are entitled to take the reserved portion free of all charges, which implies that they cannot be required to create a trust.

39. Sometimes there is a greater freedom of testation in respect of certain persons. Under the former French law, for example, the inheritance rights of the surviving spouse, which were limited to a life interest in a quarter of the estate, could be extended by gift to a life interest in the whole estate. The Netherlands has made use of that technique in its new Act. Children of a reconstituted family who are not related to the deceased, have no statutory right to inherit, but the deceased may, by testamentary disposition, give them the same share as his own children, whose reserved portion will be limited should that be necessary. Furthermore, the children despite being entitled to a reserved portion, cannot object to gifts made to a surviving spouse or to the (even unregistered) surviving partner of a cohabiting couple.

40. There is more scope for manoeuvre when those entitled to the reserved portion may, during the life of the donor, waive their rights to a forced share and thus provide for a better protection organised in favour of a handicapped child, of a child who has cared for its parents during their old days... In a number of countries, however such waivers during the lifetime of the donor are condemned as agreements on the succession of living persons.

(b) Unlawful consideration

41. For a long time it was difficult, or even impossible, to organise the financial security of the partner of an unmarried couple, because any gift between cohabitees was deemed to be inspired by unlawful consideration and therefore void, since it was made for the purpose of remunerating or perpetuating an extra-marital sexual relationship. In 1988 the Committee of Ministers of the Council of Europe

recommended (88) 3 that member States should not regard testamentary dispositions or contracts relating to property between persons living together as an unmarried couple as void solely because these persons were living together as an unmarried couple. Nowadays, the traditional disapproval of extramarital cohabitation has given way to at least a neutral, or even a positive, approach.

(c) Taxation

42. A significant obstacle to the effective organisation of security of existence for recent members of the family is taxation of the benefits granted. If the rates of estate duty laid down for strangers are applicable, the net benefit will be greatly reduced. In some countries these recent members of the family, despite the fact that they have no statutory right to inherit, are, for the purposes of inheritance tax, given the preferential treatment applicable to the surviving spouse and the descendants. That is so in the Flemish part of Belgium for the survivor of an unmarried couple who lived together for one year and for the children of a reconstituted family who are not affiliated to the deceased (cf. also Hungary).

III. PROTECTION AGAINST SUCCESSION

43. Up to now, we have examined the various members of the family and the priorities which prevail between them. This is the area of inheritance law which has benefited most from recent reforms, since it is the one most closely linked to the socio-economic aspects of society. However when addressing these problems, it is assumed that there are assets to be transferred which are sufficient to ensure the security of existence of one or more persons. But not all estates are wealthy; sometimes there is an excess of liabilities over assets. In that case the aim is rather to protect the family against the negative effects of a right to inherit.

This leads to the problem of the transfer of the estate, which is organised very differently in the national legal orders. It is a much more technical subject and one which has been overlooked by recent reforms. In the context of the protection of the family in matters of succession, it is mainly the transfer of the liabilities which is of interest. This transfer does not obey the same principles as does the transfer of the assets, but there are none the less a few common points.

A. TRANSFER OF THE ASSETS

44. In a recent work[9] the various national laws relating to the transfer of the deceased's estate have been divided into various categories. Three models for the transfer of the assets are to be distinguished.

45. In a significant number of continental legal orders (Germany, Belgium, France, Greece, the Netherlands, Switzerland) the transfer of the assets takes effect ipso jure and therefore by law on the date of death. This **immediate transfer** avoids any break in continuity in the allocation of the deceased's assets, since the heirs become (co)owners of the estate at the very moment of the deceased's death and therefore before they accept the succession. In countries (like Belgium and France) which

[9] Y.-H. Leleu, *La transmission de la succession en droit comparé*, cited above.

recognise the heirs' right to take possession of the deceased's property without any formalities, the legal heirs may at that very time take possession of the estate. For the testamentary successors on the other hand a procedure, in which the will is checked, comes in between the time of acquiring ownership and the time of taking possession of the assets. In Germany the heirs and legatees must obtain an heir's judicial certificate (*Erbschein*) before they can effectively exercise their right of possession. In some countries (Austria, Italy and Spain) the heirs must first accept the succession in order to acquire the property in it; this acceptance must sometimes be approved by the court (Austria). This **direct but deferred transfer** (transfer by *aditio*) may give rise to a vacancy in the succession, since on death the assets no longer belong to the deceased, while the heirs become owners only after their (approved) acceptance. A third party must then administer this ownerless estate.

46. In English law (and in all Anglo-American legal systems) the **transfer** may be classified as **indirect and deferred**, since the estate is first transferred to a "personal representative" who is appointed by the court in a probate procedure. It is this personal representative who becomes the owner of the deceased's estate, administers it and pays the debts of the estate before the balance is transferred to the heirs. This involvement of a third party is not always conducive to a speedy settlement of the estate and is not always appreciated by the heirs.

47. Furthermore, as Ms Hahn pointed out, the documents drawn up in the various states in order to prove title as heir differ in a number of respects. In Germany, Greece and Austria the courts must, of their own motion, make full inquiries in order to establish the identity of the heirs and their respective shares. This certificate (*Erbschein*) has probatory force. In the countries of Latin tradition, the official document is often drawn up by a notary on a simple witness declaration and provides only a certain number of details about the identity of the heirs and their shares; but it is not recognised by the authorities as having probatory force.

B. TRANSFER OF THE LIABILITIES

48. An indirect and deferred transfer of the assets may, however, entail better protection in the transfer of the liabilities. Since the heirs receive only the balance remaining after the assets have been realised and the liabilities met, they never incur a personal obligation in respect of the liabilities of the estate. The **transfer** of the liabilities is then made **intra vires**.

