The Interplay between Succession and Matrimonial Property Regimes from a Comparative Perspective

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Abstract:

Upon the death of a married person, any legal system needs to answer the following two questions: (1) should the surviving spouse participate in the economic fruits of the marriage and thus be rewarded for his or her contributions? (2) Should the surviving spouse participate in the deceased's estate according to the rules of succession law? In the absence of a marital agreement and/or a last will, virtually all European jurisdictions answer both questions affirmatively. However, in the way these policy choices are implemented, we find fundamental differences.

Under what we can call the „separation model", which is characteristic of the Romanic family legal orders, as well as of many Central and Eastern European legal systems, two distinct liquidation procedures take place. The first concerns the division of the matrimonial property, the second the distribution of the deceased's estate (with the surviving spouse typically benefitting on both occasions). An interplay between the two stages occurs only insofar as legislatures will typically define the surviving spouse's position under succession law with regard to what he or she already receives under matrimonial property law.

By contrast, under what we can call the „integration model", the task of securing the surviving spouse's interests is left to succession law alone. As a result, there is a single unitary liquidation process, in which the aims of dividing the economic fruits of the marriage and distributing the deceased's estate are combined. On the European continent, the prime example of this approach is § 1371 (1) of the German BGB, which provides that upon the death of one spouse, the surviving spouse's participation in the gains accrued during the marriage is paid in the form of an additional fixed share of one-quarter on intestacy. Further examples of the „integration model" are provided by Austrian, English, and Scottish law (notwithstanding important differences from the German solution in other regards).

On the level of private international law, the different designs of the national jurisdiction do not only raise questions of characterization (as is particularly the case of § 1371 (1) BGB, which can be viewed both as a provision of matrimonial property law and as a provision of succession law). There may also be a need for adaptations in cases where the matrimonial property regime and the succession regime are governed by different laws and thereby the coordination between the two subject matters is disturbed.