49. On the other hand, following a transfer ipso jure, the assets of the deceased and those of the heirs are intermixed, which explains why in a number of continental legal orders the heirs' unlimited obligation to pay the debts of the estate is the rule in the event of simple acceptance. Then the heirs have to meet the liabilities even where they exceed what they received from the estate (**transfer ultra vires**).

In France and in Belgium such simple acceptance may be tacit and result from the heir's conduct. Therefore no formal declaration on the part of the heir accepting the inheritance is necessary. The means of avoiding this type of unlimited personal obligation is to accept the inheritance subject to the limitation of liability for the debts to the amount of the assets received, which gives rise to a certain procedure and especially to a certain discipline, with the risk that the limitation of liability will lapse.

The heir may also disclaim the inheritance, which he will do where the estate is insolvent, but then he is deemed never to have been an heir.

50. German law provides an intermediate solution, since the option regarding the inheritance may be made in two stages. A (tacit) acceptance immediately following the death does not in any way determine in advance that the heir has an obligation to meet the liabilities of the estate, but allows him to take an active part in administering the estate. He may then, at the second stage and in knowledge of the facts, assume an obligation ultra vires or limit his liability by initiating an *ad hoc* procedure. Furthermore, an heir loses the right of limited obligation only in the event of fraud.

51. This diversity of national regulations becomes apparent when an international estate is being liquitated. For example, the harsh consequences of tacit acceptances may then lead to unpleasant surprises, especially for nationals of countries where such procedures are unknown.

IV. CONCLUSIONS

A. Is harmonisation possible in matters of succession?

52. The inventory of similarities and differences which has just been made is necessarily brief, but none the less impressive; it deserves to be treated in greater depth, especially within the wider framework of the Council of Europe. It is only when the very wide range of solutions adopted has been described that better founded solutions can be formulated with a view to possible harmonisation. It will then also be possible to identify the common core which, notwithstanding the great differences, does exist.

53. Is harmonisation, or at least an approximation, of European laws in this field possible, or does it belong to the realms of Utopia? It is often claimed that family law is too dependent on the tradition, culture and received values in the various countries and that, consequently, its unification, or even harmonisation, at European level would be bound to fail, and to conclude that in its wake the same would apply to the law relating to family assets[10]. In fact, it cannot be denied that the number of international instruments dealing directly or indirectly with family property law is

[10] On this point, see, among others: M.V. Antokolskaia, W.A. de Hondt and G.J.W. Steenhoff, *Een zoektocht naar Europees familierecht*, Kluwer Deventer, 1999; D. Martiny, "Europäisches Familienrecht - Utopie oder Notwendigkeit?", *Rabelszeitschrift*, 1995, 419-451, and "Is unification of family law feasible or even desirable?" in A. Hartkamp, *Towards a European civil code*, 1998, Ars Aequi libri, Ch. 10; W. Pintens, "Die Europäisierung des Erbrechts", *ZeuP*, 2001, 628-648; A. Rieg, "L'harmonisation européenne du droit de la famille: mythe ou réalité", in *Mélanges en l'honneur d'Alfred E. von Overbeck*, Éditions universitaires Fribourg Suisse, 1990, 473-499.

quite limited and that they have not enjoyed great success. Accordingly, there are very few uniform international rules on the matter.

54. However, that opinion deserves to be reconsidered and qualified. The succinct comparative approach which we have just made has none the less revealed converging trends as regards the objectives pursued. They are mainly the consequence of recent reforms which have taken place throughout Europe, albeit at different pace and different degrees of intensity, but all heading in the same direction. That is a first crucial indication that a certain harmonisation at a European level is possible. But there is more. According to a secular tradition, the right to inherit, classified as "lineagebased", was conceived throughout Europe as a means of keeping assets within the family. Therfor the surviving spouse, considered as being a stranger to that family was excluded from inheritance rights. The family assets were transferred to the new generation born out of the marriage, to the detriment of illegitimate children. Due to recent reforms, the logic of affection has to a large extent prevailed over the logic of blood and the former distinction between legitimacy and illegitimacy has been dispensed with. Can we then go on pretending that inheritance law cannot be harmonised because it is deeply rooted in people's history, culture, mentalities and values, now that most countries have sacrificed what has been considered for centuries as an essential basis at inheritance law?

55. We should accept, rather, that inheritance law, more than any other area of the law, is primarily dependent on the socio-economic and political context. The recent reforms took place because that context has changed drastically during recent decades. The convergence observed in reforms of inheritance law may be explained by the parallel socio-economic developments throughout Europe and by the similar change in morals and mentalities, even though the rate and intensity of change vary. But the great gap between the progressive North and the conservative South has been closed more and more. As common points, I would cite: the contraction of family ties, often reduced to the nuclear family, (and consequently) the importance attached to solidarity between spouses, the rejection of any form of discrimination, the acceptance of other cohabiting unions than marriage, spectacularly increased longevity, wealth consisting generally of assets acquired rather than inherited ...

56. This harmonisation was partly spontaneous, although stimulated by more extensive international contacts and by the study of comparative law (often in preparation for legislative reform). But it cannot be claimed that it is the outcome of a deliberate unification policy pursued by the various legislatures. It is, in particular, the general improvement of the inheritance rights of the surviving spouse, at the expense of these of blood relations, that has come about spontaneously. That is less so as regards harmonisation of the rights of children born out of wedlock, which has come about partly by intervention. The first external factors of the harmonisation of the succession law have been the convention for the protection of human rights and fundamental freedoms, promulgated within the Council of Europe. Under pressure from the developing case-law of the European Court of Human Rights (the Marckx, Inze and Mazurek judgments), a number of countries (Belgium,Austria and France) were obliged to adapt their legislation in order to eliminate existing discrimination against children born out of wedlock. Other countries spontaneously drew the inferences from that case-law (the Netherlands). Several member States (England, Austria), when ratifying the European Convention on the Legal Status of Children

born out of wedlock [ETS No. 85] (1975), had made a reservation to Article 9, which guarantees that those children will have the same rights to the estate of their father and mother and members of their family. Now they have adapted their legislation and thus no longer renewed the reservation initially made.

57. When I speak of harmonisation I mean the convergence of the objectives of the rules, not of the means whereby those ends are pursued. It would indeed be difficult to achieve within a short period of time uniformity between the various legal techniques of protection of the family in the different European substantive rules, especially since they are sometimes linked to their ideas regarding the separation of powers between the legislature and the courts. The conviction in the common law countries that "the bench is paramount" is not necessarily shared in all countries of continental Europe, which are more reluctant to accept a "gouvernement des juges ". Difference in respect for the judiciary and in confidence in its competence, played an important role in the way the delicate matter is solved of the (minimum) protection of the family in matters of succession and therefore of the (sometimes imposed) division of the assets of the family, in other words the division of its "wealth".
A preference for foreseeable solutions, provided for in the abstract by legal provision - the continental solution of the reserved portion which serves the principle of legal certainty - is opposed to a preference for judicial, and therefore discretionary, solutions which can be adapted to the specific circumstances - the common law solution of the reasonable financial provisions, which serves the principle of fairness.

It should be noted, however, that all national legal systems have organised a (more or less considerable) minimum protection of close members of the family and that an indication of a certain approximation of the techniques used might be found in the maintenance claims against the estate, which exist in several continental countries alongside a reserved portion.

B. SOME SUGGESTIONS

58. In what areas does European harmonisation appear to be desirable, feasible and therefore to be promoted for the purposes of protection of the family in matters of succession?
Let us once again go over our list of members of the family:

1. The surviving spouse

59. During this Conference it appeared that the domestic substantive rules have generally become very generous towards the surviving spouse. Nevertheless there are still wide discrepancies. Let us compare, for example, the Netherlands and Greece. In the Netherlands universal community of assets is the statutory matrimonial regime and the surviving spouse inherits the whole estate subject to a claim in favour of the children, which, however, is (generally) met only on the death of the surviving spouse. In Greece the statutory matrimonial regime is the separation of assets (somewhat mitigated) and the surviving spouse inherits only a quarter of the estate when there are descendants! Greater harmonisation in that area is thus still desirable, in order to ensure that the surviving spouse - perhaps already at the level of matrimonial property regimes, but in any event at the level of the succession - is able

to maintain his or her standard of living and (at least) to keep the use of the family home and the household contents.

60. In a large number of national legal orders the surviving spouse excludes more remote relatives. Harmonisation would be desirable, in the sense that the rights of the surviving spouse always prevail over those of distant collaterals, but that the loss of the parents' right to inherit on an intestacy due to the existence of a surviving spouse, should be compensated by granting them a maintenance claim in case of need.

2. Descendants

(a) Children born out of wedlock

61. To day the great majority of national legal systems grant to children born out of wedlock the same succession rights as if they had been born in wedlock. But for a few exceptions where that is not yet (entirely) the case. These countries should be encouraged to join the majority.

62. The activities of the Council of Europe in family matters have been principally directed towards the protection of children, as Mr De Vel, Director General of Legal Affairs, made clear in his opening speech.[11] I should therefore like to make a number of suggestions which are connected to that constant preoccupation of the Council of Europe.

(b) Children born of another union

63. Especially in countries where the surviving spouse has become a priority heir, harmonisation seems desirable in the organisation of the protection of children of the deceased born of another union. Such harmonisation should seek to strike a subtle balance between the various interests at stake, especially in the case of infants or handicapped children. The right to inherit of the children is than deferred or limited, but infants or handicapped children are not (yet) capable of providing for their own existence and (generally) do not have assets of their own.
More particularly, as regards infants, measures must be taken to ensure them the necessary means to finance their education and adequate training, even beyond their majority (since university studies continue beyond the age of majority). This should be guaranteed to the extent to which the deceased parent was under the obligation to contribute to their education. In order to assess the contribution of the surviving spouse account should be taken of any matrimonial advantages afforded in the form of gifts or benefits under the marriage contract.

(c) Children of reconstituted families

64. And next what might be called the other side of the coin: the problems relating to the protection of children of reconstituted families who are not affiliated to the

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[11] See also M. Killerby, "The Council of Europe's contribution to family law (past, present and future)", in N. Lowe and G. Douglas (editors), *Families across frontiers*, the International Society of Family Law, 1996, 14-25.

deceased. There is no need to point out that the reconstituted or mosaic family has become a frequent phenomenon in a society in which the number of divorces is constantly increasing and in which divorce is generally followed by remarriage or cohabitation. In the absence of any legal tie, no national legal system grants these children a right to inherit, nor is it clear that such a right is always desired by the deceased. Hence there is no reason to confer on these children a right to inherit on an intestacy, as in fact the rules on intestacy reflect the presumed intention of the deceased. None the less, we identified a tendency - albeit a discreet one - to afford them a certain degree of protection in matters of succession. Since it is a de facto situation, it is necessary to attempt a subtle balance which allows on the one hand the intention of the persons concerned to be complied with as much as possible, while on the other hand provides a minimum protection for the weakest party should that party be in need. As regards the first aspect, the solution recently adopted in the Netherlands shows the way. The intention expressed by the deceased of continuing after his death to treat that child as his own can be honoured since in that case the reserved portion of his own children is reduced, the main obstacle which might stand in the way of that intention. In English law, on the other hand, these children are among the persons who may ask the court to grant them minimum protection in case of need. Would it be inconceivable to provide also in continental countries a comparable protection, guaranteeing these children an adequate education in cases of need. Several continental countries recognise maintenance claims paid from the estate and/or consider that the costs of maintenance and education of these children during the deceased's life are debts for which he is liable. After all this only means that the responsibilities assumed while the deceased was alive, are thus continued after his death.

65. However, all these measures would be quite ineffective if they were subject to unfavourable taxation. A recommendation to member States to treat for tax purposes, the advantages granted to children in the same way as those granted to the deceased's own children, is therefore appropriate. As we have seen, certain legal orders have already done so.

3. Unmarried couples

66. An other "recent member" of the family is the surviving cohabitant. Some countries have partially resolved the problem whether a cohabiting partner should be entitled to some inheritance rights by making marriage available to homosexual couples or by creating a specific status for cohabiting partners, who officially declared their intention to live together. The number of these countries is rapidly increasing. However, it is too soon to speak of a broad consensus at European level as to whether or not marriage should be available for homosexual couples and perhaps even whether unmarried cohabiting couples should be entitled to a specific legal status. In any event, here the Court of Human Rights has certainly not played the leading role which it played in eliminating discrimination against children born out of wedlock. However, that is a problem which goes beyond the scope of the subject of this Conference.

67. During the Conference, we rather focused on the question whether a certain alignment of domestic laws would be desirable in the protection of (simple) cohabiting partners in matters of succession. It is clear that the national legal systems

are still very reluctant to grant them any inheritance right on an intestacy. But one cannot deny that unmarried cohabitation, traditionally deemed to be contrary to public order and morals, has become commonplace and that it is increasingly widespread. I refer to the Recommendation of the Committee of Ministers of the Council of Europe of 1988, cited above. This new approach is even reflected in the daily language, nowadays we speak of cohabiting couples rather than of concubines and of children born out of wedlock rather than of illegitimate children.

68. We have already referred to the widespread elimination of (all) discrimination in the inheritance rights of children born out of wedlock. The grant of the same inheritance rights to those children has as its consequence - and this is a fact whose importance for the structure of family law in general and succession law in particular cannot be underestimated -that marriage has ceased to be the inevitable pivot of the transfer of assets to the next generation. This was the traditional vertical function of succession law. That fact has triggered an irreversible development. The next logical step will be for marriage to also lose its pivotal role in the new horizontal function of succession law: maintain the standard of living of the surviving spouse. This will inevitably lead to the granting of some inheritance rights to the cohabiting partner. The argument that children born out of wedlock are more deserving of protection because their situation was forced on them, does not alter the fact that the monopoly of marriage as the sole cohabiting union apt to create rights has been broken. It does not seem appropriate to recommend that member States make provision for a right to inherit on an intestacy between unmarried couples who have not officially manifested their intention to live together. From that de facto situation it is not to be inferred that automatic protection is always intended by these partners. However, harmonisation or at least an approximation is desirable in order to ensure that national laws evolve along the same lines. We have, nevertheless, been able to identify a discreet tendency towards a certain protection of the unmarried partner in matters of succession. Again (see nr. 64)we must attempt to reach a balance between respect for the intentions of the persons concerned and a minimum protection guaranteed to the weakest party, should that party be in need. Once again, the recent law in the Netherlands shows the way by providing that the children cannot rely on their reserved portion in order to reduce gifts made in favour of (under certain conditions) the partner of an unmarried couple. On the other hand under English law, the unmarried partner may apply to the court for minimum protection in case of need. In other countries (e.g. the Flemish part of Belgium) the unmarried partner is, provided the couple has lived together for a certain time, entitled to the same preferential rate of estate duty as a surviving spouse. An approximation of national laws along the same lines as those that just have been proposed for children of reconstituted families (see nr. 64), is here also indicated.

69. During the Conference, it became apparent that few cohabitants are aware that, in the absence of any initiative on their part, the surviving partner will not have any rights in the estate of the first to die. An information campaign is called for.

4. Some suggestions of a more technical nature

70. All the suggestions thus far made concern issues of legislative policy. Let us finish with two technical proposals, which are aimed rather at the unification of national legal systems in this specific field. I have already pointed out that the organisation of the protection of a member of the family is more difficult in countries which prohibit

agreements on the succession of living persons. It is particularly in the case of international inheritances that this prohibition may lead to unpleasant surprises! It would be desirable to encourage those countries where this prohibition still applies, to abolish it.

71. Last, we have seen the great differences in the protection afforded to family members in case of an insolvent estate. That too is a source of enormous difficulties in international inheritances. We have scarcely touched upon it, although in my view it merits much closer study. Those, Ladies and Gentlemen of the Committee of Experts, are the fields which, after two days of intensive work, we have identified as deserving more detailed examination in order to promote the legal protection of the family in matters of succession.

CONTRIBUTIONS

Some information about the inheritance rights of children and the surviving spouse in Romania

Contribution
written by

Serban DUMITRESCU-BOLINTIN
National Union of Public, Notaries of Romania (Romania)

The applicable rules: the Civil Code and Law No 319/1944 on the inheritance rights of the surviving spouse

In accordance with the law, in order to inherit a person must have the capacity to inherit, must deserve to inherit and must have the right to inherit on intestacy.

Capacity to inherit requires the person concerned to have legal personality on the date on which the succession takes place. In accordance with Romania's Civil Code, any person in existence at the time at which the succession takes place has the capacity to inherit. A child in the womb is not considered to be a human being, and a stillborn child is considered not to exist.

Persons entitled to a reserved portion in the deceased's estate:

According to the Civil Code, the persons who are entitled to a reserved portion in a deceased person's estate are the deceased's descendants of any degree, ie all the first-class heirs of the statutory heirs, and the parents of the deceased, ie all the privileged ascendants, the second-class heirs of the statutory heirs. The deceased's ordinary ascendants and collateral relatives, irrespective of their class or degree of relationship, are not entitled to a reserved portion. The privileged collaterals (the deceased person's brothers and sisters and their descendants), although they are in the same class of statutory heirs as the parents, are not entitled to a reserved portion in the estate.

In pursuance of Law No 319/1944 on the inheritance right of the surviving spouse, entitlement to a reserved portion in the estate also extends to the deceased's surviving spouse, who either inherits together with other persons entitled to a reserved portion in the estate (privileged descendants or ascendants) or is the sole person entitled to such a portion, who inherits together with the deceased's other relatives or with other persons who are beneficiaries of gifts.

In pursuance of Article 669 of the Civil Code, the term "descendants" encompasses the deceased's children and the heirs in the direct line, irrespective of sex, and whether or not they are children of different marriages. The deceased's children and heirs outside marriage are also in the first class of statutory heirs, provided solely that descent is proven according to the law. As well as the children of the marriage and those from outside marriage, adopted children are also in the first class of statutory heirs.

If two or more first-degree descendants (children of the deceased) are entitled to inherit, the portion of inheritance due to each is equal, being divided according to their number. The same procedures are applied if the descendants of the subsequent

degree (who may not inherit through their ascendants) are entitled to inherit in their own name.

If, as well as descendants (in pursuance of Law No 319/1944 where the inheritance right of the surviving spouse is concerned), the surviving spouse of the deceased is entitled to inherit, the surviving spouse's quota is ascertained first, and the rest then divided among the descendants, in accordance with the existing rules. This means that, through the effect of Law No 319/1944, the quota of all the heirs in the descendants' class is reduced.

The descendants may inherit, in their own name or through their ascendants, the latter being, according to Article 644 of the Civil Code, a legal fiction having the effect of giving the beneficiary the place, degree and entitlement of the person through whom he/she is benefiting. Inheritance through one's ascendants is unlimited in the direct descending line (Article 665 of the Civil Code). In case of descent by a different line, inheritance through ascendants is allowed for the children and descendants of the brothers and sisters of the deceased, who inherit together with the aunts and uncles in the event that all the deceased's brothers or sisters have predeceased him/her (Article 666 of the Civil Code). They are persons entitled to a reserved portion in the deceased's estate, and the gifts made by the deceased (ie gifts and legacies) which affect their reserved portion are subject to reduction. They are also heirs legally able to acquire control of the inheritance without prior attestation of their capacity as heir. And, lastly, they are obliged to bring into hotchpot the gifts received from the person leaving the inheritance, unless such gifts were made with exemption from the hotchpot requirement. In any case, where inheritance through ascendants is allowed, the division is made *per stirpes*, and if the same line of descendants has several branches, there is also subdivision *per stirpes* within the same branch, and the members of same branch share among themselves.

When a deceased has no descendants, or when those who exist cannot (being undeserving or being disinherited, when they acquire only the reserved portion) or do not wish to take the inheritance (renouncing the benefit thereof), the law entitles to the inheritance the relatives in the second class, comprising the privileged ascendants (the deceased's parents) and the privileged collateral relatives (the brothers and sisters of the deceased and their descendants).

In order to be entitled to the estate, the surviving spouse must meet, as well as the general conditions for statutory entitlement to inheritance, a special condition (instead of relationship with the deceased), in that he/she must have the status of spouse of the deceased on the date on which the succession takes place. If the surviving spouse has this status on that date, no importance is attached to the duration of the marriage, the material situation or sex of the surviving spouse, whether the couple had children or not and whether or not they were living together on the date on which the succession took place or whether they had in fact separated. The surviving spouse has the same rights as the ascendants and collaterals up to the fourth degree (the deceased's first cousins). In the absence of fourth-degree relatives, the surviving spouse acquires the whole estate. As the occupation of separate homes, for example, by the spouses does not influence the pecuniary relationship between them during their lifetime, nor can it influence the surviving spouse's inheritance right following the death of the other

spouse. But unmarried cohabitation does not confer on the surviving cohabitee the statutory right to inherit on intestacy.

Law No 319/1944 recognises the following categories of rights to the surviving spouse: an inheritance right shared with all the classes of statutory heirs or in the absence of relatives in these four classes; a special inheritance right relating to furniture and objects belonging to the household, as well as to wedding gifts; a temporary civil-law right of habitation in the home (for one year).

The starting of the succession procedure is a practical way of officially recording the obtaining of the status of heir for those persons who, once the succession procedure has been begun, are granted the right to inherit from the deceased.

Once the succession procedure has been started for the statutory protection of the heirs at the request of the persons concerned, the public prosecutor or the secretary to the local council, the public notary takes steps to preserve the goods left by the deceased, draws up an inventory of the deceased's assets and lists, writes a description of and provisionally values the goods found in the deceased's possession on the date of death.

As well as the assets belonging to the estate, the liabilities of the estate and any debts of the deceased have to be included in the inventory. In accordance with the Family Code, the assets are assumed to be jointly owned unless and until it is proven that they are not.

Within the framework of the notarial succession procedure, and within that of a disputed succession procedure, the statutory heirs cannot alter the statutory order of succession in accordance with an agreement concluded among them.

“ Succession and the growth of the unmarried family”

Contribution
written by

Anne BARLOW
Lecturer in Law, University of Wales Aberystwyth (United Kingdom)

In England and Wales, marriage does not directly affect a spouse’s property as we do not have any form of community of property regime. Rather each spouse owns their own property separately during marriage (Married Women’s Property Act 1882). Thus there is no distinction between a married couple, an unmarried couple or two complete strangers in this regard. Furthermore, on death, under English law, a testator has in principle complete testamentary freedom and may leave the whole of his or her estate to whomsoever s/he chooses in a will. However, on divorce and on death, legal provisions recognise that marriage is an economic as well as an intimate family relationship and modify the position. Here the law permits redistribution of a spouse’s assets recognising that non-financial contributions to the welfare of the family by one spouse (e.g. caring for children, undertaking a home-making role) should be financially compensated for by the other spouse and prescribing that the married family’s needs should take priority over the preservation of property or free testamentary disposition (see s25 Matrimonial Causes Act 1973 and Inheritance (Provision for Family and Dependants) Act 1975). However, it is necessary for the spouse to make an application to the court which has discretion as to how much should be awarded in each case. On the other hand, where a spouse dies intestate (i.e. leaving no will), the surviving spouse will automatically inherit all or at least half of the estate (see s46 Administration of Estates Act 1925).

Thus in the married context despite a lack of community of property, the law does intervene to acknowledge the family relationship between spouses and to adjust the financial position of the parties according to certain criteria on death (and divorce).

However, in the case of unmarried cohabiting unions, whilst there is no longer discrimination between children of married and unmarried parents (Family Law Reform Acts 1969 and 1987), there is little provision to protect the interests of a cohabiting partner, whether same or opposite sex.

Thus if a cohabiting partner dies without leaving a will, there is no automatic assumption that their cohabitant should inherit any of their estate, no matter how long they may have lived together. The surviving partner can, since 1996, apply under the Inheritance (Provision for Family and Dependants) Act 1975 for provision out of the deceased’s estate, but unlike in the case of spouses, provision is limited to ‘maintenance’ and is far less generous than that awarded to an applicant spouse. Of course, it is open to cohabitants to make wills in each other’s favour, but recent research shows that very few cohabitants do this. Indeed as set out below, despite the sharp increase in cohabitation and decline in marriage in Britain, the research reveals, both widespread ignorance of the legal position of cohabitants and very few people taking legal steps to address the lack of legal rights given to cohabitants.

Fifty six per cent of the nationally representative British social Attitudes Survey 2000[12] believed that opposite-sex cohabiting couples had the same legal rights as married couples and 59 per cent of cohabiting couples falsely believed this was the case. This phenomenon is known as 'the common law marriage myth'. Furthermore, despite 57 per cent of cohabitants being owner-occupiers, only 44 percent of them owned their family home jointly. Yet, and perhaps as a result of this myth, only 9 per cent of owner occupiers had a written agreement about shares of ownership and only 14 per cent of all cohabitants had made wills.

The law relating to tenancy succession of the rented family home is also very complex as far as cohabitants are concerned. Here whether or not a cohabitant may succeed to the tenancy will depend arbitrarily on the type of tenancy they are renting and whether the tenancy is jointly or solely vested. The matter is further complicated if due to the history of the tenancy a third party's name remains on the tenancy record.[13]

Given that 25 per cent of all children are now born to cohabitants in England and Wales and 15 per cent of all couples are now cohabiting and this is predicted to double by 2021,[14] any reform of succession law and particularly to the succession of the family home, must take account of the unmarried family, which in many cases is now undertaking the same role as that of the married family. Indeed when asked in the British Social Attitudes survey whether the law should automatically allow succession of the family to a longstanding cohabitant on death 93% of the national sample thought that it should.[15]

One way of addressing problems of succession of the family home in the English context is to introduce a form of statutory co-ownership of both the married and cohabiting family home, which could be extended to other forms of property.[16] This would also have the benefit of 'Europeanising' the approach to family property law and family succession.

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[12] Barlow A, Duncan S, James G, and Park A, 'Just a piece of paper? Marriage and Cohabitation' in Park A, et al, *British Social Attitudes: The 18th Report*, (2001) London: Sage pp. 29 – 57.

[13] See Barlow A *Cohabitants and the Law* (2001) London: Butterworths chapter 3 for a full discussion.

[14] Shaw C and Haskey J 'New Estimates and Projections of the population cohabiting in England and Wales' *Population trends 95,* 1999, pp. 1 – 17.

[15] *Op cit* note 1.

[16] This has been suggested by the Office of Law Reform in Northern Ireland Report on Matrimonial Property, 2000, Office of Law Reform for Northern Ireland and also see Barlow A and Lind C'A Matter of Trust' [1999] (19) (4) *Legal Studies* 468, at pp. 470 - 472.

CONCLUSIONS

Conclusions

1. The participants at the 6th European Conference on family law (Strasbourg, 14 and 15 October 2002), when examining the topic "the legal protection of the family in matters of succession", agreed that further steps were still necessary to improve the legal protection of the family. They took note of the work of the Council of Europe to improve national standards concerning succession and matrimonial property regimes and the work of the European Commission to reduce the difficulties arising out of succession and matrimonial property regimes involving different European Union States.

2. The participants recognised that it was particularly important for spouses and unmarried couples to be made aware of the different means to organise their succession. These means may include, for example:
   a. agreeing to appropriate matrimonial property regimes or property arrangements;
   b. co-owning or co-leasing the family home;
   c. making wills in order to avoid intestacy and the consequent reduced rights for a surviving spouse or loss of all rights or reduced rights for partners.

3. The participants agreed that the law should provide sufficient rights for a surviving spouse. These rights may include:
   a. giving the spouse either an automatic right to a share or the ability to apply for a share in case of need;
   b. ensuring that, in case of intestacy, the surviving spouse will be entitled to a significant share.

   The participants recognised that, in relation to the rights of the surviving spouse, consideration should be given to the situation of the children. The participants noted that, in appropriate cases, account should be taken of possible means of providing sufficient rights for a surviving partner.

4. The participants agreed that consideration should be given, in appropriate cases, to the extension of Principles 4 and 8 of Recommendation No R (81)15 concerning the right of a surviving spouse to continue to occupy the family home and use the household contents, to cover a surviving partner, especially a dependent partner.

5. The participants agreed that the means to ensure that the amount of any death duties to be paid did not deprive the surviving family of a reasonable standard of living should be examined.

6. The participants recognised that, in matters of succession, adopted children and children born out of wedlock of a deceased parent should, as already provided in the European Convention on the adoption of children [ETS 058] and the European Convention on the legal status of children born out of wedlock [ETS 085], be treated as if they were born in wedlock. The participants noted that other children of the family (e.g. step children) were not always treated in the same way as

children of both parents (e.g. absence of a share in the succession of the step parent or higher amount of death duties to be paid).

7. The participants agreed that in matters of succession rapid and simple procedures should be available for both testate and intestate succession.

8. The participants proposed:
   a. that greater use be made of the possibility to register wills
   b. that States be encouraged to ratify the European Convention on the establishment of a scheme for the registration of wills [ETS 077].

9. The participants requested the Council of Europe, in particular the Committee of experts on family law (CJ-FA), to examine the means of improving the legal protection of the family in matters of succession, especially in case of the intestacy or other inadequate provision, in the light of the reports and discussions of the 6th European Conference on family law.

LIST OF PARTICIPANTS

List of participants / Liste de participants

Simona ALEXOVA, Adjoint au Représentant Permanent de la Bulgarie auprès du Conseil de l'Europe, STRASBOURG

Søren Stig ANDERSEN, Head of Section, Ministry of Justice, KØBENHAVN K, DENMARK

Catherine ANDRE, Conseiller adjoint, Service Public Fédéral Justice, Service Droit de la Famille, BRUXELLES, BELGIQUE

Tuomo ANTILA, Senior Specialist, Ministry of Justice, Law Drafting Department, FINLAND

Darius ARBAČIAUSKAS, Représentant Permanent Adjoint de la Lituanie auprès du Conseil de l'Europe, STRASBOURG

Gay BAILEY, Senior Policy Manager, Lord Chancellor's Department, Family Policy Division, LONDON, UNITED KINGDOM

Anne BARLOW, Senior Lecturer in Law, Law Department, University of Wales, ABERYSTWYTH, UNITED KINGDOM

Olga BARRETO, Direcção dos serviços jurídicos da Direcção Geral dos Registos e Notariado, Ministério da Justiça, LISBOA, PORTUGAL

Marie-Odile BAUR, **Rapporteur,** National expert on secondment, Unit of Judicial Co-operation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission

Markus BUSCH, Staatsanwalt, Private International Law Division, Federal Ministry of Justice, BERLIN, GERMANY

Gillian COCKBURN, Rapporteur, Cockburns Solicitors, Panorama, GUILDFORD, UNITED KINGDOM

Dagmar COESTER-WALTJEN, Rapporteur, Professor, Institut für Rechtsvergleichung, MUNICH, GERMANY

Jeannine DENNEWALD, Ministère de la Justice, Luxembourg

Nikola DJUKIC, First Secretary, Permanent Representation of Bosnia and Herzegovina to the Council of Europe, STRASBOURG

Serban DUMITRESCU-BOLINTIN, Notary Public, National Union of Notaries Public of Romania, BUCAREST, ROMANIA

Ana FERNANDEZ TRESGUERREZ, Ministry of Justice, MADRID, SPAIN

Helmut FESSLER, Notaire, Président honoraire de l'Union Internationale du Notariat Latin, KREFELD, GERMANY

Nicole GALLUS, Avocate, Assistante Faculté de Droit, Université Libre de Bruxelles, BRUXELLES, BELGIQUE
Odile GANGHOFER, Docteur en droit, Observateur du Saint-Siège, STRASBOURG

Edmond GRESSER, Notaire associé, LA WANTZENAU, FRANCE

Géraldine GRILLON, Rédacteur juridique, Ministère de la Justice, Bureau du droit civil général, PARIS, FRANCE

Claudia HAHN, **Rapporteur**, Unit of Judicial Co-operation in Civil Matters, Directorate-General Justice and Home Affairs, European Commission, BRUSSELS, BELGIUM

Miloš HAŤAPKA, **Chair of Session**, Director, Department of International Private Law and Legal Contact with Abroad, Ministry of Justice, BRATISLAVA, SLOVAK REPUBLIC

Bryndis HELGADÓTTIR, Legal Expert, Ministry of Justice, REYKJAVIK, ICELAND

Christian HERTEL, Director, German Notary Institute (Deutsches Notarinstitut – DnotI), WÜRZBURG, GERMANY

David HODSON, Solicitor and Mediator, The Family Law Consortium, LONDON, UNITED KINGDOM

Petra HRIBAR, Advisor to the Minister, Ministry of Labour Family and Social Affairs, LJUBLJANA, SLOVENIA

Grazina IMBRASIENE, Children's Rights Ombudsman in Lithuania, VILNIUS, LITHUANIA

Sjaak JANSEN, **Chair of Session,** Counsellor of Legislation, Ministry of Justice, THE HAGUE, NETHERLANDS

Mila JELAVIĆ, Head of Department, Ministry of Labour and Social Welfare, ZAGREB, CROATIA

Anne KAYSER, Adjoint au Représentant Permanent du Luxembourg auprès du Conseil de l'Europe, STRASBOURG

Jurgita KAZLAUSKAITE, Assistant do Children's Rights Ombudsman in Lithuania, VILNIUS, LITHUANIA

Juraj KUBLA, Deputy to the Permanent Representative of the Slovak Republic to the Council of Europe, STRASBOURG

Paul LAGARDE, Secrétaire Général adjoint, Commission Internationale de l'Etat Civil (CIEC), STRASBOURG

Magdalena LOKAYOVÁ, juriste au service international du Ministère de la Justice, PRAGUE, CZECH REPUBLIC

Jiri MUCHA, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Czech Republic to the Council of Europe,

Chantal NAST, Directrice administrative, Commission Internationale de l'Etat Civil (CIEC), STRASBOURG

Mme Markéta NOVÁKOVÁ, directeur adjoint, Office for International Legal Protection of Children, BRNO, CZECH REPUBLIC

Mr Patrik ÖRNSVED, Associate Judge of Appeal, Legal Adviser, Division for Family Law and the Law of Contracts, Torts and Personal Property, Ministry of Justice, STOCKHOLM, SUEDE

Michel PEETERMANS, Ambassadeur Extraordinaire et Plénipotentiaire, Représentant Permanent de la Belgique auprès du Conseil de l'Europe, STRASBOURG

Maria PUELINCKX-COENE, General Rapporteur, Professor of law, Department Rechten, University of Antwerp UIA, WILRIJK, BELGIUM

Wolfgang RIERING, Department international private law, German Notary Institute (Deutsches Notarinstitut – DnotI), WÜRZBURG, GERMANY

Kristin RYAN, Senior Executive Officer, Justisdepartemente, OSLO, NORWAY

Lorna SAMUELS, Sole Practitioner, International Family Law Chambers, LONDON, UNITED KINGDOM

Cynthia SCERRI DEBONO, Legal Officer, Attorney General's Office, VALLETTA, MALTA

Andrea SCHMUCKER, Chair of Session, Bundesnotarkammer, (Geschäftsführung), KÖLN, GERMANY

Werner SCHÜTZ, Chair of Session, Deputy Director General, Ministry of Justice, VIENNA, AUSTRIA

Jonathan SHARPE, Secrétaire Général adjoint, Commission Internationale de l'Etat Civil (CIEC), STRASBOURG

Xeni SKORINI, Associate Professor, Law School, Athens University, Ministry of Justice, ATHENS, GREECE

Gert STEENHOFF, **Rapporteur**, Senior Lecturer, Molengraaf Institute for Private Law, University of Utrecht, UTRECHT, NETHERLANDS

Marija STOJEVIC, Senior Legal Adviser, Ministry of Labour and Social Welfare, Directorate of Social Welfare, ZAGREB, CROATIA

Mario TENREIRO, Rapporteur, Head of Unit of Judicial Co-operation in Civil Matters, Directorate General Justice and Home Affairs, European Commission, BRUSSELS, BELGIUM *apologised/excusé*

Gabriela THOMA-TWAROCH, Judge in the District Court Döbling in Vienna, Ministry of Justice, VIENNA, AUSTRIA

Elizabeth WALSH, Editor, International Family Law, Jordans Publishers, AMERSHAM, UNITED KINGDOM

Peter WINKLER v. MOHRENFELS, Professor of Law, University of Rostock, Faculty of Law, ROSTOCK, GERMANY *apologised/excuse*

Patrick YAIGRE, Rapporteur, Notaire, BORDEAUX, France

Robert ZEGADLO, Judge, Secretary to the Commission of the Civil Law Codification, Ministry of Justice, WARSAW, POLAND

SECRETARIAT/SECRETARIAT

Guy DE VEL, Director General of Legal Affairs / Directeur Général des Affaires Juridiques

Margaret KILLERBY, Head of Private Law Deparment, Directorate General I Legal Affairs/ Chef de Service du droit privé, Direction Générale I Affaires Juridiques

Tanja GERWIEN, Principal Administrative Assistant, Private Law Department, Directorate General I, Legal Affairs/ Assistante administrative principale, Service du droit privé, Direction Générale I Affaires Juridiques

Lucy ANCELIN, Documentation, Private Law Department, Directorate General I, Legal Affairs / Documentation, Service du droit privé, Direction Générale I Affaires Juridiques

Marie-Luce DAVIES, Secretary, Private Law Department, Directorate General I, Legal Affairs / Secrétaire, Section du droit privé, Direction Générale I Affaires Juridiques

INTERPRETES/INTERPRETERS

Mme Anne CHENAIS
Mme Christine TRAPP
Mr Christopher TYCZKA